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Indirect Tax Alert

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Judgments under GST era

Dharmendra M. Jani v. *Union of India and Others*[1]

Issue for Consideration

Whether section 13(8)(b) of the IGST Act, 2017 ('the Act') to the extent it levies GST on intermediary services provided to, used and consumed by recipients located outside India is ultra vires to the Act and unconstitutional?

Discussion

- The Petitioner is engaged in providing marketing and promotional services for goods sold by overseas suppliers to customers in India.
- The Indian purchaser i.e. the importer, purchases the goods by directly placing an order and remits the sale proceeds to the overseas supplier.
- On receipt of such payment, the overseas supplier pays commission to the Petitioner.
- As per section 13(8)(b) of the Act, the intermediary service provided by the Petitioner is leviable to GST.
- The Petitioner has been paying GST under protest without collecting it from foreign customers.
- Aggrieved, the Petitioner filed the present Writ challenging the constitutional validity of levy of GST on intermediary services provided to recipients located outside India on the following grounds:
  - The Petitioner is an intermediary as per section 2(13)[2] of the Act.
  - The transaction with the foreign customer is one of export of service as per section 2(6) of the Act and it earns India valuable convertible foreign exchange.
  - As per section 13(8)(b)[3] of the Act, the place of supply for intermediary services shall be the location of supplier of service.
  - As per section 8 of the Act, if the location of supplier and place of supply are in the same state, then it is an intra-state supply.
  - Hence, by deeming fiction, in case of intermediary service where the location of recipient is outside India, the place of supply shall be the location of supplier and liable to

[1] Order nos. 51518-51519/2021 dated May 5, 2021

[2] Section 2(13) of Act: *"intermediary" means a broker, an agent or any other person, by whatever name called, who arranges or facilitates the supply of goods or services or both, or securities, between two or more persons, but does not include a person who supplies such goods or services or both or securities on his own account;*

[3] Section 13(8)(b) of Act: *The place of supply of the following services shall be the location of the supplier of services, namely:... (b) intermediary services*

GST even if it is essentially export of service and leads to double taxation.

- Levy of GST on export of service is *ultra vires* to Article 269A and Article 286 of the Constitution of India.
- GST being a destination-based consumption tax, for taxing a service, the place of consumption is relevant and not the place of performance. Once the services are consumed outside India, the Parliament has no jurisdiction to levy tax on such services.
- Levy of GST on intermediaries is violative of Article 14[4] and Article 19(1)(g)[5] of the Constitution. Further, it violates Article 286(1)[6] of the Constitution which stipulates that no law of a state shall impose or authorize the imposition of a tax on the supply of goods or services or both, where such supply takes place outside the state.
- The cardinal rule of indirect taxation is that it must be capable of being passed on to the end receiver. Therefore, an agent cannot be burdened with GST.
- There is no justifiable reason for singling out the intermediary by creating a legal fiction to deny export of service thereby denying a level playing field vis-à-vis other exporters of services.
- Levy of GST incentivises the foreign customer to set up a liaison office in India at the cost of an intermediary.
- Levy of GST has caused an exodus of intermediaries to other locations like Singapore, Dubai, Hongkong etc resulting in loss of not just GST but income tax, foreign exchange and employment.
- Even internationally, intermediary services are treated as export of services.

- The Respondent argued that the levy of GST on intermediary services is constitutionally valid on the following grounds:
  - Even under the Service tax regime, the place of provision of service for intermediaries was the location of the intermediary.
  - If the place of supply for all intermediaries located in India providing service to overseas customer were to be the location of the recipient i.e., outside India, such services would go outside the tax net.
  - The services are actually performed and enjoyed at the place where the underlying arranged supply is made. Taxing such services incentivises foreign companies to start manufacturing in India to avail tax benefits which is in line with the *Make in India* program.
  - Such levy does not lead to double taxation as intermediary services and import of goods are distinctly identifiable supplies wherein tax is levied under different statutes.

- The two-member Bench of the Hon'ble High Court has given dissenting views on the matter as follows:

  Per Ujjal Bhuyan, J.
  - Reference was made to various judicial pronouncements[7] wherein the principle upheld was that service tax is leviable only on services provided within the country.
  - On conjoint reading of Article 246A and 269A of the Constitution, it does not empower the imposition of tax on export of services.
  - There is an express bar under Article 286(1) of the Constitution that no law of a state shall impose or authorize imposition of a tax on the supply of goods or services or both where such supply takes place in the course of import into or export out of the territory of India. While Article 286(2) of the Constitution empowers the

[4] Article 14 of Constitution: "*Equality before law.- The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.*"
[5] Article 19(1)(g) of Constitution: *(1) All citizens shall have the right-..(g) to practice any profession, or to carry on any occupation, trade or business.*"
[6] Article 286 of the Constitution: *Restrictions as to imposition of tax on the sale or purchase of goods.- (1) No law of a State shall impose, or authorise the imposition of, a tax on the supply of goods or of services or both, where such supply takes place-(a) outside the State;….*
[7] *All India Federation of Tax Practitioners* v. *Union of India* [2007-VIL-19-SC-ST], *Moti Laminates Pvt. Ltd.* v. *Collector of Central Excise, Ahmedabad* [1995-VIL-10-SC-CE] and *Commissioner of Service Tax* v. *SGS India Pvt. Ltd.* [2014-VIL-112-BOM-ST]

Parliament to make laws formulating principles for determining supply of goods or of services or both, the same cannot be used to impede the scheme of Article 286(1).

- All the conditions stipulated in section 2(6) of the Act for export of service are complied with. It would also be an export of service as understood in common parlance.
- Section 13(8)(b) read with section 8(2) of the Act has created a fiction deeming export of service by an intermediary to be a local supply i.e. an inter-state supply. This is an artificial device created to overcome a constitutional embargo.
- It is apparent that section 9 of the CGST Act, 2017 cannot be invoked to levy tax on cross-border transactions. However, by artificially creating a deeming provision in the form of section 13(8)(b), the place of supply has been treated as the location of the supplier i.e., in India. This runs contrary to the scheme of the GST law going beyond the charging sections.
- With regards to the judgment of the Gujarat High Court in the case of *Material Recycling Association of India* v. *Union of India*[8] wherein the Court had held that section 13(8)(b) is not ultra vires to the Constitution, the Court in the present case observed that it was not able to accept such views considering that section 13(8)(b) not only falls foul of the overall scheme of the GST law but also offends Articles 245, 246A, 269A and 286(1) (b) of the Constitution. In fact, it runs completely counter to the fundamental principle that GST is a destination-based consumption tax.
- It is settled proposition that a statute must pass the test of legislative competence and also pass the test of constitutionality.
- The argument that similar provisions were left unchallenged under the Service tax regime cannot be a valid ground for not instituting the present challenge.
- The argument of the Respondent that levy of IGST on supply of services by intermediaries to foreign customers would strengthen the *Make in India* program by encouraging foreign investment can be no answer to the challenge on the grounds of constitutionality.

Per Abhay Ahuja, J.

- Neither section 13(8)(b) nor section 8 (2) of the Act are unconstitutional or *ultra vires* the Act.
- Section 13(8)(b) is also not *ultra vires* section 9 of the CGST Act, 2017.
- Once the Parliament has in its wisdom stipulated the place of supply of intermediary services to be the location of the supplier of service, no fault can be found with the provision by artificially attempting to link it with another provision to demonstrate constitutional or legislative infraction.
- To state that by virtue of section 13(8)(b) read with section 8(2) of the Act, Parliament has sought to impose tax on export of services by treating the same as local supply in violation of Articles 246A and 269 is completely fallacious and untenable.
- When there is a specific provision defining an intermediary as contained in section 2(13) of the Act and intermediary services are specifically dealt with in section 13(8)(b), the question of application of a general provision would not arise, particularly when the constitutionality of both the above provisions has been upheld.
- Article 286 restricts the right of the state to impose taxes on import or export of goods or services. The said restriction is not applicable to the Parliament.
- Article 269A(5) empowers the Parliament to formulate laws to determine inter-state trade or commerce.
- The supply by intermediary will be treated as an inter-state supply of services.

[8] 2020-VIL-341-GUJ

Judgment

On one hand, the Learned member Ujjal Bhuyan, J allowed the appeal of the Petitioner and held that section 13(8)(b) is *ultra vires* the Act and is also unconstitutional.

On the other hand, the learned member Abhay Ahuja, J. differed and upheld the contended section's constitutional validity.

Dhruva Comments:

Recently, the challenge to the constitutional validity of the taxation of intermediary services provided to recipients outside India has come up before the High Courts.

One interesting aspect emanating from the judgment is that whilst upholding the constitutional validity it has been held that the supply will be treated as an inter-state supply, but the provisions of section 13(8)(b) suggests that supply by an intermediary will be an intra-state supply since the place of supply is the location of supplier itself. Considering the divergent views, the matter is now remitted to the Chief Justice. It will be interesting to see how the matter unfolds in the judiciary.

Comsol Energy Pvt. Ltd. v. *State of Gujarat*[9]

Issue for Consideration

Whether refund of GST paid due to mistake of law is bound by the statutory time limit prescribed under section 54 of the CGST Act, 2017 ('the Act')?

Discussion

- The Gujarat High Court in the case of *Mohit Minerals Pvt. Ltd.* v. *Union of India and Others*[10] had declared the levy of IGST under reverse charge mechanism ('RCM') on ocean freight as ultra vires and accordingly declared entry 10 of notification no. 10/2017-Intergrated Tax (Rate) as ultra vires section of 5(3) of the IGST Act, 2017.
- In lieu of the said judgment, the Petitioner had filed a refund application for the period February 2018 and March 2018, in respect of the IGST paid on ocean freight. However, deficiency memos were issued against the said applications, stating that the applications were not filed within the time period prescribed under section 54 of the CGST Act, 2017.
- Accordingly, the Petitioner filed the present Writ Petition before the High Court of Gujarat to set aside the said deficiency memos and to allow the refund applications. The Petitioner contended as follows:
  - As per Article 265 of the Constitution of India, no tax shall be collected by the Government, except by the authority of law. Since the levy of tax on ocean freight has been held as unconstitutional, the department is obliged to refund the tax collected erroneously.
  - Reliance was placed upon the Supreme Court judgment in the case of *The State of Madhya Pradesh and Another* v. *Bhailal Bhai and Others*[11], wherein it was held that where the sales tax assessed and paid by the dealer is held to be invalid by the Court of law, the payment of tax made is one under a mistake of law, and therefore the tax paid should be refunded.
  - Section 54 of the Act is applicable only in case where a refund is claimed of tax paid under the provisions of the Act, whereas in the present case, the tax is collected without the authority of law and therefore section 54 is not applicable.
  - In the present case, section 17 of the Limitation Act, 1963 is the appropriate section for claiming the refund of amount paid to the Government under mistake of law.

[9] 2021-VIL-477-GUJ
[10] 2020-VIL-36-GUJ
[11] 1964-VIL-13-SC

- Furthermore, there are various judgments of High Courts[12], wherein it has been held that the period of limitation should not apply to claim of refund of tax that has been paid due to mistake of law.
- Additionally, in a similar case of *Gokul Agro Resources Ltd.* v. *Union of India*[13], the Gujarat High Court has held that the refund should be granted of tax paid on ocean freight without raising any technical issue for the claim amount. Also, in the case of *Bharat Oman Refineries Ltd.* v. *Union of India*[14] directions were given by the High Court to refund the amount of tax paid on ocean freight.

Judgment

The Hon'ble Gujarat High Court set aside the deficiency memos and directed the department to process the refund applications, along with applicable interest.

Dhruva Comments:

Refund claims pursuant to mistake of law are not bound by the time limit prescribed under the law but to be claimed under Article 265 and section 72 of Indian Contract Act,1872 as held by Supreme Court in the landmark judgment in the case of Mafatlal Industries Ltd. The present judgment though is welcomed but considering the refund applications being rejected by the department on a regular basis, a suitable clarification should be issued by the Government so as to put the issue to rest w.r.t. refund applications.

Further, the department appeal in the case of Mohit Minerals (*supra*) is pending before the Supreme Court [SLP (C) 13958/2020].

Circular under GST

Clarifications on applicability of Dynamic QR Code on B2C invoices

The Government has issued circular no. 156/12/2021-GST dated June 21, 2021 whereby certain clarifications have been made pertaining to the applicability of Dynamic QR Code. The key clarifications are summarised below:

- Persons having a Unique Identity Number (UIN) are not regarded as "registered persons" resulting in B2C supply having the requirement to comply with dynamic QR code.
- UPI ID is linked to a specific bank account of the payee / person collecting money, details of bank account and IFSC may not be provided in the dynamic QR code.
- In cases where the payment is collected by a third party, authorized by the supplier on his / her behalf, the UPI ID of such person instead of the supplier may be provided in the dynamic QR code.
- Wherever an invoice is issued to a recipient located outside India, for supply of services not amounting to exports, such an invoice may be issued without having a dynamic QR code, as such a code cannot be used by the recipient for making payment to the supplier.
- In cases where the invoice number is not available at the time of the digital display of dynamic QR code for over-the-counter sales and the invoices along with the invoice number are generated after receipt of payment, the unique order ID / unique sales reference number, which is linked to the invoice issued may be provided in the dynamic QR code for digital display. The cross-reference of such payment along with the unique order ID / sales reference number are available on the processing system of the merchant and are also provided on the invoice.
- When part-payment for any supply has already been received from the customer in the form of

[12] *Binani Cement Ltd.* v. *Union of India* [2013 (288) ELT 193 (Guj.)]; *Joshi Technology International* v. *Union of India* [2016 (339) ELT 21 (Guj.)]; *3E Infotech Ltd.* v. *CESTAT, Chennai* [2018 (18) GSTL 410 (Mad.)]
[13] 2020-VIL-717-GUJ
[14] 2020-VIL-397-GUJ

either advance or adjustment through voucher / discount coupon, etc., then the dynamic QR code may provide only the remaining amount payable by the customer against the "invoice value". The details of total invoice value, along with details / cross reference of the part-payment / advance / adjustment made, and the remaining amount to be paid, should be provided on the invoice.

Dhruva Comments:

The circular is a welcome one as it clarifies many aspects and helps in easing the practical difficulties of applying dynamic QR code.

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