INDIRECT TAX
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GOODS & SERVICES TAX

JUDICIAL UPDATES

ORDERS BY AUTHORITY FOR ADVANCE RULING (AAR)

GST is applicable on the canteen services provided to employees and ITC is not admissible on the GST so paid

Facts of the case

- M/s. Tube Investment of India Limited (Taxpayer), is an engineering company engaged in the manufacture of precision steel tubes and strips, automotive, etc.
- The Taxpayer has entered into an agreement with the contractors to operate the canteen within the factory premises and provide food to its employees, for which, a nominal amount would be recovered on a monthly basis
- The amount so recovered is shown as a deduction in the monthly salary slip of the employees;
- The Taxpayer is not availing ITC on the expenses incurred on the services provided by the canteen service provider. Instead, they record it in books of account and discharge GST at 5% on the cost of the canteen service provided plus 10% notional markup.

Questions before the AAR

- Whether the nominal amount recovered by the Taxpayer from the employees who are provided food in the factory canteen would be considered as a 'Supply' by the Taxpayer under the precisions of Section 7 of CGST Act, 2017
- Whether GST is leviable on the amount recovered from the employees for the food provided in the factory canteen or on the amount paid by the Taxpayer to the canteen service provider
- Whether ITC is available on the GST charged by the canteen service provider for providing the catering services of the factory where it is obligatory for the Taxpayer to provide the same to its employees as mandated under the Factories Act, 1948 even if the answer to question (a) is 'No'
- Whether ITC can be availed on GST charged by the canteen service provider, the answer to question (b) is 'yes'

Observations and Ruling by the AAR

- In the present case, the 'Taxpayer contended that the services by an employee to the employer in the course of or in relation to his employment are neither a supply of goods nor a supply of service
- Consuming food at the canteen facility made available by the Taxpayer in their premises cannot be made mandatory and it is purely optional at the end of the employees
- The AAR observed that the establishment of a canteen is in the course or furtherance of business and the supply of food to the employees through a third-party vendor for a nominal amount is not an allowance as a part of the employment since the same has not been contractually agreed between the employer and the employees.

Hence, the nominal cost paid by the employee would be treated as 'consideration' for the supplies made by the employer and hence, the same would be leviable to GST

- As regards the Taxpayer's eligibility to claim ITC on GST paid on canteen services, the AAR observed that the same is restricted under Section 17(5)(b)(i) of the CGST Act, 2017, and hence, ITC would not be available even when it is obligatory for the employer to provide canteen facilities to its employees under the Factories Act, 1948
- The AAR answered the questions as follows:
  - The nominal amount of recoveries made by the Taxpayer from the employees who are provided food in the factory canteen would be considered as a 'Supply'
  - GST is applicable on both the amount (amount paid to the canteen service provider and also on the nominal amount recovered from the employees)
  - The benefit of ITC is not admissible on the GST amount recovered from the canteen service providers and also on the amount recovered from the employees
  - ITC is not admissible on the GST amount paid to the canteen service providers

  [AAR-Uttarakhand, M/s. Tube Investment of India Limited Ruling no:12/2022-23, dated 24 November 2022]

ORDERS BY APPELLATE AUTHORITY FOR ADVANCE RULING (AAAR)

Activities undertaken in the Taxpayer's premises or production plant do not qualify for 'Job Work'

Facts of the case

- M/s. Indian Oil Corporation Limited (Taxpayer), is a public sector undertaking having two different GSTINs, for its refinery business and for its Petrochemical business
- The Taxpayer requires Hydrogen gas, Nitrogen gas and HP steam for its refining activity, collectively referred to as 'Industrial Gases'. The Industrial Gases can be obtained from inputs such as Naphtha and other utilities such as De-mineralized water (DM water), power, cooling water, service water, instrument air, etc.
- Taxpayer awarded a contract to M/s Praxair India Private Limited for the Construction (Praxier), commissioning, and leasing and thereafter for operating and maintaining the Hydrogen & Nitrogen plant within the refinery complex for supplying of industrial gas on a Build-Own-Operate (BOO) basis
- The AAR after a detailed examination of the facts of the case along with the supporting documents held that the concept of 'Job work' is not present in the said transaction
- Aggrieved by ruling the Taxpayer preferred appeal before AAAR.

Questions before the AAAR

- Whether sending of inputs (Naphtha, DM water, Power, Cooling water, service water and instrument air) by the Taxpayer to Praxair and receiving back of industrial gases under the lease agreement falls under 'job work' in terms of Section 2(68) of CGST Act, 2017
- Whether all the payments under the lease agreement will attract GST as applicable to Job Work

Submissions by the Taxpayer

- Even though the consideration under the agreement is charged under three different heads (which are 'fixed lease charges', 'fixed operation & maintenance charges' & 'variable operation & maintenance charges'), in sum and substance, it is a job work agreement
- The agreement is on a BOO basis and the plants shall always remain the property of Praxair. For the purpose of ascertaining the true purpose objective of any transaction, the entire document or contract has to be read as a whole and mere reliance on some part of the contract, divested from its context, would not be a correct approach
- The control or possession of the production plant or the facility where processing is being carried out by Praxair has never been the criteria for determining whether the activity would fall under job work or not
- The activity is in the nature of BOO, which is squarely covered within the ambit of 'job work' and all the payments made by the Taxpayer under the agreement are in consideration of job work services provided by Praxair
- The observation by the AAR on control and possession of the production plant is not with Praxair, which is not true. In support of their submission, they have also relied upon the following cases:
  - Inox Air Products Private Limited [2018 (14) GSTL 147 (AAR-GST-Guj.)]
  - Bharat Petroleum Corporation Ltd [2018 (19) GSTL 119 (AAR-GST-Ker.)]

Observations and Ruling by the AAAR

- The AAAR observed that the agreement between Praxair and the Taxpayer is a simple 'lease agreement' and not a 'job work agreement' where Praxair has no control and possession over the place where the inputs supplied by the Taxpayer are processed
- Praxair can carry out the work for the operation and maintenance of the production plant under the specific control of the Taxpayer
- Therefore, the Taxpayer's claim that Praxair uses a plant to produce Hydrogen & Nitrogen Gas by using the inputs provided by the Taxpayer is a job work, is not acceptable
- The taxpayer has not been able to produce any job work agreement and invoices reflecting job work and its charges
- In order to qualify as 'Job work' there should be specific 'job work agreement' and 'job work charges' clearly mentioned in the invoices. Activities undertaken in the Taxpayer's premises or production plant do not qualify for 'Job Work'
- In view of the above, the AAAR upheld the AAR ruling, and the appeal was dismissed.

  [AAAR-Odisha, M/s. Indian Oil Corporation Limited, Ruling no:01/ODISHA-AAAR/Appeal/2022-2023 dated 21 June 2022]

CENTRAL EXCISE

NOTIFICATION

Reduction in SAED on the production of petroleum

Amendment has been made in notification no:18/2022-CE, dated 19 July 2022 which prescribes a reduction of the SAED on the production of petroleum crude and export of aviation turbine fuel. In the said notification following amendment is made in the table:

S. No.	Chapter or heading or subheading or tariff item	Description of goods	Existing Rate	Proposed Rate
1	2709	Petroleum crude	INR 10,200 per tonne	INR 4,900 per tonne

This notification shall come into force on 02 December 2022.

[Notification no:40/2022 dated 01 December 2022]

Reduction in SAED on the export of diesel

Amendment has been made in notification no:04/2022-CE, dated 30 June 2022 which prescribes the rates of SAED for exports of petrol and diesel. In the said notification following amendment is made in the table:

Chapter or heading or subheading or tariff item	Description of goods	Existing Rate	Proposed Rate
2710	High speed diesel oil	INR 9.00 per Litre	INR 6.50 per Litre

This notification shall come into force on 02 December 2022.

[Notification no:41/2022 dated 01 December 2022]

Appointment of the Commissioner of Central Excise and Service Tax (Appeals) as Central Excise officer

Central Board of Indirect Taxes & Customs (CBIC) appointed the Commissioner of Central Excise and Service Tax (Appeals) as Central Excise officer for the entire territorial jurisdiction of the Principal Chief Commissioner/Chief Commissioner of Central Excise and Service Tax for the purpose of passing Orders-in-Appeal for the CX & ST appeals filed after 30 June 2017.

[Notification no:04/2022 dated 01 December 2022]

EXCISE/SERVICE TAX

Transaction value of the goods sold to independent buyers can be transposed onto the sales made to related parties (Rule 11 read with Section 4(1)(a) of the Excise Laws)

Facts of the case

- M/s. Merino Panel Product Limited (Taxpayer) is engaged in the manufacture of decorative laminates and other like materials falling under Chapter 48 of the Central Excise Tariff Act, 1985
- During the course of the Audit, the Commissioner discovered undervaluation in the prices charged for sales made by the Taxpayer to its related parties vis-à-vis the sales made to unrelated buyers
- As a result, a Show Cause Notice (SCN) was issued to the Taxpayer alleging that the assessable value for sales made to its related party would be the transaction value of goods sold to independent buyers. The said SCN was confirmed by the Adjudicating Authority
- The Taxpayer filed an appeal before CESTAT against the aforesaid order. CESAT allowed Taxpayer's appeal and the order passed by the Adjudicating Authority was set aside on the following grounds:
  - CBEC circular dated 01 July 2002 stipulates that Rule 11 read with Rule 9 or Rule 10 of the Central Excise Valuation Rules (CEVR) has to be resorted in respect of sales made to both independent and related buyers
  - However, the Commissioner has relied on Rule 11 read with Rule 4 and Section 4(1)(a) of the Central Excise Act, 1944. Section 4(1)(a) would apply only in cases where the sales are made exclusively to independent buyers. This is in clear contradiction to the guidelines provided by the Circular dated 01 July 2002.
- Against the aforesaid order, the Tax Authority filed an appeal with the Honorable Supreme Court of India.

Submissions by the Tax authority

- The Tax Authority assailed the CESTAT order by stating that mere invocation of an incorrect provision as the source of power is irrelevant and does not vitiate the SCN, provided the power itself actually exists
- No requirement in law stipulates how the relevant provisions can be invoked in an SCN. Rule 9 of CEVR, which the CESTAT concludes to be the appropriate provision, in this case, was also mentioned in the show cause
- Even if it is considered that the SCN did not sufficiently specify the relevant Rules, this will not invalidate the SCN. It has long been established by the Honorable Supreme Court that mere invocation of an incorrect provision as the source of power is irrelevant, and cannot vitiate the entire proceedings, provided the power itself actually exists;
- The SCN merely cited the most apt method of ascertaining the independent selling price and the proper assessable value for the goods, in line with the spirit of Section 4(1) of the Central Excise Act, 1944.

Submissions by the Taxpayer

- The Taxpayer asserted that the Tax Authority ought to have relied on the Circular dated 01 July 2002. It is well settled that the Circulars issued by CBIC are binding on the Tax Authorities and a contrary stand cannot be taken against such Circulars.
- Further, the Tax authority has erred by invoking Rule 4 of the CEVR which is applicable only when the sale of goods does not take place at the time of removal from the factory. But in the present case, a sale has taken place at the time of removal itself.

Observations and Ruling by the SC

- CBEC circular dated 01 July 2002 is binding on the Tax authority and any contrary stance against the aforesaid Circular would lead to the abrogation of uniformity and consistency that is expected in Law
- However, Courts and Tribunals can ascertain the correct position of law without being bound by the Circulars issued by CBIC
- References were made to the cases viz. Commissioner of Central Excise, Ahmedabad V. Xeographic Ltd. [(2006) 9 SCC 556] and SACI Allied Products, UP V. Commissioner of Central Excise, Meerut [(2005) 7 SCC 159] that are similar to the present case for determining the assessable value

- On perusal of the same, it was observed that the amounts charged from independent buyers can form the benchmark to determine the assessable value of goods that are sold to related parties. This approach is in tune with Rule 11 of the CEVR read with Section 4(1)(a) of the Central Excise Act, 1944
- The Circular dated 01 July 2002 also makes reference to Rule 11 of the CEVR, which in turn, refers to Section 4(1) of the Central Excise Act, 1944. Hence, the aforesaid Circular is not contrary to any statutory provisions
- The Commissioner's methodology to determine the value of the sales made to related parties by the Taxpayer, on the basis of the value of sales made to independent parties is consistent with the intent of the Circular dated 01 July 2002
- Since the appropriate method of valuing the goods in the present case remained uncertain, imposition of interest and penalties (in addition to the demand of excise duty), is not justifiable
- Based on the foregoing, the Civil Appeal filed by the Tax authority was allowed.

  [Supreme Court of India- Commissioner of Central Excise & Service Tax Vs. M/s. Merino Panel Product Limited, Civil Appeal No: 6891 of 2018]

FOREIGN TRADE POLICY (FTP)

NOTIFICATION

Inclusion of additional export items for the RoDTEP scheme

Additional export sectors/items in chapter 28 (Inorganic chemicals, organic or inorganic compounds of precious metals, of rare-earth metals, of radioactive elements or of isotopes), 29(Organic chemicals), 30(Pharmaceutical products) & 73(Articles of iron or steel) are being added in Appendix 4R under RoDTEP for exports made from 15 December 2022 and shall be applicable till 30 September 2023.

The revised RoDTEP Appendix 4R containing the eligible RoDTEP export items, rates and per unit value caps, wherever applicable is available at the DGFT portal www.dgft.gov.in under the link 'Regulatory Updates >RoDTEP'.

[Notification:47/2015-2020 dated 07 December 2022]

SEZ Notification on Work From Home Policy SEZ (fifth amendment) Rules, 2022

The Ministry of Commerce and Industry issued a notification dated 08 December 2022 to extend the 100% work-from-home facility for IT and ITes SEZs up to December 2023.

The units willing to avail of this facility are required to file an intimation to the concerned development commissioner for availing of the said benefit.

It is to be noted that in case a unit has permitted its employees to work from home or from any place outside the Special Economic Zone, before the commencement of the Special Economic Zones (Fifth Amendment) Rules, 2022 and permits its employees for work from home or from any place outside the Special Economic Zone under this rule, it shall intimate the same to the Development Commissioner through an email on or before the 31 January 2023.

[Ministry of Commerce and Industry notification dated 8 December 2022]

NEWS FLASH

1. "GST amnesty scheme: Why taxpayers need an opportunity to correct inadvertent errors" https://economictimes.indiatimes.com/small-biz/gst/gst-amnesty-scheme-why-taxpayers-need-an-opportunity-to-correct-inadvertent-errors/articleshow/96018924.cms
   [Source: Economic Times, 06 December 2022]

2. "GST Council may lower tax on health insurance" https://www.financialexpress.com/money/insurance/gst-council-may-lower-tax-on-health-insurance/2901544/
   [Source: Financial Express, 06 December 2022]

3. "Online gaming industry okay with 28% GST on gross gaming revenue, but not on entry amount" https://economictimes.indiatimes.com/news/economy/finance/online-gaming-industry-okay-with-28-gst-on-gross-gaming-revenue-but-not-on-entry-amount/articleshow/96084288.cms
   [Source: Economic Times, 08 December 2022]

4. "GST tribunal will be set up in Haryana, expected to start by March 2023: CM" https://indianexpress.com/article/cities/chandigarh/gst-tribunal-set-up-haryana-expected-start-march-2023-cm-8312291/
   [Source: Indian Express, 08 December 2022]

5. "GST Council to discuss circular trading, de-criminalisation" https://www.financialexpress.com/economy/gst-council-to-discuss-circular-trading-de-criminalisation/2904937/
   [Source: Financial Express, 08 December 2022]

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