

INDIRECT TAX WEEKLY DIGEST

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GOODS & SERVICES TAX

JUDICIAL UPDATES

ORDERS BY APPELLATE AUTHORITY FOR ADVANCE RULING (AAAR)

SEZ UNIT IS NOT LIABLE TO DISCHARGE GST UNDER RCM ON SERVICES PROCURED FOR AUTHORISED OPERATIONS ON FURNISHING LUT

Facts of the case

- M/s. Portescap India Private Limited (Taxpayer) is a Special Economic Zone (SEZ) Unit that is inter alia engaged in procuring services such as renting of immovable property and gate pass services (from the SEZ authorities) and legal services (from the Advocate). The Taxpayer discharges GST under the reverse charge mechanism (RCM) on legal services and gate pass services.
- The Taxpayer had filed an application before the Authority for Advance Ruling (AAR) for determining its liability to discharge GST under the RCM. However, the application was rejected on the ground that the Taxpayer, as a recipient of service, is not eligible to seek an advance ruling under section 95(a) of the Central Goods and Services Tax Act, 2017 (CGST Act).
- Aggrieved by the above, the Taxpayer has approached the Appellate Authority for Advance Ruling (AAAR).

Question before the AAAR

- Whether GST under RCM needs to be discharged on renting of immovable property, legal services; and Gate Pass services

Contentions by the Taxpayer

- The Taxpayer contended that as per notification no:18/2017-IGST(R) dated 5 July 2017, services imported by SEZ unit in the SEZ for authorized operations are exempted from the levy of IGST.
- The Taxpayer also relied on the following provisions of the Special Economic Zones Act, 2005 (SEZ Act)
 - Section 7 of SEZ Act provides an exemption to goods or services procured from Domestic Tariff Areas or foreign suppliers.
 - Section 51 of the SEZ Act stipulates that the provisions of the SEZ Act would have an overriding effect over any other legislation, including taxation laws;
- The Taxpayer placed reliance on *GMR Aerospace Engineering Limited and Anr. Vs. Union Of India and Ors. [2019-VIL-489-TEL-ST]*, wherein it was held that if the services are used for authorized operations of the SEZ unit, the same should be exempted from the levy of tax.
- It was submitted that if the said services are held to be leviable to GST under RCM, Taxpayer should be allowed to exercise the option of not paying tax on furnishing the Letter of Undertaking (LUT).
- Ministry of Finance, vide letter dated 18 December 2017, had clarified the following in the context of RCM liability on procurement of service by the International Financial Services Centre:
‘a Unit in SEZ or SEZ developer can procure such services, where they are required to pay GST under RCM, without payment of IGST provided the actual recipient i.e. unit in SEZ or SEZ developer, furnishes a LUT in place’

Contentions by the Tax Authority

- The Tax authority contended that the Taxpayer satisfies all the conditions mentioned in notification no:10/2017-IGST(R) dated 28 June 2017. Further, the said notification specifically covers services by way of renting of immovable property. Hence, the Taxpayer is liable to pay GST under the RCM.
- The Tax Authority is of the opinion that the Taxpayer is situated in an Exclusive Economic Zone as defined under Section 2(56) of the CGST Act. Therefore, notification no:18/2017-IGST(R) would not be applicable as both, the supplier and the recipient of services, are situated in India.
- The Tax Authority also contended that Section 26 of the SEZ Act is not aligned with the GST laws and the list of taxes, in respect of which, exemption/concession has been provided, does not include CGST/IGST/SGST. Consequently, the said benefit is not available to the Taxpayer.

Observations and Ruling by the AAAR

- AAAR observed that any supply of goods or services made to an SEZ unit for authorised operations will be considered a zero-rated supply, not leviable to GST. The provision of zero-rated supply will apply even in respect of services attracting GST under the RCM. Applying the settled principle that the specific provisions will prevail over the general provisions, it was concluded that Section 16 of the IGST Act will override the notification issued under Section 5(3) of the IGST Act.
- As per the condition mentioned in Para 1(i) of notification no:37/2017-CT dated 13 October 2017, the Taxpayer is not required to discharge GST under RCM on the supply of services by way of renting of immovable property, if it furnishes LUT.
- The AAAR also held that the above principle will also apply to other services supplied by DTA to SEZ units for authorised operations.
- In view of the above, it was concluded that the Taxpayer is not liable to discharge GST under the RCM on procurement of the aforementioned services.
[High Court of Rajasthan, M/s. EMC Limited, WP(C) No. 6048/2020, dated 18 January 2023]

SUPPLY OF GOODS AND SERVICES FOR SOLAR POWER GENERATING SYSTEMS TO BE TAXED AS PER THE 70:30 SCHEME EVEN IN CASE OF TWO SEPARATE CONTRACTS WITH DISTINCT ENTITIES

Facts of the case

- M/s. Shilchar Technologies Limited (Taxpayer) is engaged in the business of manufacturing and supply of electronics and telecom and power & distribution transformers.
- The Taxpayer received an order from M/s. Adani Green Energy Limited (AGEL) for the supply of 'aluminum foil type winding Inverter Duty Transformers' (IDT) falling under chapter heading 8504 along with the mandatory spares for transformers, for solar power generating systems.

- The technical specification for IDT includes supervisory services, for which, a separate contract for erection, testing and commissioning was executed with M/s. Adani Solar Energy Chitrakoot One Limited (ASECOL).
- The Taxpayer approached the AAR for determining the classification and GST rate on the products supplied. However, the AAR held that a present contract is a single contract for the supply of goods and services. Hence, it would be leviable to the effective GST rate of 8.9% (70% of 5% GST on goods plus 30% of 18% GST on services) as per entry no:234 in Schedule-I to notification no:01/2017-CT(R) dated 28 June 2017 (Rate Notification).
- Aggrieved by the above, the Taxpayer approached the AAAR.

Questions before the AAAR

- Whether the following items supplied/to be supplied for the initial setup of the solar project falls under entry no:234 in Schedule-I to the Rate Notification
 - IDT is classifiable under chapter heading 8504 &
 - Parts of transformers.
- Whether the aforesaid supplies are leviable to GST at the rate of 5%

Contention by the Taxpayer

- The purchase order for the supply of IDT was received from AGEL whereas the service order for the supply of supervisory services was received from ASECOL. Thus, the contract for the supply of goods and services was made with two distinct entities.
- The requirement for assigning of values of 70% (for goods) and 30% (for services) vide entry no:234 in Schedule-I to the Rate Notification arises only in case of an EPC contract. On the contrary, the transaction in question is neither a works contract nor involves civil works.
- Circular no:47/21/2018-GST dated 8 June 2018 clarifies that if the value of goods and services supplied are shown separately then such supplies would be liable to tax separately, at the applicable rates.
- Supervisory services fall under SAC 9985 and are not covered under any of the SAC falling within the scope of notification no:11/2017-CT(R) dated 28 June 2017.
- The Tax Authorities (who conducted GST Audit) had accepted the classification of similar supplies made by the Taxpayer and none of the transactions were classified as 'Works Contract'.

Observations and Ruling by the AAAR

- AAAR held that there was no evidence (except declarations) to substantiate that services were rendered to ASECOL as neither the service order nor any other documents were submitted with AAR. Thus, the Taxpayer's contention that the AAR has erred in its finding that there is only one recipient of the supply, is misleading and far from the truth, as the name of ASECOL was never disclosed to AAR.
- On perusal of the clauses of the 'technical specification', it was observed that the contract involves both supply of goods as well as services. It was also noted that a single contract was artificially split into two parts viz. supply of goods and supply of services.

- The artificial splitting of a contract into two separate orders placed by two different entities is an afterthought to circumvent the explanation inserted in entry no:234 of the Rate Notification;
- The contention that the supervisory services do not fall in SAC 9954, 9983 or 9987 as envisaged in entry no:38 to notification no:11/2017-CT(R) dated 28 June 2017, but falls under SAC 9985 'support services' is baseless since the services are covered within the scope of the aforesaid notification.
- Accordingly, it was concluded that the activities relating to the supply of goods and supervisory services are inextricably linked, being interdependent and ultimately contributing to setting up the solar power generating system.
- Explanation to entry no:234 in Schedule-I to the Rate Notification is supplier-based and not recipient based. In view of the above, the AAR ruling was modified as follows:
 - **Upto 30 September 2021:** Supplies made by the Taxpayer attract GST at the effective rate of 8.9% (70% of 5% GST on goods plus 30% of 18% GST on services); and
 - **Effective 1 October 2021:** Supplies made by the Taxpayer attract GST at the effective rate of 13.8% (70% of 12% GST on goods plus 30% of 18% GST on services).

[AAAR-Gujarat, Shilchar Technologies Limited, Ruling no:GURGAAAR/APPEAL/2023/01 dated 13 January 2023]

EXCISE/ SERVICE TAX

JUDICIAL UPDATES

CESTAT TO DECIDE THE MATTER ON MERITS IN CASE WHERE A SIMILAR ISSUE IS THE SUBJECT MATTER OF DISPUTE BEFORE THE HIGHER FORUM AND WHERE ITS RULING IS NOT LIKELY TO BE RENDERED IN THE NEAR FUTURE

Facts of the case

- M/s. AIA Engineering Ltd. (Taxpayer) is engaged in the business of manufacturing of machinery and parts thereof and providing services on which applicable tax i.e. Excise Duty and Service tax was discharged prior to 01 July 2017.
 - CENVAT credit of taxes and duties paid on inputs, input services and capital goods were availed and utilised by the Taxpayer.
 - Section 161 of the Finance Act, 2016 sought to impose Krishi Kalyan Cess (KKC) on output services. Further, the CENVAT Credit of KKC paid on input services was also allowed under the CENVAT Credit Rules, 2004 (CCR). The said credit could be utilised only for discharging output KKC liability.
 - Effective 1 July 2017, with the introduction of GST, KKC has been subsumed and hence, the Taxpayer was not liable to pay KKC on taxable services. However, the amount of unutilised KKC credit as reported in the periodical returns was INR 4.36mn. Accordingly, the Taxpayer filed an application for a refund of such unutilised KKC credit.
 - The said application was rejected by the Tax Authority on the ground that such a refund was not admissible under the CCR. On an appeal filed by the Taxpayer, the Commissioner (Appeals) had also rejected the appeal on the same ground.
 - Accordingly, the Taxpayer filed an appeal before CESTAT. However, CESTAT had directed to remand the matter back to the adjudicating authority for passing a de novo order based on the outcome of the Hon'ble Supreme Court in **Commissioner of Central Excise Vs. Bombay Dyeing and Manufacturing Company Ltd. [SLP No. 7390 of 2020]**.
 - The aforesaid direction to remand the matter was challenged by the Taxpayer before the Hon'ble Gujarat High Court.
- #### Submissions by the Taxpayer
- It was submitted that the decision of the CESTAT to take a shortcut in remanding the matter to the adjudicating authority is impermissible in law and the matter ought to have been considered on merits.
 - In cases where the CESTAT was not agreeable to the submissions of the Taxpayer, it was at liberty to decide the matter on merits. However, in no case, the matter be remanded back to the original authority.
 - In this regard, the Taxpayer placed reliance on various judicial precedents viz. **Commissioner of Central GST Vs. Jay Chemical Industries Ltd. [2018 (19) GSTL 459 (Guj.)]** and **Commissioner, Central GST and Central Excise, Vadodara-II Vs. Meghmani Finchem Ltd. [2018-TIOL-1750-HC-AHM]**.
- #### Observations and ruling by the Hon'ble High Court
- The Hon'ble High Court held that the least the CESTAT could have done was of deciding the matter on merits as per the prevalent law or to keep the matter back. Instead, the CESTAT sought to remand the matter to the adjudicating authority which is impermissible.
 - Relying on the decisions relied upon by the Taxpayer, the Hon'ble High Court concluded that the approach of the CESTAT is to abdicate its duty of deciding the matter on the merits or to retain the matter till the decision of the Hon'ble Supreme Court.
 - Accordingly, the Hon'ble High Court directed CESTAT to decide the matter on merits after considering the contentions raised by both parties.
- [High Court of Gujarat- M/s. AIA Engineering Ltd. Vs Union Of India dated 07 January 2023]*

FOREIGN TRADE POLICY (FTP)

NOTIFICATION

AMENDMENT IN IMPORT POLICY AND POLICY CONDITION OF ITC (HS) CODE 080280 & 2106 90 30, SCHEDULE-I (IMPORT POLICY)

The Minimum Import Price (MIP) imposed on tariff lines under 080280 for import policy to be treated as 'free' is revised from INR. 251 per Kilogram to INR. 351 per Kg. The import policy of supari under ITC(HS) 21069030 is revised from 'free' to 'prohibited' and the import policy shall be 'free' if the CIF value is INR. 351 or above per Kg. The given conditions shall not be applicable for imports by 100% Export Oriented Units (EOUs) and units in the SEZs subject to the condition that no DTA sale is allowed.

[Notification no:57/2015-2020 dated 14 February 2023]

Amendment in export policy of biomass

The export of agri residue-based biomass and briquettes/pellets under ITC-HS Heading 1213 is placed under the 'Free' category with immediate effect.

[Notification no:58/2015-2020 dated 14 February 2023]

PUBLIC NOTICE

PROCEDURE FOR ALLOCATION OF QUOTA, FOR THE YEAR 2023-24, FOR IMPORT OF (I) CALCINED PET COKE FOR ALUMINIUM INDUSTRY AND (II) RAW PET COKE FOR THE CPC MANUFACTURING INDUSTRY

The procedure for allocation of quota for import of (i) calcined pet coke for use in the aluminum industry; and (ii) raw pet coke for the CPC manufacturing industry for the year 2023-24 is notified.

[Public notice no:57/2015-20 dated 14 February 2023]

NEWS FLASH

“Petroleum products to soon be under GST? Here's what FM Sitharaman said”

<https://www.livemint.com/news/india/petroleum-products-to-soon-be-under-gst-here-s-what-fm-sitharaman-said-11676461424509.html>

[Source: Livemint, 15 February 2023]

“Appellate tribunals, a few rate revisions on GST Council agenda”

<https://www.financialexpress.com/economy/appellate-tribunals-a-few-rate-revisions-on-gst-council-agenda/2982675/>

[Source: Financial Express, 16 February 2023]

“GST Council: Report on online gaming, casinos, race courses not on the agenda”

<https://www.cnbctv18.com/finance/gst-council-report-on-online-gaming-casinos-race-courses-not-on-councils-agenda-sources-15946211.htm>

[Source: CNBC TV, 15 February 2023]

“Co-working cos, tax experts ask government to simplify GST registration”

<https://economictimes.indiatimes.com/news/economy/policy/co-working-cos-tax-experts-ask-government-to-simplify-gst-registration/articleshow/97969753.cms>

[Source: Economic Times, 16 February 2023]

“Cashback and gift vouchers will not attract GST, rules Karnataka High Court”

<https://indianexpress.com/article/cities/bangalore/cash-back-and-gift-vouchers-will-not-attract-gst-rules-karnataka-high-court-8447450/>

[Source: Indian Express, 15 February 2023]

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