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Indirect Tax Alert

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Rulings under GST era

M/s. Emerald Court Co-operative Housing Society Limited – Authority for Advance Ruling, Maharashtra[1]

Issue for Consideration

Whether maintenance charges collected by Co-operative Housing Society ('CHS') from its members is liable to GST?

Discussion

- The Applicant is a CHS which provides services to its members in the form of various facilities such as security, cleaning, repairs, common electricity, etc. These charges are collectively referred to as 'maintenance charges'
- The Applicant raises monthly bills on its members in two parts viz. one for property tax on which GST is not charged and another for maintenance charges on which GST is being charged.
- The Applicant approached the Maharashtra Authority for Advance Ruling ('the Authority') to contend that maintenance charges collected from its members are not liable to GST on the following grounds:
  - Activities undertaken for the upkeep and maintenance of society and collecting money from the members for the same, does not constitute 'business' since there is no exchange of consideration but mere reimbursement of the amount by the members for the facilities provided by the CHS.
  - There is no supply of goods or services by virtue of 'doctrine of mutuality'.
  - The Hon'ble Supreme Court has held in several judgments that a member's club cannot be made subject to sales tax because the members are joint owners of the club property. Supply of article to a club member by the club cannot be regarded as 'sale'. Furthermore, various High Courts have also held the levy of Service tax to be illegal basis the principle of mutuality.
  - Furthermore, even if the services are regarded as taxable then also the GST law has not specifically provided any tax rate for charging tax on supply of services rendered by CHS. It has only issued exemption notification, to exempt the value of supply made by CHS up to ₹ 7,500/-.

[1] 2021-VIL-264-AAR

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- The Hon'ble Supreme court in the case of *State of West Bengal and Others* v. *Calcutta Club Ltd.*[2] observed that there is absence of 'consideration' between club and its members. 'Consideration' is a must and should pass from one person to another for a transaction to be exigible to tax.
- Furthermore, entry 7 of schedule II of the CGST Act, 2017 does not cover incorporated clubs or associations to attract GST liability.
- The retrospective amendment made in section 7 of the CGST Act, vide the Finance Act, 2021 has **not** yet been made effective.

- The Revenue on the contrary contended as follows:
  - The activities of the CHS are covered by the definition of 'business' under the CGST Act and are bound to obtain registration if other conditions are fulfilled.
  - The definition of 'person' under section 2(84) of the CGST Act, specifically includes any association of persons whether incorporated or not and a co-operative society also.
  - Furthermore, as per section 15 of the CGST Act, the transaction between the CHS and its members is to be regarded as between 'related persons'.
  - As per Schedule I of the CGST Act, the supply of goods or services between related persons would be regarded as a supply even if made without consideration.

- The Authority, after considering the facts of the case observed that the amendment proposed in section 7 of the CGST Act vide the Finance Act, 2021 has received the assent of the President on March 28, 2021 and accordingly the issue of principle of mutuality in the case of co-operative societies like the Applicant has been settled. Therefore, the maintenance charges received are nothing, but consideration received for supply of goods or services. The case laws relied upon by the Applicant are not applicable in view of the amendment.

Ruling

The Applicant is liable to pay GST on maintenance charges (by whatever name called) collected from its members, if the monthly subscription or contribution charged from the members is more than the prescribed exemption limit (₹ 7,500/- per month).

Dhruva Comments:

The issue of principle of mutuality has been subject matter of dispute under pre-GST regime as well as under the GST regime. The CBIC has also issued various circulars under GST to clarify the tax positions on the charges collected by the housing societies.

Furthermore, it needs to be noted that the amendment made in section 7 of the CGST Act vide the Finance Act, 2021 has **not** yet been notified by the Government. Accordingly, the amendment has not yet been made effective. Thus, the ruling has erred in concluding liability to GST based on the amendment which has not been made effective yet. The ruling could undergo rectification under section 102 of CGST Act being error apparent on the face of the record.

M/s. Maharashtra State Dental Council – Authority for Advance Ruling, Maharashtra[3]

Issue for Consideration

- Whether online / offline tendering is to be considered a supply of goods or a supply of service and its tariff heading?
- Whether the activities conducted by the Applicant can be considered as 'registration and their related activities', and is the receipt of registration fees paid by the prospective dental practitioners to the Council exempt from the levy of GST?

[2] TS-222-SC-2016-VAT-Calcutta
[3] Advance Ruling no. GST-ARA-125/2019-20/B-30, dated July 13, 2021

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Discussion

- The Applicant is a non-profit-making organisation constituted by an act of Parliament "The Dentist Act. 1948" to regulate the dental profession and dental ethics. The Applicant provides help, assistance and guidance for the benefit and welfare of the dental practitioners who are registered with the Council.
- The Applicant charges a fee under chapter IV of the Dentist Act, 1948 to each Dental Practitioner for registration, renewal of registration, entry of additional qualifications in the register and various other incidental charges. The income earned by way of fees is used for the maintenance of the Council.
- The Applicant approached the Maharashtra Authority for Advance Ruling ('the Authority') to seek a ruling on the above-mentioned issues.
- The Authority after considering the facts of the case and the Applicant's submissions held as under:
  - In the present case, the entire process related to tendering (application, fees, submission of bid etc) is online.
  - The term 'Online tendering' is defined in the business dictionary as 'an internet-based process wherein the complete tendering process from advertising, receiving and submitting tender related information is done online. In common parlance also it is understood to be a process of procuring goods or services where the entire process is online.
  - Online tendering does not form part of the definition of goods. Furthermore, on perusal of the definition of 'Online information and data access or retrieval services' as defined under section 2(17) of the IGST Act, 2017 the Authority observed that the provision of e-tender, which is intangible has to be delivered through a telecommunication network or the internet and thus, the intention of the legislature is very clear, to treat such activities as supply of 'service'.
  - In case of offline tendering, the entire process such as application, payment of fees, submission of bids etc. is done manually by way of submission of hard copies.
  - The difference between online and offline tendering is that in the case of online tendering the forms are sold online, whereas in the case of offline tendering, the tender forms are sold as printed matter. In the case of offline tendering there are also intangible products such as the application, payment of fees etc. and it is difficult to identify these services individually.
  - Offline tendering does not satisfy the definition of goods in its entirety. Sometimes services are difficult to identify because they are closely associated with the goods.
  - In the present case, the Authority observed that no transfer of possession or ownership takes place when services are sold and accordingly, offline tendering amounts to supply of 'service'.
  - Online / offline tendering as a service is not specifically covered in any of the headings and the same should be taxed under heading 9997 as "other services (washing, cleaning and other miscellaneous services including services nowhere else specified)".
  - The question of whether tendering as a service falls under the category of administrative service is outside the jurisdiction of the Authority under section 97(2) of the CGST Act.
  - The activities conducted by the Applicant are not specifically covered in the exemption notification. Therefore, the receipt of registration fees is not exempted from the levy of GST.

Ruling

- Online / offline tendering will be considered as a supply of 'service' under chapter heading 9997.
- The activities conducted by the Applicant for which registration fees are received are not exempted from the levy of GST.

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Dhruva Comments:

A similar ruling was pronounced by the Maharashtra Advance Ruling Authority in the case of M/s. Navi Mumbai Municipal Corporation[4], wherein the Authority also held that online / offline tendering will be considered as supply of 'service' and should be taxed under chapter heading 9997.

Judgments under GST era

F1 Auto Components Pvt. Ltd. v. *The State Tax Officer*[5]

Issue for Consideration

Whether a notice under section 42 of the CGST Act, 2017 ('the Act') is required to be issued by the department in case of wrongful claim of input tax credit ('ITC')?

Discussion

- The Petitioner had received an intimation for the wrong claim of ITC which it accepted and reversed the ITC through Form GST DRC-03.
- Thereafter, the Petitioner had received an order (impugned order) whereby interest was levied under section 50 of the Act on the remittances made through cash and input tax credit.
- The Petitioner has challenged the impugned order before the Hon'ble High Court by contending that no notice has been issued under section 42 of the Act.
- The Hon'ble High Court observed as follows:
  - No interest is leviable in respect of the tax paid through the input tax credit as already held in its earlier judgment of *Maansarovar Motors Private Limited* v. *The Assistant Commissioner*[6].
  - Section 42 can be invoked only in a situation where there is a mismatch on account of an error in the database of the revenue or a mistake that has been occasioned at the end of the revenue. The present case is of wrongful claim of ITC and not of mismatch of ITC.
  - In respect of the levy of interest on belated cash remittance, it is compensatory and mandatory.

Judgment

The High Court modified the impugned order by setting aside the interest levied on the tax discharged through credit.

Dhruva Comments:

The procedure prescribed under section 42 of the Act is not yet made effective with respect to the communication of the mismatch of credits.

Furthermore, the availment of wrongful credit cannot be covered under section 42 as the same deals with mismatch of credit.

Greenwood Owners Association and Others v. *The Union of India and Others*[7]

Issue for Consideration

Whether the GST exemption granted to Resident Welfare Associations ('RWA) for monthly contribution received from its members upto an amount of ₹ 7,500 would apply in a situation where the monthly contribution exceeds ₹ 7,500/-.

Discussion

- Services provided by a RWA to its members for use of common facilities are exempt under GST where the member contributions are up to ₹ 7,500/- per month ('threshold limit'). In the initial period, CBIC had issued a flyer in case of co-operative housing societies wherein it was clarified that in case where contributions exceeded the threshold limit, only the differential amounts would be taxable under GST and not the entire amount collected.

[4] Advance Ruling No. GST-ARA-122/2018-19/B-68 dated June 10, 2019
[5] 2021 (7) TMI 600
[6] 2020 (11) TMI 107
[7] 2021 (7) TMI 591

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- However, a CBIC Circular[8] issued in 2019 states that exemption shall not be available if the contribution collected exceeds the threshold limit and GST shall be applicable on the entire amount collected by the RWA.

- Furthermore, one of the Petitioners had approached the Authority for Advance Ruling ('the Authority') to seek a ruling on the taxability of member contributions exceeding ₹ 7,500 under GST.

- The Authority held that the member contributions were eligible for exemption under GST only in cases where it did not exceed the threshold limit of ₹ 7,500. In that case, as the contribution exceeded the said limit, the entire amount was leviable to tax.

- The Petitioners being aggrieved by the ruling of the Authority challenged the ruling as well as the CBIC circular (*supra*) before the Hon'ble Madras High Court. The contentions of the Petitioners are as under:

  - The interpretation of the exemption entry adopted by the CBIC in its circular is contrary to the express language of the exemption notification and its desired intendment.
  - The term 'up to' in the exemption entry specifies that the grant of exemption was up to the threshold limit irrespective of the amount of contribution.
  - The withdrawal of statutory exemption by way of circular is contrary to the provisions of the Constitution.
  - The RWA had collected tax on contributions exceeding the threshold limit based on the clarificatory flyer issued by the CBIC (*supra*). If there is a contrary view at this juncture, it would be impossible for the RWA to collect the shortfall in a situation where there is change in ownership of the property.

- The Respondents grounds are as under:

  - GST is applicable on the transaction value which, in the present case, is represented by the contribution made by the members and thus GST should be levied on the entire amount collected.
  - Exemption is intended only for the middle class and not in respect of luxury apartments.
  - Comparison can be made with the provisions of the Tamil Nadu Sales Tax Act, 1970 wherein slab rates are prescribed in case of beneficial tax treatments unlike the present case under GST where only a range is specified for eligibility of the exemption notification.
  - The Respondents relied on the Supreme Court judgment in the case of *Commissioner of Customs Import, Mumbai* v. *Dilip Kumar & Company*[9] wherein it was held that, in case of ambiguity in interpretation of a tax exemption notification, the exemption entry should be interpreted strictly and the burden of proving exemption lies on the assessee.

- The Hon'ble Madras High Court held that:

  - There is no ambiguity in the language of the exemption notification and thus the ratio of the judgment in case of Dilip Kumar (*supra*) is not relevant in the present case.
  - The intention of the provision is clearly to exempt the levy of tax on contributions up to the threshold limit.
  - The Court relied upon language of the exemption entries under the erstwhile Service tax law and observed the difference in language adopted in case of exemption entries.
  - Under the erstwhile service tax regime, exemption was granted for services provided by Government or a local authority where the gross amount charged did not exceed ₹ 5000.
  - Under GST regime also, services provided by artist by way of performance in folk or classical art forms is exempt, if the consideration is less than ₹ 1,50,000/-. If the consideration exceeds

[8] Circular No. 109/28/2019- GST dated July 22, 2019
[9] Civil Appeal No. 3327 of 2007

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by even a single rupee, then the artist will lose the benefit of exemption.

- If the legislature intended that exemption under GST shall be eligible only if the threshold limit was not exceeded, it would have been expressly stated.
- The term 'up to' in the exemption entry is interchangeable with the word 'till' and shall be interpreted to mean that tax shall be levied only on contributions exceeding the threshold limit.
- In relation to the argument concerning slab rates, such slab connotes that income up to a certain limit is outside the purview of tax or eligible to lower rate, and that income above that slab would be treated differently. The intention of exemption entry is simply to exempt contributions till a specified limit. The GST department also had taken a correct view in the clarification issued in 2017.

Judgment

The Hon'ble High Court quashed the ruling pronounced by the Authority as well as the CBIC circular levying tax on the entire amounts collected by the RWA in cases where it exceeded the threshold limit.

Dhruva Comments:

This is a welcome judgment by the Hon'ble Madras High Court which provides relief to several co-operative housing societies which are registered under GST and collects monthly contributions above ₹ 7,500.

Press Release

Kerala Flood Cess

- The Kerala State Goods and Services Tax Department has issued a press release dated July 23, 2021 to state that the Kerala Flood Cess will end on July 31, 2021.
- Accordingly, the traders have been requested to make suitable changes to their billing software to avoid levy of flood cess on sales made after July 31, 2021.

Dhruva Comments:

This clarification is in line with section 14 of The Kerala Finance Act, 2019 whereby the cess was applicable for a period of 2 years.

Circulars

Clarification on extension of limitation under GST law in terms of Hon'ble Supreme Court order dated April 27, 2021[10]

- The Hon'ble Supreme Court ('SC') had issued order dated April 27, 2021 ('impugned order') whereby the period of limitation, as prescribed under any general or special laws in respect of all judicial or quasi-judicial proceedings, whether condonable or not, was extended till further orders.
- The CBIC has solicited a legal opinion with regards to the applicability of the impugned order on the timelines prescribed under the GST law. The key highlights of the legal opinion are as follows:
  - The SC has granted extensions **only** with reference to judicial and quasi-judicial proceedings in the nature of appeals, suits, petitions, etc. and has not extended it to every action or proceeding under the CGST Act.
  - The impugned order applies to appeals, reviews, revisions, etc. and not original adjudication.
  - Judicial or quasi-judicial proceedings which are pending cannot come to a standstill by virtue of the impugned order. Such cases need to be adjudicated or disposed off either by doing the personal hearings in person or through virtual mode based on prevailing policies or instructions issued.

[10] Circular no. 157/13/2021-GST dated July 20, 2021

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- The actions such as scrutiny of returns, issuance of summons, search, enquiry or investigations and even consequential arrest in accordance with GST law would not be covered by the impugned order.
- **Issuance of Show Cause Notice (SCN), granting time for filing replies and passing orders, though they are quasi-judicial proceedings, the impugned order may not cover them as it has been made applicable to matters relating petitions, applications, suits, etc**.

- Basis the above legal opinion the CBIC has clarified as follows:

  Proceedings that need to be initiated or compliances that need to be done by the taxpayers

  - These actions would continue to be governed by the timelines prescribed under the statute itself. The impugned order would not be applicable to such proceedings / compliances to be undertaken by the taxpayers.

  Quasi-judicial proceedings by tax authorities

  - The tax authorities can hear and dispose off proceedings when acting as quasi-judicial authority. Similarly, appeals filed and pending can be disposed off in accordance with the extensions granted by the statutes.

  Appeal by taxpayers / tax authorities against any quasi-judicial order

  - Where an appeal is required to be filed before Joint / Additional Commissioner (Appeals), Commissioner (Appeals), Appellate Authority for Advance Ruling, Tribunal and various courts against any quasi-judicial order or where a proceeding for revision or rectification of any order is required to be undertaken, the timeline for the same would stand extended as per the impugned order. The impugned order is not applicable to any other proceedings under the GST law.

Dhruva Comments:

The present clarification though has been issued under the GST laws, it may equally apply for erstwhile laws being under the administration of CBIC or department may issue a similar clarification for erstwhile Excise and Service tax law.

CESTAT clarification on computing the period of limitation[11]

- The CESTAT has issued an office memorandum wherein it has been stated that the benches of the Tribunals have been adopting different standards in computing the period of limitation under the various laws in lieu of the Supreme Court order dated April 27, 2021 ('order').
- The Hon'ble President has therefore directed the Registry of all Benches of Tribunal to strictly adhere to the order while computing the period of limitation and should **not** insist for a condonation of delay application ('CoD') if the appeal is covered by the order.
- Furthermore, if the appellant wishes to avail the benefit of the order, then such a statement should be made in verification and respective column of date of receipt of impugned order (*against which appeal is being filed*) in Form EA-3 / CA-3 / ST-5.

Dhruva Comments:

The said clarification removes ambiguity on filing CoD application insisted upon by Registry at several benches and issuance of defect memo. Thus, it will avoid unnecessary paperwork and delay in listing of appeals.

[11] F. No. 01(05)/Circular/CESTAT/2021 dated July 26, 2021

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