INDIRECT TAX WEEKLY DIGEST

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GOODS & SERVICES TAX

LEGISLATIVE UPDATES

CIRCULARS

CLARIFICATION REGARDING THE GST RATE OF 'RAB'

Based on the recommendation provided in the 49th GST council meeting, effective 01 March 2023, GST rate on Rab would be 5% (when sold as pre-packaged and labelled) and 0% (in other cases). The applicable rate for past periods is regularized on 'as-is' basis.

[Circular no:191/03/2023-GST dated 27 March 2023]

JUDICIAL UPDATES

WRIT PETITION

SERVICES PROVIDED ON OWN ACCOUNT CANNOT BE CONSIDERED AS "INTERMEDIARY SERVICES"

Facts of the case

- Ernst and Young Limited ('E&Y Ltd.'), a foreign company established a branch ('Taxpayer') in India pursuant to the RBI permission. The Taxpayer supplies business and legal consultancy services and discharges applicable GST on the same.
- E&Y Ltd. has entered into various service agreements for providing professional consultancy service to various overseas entities of Ernst and Young Group ('E&Y entities') on arm's length basis. In the said agreements, the E&Y entities had appointed the Taxpayer to provide professional services to the said entities.
- Accordingly, the Taxpayer supplied the aforesaid services and also issued invoices to E&Y entities and received consideration in convertible foreign exchange. Accordingly, such services were classified as 'export of services' and hence, the Taxpayer filed an application to claim refund of input tax credit ('ITC') used in supplying the aforesaid services.
- Subsequently, the Tax Authorities issued show cause notices ('SCNs') challenging the Taxpayer's determination of the aforesaid services as 'export of services' as well as the nexus between the aforesaid services and the input services on which ITC is claimed. While the Taxpayer furnished its response, the Tax Authorities confirmed the SCNs in the adjudicating orders alleging that the Taxpayer has supplied intermediary services and hence, the place of supply ('POS') of such service would be the location of supplier of service as per Section 13(8) of the Integrated Goods and Services Tax Act, 2017 ('IGST Act'). As a result, the aforesaid supply does not satisfy the provisions of Section 2(6) of the IGST Act to classify the supply as an 'export of services';
- According to the above, the Taxpayer filed appeals with the Appellate Authority against the mentioned orders. However, the Appellate Authority upheld the orders
- Aggrieved by the above, the Taxpayer filed a writ petition before the Hon'ble Delhi High Court.

Contentions by the Taxpayer

- It was submitted that the Writ Petition has been filed since the Taxpayer's statutory right to appeal is unavailable due to non-constitution of the Goods and Services Tax Appellate Tribunal (GSTAT)
- The Taxpayer referred to the definition of 'intermediary' under Section 2(13) of the IGST Act and contended that a person who supplies goods or services on their account cannot be treated as an intermediary. It was also submitted that it is undisputed that the Taxpayer does not arrange or facilitate the supply of services to E&Y entities from third parties. Instead, the Taxpayer supplies services on its account
- In this regard, reference was also made to Circular no. 159/15/2021-GST dated 20 September 2021 which reiterated the primary requirements for classifying a service as an 'intermediary services'
- Further, the Taxpayer submitted that the definition of the intermediary under the GST law is identical to the definition under the erstwhile Service tax law. Further, reliance was also placed on the order dated 8 May 2018 issued by the Tax Authorities (under the Service tax law) in the Taxpayer's case wherein it was concluded that the services supplied by the Taxpayer are not an intermediary service
- Considering the above, it was contended that the denial of the Taxpayer's refund application is unsustainable and deserves to be set aside.

Observations and Rulings by the Hon'ble High Court of Delhi

- Since the GSTAT was not constituted, the Taxpayer's statutory right to appeal was affected and hence, the Hon'ble High Court entertained the Writ Petition
- It was observed that the definition of 'intermediary' makes it very clear that an intermediary simply 'arranges or facilitates' the supply of goods or services between two or more persons. Hence, a person who supplies the goods or services (on his account) is not an intermediary
- It is undisputed that the Taxpayer has provided the services to the E&Y entities on its account and the reasoning provided by the Tax Authorities that the Taxpayer supplies services on behalf of E&Y Ltd. and hence, an intermediary is fundamentally flawed and that the Tax Authorities have misunderstood the definition of 'intermediary'
- On perusal of the definition of intermediary, it was observed that the last line of the definition merely clarifies that the definition is not to be read expansively and would not include a person who supplies goods, services or securities on its account. It was also observed that in the course of the supply of services, some constituent parts may be outsourced to a third party, but this cannot imply that the third party is providing an intermediary service
- Accordingly, it was held that merely because one of the activities could be carried on by the Taxpayer is to act as a buying/selling agent in India cannot mean that the Taxpayer has carried out such activities and the invoices raised were for the services as a buying/selling agent
- Given the above, it was concluded that the services supplied by the Taxpayer cannot be classified as 'intermediary services'. Accordingly, as per section 13(2) of the IGST Act, the place of supply of such services would be the location of the recipient of services i.e., outside India. As a result, the services supplied by the Taxpayer can be classified as an 'export of services'
- Considering the above, the Hon'ble High Court allowed the Writ Petition, setting aside the Appellate order and the Adjudicating Orders. Further, the Hon'ble High Court directed the Tax Authorities to process the refund application of the Taxpayer as expeditiously as possible.

  [M/s Ernst and Young Ltd. Vs Additional Commissioner for CGST Appeals & another dated 23 March 2023 – [2023-VIL-190-DEL]]

ORDERS BY AUTHORITY FOR ADVANCE RULING (AAR)

ENDORSEMENT OF BILL OF LADING TO AN OVERSEAS CUSTOMER SHALL BE TREATED NEITHER AS SUPPLY OF GOODS NOR SUPPLY OF SERVICE

Facts of the case

- M/s. Marubeni India Pvt. Ltd. (Taxpayer) is engaged in the supply of goods and services to various customers within as well as outside India
- The key relevant facts for the procurement of goods from an Indian manufacturer and its onward supply to overseas customers are as under:
  - The taxpayer would receive a purchase order from the overseas customer in respect of specified goods. Subsequently, the Taxpayer places an order on the Indian manufacturer
  - Transaction I: As per the arrangement, the present transaction qua the Indian manufacturer would be under the Bill-to-Ship-to model wherein the invoice would be billed to the Taxpayer and the goods would be delivered/shipped to the overseas customer. Further, the Indian manufacturer would also undertake outbound customs clearances as an exporter and share a copy of the Bill of Lading with the Taxpayer
  - Transaction II: The Taxpayer on receipt of the above, would raise an invoice on the overseas customer and forward/endorse the copy of the Bill of Lading received from the Indian manufacturer
  - Consideration for both the aforesaid transactions would be paid in compliance with the RBI and FEMA regulations
  - Accounting of 'Transaction I' would be undertaken by the Taxpayer as a purchase of goods whereas 'Transaction II' would be treated as the sale of goods.

Question before the AAAR

- In light of the above, the Taxpayer has approached AAR to determine whether the supply of goods by the Taxpayer to the overseas customer qualifies as a zero-rated supply.

Contentions by the Taxpayer

- It was submitted that as regards Transaction II, the Taxpayer issues an invoice to the overseas customer for the 'sale' of goods. Such transaction of 'sale' would amount to 'supply' under section 7 of the Central Goods and Services Tax Act, 2017 (CGST Act)
- It was also contended that both transactions were carried out by the company on a principal-to-principal basis
- While the customs formalities (including outbound customs clearance, shipping bill, and issuance of Bill of Lading) are undertaken by the Indian manufacturer, the goods are being taken outside India by the Taxpayer. Hence, 'Transaction II' would be covered under the purview of the definition of 'export of goods'
- In the alternative, it was contended by the Taxpayer that if 'Transaction I' is considered an export, then the place of supply of such goods would be outside India. Consequently, the subsequent supply (i.e., 'Transaction II') would be treated as a supply of goods from a location outside India to another location outside India. As a result, 'Transaction II' would be covered under entry 7 of Schedule III to the CGST Act, and hence, would neither be treated as a supply of goods nor a supply of services.

Observations and Ruling by the AAAR

- In referring to the definition of 'exporter' under Section 2(20) of the Customs Act, 1962, it was observed that an exporter can be any one of the following:
  - Owner of the goods
  - Beneficial owner of the goods
  - Any person holding himself out to be the exporter.
- AAR also examined the meaning of the term 'Bill of Lading' as defined by United Nations Conference on Trade and Development, Geneva (in its 1971 report) and observed that a Bill of Lading enables the consignee of goods to take delivery of the goods at their destination or to dispose of them by the endorsement and delivery of the Bill of Lading
- On a combined reading of the above definitions, it was observed that:
  - The Indian manufacturer files the shipping bill as an exporter and also gets the Bill of Lading issued to him. Hence, the Indian manufacturer is the owner of the goods and holds the title to goods till they cross the customs frontiers of India
  - As a result, the Indian manufacturer qualifies to be an exporter and hence, 'Transaction I' qualifies as an export of goods under section 2(5) of the Integrated Goods and Services Tax Act, 2017 (IGST Act)
  - However, as regards 'Transaction II', it was held that the transaction involves the supply of goods from a location outside India to a location outside India. Consequently, the said transaction would be covered under the purview of Entry 7 to Schedule III of the CGST Act.
- Based on the above, it was held that the supply of goods by the Taxpayer to the overseas customer would neither be treated as a supply of goods nor as a supply of service.

  [AAR-Karnataka, M/s. Marubeni India Pvt Ltd [TS-104-AAR(KAR)-2023-GST], dated 29 March 2023]

ITC IS NOT AVAILABLE IN CASES WHERE THE IMMEDIATE SELLER MAKES PAYMENT OF APPLICABLE TAX BUT ITS PRECEDING SUPPLIERS FAILED TO DISCHARGE APPLICABLE GST

Facts of the case

- M/s. Vimal Alloys Private Limited (Taxpayer) is procuring ferrous alloys, scrap, gas and other materials from its vendors
- The aax authorities targeted the furnaces/rolling mills on the ground that the preceding sellers of the sellers from whom the Taxpayer has purchased goods had not paid the tax and, hence, the ultimate recipient would be liable to pay tax along with interest and penalty, even though there is neither any obligation nor any infrastructure provided under the GST law to verify or to find out the status of tax payment by such preceding sellers
- The issue in the instant case is as regards the admissibility of the Taxpayer's claim of ITC under the following circumstances:
  - The immediate seller from whom the Taxpayer had purchased goods has paid applicable tax to the Government. However, the preceding sellers from whom the immediate seller had purchased goods have not paid applicable tax on such supplies
  - The Taxpayer has complied with all the requirements of Section 16 of the CGST Act barring Section 16(2)(c).

Questions before the AAR

- **Question 1**: Whether the Taxpayer is entitled to claim ITC on the purchases made by it from the seller who had discharged its tax liability, but the preceding seller has not discharged its liability?
- **Question 2**: If the answer to the above is negative, then how will the Taxpayer ensure that the tax liability has been discharged by all the sellers falling in the queue of the transaction?
- **Question 3**: Whether the Taxpayer would be eligible for the ITC since no infrastructure has been provided by the government to ensure discharging of tax liability by the sellers falling in the queue of a transaction?
- **Question 4**: Whether the Taxpayer is entitled to claim ITC on the purchases made by it from the seller in the event of non-payment of tax even though the Taxpayer complies with the following conditions:
  - Possession of the invoice and other relevant documents;

- The payments have been made through banking channels; and
- There is no connivance or collusion between the Taxpayer (i.e., Purchaser) and the Seller?

Contentions by the Taxpayer

- The Taxpayer satisfies all the conditions laid down under Section 16 of the CGST Act:
  - Taxpayer has received the goods against tax invoice issued under the GST law
  - Taxpayer has made payment to its supplier for such supplies
  - The supplier has furnished form GSTR-1 and the details of such procurements are reflected in the Taxpayer's form GSTR-2A generated from the GST portal
  - Taxpayer has also obtained copies of Form GSTR-3B filed by the supplier to substantiate payment of GST to the Government.

  Considering the above, the Taxpayer's ITC claim cannot be denied.
- It was also contended that the GST law does not cast an obligation nor provides a suitable infrastructure to verify whether the seller discharges its tax liability per law
- Moreover, the GST portal does not enable the Taxpayer to ascertain whether the preceding sellers from whom the seller has procured goods/services have discharged their tax liabilities
- Additionally, the Taxpayer also placed reliance on the settled legal principle that a bona fide purchaser cannot be vicariously held to be liable for the defaults of its sellers
- Further, any attempt to penalise the Taxpayer for the defaults of the preceding sellers from whom, its sellers have procured goods/services would be against the principles as per the legal maxim 'lex non cogit ad impossibilia' which implies that the law cannot compel a man to do an impossible task
- Given the above, it was submitted that there cannot be any liability on the part of the Taxpayer for non-payment of tax by the preceding sellers who have supplied the goods to the supplier of the Taxpayer. Instead, the proceedings must be initiated against the errant dealers, being the preceding sellers.

Contentions by the Tax Authorities

- It was submitted that the availability of ITC is subject to the conditions laid down under Section 16 of the CGST Act
- It was also contended that ITC is available only if the tax has been paid in cash or through admissible ITC. If the ITC is accumulated in violation of provisions of the GST law, the same shall not be available to its successive suppliers in the chain
- As a result, the Taxpayer is not entitled to claim ITC since the sellers from whom it had purchased goods do not have the admissible ITC for discharging its tax liabilities.

Observations and Ruling by the AAR

- On perusal of Section 16(2)(c) of the CGST Act, it was observed that no registered person shall be entitled to claim ITC in respect of goods/services unless the tax charged for such supply has been paid to the Government, either in cash or through the utilisation of admissible ITC. If the seller or its preceding sellers have not deposited the tax either in cash or through the utilisation of admissible ITC, the purchaser is not eligible to claim ITC
- Regarding questions 2, 3 and 4, it was observed that the issues raised before the AAR are not covered under the purview of Section 97(2)(d) of the CGST Act, and hence, no ruling could be passed in respect of the same.

  [AAR- Punjab, M/s. Vimal Alloys Private Limited, Order no:AAR/GST/PB/31, dated 3 February 2022]

CUSTOMS

NOTIFICATION

CERTAIN CHANGES ARE MADE IN BASIC CUSTOMS DUTY (BCD) EXEMPTION UNDER NOTIFICATION NO:50/2017 DATED 30 JUNE 2017

Notification no:50/2017 dated 30 June 2017 (said notification) has been amended to continue and streamline certain exemptions from BCD on import. The gist of key amendments is as under:

- Exemption on 'Drugs or medicines used for the treatment of rare diseases' has been extended to 'Food for Special Medical Purposes (FSMP) used for the treatment of rare diseases'
- Validity of exemption on 'Parts and raw materials for the manufacture of goods to be supplied in connection with the purposes of offshore oil exploration or exploitation' extended till 31 March 2024
- Prescribed 5% on certain weaving machines (other than old and used), knitting machines (other than old and used), machinery (other than old and used) for the manufacture of non-wovens textiles, parts and components (other than old and used) for use in the manufacturing of textile machinery.

  [Notification no:17/2023-Customs dated 29 March 2023]

HEALTH CESS EXEMPTION ON IMPORT OF GOODS FOR USE IN THE MANUFACTURE OF X-RAY MACHINES

Notification no:08/2020 dated 2 February 2020 has been amended to provide an exemption from Health cess on the import of goods used in the manufacture of X-ray machines by insertion of entry no:4 in the said notification. The changes shall come into force on 1 April 2023.

[Notification no:18/2023-Customs dated 29 March 2023]

FOREIGN TRADE POLICY (FTP)

HIGHLIGHTS FTP 2023

The following are the key highlights of FTP 2023

- New Foreign Trade Policy 2023 and Handbook of Procedures have been announced to provide policy continuity and a responsive framework
- Focus on Emerging Areas, E-Commerce exports, developing districts as export hubs, streamlining SCOMET policy
- Granting a special one-time Amnesty Scheme for default in export obligations
- Providing online approvals without a physical interface.

NOTIFICATION

INCLUSION OF 18 HS CODES UNDER HEADING 5208 IN APPENDIX 4R FOR REMISSION OF DUTIES OR TAXES ON EXPORT PRODUCTS SCHEME ('RODTEP')

18 tariff lines falling under HS code 5208 are being added in Appendix 4R (Scheme for Remission of Duties and Taxes on Exported Products) under RoDTEP for exports made from 28 March 2023.

[Notification no:63/2015-2020 dated 25 March 2023]

TRADE NOTICE

Extension of date for mandatory e-Filing of non-preferential Certificate of Origin ('CoO')

In continuation to the earlier Trade notice no:15/2022-23 dated 1 August 2023, the date for transitioning to the mandatory filing of non-preferential CoO applications through the e-CoO portal has been further extended to 31 December 2023. The exporters and notified CoO issuing agencies can use the online option at their own will for the time being.

[Trade Notice no:27/2022-23 dated 28 March 2023]

NEWS FLASH

"Ahead of GST Appellate Tribunal's launch, an SOP for investigations."

https://www.thehindu.com/business/Economy/ahead-of-gst-appellate-tribunals-launch-an-sop-for-investigations/article66679936.ece

[Source: The Hindu, 30 March 2023]

"GST collection set to exceed ₹18 lakh crore this financial year."

https://www.hindustantimes.com/india-news/gst-collection-set-to-exceed-18-lakh-cr-this-financial-year-101680199813861.html

[Source: Hindustan Times, 30 March 2023]

"Advance Ruling cannot be sought after Offering Services and Paying GST: AAR"

https://www.taxscan.in/advance-ruling-cannot-be-sought-after-offering-services-and-paying-gst-aar/265985/

[Source: Taxscan, 29 March 2023]

"Significant taxpayers yet to file returns."

https://timesofindia.indiatimes.com/city/surat/significant-taxpayers-yet-to-file-returns/articleshow/99130782.cms

[Source: Times of India, 31 March 2023]

"GST rate rationalization unlikely before 2024 Lok Sabha elections."

https://www.business-standard.com/india-news/electoral-compulsion-may-delay-gst-overhaul-amid-inflationary-uncertainties-123032800988_1.html

[Source: Business Standard, 29 March 2023]

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