INDIRECT TAX WEEKLY DIGEST

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GOODS & SERVICES TAX

JUDICIAL UPDATES

CLASSIFICATION OF DETTOL, MOSQUITO MATS, COILS, HARPIC AND LIZOL UNDER THE KERALA VAT ACT

Facts of the case

- M/s. Reckitt Benckiser (India) Ltd. (Taxpayer) is inter alia engaged in selling the following categories of goods:
  - **Category I**: Mosquito Mats, Coils and Vaporisers
  - **Category II**: Mortein Insect Killers
  - **Category III**: Harpic Toilet Cleaner and Lizol Floor Cleaners
  - **Category IV**: Dettol Antiseptic Liquid.
- For discharging applicable VAT under the Kerala Value Added Tax Act, 2003 (KVAT Act), the aforesaid goods were classified by the Taxpayer as follows:
  - Categories I to III were classified as 'Pesticides, insecticides' corresponding to HSN Code 3808 [Entry 44(5) of Schedule III to the KVAT Act] attracting VAT @ 4%
  - As regards Category IV, the same was classified under Entry 36(8)(h)(vi) as 'medicaments' corresponding to HSN Code 3004.90 attracting VAT @ 4%.
- However, the Tax Authority rejected the aforesaid classification and sought to reclassify the products as under by passing an assessment order:

Category	Classification and Reference	VAT Rate
I	'Mosquito Repellants, electric or electronic mosquito repellants, gadgets and insect repellants, devices and parts and accessories thereof' corresponding to HSN Code 8516 7920 [Entry 66 of Notification SRO 82/06 dated 21 January 2006 (Notification dated 21 January 2006)	12.5%
II	Residuary entry under Sl. No. 103 of Notification dated 21 January 2006	12.5%
III	'Stain busters, stain removers, abir, blue and all kinds of cleaning powder and liquids including floor and toilet cleaning' [Sl. No. 27(4) of Notification dated 21 January 2006]	12.5%
IV	Residuary entry under Sl. No. 103 of Notification dated 21 January 2006	12.5%

- The Taxpayer challenged the aforesaid order before the Hon'ble Kerala High Court which dismissed the appeal confirming the order passed by the Tax Authorities.
- Aggrieved by the above, the Tax Authority filed an appeal before the Hon'ble Supreme Court.

Contentions by the Taxpayer

- With respect to the classification of goods covered in Category I and II above, the following submissions were made by the Taxpayer:
  - These products are manufactured under an insecticides license issued under the Insecticides Act
  - Hence, even after the introduction of the Notification dated 21 January 2006, the classification of the said products would not undergo any change.
- As regards the classification of Category III above, it was contended that
  - The products in question are disinfectants under the Drugs & Cosmetics Act/Rules and manufactured under the license granted as a disinfectant under the said act
  - Accordingly, even after the deletion of the HSN Code 3808 from Entry 44(5) of Schedule III of the KVAT Act, the classification adopted by the Taxpayer would not undergo any change.
- With respect to Dettol (Category IV), the Taxpayer has submitted that
  - Dettol is an antiseptic liquid manufactured under a Drug License and it prevents infection
  - It is considered an essential drug and hence, its price was controlled under the Drug Price Control Order, 2013. The ingredients of Dettol are Chloroxylenol IP, Teripineol BP and Alcohol Absolute IP (denatured). It is an antiseptic having germicidal properties that kills germs, bacteria and it prevents infection. Therefore, it is applied on wounds, cuts, grazes, bites and stings. It is also used in hospitals for surgical use, medical use and midwifery due to therapeutic and prophylactic properties
  - In this regard, the Taxpayer also placed reliance on the decision passed by the Hon'ble Rajasthan High Court in the Appellant's own case wherein it was held that Dettol was to be classified as a drug. It was also submitted that the said order was affirmed by the Hon'ble Supreme Court
  - As a result, Dettol is classifiable as a drug/medicine under Entry 36(8)(h)(vi) of Schedule III to the KVAT Act.
- It was also submitted that the Hon'ble High Court had failed to consider the following settled principles of classification:
  - Plain meaning to be given to the taxing provision
  - Burden to prove classification in a particular entry is always on the Revenue
  - Any ambiguity has to be resolved in favour of the assessee and in case of reasonable doubt, the construction most beneficial to the assessee must be adopted
  - Specific entry would override a residuary entry
  - Resort to residuary entry is to be taken as a last measure, only when by liberal construction, the specific entry cannot cover the goods in question.

Contentions by the Tax Authorities

- As regards goods covered in Category I and II above, it was submitted as follows:
  - Reference was made to the decision of the Hon'ble Supreme Court, which, in an identical case had held that 'Mosquito Repellant Mat' is a mosquito repellant even though it not only repels the mosquitoes but also is capable of killing them and that it is difficult to hold such product as an insecticide
  - Entry 44(5) is related to products used in agricultural operations viz., an agricultural field in relation to growing agricultural products and controlling pets, insecticides, etc. which attacks plants.
- As regards goods covered in Category III, it is submitted that the said products are not used in controlling pets and insecticides in the agricultural field. Further, the name of these products contains the phrase 'Toilet Cleaner and Floor Cleaner'. Accordingly, such products are exclusively used for cleaning toilets and floors and hence, cannot be classified as an insecticide
- As regards Dettol, it is submitted that the same cannot be classified as an item used for Medicament for therapeutic or prophylactic treatment for the prevention and cure of diseases. Reliance was also made on the findings made by the Hon'ble Kerala High Court which had observed that Dettol is not able to prevent or cure any disease.

Observations of the Hon'ble Supreme Court

- As regards goods covered in Category I and II above, it was held as follows:
  - HSN Code 3808 has been deleted from Entry 44(5) with effect from 1 July 2006 and from 21 January 2006, these products would fall under Sl. No. 66 namely 'Mosquito Repellant', being a specific entry attracting VAT @ 12.5%
  - The insecticides covered under Entry 44(5) can be said to be a general entry. Even otherwise, Entry 44(5) includes insecticides relating to products used in agricultural operations. All the products in the said entry are used in the agricultural field for growing agricultural products and controlling pets, insecticides, etc. which attack plants
  - Since in the present case, there is a specific entry for Mosquito Repellants which shall be applicable in the present case instead of insecticides
  - Accordingly, the Hon'ble Supreme Court agreed to the view taken by the Hon'ble Kerala High Court.
- As regards goods covered in Category III above, the Hon'ble Supreme Court observed that
  - After the introduction of Notification dared 21 January 2006, these products would fall under Sl. No. 27(4), which is a specific entry and would not be classified as insecticides (which is a general entry)
  - Merely because these products kill germs, they cannot be classified as insecticides under Entry 44(5) because the dominant use of these products is cleaning and removal of stains on the floor and the toilet

  - Accordingly, the Hon'ble Supreme Court agreed to the view taken by the Hon'ble Kerala High Court.
- As regards Dettol, it was held that
  - Dettol is used as an antiseptic liquid and is used in hospitals for surgical use, medical use and midwifery, due to its therapeutic and prophylactic properties. Therefore, the same can be said to be an item of medicament for being treated as a drug and medicine
  - In view of the judicial precedents relied on by the Taxpayer and considering the dominant use of Dettol and also its active ingredients, Dettol would not fall under the residuary category as contended by the Tax Authorities. Instead, the same would fall under Entry 36(8)(h)(vi) as contended by the Taxpayer
  - To this extent, the judgement of the Hon'ble Kerala High Court deserves to be quashed and set aside.
- In view of the above, it was concluded that
  - Goods covered in Category I and II would be classified under Sl. No. 66 of Notification dated 21 January 2006 namely 'Mosquito Repellant' attracting VAT @ 12.5%
  - Goods covered in Category III would be classified as floor and toilet cleaner classifiable under Entry 27(4) of Notification dated 21 January 2006 attracting VAT @ 12.5%
  - Dettol would be classified under Entry 36(8)(h)(vi) of Schedule III of the KVAT Act attracting VAT @ 4%.

    [Reckitt Benckiser (India) Ltd. Vs. Commissioner of Commercial Taxes & Ors. [TS-142-SC-2023-VAT] dated 10 April 2023]

DUTY-FREE SHOPS ARE ENTITLED TO A REFUND OF TAX WITHOUT RAISING ANY TECHNICAL OBJECTIONS, INCLUDING THAT OF LIMITATION

Facts of the case

- M/s. Flemingo Travel Retail Limited (Taxpayer), engaged in the business of running duty-free shops at the International Airport terminals of Mumbai and Delhi, was registered under the Service tax regime
- Notification no.41/2012-ST dated 29 June 2012 granted a rebate of Service tax paid on services received by an exporter and used in the export of goods. Accordingly, the Taxpayer filed an application claiming a refund of Service tax on charges paid to Mumbai International Airport Ltd. (MIAL) for renting immovable property
- The Adjudicating Authority issued an order rejecting the aforesaid application because the Service tax on the renting of immovable property of the concerned Duty-Free Shops was rightly levied and hence, not liable to be refunded. Against the above, the Taxpayer filed an appeal before the Appellate Authority which upheld the above order
- Subsequently, the Taxpayer filed an appeal before the CESTAT which had allowed the said appeal on the ground that Duty-Free Shops situated at international airports are a global market competing amongst themselves in a tax-exempt environment and consequently, the levy of Service tax shall be bereft of the lawful authority
- Aggrieved by the above, the Tax Authorities filed an appeal before the Hon'ble Supreme Court.

Contentions by the Tax Authorities

- The Tax Authorities pointed out that two appeals similar to this case were pending and requested the Hon'ble Supreme Court to tag the present appeal with the aforesaid matters.

Contentions by the Taxpayer

- The Taxpayer submitted that Duty-Free Shops in international arrival or departure terminals shall be deemed to be the area beyond the customs frontiers of India as was rightly held in the following judicial precedents:
  - ***Decision by Central Government in the case of Aatish Altaf Tinwala Vs. Commissioner of Customs (Airport), Mumbai (as upheld by the Hon'ble Bombay High Court in WP(C) No. 564/2019)***
  - ***A1 Cuisine Pvt. Ltd. Vs. Union of India [WP No. 8034 of 2018 (Bom.)] (affirmed by the Hon'ble Supreme Court in SLP(C) No. 33011 of 2018, Order dated 14 December 2018).***
  - ***Sandeep Patil Vs. Union of India [2019-VIL-495-BOM]***
  - ***CIAL Duty-Free and Retail Services Ltd. Vs. Union of India [2020-VIL-463-KER].***
- Reference was also made to the communication obtained from the Legal Cell of CBIC dated 25 June 2020 and 6 April 2022 wherein it was confirmed that no appeal was filed against the aforesaid orders.

Observations of the Hon'ble Supreme Court

- Referring to the aforesaid precedents as well as Article 286 of the Constitution of India, it was observed that Duty-Free Shops, whether in the arrival or departure terminals, being outside the customs frontiers of India, cannot be saddled with any indirect tax burden and any such levy would be unconstitutional. Accordingly, if any tax is levied, the same cannot be retained and the Duty-Free Shops would be entitled to a refund of the same without raising any technical objection **including that of limitation**
- As regards the contention of the Tax Authorities, since the present appeal was filed prior to the acceptance of the well-reasoned orders by various High Courts and the Union of India, the Hon'ble Supreme Court was not included to keep the present matter pending for consideration with the other matters
- In view of the above, the appeal filed by the Tax Authority was dismissed. Further, the Hon'ble Supreme Court had left it open for the CBIC to take appropriate decisions in respect of the continuation of the other matters (which are pending) in light of the view taken in this matter.

  [Commissioner Of CGST And Central Excise, Mumbai East Vs M/s. Flemingo Travel Retail Limited [2023-VIL-39-SC-ST] dated 10 April 2023]

MERE PRODUCTION OF TAX INVOICES AND PROOF OF PAYMENT DOES NOT PROVE THE ACTUAL SALE OF GOODS

Facts of the case

- M/s. Ecom Gill Coffee Trading Pvt. Ltd.(Taxpayer) had purchased green coffee beans from various dealers (sellers) for its onward sale in the domestic market and exports. The Taxpayer had claimed an input tax credit (ITC) of VAT charged by the sellers on such purchases
- The Tax Authorities found some irregularities in the aforesaid ITC and hence, issued a notice under Section 39 of Karnataka Value Added Tax Act, 2003 (KVAT Act) seeking books of accounts and other documents such as invoices from the Taxpayer
- Accordingly, a re-assessment order was passed as under:
  - Taxpayer mainly claimed ITC from 27 sellers. Of these, 6 sellers were de-registered under the KVAT Act, 3 sellers had effected sales but did not file returns and 6 sellers had outrightly denied turnover nor paid taxes
  - Accordingly, the Taxpayer's claim of ITC was disallowed.
- Against this, the Taxpayer filed an appeal before the Appellate Authority which upheld the aforesaid order. Subsequently, the Taxpayer filed an appeal before the Tribunal which had set aside the Appellate Authority's orders and allowed the Taxpayer's claim of ITC
- Pursuant to the above, the Tax Authorities filed a revision application before the Hon'ble High Court of Karnataka which was dismissed by the Hon'ble Court relying upon its decision in the case of the State of Karnataka Vs M/s. Tallam Apparels
- Aggrieved by the same, the Tax Authorities filed an appeal before the Hon'ble Supreme Court of India.

Contentions by the Tax Authorities

- The Tax Authorities contended that the Hon'ble High Court failed to appreciate that when the Assessing Officer had doubted the genuineness of the transaction/sales and when it was found that such transactions were only paper transactions and, in some cases, nothing was on record that the tax has been paid by the seller, the purchasing dealers are not entitled to claim ITC
- it was also submitted that mere production of invoices or even payment to the seller by cheque cannot be sufficient and may not be said to be discharging the burden to claim ITC under Section 70 of the KVAT Act. The Taxpayer must also establish an actual movement of goods and even the demand of tax by the seller
- It was also submitted that to claim ITC, the purchasing dealer has to prove actual payment of tax and actual transfer of goods and the mere paper transaction is not sufficient.

Contentions by the Taxpayer

- The Taxpayer contended that once they have discharged the burden of proof cast under Section 70 of the KVAT Act by providing valid invoices and making the payment online to the supplier. Accordingly, once such burden is discharged, the purchasing dealer is entitled to claim ITC and if at all it is found that tax has not been paid by the seller, the same can be recovered from the seller
- It was also submitted that neither the KVAT Act nor the Karnataka Value Added Tax Rules, 2005 (KVAT Rules) for any other document or any other obligation which are statutorily required for establishing the claim of ITC. As a result, the decision of the adjudicating authority was beyond the KVAT Act and KVAT Rules framed thereunder
- It was also contended that ITC could be denied only in cases where the purchasing dealer acts without due diligence. However, the denial of ITC to a purchasing dealer who has undertaken all necessary precautions places both diligent and non-diligent purchasers on the same footing.

Observations and Rulings by the Hon'ble Supreme Court

- On perusal of Section 70 of the KVAT Act, it was observed that the burden of proving the claim of ITC is on the purchasing dealer and the same cannot be shifted to the revenue. Mere production of invoices or the payment is not enough and cannot be said to be discharging the burden of proof cast under Section 70 of the KVAT Act
- For claiming ITC, the genuineness of the transaction and actual physical movement of the goods are the sine qua non and the same can be proved by furnishing name and address of the selling dealer, details of the vehicle which has delivered goods, payment of freight charges, acknowledgement of taking delivery of goods, tax invoices and payment particulars, etc
- In a case where the purchasing dealer fails to establish and prove the aforesaid aspect, the Tax Authority is justified in rejecting the claim of ITC
- The Taxpayer's contention that the burden of proof is discharged by complying with Rules 27 and 29 of the KVAT Rules has no substance. Merely because the tax invoice has been produced, the same cannot be said to be proving the actual physical movement of the goods, which is required to be proved, as observed above. Producing the invoices as per said rules can be said to be proving one of the documents, but not all documents to discharge the burden to prove the genuineness of the transactions as per Section 70 of the KVAT Act
- In view of the above, it was concluded that the Tribunal and the Hon'ble High Court have materially erred in allowing the ITC to the Taxpayer and consequently, such orders are unsustainable and hence, set aside.

[State Of Karnataka Vs M/s. Ecom Gill Coffee Trading Pvt. Ltd., [TS-99-SC-2023-VAT], dated 13 March 2023]

CUSTOMS

NOTIFICATION

IMPOSITION OF ANTI-DUMPING DUTY (ADD) ON VINYL TILES ORIGINATING IN OR EXPORTED FROM CHINA PR, TAIWAN, AND VIETNAM.

The Government has imposed ADD on Vinyl Tiles other than in roll or sheet form, commonly known as Luxury Vinyl Tiles/Flooring falling under the HSN 3918 for 5 years starting from the date of this Notification i.e., 19 April 2023, imported from China PR, Taiwan, and Vietnam.

[Notification no:05/2023-Customs (ADD) dated 19 April 2023]

FOREIGN TRADE POLICY (FTP)

AMENDMENTS IN ANNEXURE-IV UNDER APPENDIX-2A.

Condition (g) regarding manufacturer requirement for import of Gold under HS code 7108 under the Tariff Rate Quota of India-UAE CEPA has been waived off in sync with Notification no:20/2023-Cus. dated 31st March 2023.

[Public Notice no:6/2023 dated 17 April 2023]

AMENDMENT TO AMNESTY SCHEME FOR ONE-TIME SETTLEMENT OF EXPORT OBLIGATION.

Public Notice No. 2/2023 dated 1 April 2023 is amended to clarify the duties on which interest is payable. No interest is payable on the portion of Additional Customs Duty and Special Additional Customs Duty.

[Public Notice no:7/2023 dated 18 April 2023]

TRADE NOTICE

CLARIFICATION REGARDING NOTIFICATION OF NEW HSN CODES FOR TECHNICAL TEXTILES ITEMS.

Notification no:20/2015-2020 dated 7 July 2022 had amended ITC(HS) 2022, Schedule 1 (Import Policy) in sync with the Finance Act, 2022 by introducing a total of 32 New HSN Codes for Technical Textiles under Chapters 39, 54, 55, 56, 59, 60, 63 and 68. However, despite the aforesaid insertion, imports/exports have not been booked under the correct HS Codes.

In this regard, it has been clarified and reiterated that all importers/exporters should file their Bill of Entry/Shipping Bill with specific HSN codes available for Man Made Fibre and Technical Textiles under ITC(HS), Schedule I (Import Policy) at 8-digit level and to avoid using any other or 'Others' category codes, a list of 32 HS Codes has been prescribed in Annexure I to the Trade Notice.

[Trade Notice no:02/2023-24 dated 17 April 2023]

NEWS FLASH

"Rajasthan GST collections rise by 23% in FY23"
https://timesofindia.indiatimes.com/city/jaipur/state-gst-collections-rise-by-23-in-fy23/articleshow/99628018.cms
[Source: Times of India, 20 April 2023]

"GST Network improved over last 5 years: Report"
https://timesofindia.indiatimes.com/business/india-business/gst-network-improved-over-last-5-years-report/articleshow/99653276.cms
[Source: Times of India, 21 April 2023]

"No input tax credit: Intra-co services GST a pain"
https://m.timesofindia.com/business/india-business/no-input-tax-credit-intra-co-services-gst-a-pain/articleshow/99598171.cms
[Source: Times of India, 19 April 2023]

"Rising complications for corporates in ITC claims under GST"
https://m.economictimes.com/news/company/corporate-trends/rising-complications-for-corporates-in-itc-claims-under-gst/articleshow/99585912.cms
[Source: The Economic Times, 18 April 2023]

"Plea to allocate 1% of GST revenue for unorganised sector labourers"
https://www.thehindu.com/news/cities/Madurai/plea-to-allocate-1-of-gst-revenue-for-unorganised-sector-labourers/article66756231.ece
[Source: The Hindu, 19 April 2023]

"With Kernel, a Georgian entrepreneur wants to help Indian MSMEs with GST"
https://m.economictimes.com/small-biz/entrepreneurship/with-kernel-a-georgian-entrepreneur-wants-to-help-indian-msmes-with-gst/articleshow/99574614.cms
[Source: The Economic Times, 18 April 2023]

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