dhruva advisors llp

Indirect Tax Alert

Date: April 24, 2021

Dimensions – 110th Edition

Rulings under GST era

M/s. Manoj Bhagwan Mansukhani (M/s. Rishi Shipping) – Authority for Advance Ruling, Gujarat[1]

Issue for Consideration

Can the job work activity carried out on goods that have been temporarily imported into India and kept in a customs bonded warehouse, along with the provision of various services of stevedoring, transportation, storage, bagging, stuffing and again transporting the goods, be regarded as an 'export of services' under GST?

Discussion

- The Applicant is engaged in the business of warehousing and storage activities of tradable commodities and also undertakes job work for fertilizer commodities such as handling, packing and dispatches at Kandla port, India.
- The Applicant has entered into agreements with Foreign customers ("Client"), whereby the bulk fertilizers would be temporarily imported into India, stored in the customs bonded warehouse and then packed into smaller bags and thereafter despatched outside India as per the instructions of the Client.
- The Applicant will undertake the following activities:
  - Discharge of cargo from the vessel;
  - Storage of cargo at the custom bonded warehouse;
  - Bagging as per the requirement of the Client;
  - Dispatch cargo as per requirement;
  - Act as an agent for the Client and follow instructions for negotiations of freight containers, purchase of empty bags locally or purchase of any other product, if the Client so desires.
- The Applicant receives the consideration in convertible foreign exchange for rendering the aforementioned services. Furthermore, the imported cargo never crosses the customs barrier and does not mix with the indigenous goods and is directly exported outside India from the customs bonded warehouses after the job work activity is undertaken by the Applicant.
- The Applicant approached the Authority for Advance Ruling ("the Authority") to contend that the services rendered to the Client qualify as 'export of service' in terms of section 2(6) of the IGST Act,

[1] 2021-VIL-198-AAR

2017, and thus, eligible for 'zero-rated supply' under section 16 of the IGST Act, 2017.

- The Authority, after considering the submissions made by the Applicant, and after perusing the various warehouse-cum-jobwork agreements and sample copies of the bill of supply observed as follows:
  - In order to qualify a service as an 'export of service', all the five conditions specified in section 2(6) of the IGST Act, 2017 must be satisfied. In the present case, condition no. (i) and (iv) i.e. supplier of service being in India and the consideration to be received in foreign currency are being satisfied.
  - In respect of condition no. (ii) i.e. recipient of service to be located outside India, one needs to refer to section 2(14) of the IGST Act, 2017. Clause (a), (b) and (c) of the said section is not applicable in the present case and accordingly clause (d) would be applicable whereby the location of the recipient would be the usual place of residence i.e. outside India. Thus, the said condition is satisfied.
  - In respect of condition no. (v) i.e. the supplier of service and recipient of service should not merely be establishments of a distinct person. In this regard, on reading of the explanation 1 of section 8 of the IGST Act, 2017 with the said condition and along with the copies of the agreements, the Applicant and the Client are not merely establishment of distinct persons. Thus, condition no. (v) is also satisfied.
  - Furthermore, condition no. (iii) requires that the place of supply of service should be outside India. In the present case, since the goods are required to be made physically available by the Client to the Applicant in order to carry out aforementioned services, the place of supply of service as per section 13(3a) of the IGST Act, 2017 should be the location where such services are actually performed i.e. within India. Also, as the goods are not imported into India for any 'repairs', the second proviso[2] to the said section (as existed upto January 31, 2019) should not be applicable.
  - However, the second proviso to section 13(3a) was substituted by IGST (Amendment) Act, 2018 (vide notification no. 1/2019-Integrated Tax dated January 29, 2019) w.e.f. February 1, 2019 wherein the words *'or for any other treatment or process'* were included after the word 'repair'. As per the dictionary meaning of the term 'process' the various activities / services rendered by the Applicant would be covered under the term 'process'. Therefore, w.e.f. February 1, 2019 the place of supply of service should be determined as per section 13(2) and not as per section 13(3) of the IGST Act, 2017. Thus, the place of supply would be outside India w.e.f. February 1, 2019.
  - Furthermore, the activities undertaken by the Applicant are covered within the definition of 'job work' as defined under section 2(68) of the CGST Act, 2017.

Ruling

The services provided by the Applicant shall not be regarded as 'export of service' upto January 31, 2019 but shall be considered as 'export of service' w.e.f. February 1, 2019.

Dhruva Comments:

The ruling has discussed in detail the conditions required to be fulfilled to qualify as an export of service. However, it needs to be noted that though there are various activities undertaken by the Applicant, there is no discussion on the supply being a 'composite supply' or not since there are various taxable services being performed by the Applicant.

Also, interestingly, it needs to be evaluated as to whether the goods which are kept within the customs

[2] Second proviso read as "Provided further that nothing contained in this clause shall apply in the case of services supplied in respect of goods which are temporarily imported into India for repairs and are exported after repairs without being put to any other use in India, than that which is required for such repairs"

bonded warehouse can be regarded as 'imported into India'.

M/s. I-Tech Plast India Pvt. Ltd. – Authority for Advance Ruling, Gujarat[3]

Issues for Consideration

- What is the appropriate classification and rate of GST applicable on supply of plastic toys?
- Can input tax credit ("ITC") be availed on debit notes issued in FY 2020-21 towards transactions of FY 2018-19?

Discussion

- The Applicant is engaged in the manufacturing and supply of toys made of both plastic and / or rubber or both wherein plastic is the main component. The plastic toys supplied by the Applicant fall under Chapter heading 9503 and is liable to GST @ 12%.
- Furthermore, one of the suppliers of the Applicant recently noticed that they had inadvertently charged a low price at the time of issue of the original invoice in FY 2018-19 and is seeking to issue debit notes along with appropriate GST in the FY 2020-21 for the differential amount.
- The Applicant is of the view that they are eligible to avail ITC of the GST charged on the debit notes to be issued by the supplier in the FY 2020-21 towards the original transaction effected in the FY 2018-19 based on the recent amendment in the Finance Act, 2020.
- The Applicant approached the Authority for Advance Ruling ("the Authority") seeking clarity on the following issues:
  - Classification and rate of GST applicable on the supply of plastic toys; and
  - Eligibility to avail ITC based on the debit notes issued in FY 2020-21 towards original transactions effected in FY 2018-19.
- After considering the facts of the case and the contentions of the Applicant, the Authority observed as follows:

  Classification and GST rate applicable on supply of plastic toys

  - Referring to the provisions of law, the pictures / photographs of toys and the sample toys produced during the personal hearing, the Authority observed that the toys are made of plastic meant for children and are not electronic toys. Accordingly, the toys are classifiable under Chapter Heading 9503 00 30 and shall attract GST @ 12% as per sl. no. 228 of Schedule II of notification no. 01/2017-Central Tax (Rate) dated June 28, 2017.

  Eligibility to avail ITC based on the debit notes issued in FY 2020-21 towards original transactions effected in FY 2018-19

  - The Authority compared the text contained in section 16(4) of the CGST Act, 2017 before and after the amendment as per Finance Act, 2020. Relevant extracts of the provisions are reproduced as follows:
    - Section 16(4) of the CGST Act, 2017 prior to the amendment:

      "(4) A registered person shall not be entitled to take input tax credit in respect of any invoice or debit note for supply of goods or services or both after the due date of furnishing of the return under section 39 for the month of September ***following the end of financial year to which such invoice or invoice relating to such debit note pertains*** *or furnishing of the relevant annual return, whichever is earlier."*
    - Section 16(4) of the CGST Act, 2017 after the amendment *w.e.f.* January 1, 2021:

      "(4) A registered person shall not be entitled to take input tax credit in respect of any invoice or debit note for supply of goods or services or both after the due date of

[3] 2021-VIL-205-AAR

furnishing of the return under section 39 for the month of September ***following the end of financial year to which such invoice or debit note pertains*** *or furnishing of the relevant annual return, whichever is earlier."*

- After amendment, the portion of the sentence in section 16(4) of the CGST Act, 2017 which read as "such invoice or invoice relating to such debit note pertains" shall now be read as "such invoice or debit note pertains". The Authority also observed that there is no drastic or far-reaching change effected by the Finance Act, 2020 as interpreted by the Applicant, as whether the words "invoice relating to such" are connected to "debit note" or omitted. A debit note is always connected to the invoice and is issued in relation to change in value of invoice.
- Deletion of the words "invoice relating to such" does not suggest that the relation of a debit note has been cut off with the invoice or that such omission implies that the year in which the debit note is issued shall be considered as the "financial year" as per the amended section 16(4) of CGST Act, 2017.
- Furthermore, a plain reading of the amended provisions does not imply that it was the intention of the Government to disconnect the debit note from the original invoice so that the debit note gains an independent existence to entitle the Applicant to claim ITC in FY 2020-21 towards transactions for the FY 2018-19.
- The amendment has not made any significant change in interpretation of section 16(4) of the CGST Act, 2017. Furthermore, the debit note will always be considered to be of the financial year in which the original invoice was issued even if it is issued in a different financial year.
- Referring to the e-flyer issued by the CBIC the Authority stated that the serial number and date of the corresponding tax invoice should be mentioned on the debit note. The very purpose of this requirement is to enable the recipient to correlate the debit note with the original invoice issued by the supplier and to avail the ITC.
- On a combined reading of the definition of "debit note", section 34(3) of the CGST Act, 2017 and the particulars to be mentioned on a debit note, it is clear that:
  - a debit note is not an independent document or an invoice in itself; and
  - the debit note is connected to an invoice as it is issued in pursuance to change in value of an invoice.
- Therefore, the financial year to which a debit note pertains is invariably the financial year in which the original invoice (related to the debit note) is issued.
- The Applicant shall be entitled to claim ITC for the debit notes which are issued by its supplier for the transactions effected during the financial year 2018-19, on or before the due date of furnishing GST return for the month of September following the end of FY 2018-19 or furnishing the relevant annual return, *whichever is earlier*.

Ruling

- The plastic toys supplied by the Applicant should be classified under the Chapter Heading 9503 00 30 and liable to GST @ 12%.
- The Applicant cannot claim ITC in relation to debit notes issued by the supplier in FY 2020-21 towards the transactions effected in the FY 2018-19.

Dhruva Comments:

A debit note shall always be related to a transaction or series of transactions for which it is sought to be issued. From a time limit perspective, for availing ITC, the ruling disregards any debit note issued after the end of September of the succeeding financial year to which such tax invoice pertains. Under such an interpretation, if adopted, the supplier of goods / services would be discharging additional tax with consequential interest, while it would equally not be entitled to ITC in the hands of the recipient. The ruling has far-reaching implications

on trade and the matter is likely to go to further rounds of litigation. The intent of providing a cut-off of September following the end of the financial year is to ensure all invoices, input tax credits are accounted for. If any debit note is issued beyond the cut-off date, it should be treated independently.

M/s. Enpay Transformer Components India Private Limited - Authority for Advance Ruling, Gujarat [4]

Issues for Consideration

- Whether GST is payable under reverse charge in case of interest paid on delay in payment of imported goods. If yes, then what would be the applicable rate of GST?
- Applicability of GST on reimbursement of stamp tax paid on behalf of the recipient by a supplier of goods located outside India.

Discussion

- The Applicant ("Enpay India") is a dealer registered under GST and deals in manufacturing and supplying transformer components. The Applicant is importing goods from its Holding Company located in Turkey namely M/s. Enpay Endstriyel Pzarlamave Yatirim A. S. ("Enpay Turkey").
- The payment terms are 120 days from the date of invoice for import of goods and interest is payable on late payment. Furthermore, the Applicant has obtained bank credit facility from CITI Bank based on the corporate guarantee issued by the holding Company, Enpay Turkey. It has paid stamp tax in Turkey as per their land rules. The stamp tax paid has been reimbursed by Enpay India as per invoices raised by Enpay Turkey.
- In respect of the first issue, the Authority for Advance Rulings ("the Authority") observed as follows:
  - Enpay Turkey has tolerated the act of receiving payment beyond a period of 120 days from the date of the invoice in respect of the goods supplied by them to the Applicant for which interest is to be paid by the Applicant. Therefore, this transaction will be covered under the Supply of Services under Schedule II to the CGST Act, 2017 i.e. agreeing to the obligation to refrain from an act, or to tolerate an act or a situation, or to do an act.
  - Furthermore, section 15 of the CGST Act, 2017 provides that the value of supply includes interest or late fee or penalty for delayed payment of any consideration for any supply.
  - In light of the above discussion, the Authority concluded that the above transaction amounts to 'supply' and is taxable under GST.
  - The Authority further held that the rate of GST payable on the interest payments will be the same as that of the IGST applicable on the imported goods.
- In respect of the second issue of GST on reimbursement of stamp duty paid to Enpay Turkey, the Applicant submitted that the above transaction falls under the concept of a 'Pure agent' under GST and hence is not liable to tax.
- In the present case, the Authority has discussed rule 33 of the CGST Rules, 2017 which prescribes the value of supply of services in case of a pure agent. The said rule lays down certain conditions to be met for classifying expenses incurred by a supplier as a pure agent and these amounts shall be excluded from the value of supply under GST. The conditions are as follows:
  - The supplier should act as a pure agent of the recipient of the supply when he makes the payment to the third party on authorisation by such recipient;
  - Such payments made by the pure agent should be separately indicated in the invoice issued by the pure agent to the recipient of service; and

[4] 2021-VIL-210-AAR

- The supplies procured by the pure agent from the third party are in addition to the services supplied by the supplier on his own account.

- The term ‘Pure agent’ has been further defined under rule 33 as a person who:
  - Enters into a contractual agreement with the recipient to act as his pure agent to incur expenditure or costs during supply of goods or services or both;
  - Neither intends to hold nor holds any title to the goods or services or both so procured or supplied as pure agent;
  - Does not use for his own interest such goods or services so procured; and
  - Receives only the actual amount incurred to procure such goods or services in addition to the amount received for supply he provides on his own account.
- The expenses incurred by the supplier on behalf of the Applicant will be excluded from the value of supply **only if** it fulfils all the conditions of Pure agent as mentioned in the points above.
- In the present case, the Authority observed that no documentary evidence was provided by the Applicant to substantiate that how the conditions of a ‘pure agent’ are satisfied. Furthermore, the documents submitted by the Applicant being in foreign language, the Authority is unable to make out whether these are stamp duty receipts issued by Stamp Tax Office, Turkey. Thus, the Applicant has not fulfilled / satisfied all the conditions required for being a ‘pure agent’.
- The Authority further noted that in the present case, the stamp tax paid by the supplier to obtain the corporate guarantee and its reimbursement claimed from Enpay India is directly related to the business connection (import of goods) between the parties involved. As a result, it forms part of the consideration for supply under GST and is included in the value of supply under section 15 of the CGST Act, 2017.

Ruling

- Interest on late payment on import of goods is liable to GST under reverse charge. The rate of tax on such interest payments will be same as that applicable on supply of respective goods.
- Enpay Turkey does not satisfy all the conditions required for being a 'pure agent' under GST law, and therefore, the expenditure incurred by it on behalf of the Applicant cannot be excluded from the value of supply and is liable to GST under reverse charge.

Dhruva Comments:

It needs to be evaluated as to whether there can be an incidence of GST on interest payment due to delayed payment of consideration on imported goods, which have already been assessed to tax at the time of importation of goods. Also, it needs to be seen whether such a payment can independently tantamount to tolerating an act so as to be classified as a taxable supply. While stating that it may be considered as an independent supply of toleration of an act, the ruling has concluded that the rate applicable would be the rate applicable to the imported goods, which is inconsistent with the conclusion.

www.dhruvaadvisors.com

Follow us on:

ADDRESSES

Mumbai
11th Floor, One World Centre,
Tower 2B, 841, Senapati Bapat Marg,
Elphinstone Road (West),
Mumbai 400 013
Tel: +91 22 6108 1000 / 1900

Ahmedabad
B3, 3rd Floor, Safal Profitaire,
Near Auda Garden,
Prahladnagar, Corporate Road,
Ahmedabad 380 015
Tel: +91-79-6134 3434

Bengaluru
Prestige Terraces, 2nd Floor
Union Street, Infantry Road,
Bengaluru 560 001
Tel: +91-80-4660 2500

Delhi / NCR
101 & 102, 1st Floor, Tower 4B
DLF Corporate Park
M G Road, Gurgaon
Haryana 122 002
Tel: +91-124-668 7000

Pune
305, Pride Gateway, Near D-Mart, Baner,
Pune 411 045
Tel: +91-20-6730 1000

Kolkata
4th Floor, Unit No 403, Camac Square,
24 Camac Street, Kolkata
West Bengal 700016
Tel: +91-33-66371000

Singapore
Dhruva Advisors (Singapore) Pte. Ltd.
20 Collyer Quay, #11-05
Singapore 049319
Tel: +65 9105 3645

Dubai
WTS Dhruva Consultants
U-Bora Tower 2, 11th Floor, Office 1101
Business Bay P.O. Box 127165
Dubai, UAE
Tel: + 971 56 900 5849

KEY CONTACTS

Dinesh Kanabar
Chief Executive Officer
dinesh.kanabar@dhruvaadvisors.com

Ritesh Kanodia
ritesh.kanodia@dhruvaadvisors.com

Niraj Bagri
niraj.bagri@dhruvaadvisors.com

Ranjeet Mahtani
ranjeet.mahtani@dhruvaadvisors.com

Dhruva Advisors has been consistently recognised as the **"India Tax Firm of the Year"** at the ITR Asia Tax Awards in 2017, 2018, 2019 and 2020.

Dhruva Advisors has also been recognised as the **"India Disputes and Litigation Firm of the Year"** at the ITR Asia Tax Awards 2018 and 2020.

WTS Dhruva Consultants has been recognised as the **"Best Newcomer Firm of the Year"** at the ITR European Tax Awards 2020.

Dhruva Advisors has been recognised as the **"Best Newcomer Firm of the Year"** at the ITR Asia Tax Awards 2016.

Dhruva Advisors has been consistently recognised as a Tier 1 firm in **India's 'General Corporate Tax'** and **'Indirect Tax'** ranking tables as a part of ITR's World Tax guide. The firm is also listed as a **Tier 1 firm** for India's **'Transfer Pricing'** ranking table in ITR's World Transfer Pricing guide.