INDIRECT TAX WEEKLY DIGEST

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GOODS & SERVICES TAX

JUDICIAL UPDATES

WRIT PETITION

'RECIPIENT OF SERVICE' IS ENTITLED TO FILE ADVANCE RULING APPLICATION

Facts of the case

- M/s. Anmol Industries Ltd. (Taxpayer) is a registered person under the GST law
- The Taxpayer intended to seek clarification as to whether the agreement executed with its supplier (Prasad Mookerjee Port) concerning the lease of an industrial plot for setting up a commercial complex is exempted from the levy of GST under Notification No. 12/2017-CGST (Rate) dated 28 June 2017 (Notification dated 28 June 2017)
- For this, the Taxpayer filed an application before the West Bengal Authority for Advance Ruling (WBAAR). However, the said application was rejected by WBAAR on the ground that the Taxpayer has no locus standi to file such an application in relation to the supply where he is a 'recipient of service'
- Aggrieved by the above, the Taxpayer applied to the Hon'ble Calcutta High Court.

Observations and rulings by the Hon'ble High Court

- As per Section 95(c) of the Central Goods and Services Tax Act, 2017 (CGST Act), the term 'applicant' is defined to mean any person registered or desirous of obtaining registration under the CGST Act. Thus, the said term has been used in the widest possible manner
- The application filed by the Taxpayer would fall within the purview of Section 97(2)(b) of the CGST Act which deals with the applicability of an exemption notification viz., Notification dated 28 June 2017. Thus, it would be well within the jurisdiction of the WBAAR to consider the application on merits rather than rejecting the same on the ground of *locus standi*
- In view of the above, it was concluded that the application filed by the Taxpayer ought to be decided on merits. The Hon'ble High Court also placed reliance on the case of **M/s. Gayatri Projects Ltd. and Anr. Vs. The Assistant Commissioner of State Tax, Durgapur Charge & Ors. [MAT No. 2027 of 2022, dated 5 January 2023 (Cal.)]** wherein the Hon'ble Calcutta High Court had observed that the Taxpayer, being registered under the GST law would fall within the ambit of the term 'applicant' under Section 95(c) of the CGST Act, though the Taxpayer was not a party to the proceedings before the AAR
- In view of the above, the writ petition was allowed, setting aside the order passed by WBAAR and the matter is remanded to WBAAR to decide the matter on merits.

  [Anmol Industries & Anr. Vs. West Bengal Authority for Advance Ruling [TS-153-(HC)CAL-2023-GST]]

ORDERS BY AUTHORITY FOR ADVANCE RULING (AAR)

ONE-TIME PREMIUM RECEIVED FOR A 90-YEAR LEASE IS NOT SALE OF IMMOVABLE PROPERTY AND IS LEVIABLE TO GST @ 18%

Facts of the case

- M/s. Kedaram Trade Centre (Taxpayer) is engaged in the business relating to the construction of immovable properties
- The Government of Gujarat acting through Gujarat State Road Transport Corporation (GSRTC) intended to develop the area through a private sector participant on a commercial build, operate and transfer basis. For this, GSRTC executed a concession agreement with Hubtown Bus Terminal (Ahmedabad) Pvt. Ltd. (Hubtown) by which, GSRTC granted development rights to Hubtown

- Out of the total development rights, Hubtown executed a deed of assignment with the Taxpayer for transferring a portion of the development rights for the construction of the commercial units on the plot
- Upon completion of the construction of the aforesaid commercial units by the Taxpayer, the Ahmedabad Municipal Corporation issued a Building Usage (BU) permission
- Pursuant to the above, the Taxpayer intends to allot the developed units to the prospective buyers on a long-term lease basis for 90 years by entering into the lease deed inter se between the following parties:
  - GSRTC acting as the Lessor in the lease transaction
  - Prospective buyer acting as the Lessee in the lease transaction
  - Hubtown acting as Confirming Party No. 1
  - Taxpayer acting as Confirming Party No. 2.
- Further, as per the proposed arrangement, the prospective buyer would be liable for making the following payments:
  - One-time premium as a consideration for allotment of the commercial unit - Payable to the Taxpayer
  - Advance Annual Lease rentals (at prescribed rates) - Payable to the Lessor i.e., GSRTC.

Questions before the AAR

- Whether a one-time premium received by the Taxpayer on allotment of the completed building would be treated as taxable supply or not?
- In case the supply is treated as a taxable supply, what will be the applicable rate of tax?

Contentions by the Taxpayer

- It was submitted that receipt of a one-time premium may not be considered as rental or leasing services supplied by the Taxpayer because the Lessor (in respect of the immovable property) is GSRTC and not the Taxpayer
- The Taxpayer has merely constructed the commercial units on the land and intends to transfer the constructed commercial units to the prospective buyers
- It was also contended that the sale of commercial units after the receipt of BU permission should be treated as a sale of the building. Accordingly, in terms of Entry 5 to Schedule III of the CGST Act, such a sale of the building would neither be treated as a supply of goods nor a supply of services. Consequently, the question of levy of GST on such amounts would not arise.

Observations and Ruling by AAR

- As per Entry 2 to Schedule II of the CGST Act, the following activities are treated as a supply of service:
  - Any lease, tenancy, easement, license to occupy land
  - Any lease or letting out of a building including a commercial, industrial or residential complex for business or commerce, either wholly or partially.
- As regards the Taxpayer's averment that the transaction in the present case is a sale of a building wherein consideration has been received after the issuance of the completion certificate, the AAR had raised a specific issue as to how a sale can be executed by someone who does not hold a title of the property/goods. In this regard, no response was provided by the Taxpayer
- On perusal of the lease deed, it was observed that the agreement can by no stretch of the imagination be termed as a sale of the building but in fact, would be treated as a lease for 90 years
- It was also observed that the agreement does not stipulate that the consideration received by the Taxpayer is related to the construction of a complex, building, civil structure or part thereof
- Accordingly, the transaction in the present case would not fall within the ambit of Entry 5 to Schedule III of the CGST Act
- Considering the above, it was concluded that the present transaction is for a lease of commercial units and would be treated as a 'supply' under section 7(1) of the CGST Act read with entry 2 to Schedule II of the CGST Act
- A similar view was also upheld by the Hon'ble Bombay High Court in Builders Association of Navi Mumbai [Writ Petition No. 12194 of 2017 (Bom.)]
- On perusal of Notification No. 11/2017-Central Tax (Rate) dated 28 June 2017, it was observed that the services in the present case i.e., leasing of commercial units would be classifiable under HSN code 9972 i.e., Real Estate Services attracting GST @ 18%
- Accordingly, it was concluded that a one-time premium receivable from the prospective buyers would be treated as a supply of services covered under HSN code 9972 attracting GST @ 18%.

  [Authority of Advance Ruling Gujarat, M/s Kedaram Tarde Centre, Advance Ruling No: GUJ/GAAR/R/2023/15 dated, 31 March 2023]

EXCISE/SERVICE TAX

JUDICIAL UPDATES

CIVIL APPEALS

IMPORT OF 'ENGINEERING DESIGN & DRAWINGS' FOR MANUFACTURING WIND TURBINE GENERATOR IS LEVIABLE TO SERVICE TAX AS 'DESIGN SERVICES'

Facts of the case

- M/s. Suzlon Energy Ltd (Taxpayer), inter alia engaged in manufacturing of Wind Turbine Generator (WTG), had entered into an agreement for product development and purchase agreement which would be used exclusively in manufacturing WTG in India
- The Taxpayer had imported 'Engineering Designs & Drawings' under the aforesaid agreement and filed a Bill of Entry (BoE) with the Customs Authorities classifying the same as 'Paper' under the HSN 49119920 and claimed the benefit of 'Nil' rate of Basic Customs Duty and Countervailing Duty (CVD). Further, the Taxpayer did not pay Service tax on the aforesaid designs under the reverse charge mechanism since the same was classified as goods
- Pursuant to the audit, the Tax Authorities issued a Show Cause Notice (SCN) alleging non-payment of Service tax on the aforesaid designs which are classifiable as 'Design Services'. The aforesaid SCN was confirmed by the Tax Authorities
- Against this, the Taxpayer filed an appeal before CESTAT which allowed the appeal by placing reliance on **M/s. Solitz Corporation Vs CST, New Delhi [2009 (14) STR 642 (Tri.-Del.)]** and held that 'Engineering Design & Drawings' are goods and not services and that the same activity cannot be taxed both as goods and as services
- Aggrieved by the above, the Tax Authorities filed an appeal before the Hon'ble Supreme Court.

Contentions by the Tax Authorities

- The Tax Authorities contended that merely because the intellectual property is put in a media, it would not per se make them goods. The classification (whether as goods or services) would depend on the intention of the parties. For example, importation of tailor-made or readymade drawings will constitute a sale of goods whereas if a painter is engaged to draw a picture of his choice / specifications and the delivery thereof, even though on a canvas may constitute a service
- The Tax Authorities also placed reliance on BSNL Vs. Union of India [2006 (3) SCC 1] wherein the Hon'ble Supreme Court laid down the dominant intention test in respect of the distinction between the sale of goods and a contract of service
- Accordingly, it was submitted that the issue to be considered should be, did the contracting parties intend the transfer of both goods and services, either separately, in an indivisible manner or in a composite manner.

Contentions by the Taxpayer

- The Taxpayer relied on **Hindustan Shipyard Ltd. Vs. State of AP [2000 (6) SCC 579]** wherein it was held that if the thing to be delivered has any individual existence before the delivery as the sole property of the party who is to deliver it, then it is a sale
- Further, relying on **Associated Cement Companies Ltd. Vs Commissioner of Customs [2001 (4) SCC 593]** it was submitted that:
  - Designs on a medium will be treated as goods under Customs law.
  - Amount paid by the importer to the original supplier is nothing but the price for the sale of such goods.
- Reference was also made to Tata Consultancy Services Vs. State of AP [2005 (1) SCC 308] wherein it was held that intellectual property, once put on a media, whether in the form of books or canvas (in case of painting) or computer discs or cassettes and marketed would become goods
- Therefore, a transfer of goods for a price cannot be subjected to the levy of Service tax.
- It was submitted that aspect theory permits taxation of 2 different aspects/ features of a transaction and the aspect theory does not allow value of goods to be included in services & vice versa (as per principle laid down in BSNL (supra))
- Further, Taxpayer had made 2 contentions before CESTAT which have not been dealt with by CESTAT viz., whether services rendered by a foreign entity will not fall within the purview of 'design services' and whether the department was justified in invoking the extended period of limitation.

Observations and Rulings by the Hon'ble Supreme Court

- The Hon'ble Supreme Court referred to the definition of 'design services' under section 65(35b) read with Section 65(105) (zzzzd) of the Finance Act, 1994 and observed that the said definition is a wide and conclusive one and excludes fashion design and interior designing, which were taxable under separate taxable category
- 'Engineering Designs & Drawings' used in the manufacturing of WTG was reduced as a blueprint on paper and delivered to the Taxpayer. Accordingly, the same was subjected to the levy of Service tax
- The Taxpayer has neither paid any customs duty by treating the same as 'paper' (exempted under the Customs law) nor Service tax was paid.
- Merely because the aforesaid designs were shown as 'goods' under the Customs Act and in the BoE, that cannot be a ground to take such services outside the purview of 'design services' under the Finance Act, 1994

- The issue is squarely covered by the decision of BSNL (supra) wherein it was held that there can be two different taxes/ levies under the different heads by applying the aspect theory. Thus, the CESTAT order holding that the same activity cannot be taxed as both goods and services is erroneous
- Accordingly, the appeal is allowed and the CESTAT order is set aside. However, the matter is remitted back to the CESTAT to consider the contentions raised by the Taxpayer which were not dealt with by CESTAT.

  [CCEST Vs M/s. Suzlon Energy Ltd., [TS-145-SC-2023-ST], dated 10 April 2023]

FOREIGN TRADE POLICY (FTP)

PUBLIC NOTICE

AMENDMENT IN PARA 4.12 (VI) OF THE HANDBOOK OF PROCEDURES, 2023 (HBP)

Para 4.12(vi) of the HBP in respect of Advance Authorization issued under para 4.07 of HBP 2015-2020 has been amended to extend the validity of ad-hoc norms ratified from 1 April 2015 to 31 March 2023 shall now be valid till 31 March 2026, for ease of doing business and reduction of the transaction cost.

[Public Notice no:9/2023 dated 25 April 2023]

APPENDICES & AAYAT NIRYAT FORMS OF FOREIGN TRADE POLICY, 2023 (FTP)

The Appendices & Aayat Niryat Forms of FTP have been notified.

[Public Notice no:10/2023 dated 26 April 2023]

TRADE NOTICE

AMENDMENTS UNDER THE INTEREST EQUALISATION SCHEME IN RESPECT OF UIN

Attention is drawn towards Trade Notice no:03/2023-24 dated 20 April 2023 which has amended Trade Notice no:38/2021-22 dated 15 March 2022 to state that the Unique Identification Number (UIN) generated while availing Interest Equalisation would be associated with a particular bank only for a one-time disbursement w.e.f. 1 May 2023. This amendment has been deferred considering the operational challenges faced by the beneficiaries of the scheme and the banks. Accordingly, the revised guidelines have been issued which stipulate that UIN with a specific bank would be valid for a financial year and a new UIN should be provided for each bank.

[Trade Notice no:04/2023-24 dated 21 April 2023]

NEWS FLASH

"GST dept work with Meity to track offshore online gaming cos"

https://www.financialexpress.com/economy/gst-dept-work-with-meity-to-track-offshore-online-gaming-cos/3064304/

[Source: Financial Express, 27 April 2023]

"Finance ministry weighs different GST rates for games of skill, chance"

https://indianexpress.com/article/business/finmin-classifying-online-games-levy-differential-gst-rate-8579410/

[Source: The Indian Express, 27 April 2023]

"Govt to announce national retail trade policy, accident insurance scheme for GST-registered traders soon"

https://economictimes.indiatimes.com/industry/services/retail/govt-to-announce-national-retail-trade-policy-accident-insurance-scheme-for-gst-registered-traders-soon/articleshow/99704362.cms

[Source: The Economic Times, 23 April 2023]

"Issue of GST on intermediary services to foreign clients may get resolved"

https://www.business-standard.com/economy/news/issue-of-gst-on-intermediary-services-to-foreign-clients-may-get-resolved-123042500459_1.html

[Source: Business Standard, 25 April 2023]

"GST compliance in Mizoram below standard, Governor told"

https://www.eastmojo.com/mizoram/2023/04/27/gst-compliance-in-mizoram-below-standard-governor-told/

[Source: East Mojo, 27 April 2023]

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