INDIRECT TAX WEEKLY DIGEST

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GOODS & SERVICES TAX

JUDICIAL UPDATES

WRIT PETITION

ONLINE GAMES LIKE RUMMY, POKER, ETC. ARE GAMES OF SKILL RATHER THAN THAT OF CHANCE/ BETTING/GAMBLING

Facts of the case

- M/s. Myteam11 Fantasy Sports Private Limited (Taxpayer) is engaged in the business of providing online gaming services such as Rummy, Poker, Fantasy sports and casual games on their websites.
- The Taxpayer received a Show Cause Notice (SCN) under Section 74(1) of the CGST Act, 2017 on the following allegations:
  - Misclassification of their supply, as supply of services instead of actionable claims; and
  - Avoidance of tax by undertaking activities in the form of betting.
- Aggrieved by the above-mentioned SCN, the Taxpayer preferred a Writ petition before the Hon'ble Rajasthan High Court.

Contentions by the Taxpayer

- It has been decided by a catena of judicial precedents that online games offered by the Taxpayer are games of skill and would not be covered as games of chance or gambling.
- Once the controversy regarding the classification of the supply stands settled by the decision of the Honorable High Court, the Tax authorities have no jurisdiction to issue any SCN taking a different opinion on the same matter. Hence, the impugned SCN was issued without jurisdiction.
- The impugned SCN in fact is not a mere SCN rather, it is in the nature of a final order determining the tax liability, interest & penalty and requiring the taxpayer to deposit the same.

Contentions by the Tax Authority

- The gaming services provided by the taxpayer are not in nature of skill but are in the form of betting and gambling.
- The impugned SCN is not final in nature. It only tentatively determined the amount of tax interest and the penalty which is subject to confirmation upon consideration of the reply of the taxpayer.
- The direction to deposit part of the tax, interest and penalty is in consonance with the statutory provisions which provide that if the taxpayer deposits tax dues, interest and penalty equivalent to 25% of the tax, the matter would stand concluded with no further inquiry.

Observations and ruling by the Honorable High Court

- This issue is no longer res-integra as it was held in numerous legal cases that the online games offered by the Taxpayer are games of skill rather than games of chance and hence, cannot be treated as betting/gambling.
- Thus, when the matter is settled by various courts, issuance of the Impugned SCN is nothing but an abuse of the process of law.

- The Tax authority was called to file a counter affidavit to this Writ petition within a period of one month from the date of this order.
- The Tax authority shall not take any coercive measures for recovering any amount from the Taxpayer pursuant to the impugned SCN, provided the Taxpayer files a reply to the said SCN within a period of one month from the date of this order.
- The final decision of the Tax authority shall be subject to the decision of this petition.

  [High Court of Rajasthan, Myteam11 Fantasy Sports Private Limited, D.B. Civil Writ Petition No. 1100/2023 dated 18 January 2023]

FAILURE OF NATURAL JUSTICE IN THE AUTHORITY OF FIRST INSTANCE CANNOT BE CURED BY SUFFICIENCY OF NATURAL JUSTICE IN THE APPELLATE BODY

Facts of the case

- M/s. Chandni Crafts (Taxpayer) claimed a refund of accumulated input tax credit (ITC) on account of the export of goods under Section 54(3) of the Central Goods & Service Tax Act, 2017 (CGST Act) amounting to INR 0.60mn and INR 0.87mn for the months of July 2017 and August 2017.
- The Assistant Commissioner issued provisional refund order dated 26 September 2018, partially sanctioning the refund claim of the SGST component to the Taxpayer while rejecting the refund claim for the IGST and CGST.
- Aggrieved by the above, the Taxpayer filed an appeal before the first appellate authority, which was rejected vide order dated 15 January 2020. Hence, the Taxpayer filed the Writ Petition challenging the aforesaid order before the Honorable High court.

Contentions by the Taxpayer

- The Taxpayer relied upon the provisions of Section 54(3) of the CGST Act and Rule 92 of the Central Goods & Services Tax Rules, 2017 (CGST Rules) and contended that the refund could not be rejected by the authority without adhering to the principles of natural justice.

Contentions by the Tax Authority

- It was submitted that since the Appellate Authority has considered all the issues raised by the Taxpayer in the Appeal, and merely because the original authority did not provide an opportunity of being heard by the Taxpayer, the same cannot be a reason for questioning the validity of the orders on this ground alone. Therefore, the present petition deserves to be dismissed.

Observations and ruling by the Honorable High Court

- The Honorable High Court observed that the provisions are clear and specific requiring the issuance of notice in Form GST RFD-08, seeking a reply and making an order thereafter.
- The proviso to Rule 92(3) of the CGST Act further emphasises that the refund shall not be rejected without giving the applicant an opportunity of being heard. The language of the provisions is mandatory and apparently, the adjudicating authority has failed to comply with the said statutory provision.
- The Appellate Authority conclusively found that the principles of natural justice were not followed by the adjudicating authority. However, merely because the natural justice was duly followed during appeal proceedings, the Impugned Order did not interfere with the original order.
- It is well settled that failure to adhere to the principles of natural justice by the adjudicating authority cannot be cured by the sufficiency of natural justice in the appellate body, else the same would encourage the tendency of the authorities to give short shrift to the proceedings before them.
- In view of the above, wherein admittedly the principles of natural justice have been violated by the adjudicating authority and the appellate authority only on account of the fact that it had provided an opportunity for hearing and hence, did not interfere with the order of the adjudicating authority, both the orders cannot be sustained.
- The matter is remanded back to the adjudicating authority to follow the provisions of Rule 92(3) of the CGST Rules, and thereafter, pass an appropriate order in accordance with the law.

[High Court of Rajasthan, M/s. Chandni Crafts, D.B. Civil Writ Petition no:5460/2020 dated 17 January 2023]

EXCISE/SERVICE TAX/CUSTOMS

CUSTOMS AUTHORITY FOR ADVANCE RULINGS (CAAR)

ADMISSIBILITY OF VALUATION OF FUTURE IMPORTS USING TRANSFER PRICING AND STEERING CONCEPT AS THE ASSESSABLE VALUE

Facts of the case

- M/s. Sick India Private Limited (Taxpayer) has filed an application for seeking an advance ruling under Section 28H(2)(c) of the Customs Act, 1962 with respect to their proposed transaction(s) with their related parties.
- Currently, they are importing goods as per an agreed transfer price with the overseas company;
- The overseas company i.e. Sick AG, Germany, is proposing to standardize and harmonise its Transfer Pricing methodology across the globe.
- Currently, the price is based on a gross price list (based on sale proceeds of the overseas company) minus a discount (depending on the sale territory).
- This revised method of arriving at the transfer price is referred to as Transfer Pricing System and Steering Concept (TPuS), commonly known as the Resale Price method or Resale Minus method and it will be applied to all entities of the overseas company across the globe.
- The Taxpayer wishes to change the process for arriving at the valuation of its future imports;
- Under TPuS, the assessable value under the Customs law will be based on the summation of manufacturing cost and CAR (Commercial Adjustment Rate). CAR will be calculated based on a reverse calculation wherein all costs incurred by the Taxpayer, along with an EBIT target, will be deducted from the sales value charged to unrelated buyers in India. Thereafter, CAR will be arrived at as a residual value.
- In view of the above, the Taxpayer wishes to adopt a new Transfer Pricing methodology for arriving at the transaction value for imports from related parties in line with TPuS.

Questions before The CAAR

- Whether the value arrived by using TPuS is acceptable as the assessable value under Section 14 of the Customs Act, 1962 read with Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 (CVR, 2007) for determining the Customs duty liability

Contention by the Taxpayer

- The Taxpayer and the overseas company are related parties in terms of Rule 2(2)(v) of the CVR, 2007 as the overseas company has 99.99% shareholding in the Taxpayer. Therefore, in order to determine the assessable value in case of the Taxpayer, Section 14 read with Rule 3(3)(a) or Rule 3(3)(b) should be referred to.
- The Interpretative notes to Rule 3(3) of the CVR, 2007 provide three ways by which it can be determined whether in a transaction between two related parties, the price was not influenced by their relationship:
  - the related parties act in a manner consistent with the normal pricing practice of the industry
  - the seller acts as he does in setting his prices to unrelated buyers
  - the price is shown to cover all the seller's costs, plus profit which is representative of the firm's overall profit realised over a representative period of time (e.g., on annual basis) in the sale of goods of the same class or kind.
- In view of the above, where the transaction value is adequate to recover all the costs and profit representative of the firm's overall profit, it can be said that the price had not been influenced by the relationship between the parties.
- The overseas company will recover all its costs and a profit percentage from the Taxpayer under TPuS. The transaction value under TPuS will be determined on the basis of manufacturing cost and CAR. Further, the CAR will include administrative and other expenses of the overseas company and its profit.
- Therefore, the proposed transaction value is based on the recovery of all costs and profit from the Taxpayer.
- The relevance of the deployment of Taxpayer's profit (instead of the profit of an overseas company) draws support from the WCO Guide to Customs Valuation and Transfer Pricing.
- In case the transaction value as detailed above is not acceptable as the assessable value, then the same should be determined sequentially as per Rules 4 to 8 of the CVR, 2007.
- Rules 4 to 6 shall not be applied as the same related scenarios are different from the instant case.
- Rule 7 of the CVR, 2007 implies that the Taxpayer has deducted all the costs along with the profit earned in the country of importation from the sales to unrelated buyers in India in order to arrive at the assessable value. The said profit is expected to be similar to the profit earned on the same class of products, derived on the basis of the transfer pricing benchmark study.
- Therefore, on the basis of the above arguments, even if valuation under Rule 7 of CVR, 2007 was resorted to, the value arrived at would be the same as the transaction value calculated under TPuS;
- Further, once the assessable value has been substantiated under Rule 7, the assessable value need not be determined under Rule 8.

- In any case, since the value is being determined under Rule 3(3)(a) of the CVR, 2007, therefore, there is no requirement to evaluate the determination under any subsequent rules. Reliance is placed on the judgement of the Honorable Madras bench of CESTAT in the case of CC Vs. Hewlett Packard Limited for the same.

Observations and Ruling by the CAAR

- It was held that CBIC issued circular no:5/2016 dated 9 February 2016 is relevant for all related party transactions.
- The said Circular has taken cognisance of WCO's Guide to Customs Valuation and Transfer Pricing which recognises the TPuS method. However, there is no separate dispensation provided in the circular for this method in related party transactions. The said circular remains applicable on equal footing to the importer following the TPuS method as per the WCO guide as well as to any other related party importer(s).
- TPuS method clearly shows that the proposed transaction value is the sum total of manufacturing cost (direct cost & indirect cost) and administrative expenses, other expenses and profit represented by CAR indicating an absence of any financial flows.
- The Taxpayer's proposed valuation method, the TPuS method for determination of transaction value under Section 14 of the Customs Act, 1962 for goods proposed to be imported from the related party suppliers, is consistent with Rule 3 as well as Rule 7 of the CVR Rules, 2007.
- This ruling will apply prospectively only to the TPuS method proposed to be adopted by the Taxpayer for transaction value determination w.e.f. 01 May 2023.

[CAAR-Mumbai, Application No:CAAR/CUS/APPL/69/2022, 27 December 2022]

FOREIGN TRADE POLICY (FTP)

NOTIFICATION

AMENDMENT IN IMPORT POLICY CONDITION OF UREA [EXIM CODE 31021000]

Fertilizer Marketing Entities (FMEs), authorized by the Department of Fertilizers, have been allowed to file Bill of Entries at Indian ports for import of Urea (for agriculture purpose) on Government Account.
[Notification no:54/2015-2020 dated 24 January 2023]

POLICY CIRCULAR

IMPLEMENTATION OF PAPER IMPORT MONITORING SYSTEM (PIMS)

DGFT issued a clarification on the applicability of the Notification dated 25 May 2022 in certain situations.

(i) Whether imports through Air mode are exempted from Registration from PIMS?
Response: In Paper, there are no small volume/high-value goods on which Air-Cargo is justified. Therefore, registration under PIMS shall be mandatory regardless of the mode of transportation.

(ii) Whether import of samples of paper is exempted from Registration from PIMS?
Response: Import consignment of samples for FOB value of INR. 10,000/- irrespective of quantity, shall be exempted from the requirement of compulsory registration under PIMS.

(iii) Can returnable paper items imported on temporary import be exempted from PIMS registration and given a fee waiver?
Response: Since paper products are not small-volume/high-value goods, therefore, registration under PIMS shall be compulsory regardless of the purpose of imports of paper products.

(iv) Whether registration from PIMS is exempted for import under common IEC by individuals and Government agencies?
Response: Registration under PIMS shall be compulsory for imports of all notified paper products. However, exemption from PIMS can be considered for non-commercial import under common IECs by individuals and the Govt. agencies on case to case basis, in terms of Para 2.58 of the Foreign Trade Policy.

(v) Will PIMS be applicable to imports through Advance Authorisation, DFIA and ICGR?
Response: PIMS shall be mandatory regardless of the purpose of the imports of paper products under any scheme (Advance Authorisation/IGCR/EOU/SEZ etc.).

(vi) Whether PIMS registration is required both at the point for import into SEZ/ FTWZ and at the time of Customs Clearance from SEZ to DTA? Whether registration is required for EOUs as well at the time of import by an EOU?
Response: PIMS Registration shall be required at the point of import by a Unit in SEZ/FTWZ or at the time of import

by an EOU of the items covered under PIMS. PIMS registration shall not be required by the DTA Unit at the time of Customs Clearance from the SEZ/FTWZ/EOU to DTA if no processing has taken place of the item of paper that has already been registered under PIMS at the time of entry into an SEZ/FTWZ/EOU. However, if processing has taken place in the SEZ/FTWZ/EOU with a change in HS Code at the 8-Digit level, then the importer in DTA will require to register under PIMS if the processed item falls under any of the tariffs.

[Policy circular no:45/2015-20 dated 23 January 2023]

NEWS FLASH

“Traders' Body Terms GST One of Most Complicated Taxation System, Urges FM for Review”

https://zeenews.india.com/economy/traders-body-terms-gst-one-of-most-complicated-taxation-system-urges-fm-for-review-2566346.html

[Source: Zee News, 27 January 2020]

“Budget 2023-24 Expectation: Reduce GST on insurance products to 12 per cent”

https://www.firstpost.com/opinion/budget-2023-24-expectation-reduce-gst-on-insurance-products-to-12-per-cent-12051272.html

[Source: Firstpost, 26 January 2020]

“Budget 2023: Edtech players seek reduction in GST, recognition as mainstream mode of education”

https://www.financialexpress.com/budget/budget-2023-edtech-players-seek-reduction-in-gst-recognition-as-mainstream-mode-of-education-2959018/

[Source: Financial Express, 25 January 2020]

“Supreme Court notice on Kerala GST law permitting levy of tax under repealed VAT regime”

https://www.thehindu.com/news/national/sc-notice-on-kerala-gst-law-permitting-levy-of-tax-under-repealed-vat-regime/article66420293.ece

[Source: The Hindu, 22 January 2020]

“How to resolve mushrooming GST disputes”

https://economictimes.indiatimes.com/small-biz/gst/how-to-resolve-mushrooming-gst-disputes/articleshow/97269514.cms

[Source: Economic Times, 24 January 2020]

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