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Indirect Tax Alert

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Dimensions – 68th Edition

Ruling under GST era

Dolphin Die Cast Pvt. Ltd. - Karnataka[1]

Issues for Consideration

- Whether GST is liable to be paid on the dies manufactured for the foreign customer, though not been physically exported to the customer. If yes, whether the input tax credit (ITC) can be claimed of such tax paid.
- Whether GST is liable to be paid under reverse charge mechanism (RCM) on the invoice raised for the dies, by the foreign supplier, without their physical importation into India.

Discussion

- The Applicant is a manufacturer and exporter of aluminium and zinc die castings (goods). The Applicant first manufactures the steel die (die) as per the requirement / specifications of the foreign customer and then uses the die to make the goods.
- The goods are exported to the customer, but the die is retained by the Applicant. A tax invoice is raised for sale of die and consideration is received. Once the export order is completed, the die is either exported to the customer or scrapped at Applicant's end as per the instructions of the customer.
- Similarly, the Applicant also gets the goods manufactured from a foreign vendor who supplies the goods, but the die is retained by him. The foreign vendor also raises the invoice on the Applicant for the dies. Once the order is completed, the die is either imported by the Applicant or scrapped at the vendor's end as per the instructions of the Applicant.
- The Applicant approached the Authority for Advance Ruling (Authority) in respect of the above-mentioned issues. The Authority observed as follows:

Goods manufactured by the Applicant

- The dies manufactured by the Applicant do not physically move out of India and accordingly, the same does not amount to export of goods as per section 2(5) of the IGST Act, 2017.
- The invoice has been correctly raised by the Applicant on the foreign customer at the time of supply of die, as per section 12 of the CGST Act, 2017. Further, the die at the time of supply, being with the Applicant, the place of supply

[1] 2020-VIL-125-AAR

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(POS) of the die as per section 10(1)(c) of the IGST Act, 2017 should be the location of the goods at the time of delivery to the recipient i.e. location of the Applicant.

- The location of the supplier and the POS of the die being the same, the supply should be regarded as an intra-state supply in terms of section 8(1) of the IGST Act, 2017 and the Applicant should charge CGST and SGST on the invoice. The Applicant should not be eligible to claim the ITC of the tax paid since it is not the recipient of goods.
- Further, if the die is scrapped in India, then the Applicant should issue an inter / intra-state tax invoice depending upon the nature of transaction.

Goods imported by the Applicant

- The dies are not physically imported into India and accordingly, the same does not amount to import of goods as per section 2(10) of the IGST Act, 2017.
- After completion of the order, if the dies are physically imported into India, then the Applicant should be liable to pay IGST under RCM and claim ITC, if eligible.
- Further, if the dies are scrapped at the location of the foreign vendor, then, since the transaction has taken place outside the taxable territory i.e. India, it is not covered under the purview of GST.

Judgment

Goods manufactured by the Applicant

- The tax invoice raised for the manufacture of the die, without its movement, should be an intra-state supply and the liability should be accordingly discharged. The Applicant should not be eligible for ITC of such tax paid.
- If the die is scrapped at Applicant's end, then, it would be an inter / intra state supply depending upon the nature of transaction.

Goods imported by the Applicant

- If the die is physically imported into India, then IGST has to be paid by the Applicant under RCM and the tax paid can be claimed as ITC, if eligible.
- If the die is scrapped at the vendor's location, then, no tax is payable as it is outside the purview of GST.

Dhruva Comments:

Interestingly, the Tamil Nadu Authority for Advance Ruling in a similar case of *Automotive Component Technology India Pvt. Ltd.*[2] had held that when the Indian manufacturer transfers the title in the mould to the Indian buyer (without the die being physically imported into India from a foreign supplier), it amounts to supply of goods and GST is payable on the same. However, in the present ruling, where dies are not physically imported, the Authority has held that the POS being outside India, the transaction is not within the purview of GST. Thus, there exists contradictory rulings.

Further, the present ruling also does not state what the GST implications would be when the dies are actually exported by the Applicant to customers outside India i.e. whether it would qualify as an export under GST or not.

Additionally, when the dies are imported into India there should not be any GST payable under RCM but the same would be subject to customs duty (including IGST) in terms of section 5(1) of the IGST Act, 2017.

The ruling does not provide any reasons for confirming liability to pay GST in case where die is scrapped, since the title in those goods does not vest with the Applicant.

Judgment under Pre-GST era

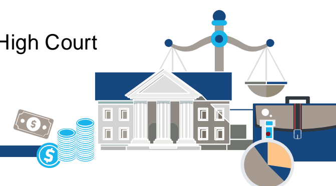
***M/s. TVL. M. R. Motor Company* v. *Assistant Commissioner (CT), (FAC), Salem*[3]**

Issues for Consideration

- Whether the Petitioner is entitled to refund of excess input tax credit (ITC) as per the provisions

[2] Order no. 05/ARA/2020 dated January 31, 2020

[3] 2020 (5) TMI 495 – The Hon'ble Madras High Court



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of the Tamil Nadu Value Added Tax Act, 2006 (TNVAT Act).

- Whether the Petitioner is entitled to refund after the transition of closing balance of ITC under the TNVAT Act to the Tamil Nadu Goods and Services Tax Act, 2017 (TNGST Act).

Discussion

- The Petitioner, a motor vehicle dealer, claimed a refund of excess ITC in terms of section 19(17) and section 19(18) of the TNVAT Act read with rule 10(10) and 11 of the Tamil Nadu Value Added Tax Rules, 2007 (TNVAT Rules).
- The Petitioner filed a claim for refund of accumulated ITC with the Respondent in November 2011 for assessment years 2006-07 to 2009-10. Thereafter, the Petitioner filed a Writ Petition[4] before the Hon'ble High Court with a prayer for consideration of its increased refund claim. While disposing the Writ Petition in August 2013, the Court directed the Respondent to consider the representation of the Petitioner and pass orders on merits in accordance with law.
- The Petitioner thereafter filed another representation for refund of ITC which was rejected by the Respondents. Aggrieved by the rejection of refund claim, the Petitioner moved the Hon'ble Madras High Court.
- During the pendency of the proceedings, the TNVAT Act was replaced by the TNGST Act and the closing ITC under the TNVAT Act was transitioned to the TNGST Act. Furthermore, the Petitioner is regularly filing returns under the TNGST Act and no set-off or adjustment has been made from such ITC.
- The Hon'ble High Court observed as follows:
  - Section 19(17) of the TNVAT Act allows adjustment of the outstanding tax dues from a dealer, if the ITC determined by the authorities exceeds the tax liability for a particular year. Section 19(18) of the TNVAT Act, allows either a carry forward or a refund of the balance ITC after the adjustment prescribed in section 19(17) of the TNVAT Act.
  - Rule 10(10)(a) of the TNVAT Rules prescribes a carry forward to the next month in the case of excess ITC balance in a month. However, rule 10(10)(b) mandates an adjustment with arrears of tax in cases where the ITC determined by the authorities exceeds the tax liability for the year. The authorities are bound to serve a notice in Form P to the dealer for refund of any leftover ITC balance after the above adjustment.
  - Perusing the provisions related to the refunds, the Court observed that any excess ITC must be refunded. Furthermore, there are no provisions allowing a carry forward of such excess ITC to the subsequent period for adjustment of future tax liabilities.
  - The Petitioner should not be deprived of their right to claim refund based merely because they were satisfying the criteria of a going concern.
  - If the refund claim were permitted by the authorities, the present situation of transition of the accumulated credit balance to the GST regime would not have arisen. Furthermore, introduction of GST and replacement of TNVAT Act by the TNGST Act would not disentitle the Petitioner to claim refund of the excess ITC.
  - The High Court also relied upon the judgement pronounced by the Hon'ble Supreme Court in the case of *Unichem Laboratories Ltd.* v. *Collector of Central Excise, Bombay*[5] wherein it was observed that the authorities should act fairly and reasonably and should not deprive a benefit legally available to an assessee with an intention to enhance the duty for the benefit of the authorities.

Judgment

The Hon'ble High Court quashed the rejection order passed by the Respondent with a direction to refund the unutilised ITC lying after necessary adjustments at the beginning of each financial year.

[4] Writ Petition no. 18839 of 2013 –The Hon'ble Madras High Court

[5] (2002) 7 SCC 145

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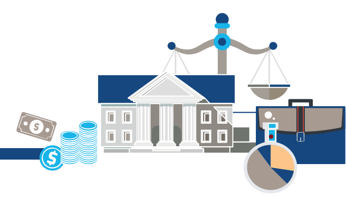

Dhruva Comments:

On a combined reading of section 19(17) and 19(18) of the TNVAT Act with rule 10(10)(a) and 10(10)(b) of the TNVAT Rules, it can be said that ITC being a vested right of the taxpayer should either be available as a set-off or a refund. This judgment allows the refund despite credits transitioned to GST regime.

M/s. DLF Utilities Ltd. v. *Union of India & Ors.*[6]

Issue for Consideration

Whether demand of duty from a Special Economic Zones (SEZ) developer pursuant to change in demarcation of a *Processing Area* (PA) to a *Non-Processing Area* (NPA) in the SEZ in relation to procurements used for authorised operations is tenable under the SEZ law?

Discussion

- The Petitioner is a co-developer of an SEZ located in Chennai for Information Technology / Information Technology Enabled Services (IT / ITes). Approval to act as a co-developer was granted to the Petitioner by the Board of Approval, Ministry of Commerce (BOA) for generation of 84 MW power to be supplied to units located in an SEZ developed by DLF Info City Developers (Chennai) Ltd.
- The Petitioner was procuring High Speed Diesel (HSD) without payment of excise duty from a local refinery according to section 26(1)(c) of Special Economic Zones Act, 2005 (SEZ Act) read with rule 27 of the Special Economic Zones Rules, 2006 (SEZ Rules) for carrying out authorised operations in the PA.
- The guidelines dated April 6, 2015[7] (guideline no. 3) were introduced to restore the guidelines dated February 27, 2009[8] (guideline no. 1) and annul the effect of guidelines dated March 21, 2012 (guideline no. 2).
- According to the guideline no. 1, a power plant to be set up by a Developer in SEZ must be located in the NPA of the SEZ and a co-developer was eligible for certain fiscal benefit to the extent of initial setting up costs. However, this guideline was modified by guideline no. 2 which provided benefits for power plants set up in PA / NPA. The power plant set up in PA are entitled to all benefits available to developer / co-developer including fiscal benefits for initial setting up, duty free import of raw materials, components and consumables for operation and maintenance of power plant. Furthermore, power plant set up by a developer / co-developer in a non-processing area, as a part of the infrastructure facility, will be entitled to fiscal benefit only for initial setting up and no fiscal benefit would be admissible for operation and maintenance. There would not be any obligation to achieve positive net foreign exchange earnings for such power plants.
- The benefit available as per guideline no. 2 was withdrawn by issuance of guideline no. 3 and resultantly, the Petitioner was required to procure HSD by paying Excise duty from April 1, 2015 to February 15, 2016. However, the benefits available as per guideline no. 2 were partly restored by introduction of new guidelines dated September 16, 2016 (guideline no. 4).
- A show cause notice (SCN) was issued by the SEZ authorities for recovering Excise duty from the Petitioner for procuring HSD from Indian Oil Corporation Ltd (IOCL) without payment of Excise duty from April 1, 2015 to February 15, 2016. Aggrieved by the denial of benefit and issuance of SCN, the Petitioner filed a Writ Petition before the Hon'ble High Court.
- The Hon'ble High Court observed as follows:
  - The Petitioner was initially provided an approval for set up of a co-generation plant by installing and commissioning gas turbine based power generating sets by setting up an energy centre to provide electricity as a single source and to generate chilled water using vapour absorption machine.
  - Thereafter, the Petitioner was allowed to set up 48 MW capacity power plant in the NPA of the

[6] 2020-VIL-222-MAD-CE – The Hon'ble Madras High Court
[7] Reference no. P.613/2006-SEZ
[8] Reference no. P.6/2003-SEZ

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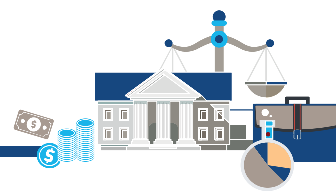

IT facility infrastructure in the SEZ which was later enhanced to 84 MW by the BOA and location of the plant was altered to fall within the PA. Therefore, the Petitioner was procuring HSD from IOCL situated in Domestic Tariff Area (DTA) without payment of duty after issuance of guideline no. 2.

- However, the benefit under the guideline no. 2 was withdrawn and all PAs were demarcated as NPAs resulting in curtailing of operation and maintenance benefits to the Petitioner.
- Section 7 of the SEZ Act provides exemption from payment of taxes, duties or cesses specified in the First Schedule on export of or procure of goods or services by the SEZ units or developers. The Petitioner is not eligible to procure HSD without payment of duty from a DTA in absence of any mention of the Excise laws in the Schedule and could only claim exemption under section 26 of the SEZ Act for procurements to carry out authorised operations.
- On a combined reading of section 26, 2(m) and 2(o) of the SEZ Act, it was observed that a supply of goods from DTA to SEZ qualifies as an export and therefore a supplier located in the DTA is eligible for supply without payment of duty to the SEZ. Furthermore, a receipt of goods or services from a DTA supplier does not qualify as an import in the hands of unit or developer located in SEZ though it qualifies as an export in the hands of such supplier.
- The Petitioners were entitled to exemption from excise duty on procurement of HSD from the DTA for carrying out authorised operations. The definition of authorised operations under section 2(c) of the SEZ Act includes approvals authorised by the BOA and by the Development Commissioner. The Petitioner had already secured an approval for the setting up of the power plant in the PA in the year 2008.
- Introduction of guideline no. 3 under section 5 of the SEZ Act not only restricts the future location of the power plants but also states that power plants in existence and located in a PA of the SEZ shall be demarcated as NPA.
- Placing reliance on section 5 and 6 of the SEZ Act, the Court observed that the power to demarcate an area within the SEZ as a PA or NPA vests only with the Central Government. Furthermore, an area must necessarily be declared as a PA, where any manufacturing of goods or rendition of service takes place. Observing that the definition of manufacture is very wide, the Court stated that generation and supply of power should qualify as manufacture and supply of service, respectively.
- Guideline no. 2 merely recognises the principle that a DTA unit can supply goods without payment of duty in terms of section 26 of the SEZ Act read with rule 30 of the SEZ Rules. Furthermore, withdrawal of guideline no. 2 should not disentitle the Petitioner of the benefits available under the SEZ Act and therefore guideline no. 3 is neither sustainable nor enforceable in the present scenario.
- Levy of Excise duty is on the manufacture of products. In absence of any provision for payment of duty by the purchaser under a reverse charge mechanism liability to pay the duty rests upon the manufacturer.
- The DTA unit is entitled to export benefits under the Foreign Trade Policy in terms of rule 23 of SEZ Rules and is also allowed to clear the goods under a bond or claim rebate of tax / duty paid in terms of rule 30 of the SEZ Rules. Even otherwise, the demand of Customs duty and interest on the duty foregone by the DTA should not be tenable since the procurement of HSD does not qualify as an import in terms of section 2(o) of the SEZ Act, 2006.
- Referring to rule 47(5) of the SEZ Rules, the Court observed that the impugned SCN is also liable to be declared as without jurisdiction, since only a jurisdictional officer concerned under the Central Excise Act, 1944 within whose jurisdiction the DTA unit is registered is competent to issue a SCN for the recovery.
- The demand proposed is revenue neutral as duty paid by the supplier is allowed as a rebate under the Central Excise Rules, 2002.

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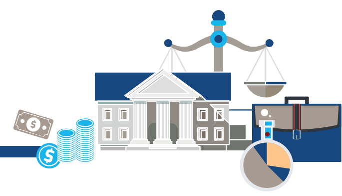

– The Court also observed that there was no rationale for the act of recognising the exemption, removing it subsequently and re-introducing the same with a slight modification.

Judgment

The Hon'ble High Court allowed the Writ Petition and quashed the demand raised by the Respondents.

Dhruva Comments:

Procurements of goods or services by a SEZ developer which are used in carrying out authorised operations are exempt from any duty / taxes under section 26 of the SEZ Act. The judgment is in line with provisions contained in the SEZ Act and the Rules thereunder.

Public notice by DGFT

Increase in duration of validity of MEIS / SEIS scrips and relaxation in last date for filing applications under MEIS / SEIS[9]

Extension of validity of duty credit scrips

- As per para 3.13 of the Hand Book of Procedures (HBP) duty credit scrips (MEIS / SEIS) should be valid for a period of 24 months from the date of issue. The DGFT has now amended the said para to state that scrips issued between March 1, 2018 and June 30, 2018 shall be valid till September 30, 2020.

Late cut on filing of applications

- Para 9.02 of the HBP prescribes late cut applicable on submission of applications of any financial / fiscal benefits under the FTP which are received after the expiry of the last date for submission of such applications. The DGFT has now granted relief in levy of late cuts for MEIS / SEIS applications as follows:
  - For MEIS application which attracted a late cut as on March 1, 2020, the period between March 1, 2020 and June 30, 2020 should not be counted and the last date for submission of the various categories of the applications and applicable late cuts should be accordingly determined.
  - Last date for submission of SEIS application for FY 2016-17, would be June 30, 2020 with late cut of 10%. Thereafter, the said application shall stand time barred.
  - Last date for submission of the SEIS application for FY 2017-18 would be June 30, 2020 with late cut of 5%. Thereafter, 10% late cut would be applicable for application submitted till March 31, 2021.

Dhruva Comments:

The amendments made in the HBP are a welcome initiative in line with the trade demands considering the present COVID-19 situation and lockdown in various parts of the country.

Further, the amendment in respect of the late cuts for SEIS applications also clears the anomaly that existed in the public notice[10] issued earlier, whereby the last date for filing SEIS applications for FY 2018-19 was extended to December 31, 2020 without there being any relief granted for applications of FY 2016-17 and 2017-18.

Circular under GST era

Corrigendum dated June 2, 2020

- The Maharashtra GST authorities had issued a trade circular[11] with respect to the timelines for filing an appeal before the Appellate Tribunal. This circular also required the tax payer to file a declaration within 15 days from the communication of the order, before the jurisdictional officer, stating that he is proposing to file an appeal under section 112(1) of the CGST Act, 2017 before the Appellate Tribunal. This declaration contained an undertaking that the tax payer would file the appeal **within seven days** of the constitution of the Appellate

[9] Public notice no. 08/2015-2020 dated June 1, 2020
[10] Public notice no. 67/2015-2020 dated March 31, 2020

[11] Trade Circular no. 9T of 2020 dated May 26, 2020

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Tribunal. This declaration was contrary to the timelines prescribed by the CBIC vide its order[12] and the circular[13] issued (i.e. the appeal should be filed within three months from the date when the President / State President of the Appellate Tribunal enters office).

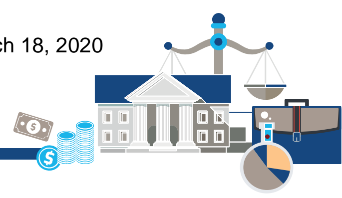
- Now a corrigendum has been issued to state that this undertaking is replaced to read that the appeal should be filed under section 112(1) of the CST Act, 2017, within the time prescribed by the law (i.e. within three months from the date when the President / State President of the Appellate Tribunal enters office).

Dhruva Comments:

The corrigendum has been rightly issued and is in line with the time period prescribed by the law for filing of the appeal.

[12] Order no. 9/2019-Central Tax dated December 3, 2019

[13] Circular no. 132/2/2020-GST dated March 18, 2020



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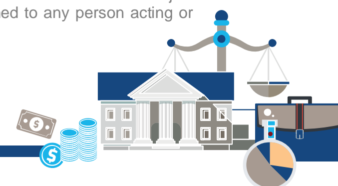

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