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Indirect Tax Alert

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Judgment under Pre-GST era

Kiran Gems Private Limited v. *Union of India and Ors.*[1]

Issue for Consideration

Whether the Comptroller and Auditor General ("CAG") has powers and jurisdiction to conduct Central Excise Revenue Audit ("CERA") audit of a private entity?

Discussion

- The Petitioner is engaged in the manufacture and export of cut and polished diamonds.
- It was intimated to the Petitioner that its case was selected for CERA audit by an audit wing of the Principal Director of Audit (control), Kolkata under the CAG. In this respect, the Petitioner was called upon to submit records for FY 2015-16 to FY 2017-18 ("impugned notice").
- The Petitioner submitted their reply stating that the CERA audit cannot be conducted. However, no reply was received from the Respondent.
- Being aggrieved, the Petitioner filed the present Writ Petition before the Hon'ble High Court challenging the impugned notice on the primary contention that CERA audit cannot be conducted on private entities by CAG in absence of any power traceable to any law.
- The Respondents contended that the impugned notice has been issued under section 16 of the Comptroller and Auditor General's (Duties, Powers and Conditions of Service) Act, 1971 ("CAG Act")
- After hearing the contentions of the Petitioner and the Respondents, the Hon'ble High Court observed as follows:
  - Section 72A of the Finance Act, 1994, relating to special audit is applicable where the assessee is not maintaining proper books of accounts to ascertain the liability of Service tax and if need be, the books may be audited by a qualified Chartered Accountant or a Cost Accountant to be appointed by the Commissioner.
  - On perusal of rule 5A of the Service Tax Rules, 1994, it is crystal clear that in case of a private assessee, the Commissioner must refer the matter to an officer to collect the material or to a Chartered Accountant for the purpose of audit. Hence, audit can be performed only by a Chartered Accountant.
  - However, as the Respondents have contended that the impugned notice has been issued

[1] 2021-VIL-58-BOM

under section 16 of the CAG Act, the question for determination is whether CAG has the power / jurisdiction to conduct CERA of the Petitioner, a private entity.

- Section 13 of the CAG Act clearly defines the intent of the legislation in unambiguous words and certainty that the audit exercise cannot extend to a private entity though the audit may pertain to the accounts receipts of a private entity kept in any Government department.
- Section 16 of the CAG Act requires the CAG to audit all receipts which are payable into the Consolidated Fund of India ("CFI") and not receivables. It is the receipts payable into CFI that the CAG is required to audit.
- As per section 17 and section 18 of the CAG Act, it is clearly discernible that the powers of CAG extend to any office or department of the Government and not to a private entity. Further, the provisions of Chapter III of the CAG Act concludes that CAG cannot have jurisdiction to audit the accounts of a private entity directly.
- Section 20 of the CAG Act provides for an exception stating that on request by the President of India, Governor of State or Administrator of a Union Territory, CAG shall undertake the audit of accounts of any body or authority. It is evident that even this special power extends to a body or authority which undertakes the functions of the Government.
- Even if it is argued that the Petitioner is covered by the definition of '*any body*' or '*authority*' under section 20 of the CAG Act, then too, in absence of any request / sanction obtained to audit the Petitioner's accounts, the action of the Respondents is without jurisdiction.
- In a similar case[2], the Hon'ble Calcutta High Court held that section 16 of the CAG Act does not authorise CAG to audit the accounts of a non-government company, that too, in the absence of any request either from the President of India or Governor of the State.
- It is a settled law that jurisdiction goes to the root of the matter and power of any authority invoking such jurisdiction to call for special audit needs to be traceable to the relevant statutory provision. In absence of such statutory backing, such an exercise of power is invalid.
- The contention of the Respondents that CERA is authorised to conduct the audit private company to ascertain whether the Government is getting its due share by way of indirect taxes deposited by the private company and therefore the private company is bound to provide the relevant records and documents called for CERA by CAG is rejected.

Judgment

The Hon'ble High Court allowed the Writ Petition and quashed the impugned notice.

Dhruva Comments:

The Hon'ble High Court has elaborately discussed the scheme, purpose, and the provisions of the CAG Act and its jurisdiction with respect to conducting any audit and excludes any private enterprise for its purview. The judgment certainly would bring relief to the industry.

Judgment under GST era

Dimension Data India Private Ltd. v. *Commissioner of Customs and Anr.*[3]

Issue for Consideration

Whether self-assessed Bill of entries ("BOEs") can be amended for an inadvertent mistake or error?

Discussion

- The Petitioner is an importer and had imported 48 units of routers by filing five BOEs.
- However, during an internal audit, the Petitioner realised that the Customs Tariff Heading ("CTH") was inadvertently mentioned as '85176990' instead

[2] *SKP Securities Ltd* v. *Deputy Director (Ra-IDT)* [2013 (1) TMI 549]
[3] Writ Petition (L) no. 249 of 2020 dated January 18, 2021

of '85176930'. The rate of duty under CTH '85176930' is nil whereas rate of duty under CTH '85176990' is 20%. Due to this error, the Petitioner made an excess payment of basic customs duty.

- Accordingly, the Petitioner submitted a letter before the Respondents requesting for correction of the BOEs. However, the Petitioner received a communication from the Respondents declining the request in the absence of an order of re-assessment or appeal against the self-assessed BOEs.
- Thereafter, the Petitioner filed a detailed representation requesting the Respondents to pass a re-assessment order in accordance with section 17(4) read with section 149 of the Customs Act, 1962 ("CA, 1962").
- However, even after several reminders, the Respondents failed to take any decision for re-assessment of the self-assessed BOEs.
- Aggrieved by the same, the Petitioner filed the present Writ Petition before the Hon'ble High Court of Bombay for re-assessing the customs duty in the BOEs by correcting the CTH on the following contentions:
  - On perusal of section 17(4) read with section 149 of the CA, 1962, the Respondents have the power to rectify the mistakes inadvertently made in the BOEs and pass the order of re-assessment.
  - The judgment of the Hon'ble Supreme Court in the case of *M/s. ITC Ltd.* v. *Commissioner of Central Excise Kolkata-IV*[4] is no longer relevant after the amendment to notification no. 40/2012 -Customs (NT) dated May 2, 2012 in 2017 and as per circular no. 45/2020-Customs dated October 12, 2020.
  - Reliance was also placed on various other judgments in support of their contention.
- On the other hand, the contentions of the Respondents are as follows:
  - Consequent to the amendment to section 17 of the CA, 1962, the concept of 'self-assessment' was introduced effective April 8, 2011. Therefore, the burden to ensure the declaration of correct classification and the correct rate of customs duty is on the importer.
  - The BOEs being self-assessed would itself be an order of assessment. However, since no appeal had been preferred against such an assessment order, no order for re-assessment can be obtained. Hence, the request for an amendment of the BOEs cannot be accepted.
  - After self-assessment of BOEs, the process of import is complete. Hence, to re-open the assessment at this stage would require the Petitioner to challenge the order of assessment by filing an appeal before the Commissioner of Customs (Appeals).
  - Reliance was placed on the judgment of the Hon'ble Supreme Court in the case of *M/s ITC Limited* (supra) and the judgment of this Court in the case of *M/s. Maharashtra Cylinders Pvt. Ltd.* v. *CESTAT, Mumbai*[5].
  - If the Petitioner is aggrieved by the order of assessment, he is required to file an appeal before the Commissioner of Customs (Appeals) and without exhausting the remedy of appeal, it is not open to the Petitioner to invoke the writ jurisdiction.
- After hearing the contentions of the Petitioner and the Respondent, the Hon'ble High Court observed as follows:
  - On perusal of section 17 of the CA, 1962, it is quite evident that a duty is cast upon an importer to self-assess the Customs Duty leviable on the imported goods and also upon the proper officer to verify and examine such self-assessment.
  - If the proper officer finds any misclassification of the CTH of imported goods that leads to short / excess levy of customs duty, the officer has the power and authority under section 17(4) of

[4] (2019) 17 SCC 46
[5] 2010 (259) ELT 369 Bom

the CA, 1962 to re-assess the duty leviable on the goods.

- On perusal of section 149 of the CA, 1962, amendment to a BOE is clearly permissible even in a situation where the goods are cleared for home consumption and the only condition being amendment shall be allowed basis documentary evidence existing at the time of the clearance of goods.
- On a conjoint reading of section 149 and section 154 of the CA, 1962, it is evident that customs authorities have the power and jurisdiction to make corrections of any clerical or arithmetical mistakes or errors arising in any decision or order due to any accidental slip or omission at any time which would include an order of self-assessment post out of charge.
- The issue before the Supreme Court in the case of *M/s. ITC Ltd.* (supra) was whether in the absence of any challenge to an order of assessment in appeal, any refund application against the assessed duty could be entertained and not on invocation of power of re-assessment or of amendment of documents or correction of clerical error in self-assessment order vis-à-vis challenging an order of assessment in appeal.
- In the present case, the Petitioner has not sought any refund basis of the self-assessment. In fact, the Petitioner has sought re-assessment upon amendment of the BOEs by correcting the CTH of the goods which would then facilitate the Petitioner to seek a claim for a refund. This subtle distinction is crucial to distinguish the case of the Petitioner from the judgment of the Hon'ble Supreme Court and the judgment of this Court in the case of *Maharashtra Cylinders Pvt. Ltd.* (*supra*).
- The Petitioner is aggrieved by the failure of the respondents to carry out an amendment in the BOEs by replacing the incorrect CTH with the correct one. This request falls squarely within section 149 read with section 154 of the CA, 1962.
- Reliance was placed on the judgment of the Hon'ble High Court of Madras in the case of *M/s Hewlett Packard Enterprise India Private Limited* v. *Joint Commissioner of Customs*[6] where it has been correctly held that in a case of the correction of inadvertent error, the appropriate remedy would be to seek an amendment to the BOEs and not filing of appeal because there is no legal flaw in the order of self-assessment amenable to appeal but only a factual mistake which can be rectified by way of amendment or correction.
- The expression "mistake" appearing in section 154 of the CA, 1962 could be a mistake of law or a mistake of fact. It need not be an arithmetical error alone. It may connote errors that can be discerned upon due verification.
- Furthermore, the power to amend documents under section 149 of the CA, 1962 read with correction of clerical or arithmetical mistakes or errors in orders due to accidental slip or omission under section 154 of the CA, 1962 is different and distinct from the appellate power exercised under section 128 of the CA, 1962.
- The power of amendment is vested with the same officer who had passed the initial order or an officer of equivalent rank. On the other hand, appellate jurisdiction is directed to correct decisions or orders passed by an inferior or lower authority. By its very nature, an appellate authority is superior to the authority that had passed the order appealed against.

Judgment

The Hon'ble High Court directed the Respondents to consider the amendment of the BOEs by exercising power under section 149 read with section 154 of the CA, 1962 and thereafter pass an appropriate order under section 17(4) of the CA, 1962 after giving due opportunity of hearing to the Petitioner.

[6] 2020 (10) TMI 970

Dhruva Comments:

In the recent Union Budget for FY 2021-22 pronounced by the Hon'ble Finance Minister, there is an amendment proposed in the CA, 1962 to allow online amendment of various documents such as bill of entry, shipping bill etc on customs automated system considering risk evaluation through appropriate selection criteria. The said amendments would provide big relief to the assesses and would aid in reducing litigation in the said areas.

Ruling under GST era

M/s Nexustar Lighting Project Private Limited[7]

Issue for Consideration

- Whether the activity of supply, installation, operation and maintenance of Greenfield street lighting project ("GSLP") is classifiable as a works contract service? If yes, whether GST is liable to be paid under entry 3(vi)[8] of notification no. 11/2017-Central Tax (Rate) dated June 28, 2017 ("Notification")?
- Whether capital subsidy receivable is liable to be included in the transaction value for purpose of valuation under GST?

Discussion

- The Applicant was engaged by Government of Odisha, represented by the 'Directorate of Municipal Administration' ("DMA") and the 'Urban Local Bodies' ("ULBs"), for design, supply, installation, operation, maintenance ("SIOM") (supply and installation of equipment such as LED Luminaire, feeder panels, poles, outreach arms, etc.) and transfer of the energy efficient GSLP system and the Centralized Control & Monitoring ("CCM") System.
- The Applicant was entitled to receive consideration in the form of capital subsidy, being 90% of total capital expenditure incurred by the Applicant in supply, installation and commissioning of the equipment and balance 10% was receivable along with O&M fees as Annuity fees by raising quarterly invoices on the ULBs.
- The Applicant approached the Authority for Advance Ruling of Odisha ("the Authority") and contended as under:
  - The GSLP and the CCM systems are immovable property as the streetlight poles along with LED Luminaires, feeder panels, etc. are erected along the roadways by laying them underground and cannot be dismantled and reassembled without substantial damage to entire paraphernalia.
  - Placing reliance on various advance rulings under GST, the Applicant contended that the instant contract should be treated as a composite supply of works contract.
  - The works contract should get covered by sl. no. 3(vi) of the Notification *supra* and hence liable to 12% GST.
  - DMA and ULB are extension of the State Government and hence the capital subsidy received should not be included in the value of supply.
- After hearing the Applicant, the Authority observed as follows:
  - Perusal of the SIOM agreement indicate that the contract price clearly bifurcates the contract into supply of goods and supply of services and that the price of O&M fees is lesser as compared to the price of equipment.
  - The SIOM agreement clearly demarcates goods and services to be provided by the Applicant, although the supplies are naturally bundled and in conjunction with each other.

[7] 2021-VIL-127-AAR

[8] *Composite supply of works contract as defined in clause (119) of section 2 of the Central Goods and Services Tax Act, 2017 other than that covered by items (i), (ia), (ib), (ic), (id), (ie) and (if) above, provided to the Central Government, State Government, Union Territory, a local authority, a Governmental Authority or a Government Entity by way of construction, erection, commissioning, installation, completion, fitting out, repair, maintenance, renovation, or alteration of- (a) a civil structure or any other original works meant predominantly for use other than for commerce, industry, or any other business or profession;*

- A major part of SIOM agreement is supply of goods (98.43% of total contract price). Such goods are used to provide services such as installation, commissioning and maintenance etc. Without the goods, these services cannot be supplied, and hence the goods and services are supplied as a combination and in conjunction in the course of business with the principal supply being 'supply of goods'.
- Thus, the supply falls under the definition of 'composite supply'. However, there is no building, construction, fabrication, completion, erection etc. of any immovable property wherein transfer of property in goods is involved in the execution of the SIOM agreement.
- Furthermore, as per para 1(c) of Schedule II of the CGST Act, 2017, any transfer of title in goods under an agreement which stipulates that property in goods shall pass at a future date upon payment of full consideration as agreed, is a supply of goods and not a service.
- The salient features of the agreement indicate that the Applicant's obligation is in relation to the effective installation and functioning of the goods supplied by them and thereafter to undertake the activities of 'operation and maintenance' of the same. The SIOM agreement does not relate to building, construction, and fabrication etc. of any immovable properties, as envisaged in the definition of 'works contract', but is in the nature of movable property i.e. supply of goods which involves ancillary services such as installation, commissioning etc.
- All the services which are supplied are ancillary activities with the main / primary activity being supply of goods. The activity of the Applicant is not related to the immovable property at any point of time and hence the said activity does not qualify to be a 'works contract'.
- Consequently, notification no. 11/2017 *supra* shall not apply, and the GST will be payable on the appropriate rate of goods after classification under the appropriate heading.
- The capital subsidy receivable by the Applicant is the actual cost incurred in the project as approved by DMA and ULB. It is not a subsidy which generally means grant / grant-in-aid or a benefit given by the government or which is typically given to remove certain burden and to promote a social good or an economic policy for overall interest of the public. The so called 'capital subsidy' cannot be a 'subsidy' by any stretch of the imagination, rather the same is a consideration, as defined in section 2(31) of the CGST Act, 2017, in relation to the supply of goods and therefore the said 'capital subsidy' is includible in the transaction value for the purpose of valuation under GST.

Ruling

The Authority held that the SIOM agreement is not classifiable as a works contract service and hence the lower rate of GST of 12% shall not apply. Also, the capital subsidy receivable is includible in the transaction value for the purpose of GST.

Dhruva Comments:

Interestingly, the ruling has been pronounced without any reference to AARs relied upon by the Applicant wherein in a similar fact pattern it is held to be a works contract transaction.

The Ruling also does not delve upon the aspect of Annexation i.e. tests of Extent of Annexation and Object of Annexation which are key criterion to determine whether a property qualifies as 'immovable' or 'movable' for the purposes of taxation. Rather, it laid emphasis on the price schedule to hold that the contract is for supply of goods and the services of installation, commissioning, etc. being ancillary to it.

One may also take note of the Hon'ble Supreme Court decision in *Commissioner of Central Excise.,*

Ahmedabad v. Solid and Correct Engineering Works[9] to ascertain the aspect of immovability in a particular contract. It was held in this case that even if the goods are affixed to the ground**,** it must be done with an intention to do so permanently and mere setting up of the plant to provide stability would itself not lead to a conclusion on immovability.

[9] 2010 (252) ELT 481 (SC)

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