



## Dimensions – 112<sup>th</sup> Edition

### Judgment under GST era

#### ***D. Y. Beathel Enterprises v. The State Tax Officer (Data Cell)***<sup>1</sup>

##### Issue for Consideration

Whether the input tax credit (“ITC”) taken by the buyer can be reversed by the department when the seller has defaulted to remit the tax to the Government?

##### Discussion

- The Petitioner is engaged in trading of raw rubber sheets and had purchased goods from a supplier who was registered under GST. The Petitioner had made the payment to the supplier along with the tax.
- The Petitioner had claimed the Input Tax Credit (“ITC”) based on the GST returns filed by the supplier. At the time of inspection, it was found by the department that the supplier had not paid GST to the Government.
- The department issued a show cause notice (“SCN”) to the Petitioner to recover the entire tax liability from them. In response to the SCN, the Petitioner had replied that all the amount payable was paid to the supplier and the supplier should be confronted during the enquiry. However, the

department passed the order for reversal of the ITC that was availed by the Petitioner, without seeking to recover from the supplier.

- Aggrieved by the order, the Petitioner filed the present Writ Petition before the Hon’ble High Court which after taking into account the facts of the case observed as follows:
  - The reliance placed by the Petitioner on the judgment of *Sri Vinayaga Agencies v. The Assistant Commissioner, CT Vadapalani*<sup>2</sup>, wherein it was held that the Authority has no jurisdiction to reverse the ITC that has already been availed by the buyer on the ground that the seller has not paid the tax, may not be straight away applicable to the GST regime as the judgment pertained to VAT regime.
  - The GST council had issued a press release dated May 4, 2018 wherein it was mentioned that there should not be an automatic reversal of ITC from a buyer on account of non-payment of tax by the seller. The recovery shall be made from the seller. However, reversal of ITC from the buyer shall be made only in exceptional situations such as missing dealer, closure of

<sup>1</sup> 2021 (3) TMI 1020

<sup>2</sup> 2013 60 VST page 283



business by the supplier or the supplier not having adequate assets, etc.

- As per section 16(1) and (2) of the CGST Act, 2017, the buyer must receive the goods / services and tax charged in respect of the said supplies must be deposited with the Government. Therefore, in case of a failure to deposit the tax, the liability will have to be borne either by the buyer or the seller. However, in the present case, the department had failed to initiate any recovery action against the supplier.
- Furthermore, the assessment of the supplier had been completed by excluding the subject transactions. When it has been found that the supplier has collected the tax from the Petitioner, the omission on his part to remit the tax to the Government should have been viewed seriously and strict action ought to have been taken.
- The supplier should have been examined and confronted in the enquiry. This is more necessary since the Respondents have taken a stand that the goods were not received, and the ITC was taken on the strength of the invoices.
- The impugned order suffers from fundamental flaws and needs to be quashed for the following reasons:
  - Non-examination of supplier in the enquiry;
  - Non-initiation of recovery action against the supplier in first place.

### Judgment

The Hon'ble High Court allowed the Writ Petition with the following directions:

- The impugned order is quashed, and the matter is remitted back to the Respondent. The replies filed by the Petitioner will hold good.
- Enquiry alone will be held afresh in which the supplier will have to be examined as witness.
- The Respondent to initiate recovery against the suppliers.

### **Dhruva Comments:**

The judgment is a welcome one and would certainly provide relief to assesseees where suppliers have defaulted in payment of tax to the Government.

However, it needs to be mentioned that the supplier reports invoices for outward supplies in GSTR 1 which get reflected in GSTR 2A /2B of the recipient and basis which the ITC is availed, whereas the GST liability on a net basis (after claiming ITC) is discharged by the supplier through GSTR 3B. Thus, it needs to be debated as how would the claimant of ITC ensure that the condition of actual payment of tax to the Government stands fulfilled by the supplier?

## **Judgment under Pre-GST era**

***Runwal Constructions, v. Union of India, The office of the Assistant Commissioner of Central Excise, Mulund Division, Mumbai III, Commissionerate, M/s. Bluemoon Engineers Limited<sup>3</sup>***

### Issue for Consideration

Can excise duty dues of the prior owner of a property, can be recovered from the current owner of the property where only transfer of property is involved without transfer or disposal of business or trade?

### Discussion

- The Petitioner is a partnership firm engaged in the business of construction and development.
- A land situated at Mulund, Mumbai ("the property") belonging to the Company Blue Moon Engineers Ltd. ("BMEL") was mortgaged to Indian Bank ("the Bank") as security for certain facilities provided by the bank. The bank intended to sell the property to recover its dues from BMEL.
- Accordingly, an auction was conducted for sale of the property by the Debt Recovery Tribunal, Kolkata ("DRT") wherein the Petitioner was the successful bidder. Accordingly, DRT issued a certificate of sale

<sup>3</sup> 2021 (4) TMI 1052



- of the property in November 2004 wherein the Petitioner was declared as the purchaser of the property.
- Pursuant to the purchase of the property, the Petitioner issued a public notice inviting claims on the property in March 2005.
  - Thereafter, in April 2005, the Petitioner received a letter from the Central Excise department informing that BMEL had outstanding excise duty dues and that the Petitioner could not claim title to the property unless the excise duty claims were settled. This was followed by multiple notices from the excise department directing the Petitioner to pay the excise duty along with penalty stating that the Petitioner had purchased the property with all statutory liabilities. In case of failure to pay the demand, steps would be initiated to realize the dues under the Customs Property Adjustment Rules and also prohibiting / restraining the Petitioner from transferring or charging the property (All such notices are collectively referred to hereafter as “impugned notices”)
  - The Petitioner replied to the department correspondences stating that:
    - the property was acquired only with workers liability which was already settled;
    - the Petitioner had nothing to do with the payment of excise duty arrears which is a liability of BMEL;
    - the Petitioner had already started developing the property.
  - Aggrieved by the continual notices and restraint on the property, the Petitioner filed the present Writ Petition before the Hon’ble High Court of Bombay challenging the impugned notices on the following grounds:
    - At the time of purchase of the property, the Petitioner was unaware of the excise duty payable by BMEL.
    - By virtue of the order of confirmation of sale and certificate of sale of the property, the Petitioner became the owner of the property and therefore all the rights, title and interest in the property stood vested in the Petitioner on and from September 2004 as the property was transferred in the Petitioner’s name and property tax was also paid by the Petitioner.
    - Liability to pay excise duty arises from the manufacture of excisable products. However, the Petitioner is not a manufacturer of excisable products and hence the Petitioner is not an “assessee” as per the Central Excise Act, 1944 (“CEA, 1944”).
    - Petitioner purchased the property with the liability to pay the workers and “other existing liability”. The words “other existing liability” should include liabilities pertaining to the extent of property only and cannot be construed to additionally include excise duty liability.
    - The attachment / restraint of the property as sought by the department would be illegal, unlawful and is liable to be removed forthwith.
    - The main issue is with regards to priority of secured debt versus crown debt / state dues / tax dues as the Petitioner has stepped into the shoes of Indian Bank having purchased the property from a secured creditor.
    - The Petitioner has purchased the property mortgaged to the Bank and hence the Petitioner should receive the same treatment as a secured creditor and this right cannot be interfered with by the excise department for recovery of excise duty dues of BMEL.
    - Section 11 of CEA, 1944 does not apply in the present case as the Petitioner has not succeeded to the business or trade of BMEL. Reliance was placed on the judgment of Hon’ble High Court of Bombay in the case of *Gharkul Industries Pvt. Ltd., & Another v. Superintendent, Central Excise Range & Others*<sup>4</sup> wherein it was held that if the property of the Company in liquidation is purchased

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<sup>4</sup> 2009 (247) E.L.T. 3 (Bom.)



pursuant to a public auction as a purchaser of asset and not purchaser as successor of business, then the proviso to section 11 of CEA, 1944<sup>5</sup> would not be attracted.

- In view of the judgment of the Hon'ble Supreme Court in the case of *Rana Girders v. Union of India & Ors.*<sup>6</sup> and the judgment of the Hon'ble High Court of Bombay in the case of *Siddhi Sugar & Allied Industries, Latur v. State of Maharashtra & Ors.*<sup>7</sup>, since the Petitioner had only purchased land from BMEL and not the business, excise duty arrears of BMEL cannot be claimed from the Petitioner.
- On the other hand, the department contended as under:
  - The property was purchased by the Petitioner along with workers liability and other existing liabilities. Hence, in view of the clear language, the Petitioner is liable for excise duty dues of the Department. Also, the certificate of sale of the property declaring the Petitioner as the purchaser nowhere states that the property was sold free from encumbrances.
  - As per the order sheet passed by DRT, the Petitioner is required to settle not only workers dues but also statutory dues of the Government and other departments.
  - The Petitioner has purchased all the security that was owned by the borrowers and if there is priority of secured debt over excise duty dues, then there is no way for the state to recover its taxes as there is no property left with BMEL which can be sold to recover the taxes, and therefore the liability must be borne the purchaser of property.
  - The ratio of the judgment of the Hon'ble High Court of Bombay in the case *Medineutrina Pvt.*

*Ltd. (Company) Through its director – Mr. Dilipkumar v. District Industries Centre (D.I.C.), Udyog Bhavan, Nagpur & others*<sup>8</sup> would apply in the present case and hence no relief can be granted to the Petitioner until the excise duty is paid.

- After considering the facts of the case and the contentions of the parties, the Hon'ble High Court observed as follows:
  - Reliance was placed on the judgment of Hon'ble Supreme Court in the case of *Rana Girders (supra)* and in the judgment of Hon'ble High Court of Bombay in the case of *Gharkul Industries Private Limited (supra)* and it was observed that in the present case there is only purchase of land by the Petitioner and not transfer or disposal of business or trade in whole or in part and hence the proviso to section 11 of the CEA, 1944 would not be attracted.
  - A secured creditor has priority over crown debts / excise dues. The Petitioner had purchased the land in auction and is not a successor of BMEL in business or trade nor had they taken over BMEL's manufacturing business but had only purchased the property. The Petitioner has acquired the property without any charge independent of business or trade of BMEL.
  - Excise duty liability can be fastened only on the person who has purchased land and building or machinery of erstwhile concern in succession and it is only in such cases that the buyer would be responsible to discharge the liability of central excise.
  - The purchaser cannot be burdened with the liability relating to dues of the Government

<sup>5</sup> Proviso to Section 11 of CEA : “..where the person (hereinafter referred to as predecessor) from whom the duty or any other sums of any kind, as specified in this section, is recoverable or due, transfers or otherwise disposes of his business or trade in whole or in part, or effects any change in the ownership thereof, in consequence of which he is succeeded in such business or trade by any other person, all excisable goods, materials, preparations, plants, machineries, vessels, utensils, implements and articles in the custody or possession of the person so succeeding may also be attached and sold by such officer empowered by the Central Board of Excise and Customs, after obtaining written approval from the Commissioner of Central Excise, for the purposes of recovering such duty or other sums recoverable or due from such predecessor at the time of such transfer or otherwise disposal or change.”

<sup>6</sup> (2013) 10 SCC 746

<sup>7</sup> (2019) (6) Mh. L. J. 333

<sup>8</sup> 2021-VIL-159-BOM



unless there is a specific statutory provision to that effect.

- As per the order of confirmation of sale, the Petitioner is liable for workers liability and other existing liabilities of the owners of the property. The workers dues have been settled. Furthermore, excise dues are not dues which arise out of land or building. Such liabilities could be in the form of property tax, municipal tax etc. but cannot mean excise duty dues, which arise out of manufacture.
- The language in the confirmation of sale is with reference to the liabilities relating to the property and not with reference to the business of BMEL.
- Since the Petitioner has not purchased the entire unit with business, the Petitioner is not liable for the dues of the excise department.
- The judgment of the Hon'ble High Court of Bombay in the case of *Medineutrina Pvt. Ltd.* (*supra*) is not applicable since it did not consider the judgment of the Hon'ble Supreme Court in the case of *Rana Girders* (*supra*).
- The judgment of the Hon'ble High Court of Bombay in the case of *Siddhi Sugars* (*supra*) is not considered as the said judgment pertains to the period after the insertion of section 11E<sup>9</sup> to the CEA, 1944 whereas the present matter and the judgment of *Rana Girders* (*supra*) pertains to period prior to April 1, 2011 i.e. prior to insertion of section 11E of CEA, 1944.
- Reliance was placed on the judgment of Hon'ble High Court of Bombay in the case of *State Bank of India* (*supra*) and observed that if any central statute creates priority of a charge in favour of a secured creditor, the same will rank above the charge in favour of a state for a tax due thereunder. Hence, the mortgage of the secured creditor will get prior charge over the revenue.

## Judgment

The Hon'ble High Court quashed and set aside the impugned notices and ordered to refund to the Petitioner recovery made by the Department, if any.

### **Dhruva Comments:**

First charge provisions / priority of dues to secured creditors and payment to statutory authorities is an evolving subject, with plethora of laws being enacted from time to time and assumes lot of significance even in merger / acquisition / demerger transactions.

<sup>9</sup> Section 11E of CEA, 1944: "Notwithstanding anything to the contrary contained in any Central Act or State Act, any amount of duty, penalty, interest, or any other sum payable by an assessee or any other person under this Act or the rules made thereunder shall, save as otherwise provided in section 529A of the Companies Act, 1956, (1 of 1956) the Recovery of Debts Due to Banks and the Financial Institutions Act, 1993 (51 of 1993) the Securitisation and Reconstruction of Financial Assets and the Enforcement of Security Interest Act, 2002 (54 of 2002) and the Insolvency and Bankruptcy Code, 2016 be the first charge on the property of the assessee or the person, as the case may be."





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