



Dimensions – 63rd Edition

Judgments under GST era

***Union of India & Another v. M/s V.V.F Limited & Ors.*¹**

Issue

Whether a vested right conferred upon an assessee can be said to be taken away by a subsequent notification retrospectively amending the exemption notification or industrial policy? Whether the same shall be hit by the doctrine of promissory estoppel?

Discussion

- The Government of India (GOI) announced Incentive Scheme for setting up new industries in the earthquake (January 26, 2001) affected Kutch, Gujarat to attract large scale investment and generation of new employment opportunities vide notification no. 39/2001-CE dated July 31, 2001 (excise exemption notification).
- The said notification granted exemption on clearance of goods by a new industrial unit set up in the Kutch prior to July 31, 2003 (subsequently extended to December 31, 2005) from so much of duty of excise as was equivalent to the amount paid in cash on the finished goods.

- This incentive of refund of the duty paid was available for a period of five years from the date of commencement of commercial production. Where fresh investment in plant and machinery exceeded INR 20 crores, there was no upper cap on the incentive.
- The Respondents set up new industrial units in the Kutch District investing more than INR 20 crores in plant and machinery and paid almost the entire duty in cash, thus being eligible for full refund.
- Various amendments were made to the excise exemption notification to clarify matters and extend cut-off date for setting up new units to December 31, 2005. Further, notification No. 65/2003-CE applicable w.e.f. August 6, 2003 amended to provide that duty could be paid in cash only after exhausting Cenvat credit balances.
- Government of Gujarat also announced an Incentive Scheme, 2001 dated November 9, 2001 providing Sales tax exemption only to industries eligible for the Excise duty exemption (*supra*).
- Availability of the incentives attracted the Respondents to set-up units in Kutch instead of Maharashtra. Further, the Respondents suffered

¹ TS-232-SC-2020-EXC-SC – The Hon'ble Supreme Court



from locational disadvantages and incurred substantial costs for setting up units in Kutch. The Respondents commenced commercial production during the period – November 2004 to December 2005.

- The excise exemption notification was again amended by notification no. 16/2008-CE dated March 27, 2008 which provided that:

- Benefit of refund to be granted basis value addition, which was notionally fixed @ 34% for the commodity manufactured;
- determination of special rate by the Commissioner in situations where actual value addition was more than the deemed value addition.

- The said amendment reduced the incentive available from the refund of entire duty paid in cash to 34% of the total duty paid. Aggrieved by the impugned notification, the Respondents filed a Writ Petition before the Hon'ble High Court of Gujarat on the grounds of breach of the doctrine of promissory estoppel.

- Thereafter, vide another notification no. 51/2008-CE dated October 3, 2008 deemed value addition was revised to 75% for products manufactured by the Respondents without providing an option for applying special rate.

- The High Court held that incentive as originally envisaged by the exemption notification should be implemented and directed to refund the differential amount to the Respondents. Similar judgments were passed by the Hon'ble High Court of Sikkim and Guwahati on the grounds of breach of doctrine of promissory estoppel. Aggrieved, the Union of India moved the Hon'ble Supreme Court challenging the judgments pronounced by the Courts.

- The Hon'ble Supreme Court observed as follows:

- The Court observed that the doctrine of promissory estoppel cannot be invoked as the subsequent notifications / industrial policies are issued in public interest and in the interest of Revenue and to achieve the original object of giving incentives/exemptions. Also, the doctrine of promissory estoppel being an equitable doctrine has to be moulded to suit the particular situation with an objective to provide just and equitable treatment. Reliance placed on – *Kansika Trading v. Union of India*², *Shrijee Sales Corporation v. Union of India*³, *STO v. Shree Durga Oil Mills*⁴, *State of Rajasthan v. Mahaveer Oil Industries*⁵ and *Shree Sidhali Steels Ltd. v. State of U.P.*⁶;
- Placing reliance on various case laws⁷ it was observed that respective notifications/industrial policies can be said to be clarificatory in nature and it can be defined as an act to remove doubts. It cannot be said that by the subsequent notifications / industrial policies the benefits which were granted under the earlier notifications were sought to be taken away;
- Main objective of the exemption notification / policies was to encourage the setting up of new industries to generate employment and incentivise by offering refund of excise duty paid in cash, subject to fulfilment of conditions. However, the authorities noticed certain unscrupulous manufacturers misusing the exemptions and indulging in tax evasion tactics and impugned notifications / policies were introduced which provided refunds calculated on the basis of actual value additions;
- On perusal of the impugned notifications / policies, it was clear that the object was to refund the excise duty paid on genuine manufacturing activities and curb tax evasion. Further, subsequent notifications issued only rationalize the quantum of exemption and rate of refund on manufacture of genuine products;

² (1995) 1 SCC 274

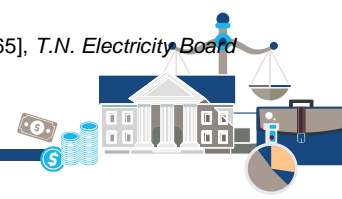
³ (1997) 3 SCC 398

⁴ (1998) 1 SCC 572

⁵ (1999) 4 SCC 357

⁶ (2011) 3 SCC 193

⁷ *State Bank of India v. V. Ramakrishnan* [(2018) 17 SCC 394], *State of Bihar v. Ramesh Prasad Verma* [(2017) 5 SCC 665], *T.N. Electricity Board v. Status Spg. Mills Ltd.* [(2008) 7 SCC 353] and *Zile Singh v. State of Haryana* [(2004) 8 SCC 1]



- The purpose of the original scheme was not to give benefit of refund of the excise duty paid on the goods manufactured only on paper or in fact not manufactured at all. Further, the impugned notifications / policies do not take away any vested right conferred under the earlier notifications / industrial policies;
- The Court also observed that the High Courts committed a grave error in holding that the impugned notifications / policies impugned were hit by the doctrine of promissory estoppel.

Judgment

- The Hon'ble Supreme Court quashed the judgments pronounced by the High Courts and held that the impugned notifications / policies do not take away any vested rights and cannot be said to be hit by the doctrine of promissory estoppel.
- The Court clarified that this judgment shall not affect amount refunded prior to issuance of impugned notifications / policies. However, pending applications should be decided in accordance with the law on merits and as per the impugned notifications / industrial policies.

Dhruva Comments

Doctrine of promissory estoppel cannot be looked upon in abstract and public good at large would prevail. The Larger Bench of Supreme Court examining the contentious issue held the subsequent amendments only rationalise the benefits by ensuring that the same are claimed by genuine manufacturers through actual value addition and not hit by doctrine of promissory estoppel.

Rulings under GST era

M/s T & D Electricals – Karnataka⁸

Issues

- Whether the Applicant, being registered in the State of Rajasthan and awarded a contract in the State of Karnataka, would be required to obtain a separate GST registration in such State? If yes, would the

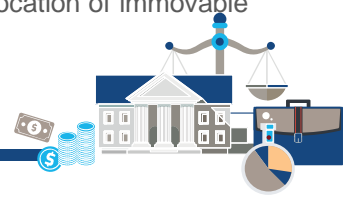
contract copy suffice as address proof to obtain registration?

- If not, what would be the tax charged by the vendors (CGST and SGST or IGST) who ship the goods directly to Karnataka?
- What documents will be required with transporter for transit / shipment of materials from dealers registered in Rajasthan or Karnataka to the project site in Karnataka?

Discussion

- The Applicant has GST registration in the State of Rajasthan and has been awarded a contract by M/s Shree Cements Ltd, (SCL) Rajasthan to provide installation, electrical and IT job services (work contract services) at a township (unit of SCL) located in Karnataka.
- The scope of work includes supply of materials and installation, testing and commissioning activities. The Applicant will have to arrange all the required manpower / technician / electrician and materials.
- The Applicant would have to raise the invoices on the Karnataka location of SCL.
- The Applicant does not have a separate fixed establishment of business in Karnataka. The Applicant is provided with temporary small space for office and store in the premises of SCL in Karnataka.
- The Applicant approached the Authority in respect of the above-mentioned issues and contended as follows:
 - Section 22 of the CGST Act, 2017 requires a supplier to obtain registration in the State from where he makes a taxable supply, if the aggregate turnover of the supplier exceeds the threshold limit in a financial year;
 - The location of supplier of services in terms of section 2(71) of CGST Act, 2017 will be the principal place of business i.e. Rajasthan as the Applicant does not have a fixed establishment in the State of Karnataka;
 - Further the place of supply in case of work contracts services is the location of immovable

⁸ Order no. KAR ADRG 18/2020 dated March 31, 2020



property in terms of section 12(3)(a) of IGST Act, 2017;

- Hence, the Applicant is not required to obtain separate registration in Karnataka;
 - The Applicant does not possess any document required for proof of principal place of business to substantiate that they have a permanent establishment in Karnataka;
 - Further, if no registration is obtained in Karnataka, section 10(1)(b) of the IGST Act, 2017 will be applicable i.e. in the case of direct shipment of goods by the dealer in Rajasthan, CGST and SGST will be charged and in case of direct shipment of goods by dealer in Karnataka, IGST will be charged.
- The Authority observed as follows:
 - Applicant has only one principal place of business i.e. Rajasthan, from where it intends to supply goods or services or both;
 - Since the Applicant has obtained registration for their principal place of business and does not have any other fixed establishment other than Rajasthan, the location of the supplier is Rajasthan;
 - Hence no separate registration is required in Karnataka;
 - Applicant has correctly applied the provisions in respect of the bill to ship to movement of goods in terms of section 10(1)(b) of the CGST Act;
 - Further, the Applicant shall charge IGST on the invoice raised on SCL, Karnataka (unit of M/s SCL in Karnataka).

Ruling

- The Applicant is not required to obtain separate registration in the state of Karnataka. However, Applicant is at liberty to obtain the registration, if the Applicant intends to have a fixed establishment in Karnataka.
- In case of a direct shipment by vendor in Rajasthan, CGST and SGST should be charged on the goods purchased by the Applicant under bill to ship to model in terms of section 10(1)(b) of IGST Act, 2017.

- Similarly, in the case of direct shipment by vendor in Karnataka, IGST should be charged on the goods purchased by the Applicant under bill to ship to model.
- No ruling was given in respect of the documents which will be required with the transporter, as it was outside the scope of Advance Ruling Authority.

Dhruva Comments:

The Authority has correctly interpreted the provisions of the law discarding the requirement for obtaining separate registration in the State where project site is located. Nevertheless, the ability to claim eligible credits could get jeopardised, for want of registration, where supplies are received at site with intra-state GST.

M/s Siemens Limited – Maharashtra Appellate Authority⁹

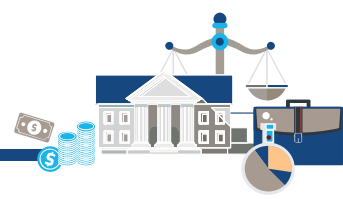
Issue

- Whether the freight charges recovered by the Appellant from the customer without issuance of consignment note would be exempt under GST?

Discussion

- The Appellant as Joint Venture (JV) associate with other foreign partners has entered into 6 contracts with the customer for on-shore and off-shore supply of goods and services for complete execution of VSC based HVDC Terminals and DC XLPE Cable system (plant).
- Out of the 6 contracts, the 3rd and 5th contract are entered between the Appellant (as JV associate) and customer wherein the 3rd contract was for supply of goods on ex-works basis and the 5th contract was for delivery of goods at the customer's site, installation, insurance etc.
- For the transportation service, Appellant engages local transporters for who issue consignment notes and freight invoice on the Appellant for transportation of goods. The Appellant discharges GST under reverse charge on such transportation service.

⁹ Order no. MAH/AAAR/SS-RJ/4/2019-20 dated August 23, 2019

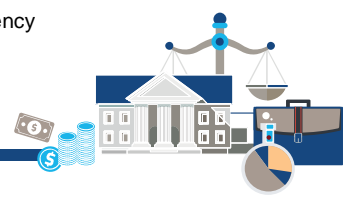


- Appellant recovers these freight charges from the customer but since the consignment note is already issued by the transporter, no subsequent consignment note is issued by the Appellant
- The Appellant was of the view that it would be eligible for GST exemption in terms of sl. no 18¹⁰ of the exemption notification¹¹ and had accordingly, approached the Authority for Advance Ruling (Authority).
- The Authority held¹² that all the supplies made under the different contracts are linked through the cross fall breach clause and the Appellant has not contracted for ex-works supply of goods or transportation, but for composite supply namely works contract for the installation of the entire plant. Therefore, the services should be taxable as works contract at the rate of 18% and no exemption would be available on transportation service.
- Aggrieved by the order, Appellant approached the Appellate Authority and contended as follows:
 - Appellant is not a GTA, as it does not issue consignment note and should be eligible for the exemption;
 - The 3rd and 5th contract are independent contracts having separate clauses, terms etc. and are distinct in nature cannot be considered as composite supply;
 - The ownership of goods under 3rd contract gets transferred to the customer at Appellant's factory gate. The supply of service under 5th contract commences only when ownership in goods is transferred. Further, the customer has option to avail transportation service from any other person. Hence, both supply of goods and services are not naturally bundled;
 - Further, the goods installed at project site are not permanently affixed to earth and can be dismantled / removed. Hence, the supply of goods under the contracts does not result in any immovable property and therefore would not be a composite works contract supply;
- The Appellant placed reliance on various rulings / judgments of different forums in support of their arguments.
- The Appellate Authority after detailed scrutiny of the terms of the contract, observed as follows:
 - All the 6 contracts entered by the JV are covered by cross fall breach clause meaning breach of one contract will be deemed as breach of other. Hence not only 3rd and 5th contract, but all the contracts are interrelated with each other;
 - Although there is breakup of contract price in 3rd and 5th contract, the contract is to be construed as single source responsibility and the Appellant shall remain responsible to ensure both the contracts are successfully completed;
 - The 3rd and 5th contract are naturally bundled under the whole contract;
 - Supply of goods and supply of services are not separately enforceable. The recipient has not entered into ex-factory supply of materials but for composite supply;
 - The obligation of Appellant under the contract ceases only after the project becomes operational and after final payment is made for supply of material and erection of system;
 - The supply of goods and services are provided as package and if one or more is removed, nature of supply would be affected. Hence, they are naturally bundled since both are required to fulfil the intention of buyer;
 - By making two separate agreements, artificial division of contracts is purported to be done. The same cannot take away true and inherent nature of contract;
 - The plant is attached to the earth with the help of civil work. Also, foundations in cement concrete walls and structures are constructed. Hence, completion of project results in immovable property. Hence, the total project is a composite supply of works contract.

¹⁰ Sl. No 18 provides exemption for services by way of transportation of goods by road other than by Goods Transport Agency

¹¹ Notification no. 12/2017-Central Tax (Rate) dated June 28, 2018

¹² Ruling No. GST-ARA-69/2018-19/B-164 dated December 19, 2018



Ruling

- Appellant is not eligible for the exemption as claimed.
- The transportation service provided by Appellant is part of a composite works contract taxable at 18%.

Dhruva Comments:

In a case where separate contracts are entered for making different supplies, it needs to be determined as to whether there is any interdependency between the contracts or the same are independent from each other. The concept of composite supply has been a consistent matter of debate under GST.

A similar advance ruling was also given by the Authority in the case of *Emco Ltd*¹³.

- Soft copy of 'record of personal hearing' will be sent through email and the same shall be modified or accepted by the parties in prescribed manner;
- Timelines for these activities has been provided in the Instructions;
- These instructions are to be equally applicable for matters of Service tax and Central Excise.

Dhruva Comments:

Considering the present COVID-19 situation and the lockdown in the country such a move would help to reduce the pending litigations to some extent.

Instructions under Customs law

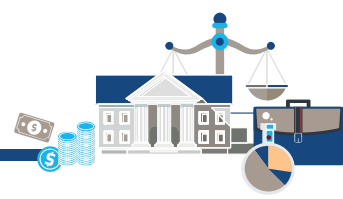
Guidelines for conduct of personal hearing in virtual mode¹⁴

CBIC has issued guidelines for conduct of personal hearings in virtual mode under the Customs Act, 1962, with an aim to create a virtual working environment, ensuring social distancing, reduce physical presence, usage of information, communication and technology systems. The guidelines issued in brief are as follows:

- Appellant or respondents are required to give consent to avail personal hearing through video conferencing at the time of filing appeal or immediately after issue of this instruction, indicating their email address for correspondence, etc.;
- Date and time of hearing along with link of video conferencing should be informed to relevant parties through email;
- Advocates/ consultants/ authorized representatives appearing on behalf of parties, in virtual hearing should file vakalatnama / authority letter along with their photo id card and contact details through email;
- Virtual hearing will be conducted through applications like VIDYO or other secured computer networks;

¹³ Order No. GST-ARA-16/2018-19/B-74-Mumbai, dated July 25, 2018

¹⁴ Instructions: F. No. 390/Misc/3/2019-JC dated April 27, 2020 under Customs Law





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