Legal Update

GST

LD/67/148

Delhi International Airport Ltd.
Vs.
CGST Delhi
(CESTAT-DEL)
08/02/2019

Tribunal held that recovery of costs towards development of common infrastructure facilities, in terms of obligations imposed under the 'operation, management and development agreement' cannot be taxed under 'renting of immovable property services'.

Facts:

In terms of Operations, Management and Development (OMD) agreement with Airport Authority of India, appellant was entitled to area of 62.5 acres to be developed as 'hospitality district' for commercial development. For Asset Area measuring to 45 acres, appellant entered into 'Development Agreement' with various developers for commercial development in such Asset Area and charged licensee fees as consideration, on which appellant had discharged service tax liability. For developing and providing infrastructure facilities in the remaining area of 'hospitality district' (other than Asset Area) the appellant entered into 'Infrastructure Development and Service Agreement' (IDSA) with each developer. In terms of IDSA agreements, appellant was required to develop common area outside the asset area, provide and maintain infrastructure development facilities in common area. Appellant received 'advance development cost' from various developers for development of such common infrastructure facilities. In present appeal, the issue before the Tribunal was whether said 'advance development cost' received from the developers was chargeable to service tax under 'renting of immovable property services'.

Held:

Hon'ble Tribunal observed that granting of License to the Developer for the Asset Area and Development of Common infrastructure facilities, outside the Asset Area, are two independent and distinct transactions and the same cannot be considered together, so as to constitute a single transaction, as alleged by the revenue. It was noted that in terms of OMD agreement between appellant and AAI, the appellant was entrusted with responsibility to adhere to various regulatory norms and therefore, even while allowing development rights to developers in allocated development area, the appellant had to perform supervisory role to develop facilities as per the approved plans. Since, it was a responsibility of the appellant as a privy to contract under OMD agreement, to be responsible for operation, management and development. Therefore, as the common facilities could not have been developed by any developer for everyone including members of public, only the appellant was responsible to do the same. Tribunal held that by any reasoning, development of common facilities cannot be equated with any leased/rental property and such common facilities were never exclusive right of any developer.

Tribunal also categorically noted that since in terms of IDSA agreement, appellant was not allowed to make any profit/retain any surplus and excess deposit of the Advanced Development Cost was liable to be returned to the developers, no consideration for any purported service has been retained by the appellant. Thus, in light of ratio laid down by the Hon'ble SC in *Union of India Vs. Intercontinental Consultants and Technocrats Pvt. Ltd. 2018-TIOL-76-SC-ST,* the Tribunal held that the costs defrayed/reimbursed to the appellant in terms of IDSA, even in advance cannot be included in gross value under section 67 of Finance Act, 1994.

Further, the Tribunal observed that development of Common Infrastructure facilities outside Asset Area cannot be construed as 'Renting of Immovable Property' or a service in relation to the renting of immovable property. The treatment of reimbursement of cost, of common facilities, as 'Renting Service' by the Adjudicating Authority is not legal because such common facilities were developed by taking advances as a pool of fund, for the infrastructure to be used by common beneficiaries and the account was to be settled as per the Agreement by returning excess, if any, or charging deficit, etc. if any, if the cost of the works exceeded or was less than the amount collected as advance. It is common knowledge that rent/lease rent is never subjected to such accounting on real cost basis. For rent on immovable property service, the expression 'in relation to' has to be read in conjunction with the expression 'rental'. The term 'rental' even in enlarged form of Lease, Rent, Licence, etc., cannot encompass anything done for the development of the common facility/ property. There is difference between anything done in relation to 'renting of immovable property service' and anything done in relation to 'immovable property' per-se, which is in common domain. The latter cannot fall within the ambit of the former.

Further, Tribunal noted that the term 'rent' means letting out or use by another person usually for fixed periodical return. It cannot encompass development and maintenance of common facilities, which was to be defrayed on the basis of actual expense incurred. In present case, there is no right vested in the immovable property to be transferred to the developer; again, for a license, a right is required to be conferred to do or continue to do something upon the immovable property of the granter. Also, the common area is meant for public use and such immovable property is neither the property of DIAL nor the developer. The road network, metro facilities, etc. are for the general/ common use of public and confer any rights, neither on DIAL nor on any developers.

Further, it was found that there is no Service Provider-Service Recipient relationship between the appellant and the Developers, as regards the advance development cost, because common facilities developed belong to none (held in trust) and the benefit is derived by all the developers as well as the public. Since there is only development of common infrastructure facilities involved (as trustee), there is no service flowing from any party to other. Accordingly, the Tribunal set aside the impugned demand and held that since the advanced development cost is not a consideration for any services rendered, Section 67 has been improperly invoked to take gross value as consideration for services that were alleged to be provided.

LD/67/149

Lubrizol Advanced Materials India Pvt. Ltd.

Vs.

Commissioner of Central Excise, Belapur

11/01/2019

When the consideration charged by Indian entity for the services to its overseas ground entities had no nexus with supply of goods by such overseas entities to its customers in India, Tribunal held that the Indian entity cannot be regarded as 'intermediary' and the place of provision of services provided by Indian entity would be outside India.

Facts:

Appellant is engaged in the business of rendering administrative and sales related services to the group entities located outside India. The appellant had entered into various agreements with overseas group entities for promotion of products and solicitation of orders for them from prospective customers located in India. The appellant in terms of Place of Provision of Services Rules, 2012 (POPS Rules, 2012) had considered their services as export of service and accordingly, claimed refund of accumulated Cenvat credit in terms of Rule 5 of the Cenvat Credit Rules, 2004 (CCR, 2004). Revenue contented that w.e.f. 01.10.2014, appellant should be considered as 'intermediary' as the appellant had facilitated supply of goods between its foreign counterpart and purchaser of goods and thus, place of provision of services provided by appellant would be India in terms of Rule 9 of POPS Rules, 2012. Thus, the Revenue rejected refund claim filed by the appellant on the ground that the services provided by the appellant cannot be regarded as 'export of services'. Being aggrieved, the appellant has filed the present appeal.

Held:

Hon'ble Tribunal noted that the service fee charged by the appellant to its overseas group entities for provision of service has no direct nexus with the supply of goods by the overseas group entities to its customers in India. The appellant had provided the service to the overseas entities on principal to principal basis. Further, the Tribunal found that the consideration received by the appellant for providing the services was based upon cost plus markup and is nowhere connected with the main supply of goods. In other words, the main supply may or may not happen and thus, cannot be directly correlated with the service provided by the appellant. Therefore, the Tribunal held that the appellant is not acting as a bridge between the overseas group entities and supplies made to their customers in India and it cannot be said that the appellant has provided intermediary service and should be governed under Rule 9 of POPS Rules, 2012. Thereby, impugned order denying refund benefit to the appellant was set aside.

LD/67/150

E-Square Leisure Pvt Ltd

(AAR Maharashtra)

29/12/2018

AAR held that no GST would be chargeable on interest free security deposits unless such deposits are forfeited by the supplier towards consideration due for supply.

Facts:

The applicant is engaged in providing services of renting of immovable property to business entities

for commercial purpose. The applicant has received interest free security deposits from the lessees. Such security deposit was taken by the applicant on returnable basis and has to be returned on completion of the tenure of lease. The applicant sought ruling from AAR as to whether GST would be applicable on interest free security deposit and on notional interest. Applicant submitted that unlike Excise Law, where notional interest on advances was required to be included in assessable value if the receipt of advance has influenced fixation of price of the goods, under GST law concept for inclusion of notional interest is not prescribed.

Held:

The AAR noted that in terms of definition of the term 'consideration' under section 2(31) of CGST Act, 2017, there should be a close nexus between payment and supply and thus, any payment/exchange/barter etc. would be treated as consideration for supply and will be liable to GST. AAR found that the security deposit taken by the applicant is to secure or to act as guarantee as per the terms of the agreement against the damages to the properties, furniture, equipments, fittings etc. supplied along with premises. Such deposits are collected by the applicant in addition to the rent and returnable on completion of tenure of lease. Accordingly, AAR held that since such returnable deposits cannot be considered as consideration for supply of services, the same will not be liable to GST. AAR further held that at the time of completion of the lease tenure, if the entire deposit or part of it is withheld and not paid back, as a charge against damages etc., then at that stage, the amounts not returned back by the applicant will be liable to GST.

LD/67/151

Kun Motor Co. Pvt. Ltd., Vishnu Mohan

Vs.

The Assistant State Tax Officer and the State of Kerala

(HC-Kerala)

06/12/2018

When the authorised dealer of car arranged for the transportation of new car in a special carriage from Puducherry to Kerala, upon a request from the buyer of the car located in Kerala and the vehicle carrying the car was detained by the Revenue on account of omission to generate e-way bill, HC held such detention to be illegal treating it as intra-state supply and also because the car, registered in the name of buyer before putting into transportation, partakes character of 'used personal effects' and thus, covered under exemption under Rule 138(14) of KGST Rules, 2017.

Facts:

The 1st appellant, a dealer in motor cars in union territory of Puducherry sold a brand new car to 2nd appellant, purchaser from the state of Kerala. The temporary registration was taken in the name of purchaser from Puducherry Motor Vehicles Department as also an insurance cover obtained. The dealer charged IGST to purchaser for sale of car, being inter-state sale. The purchaser requested the dealer to deliver the car to Kerala from Puducherry. The dealer arranged for transportation of car in specially equipped carriage by road. An invoices issued for transportation charges was subject to IGST, being tax for service of transportation of vehicles. The vehicle carrying the said car was detained by the Revenue authorities in the state of Kerala for omission to upload e-way bill, by invoking provisions of Section 129 of KSGST Act, 2017.

Appellants contented that since the car was purchased by the purchaser, delivery effected and temporary registration taken, the car becomes personal effect of the purchaser and thus, in light of the exemption granted by Rule 138(14) of KGST Rules, 2017 read with Annexure, there was no requirement for uploading e-way bill. On the other hand, department contented that in terms of Section 7 and 10 of IGST Act, 2017, the inter-state supply of goods would be completed only when the movement of goods terminates with delivery to recipient. Department further contended that as the transport was of brand new car purchased by the appellant purchaser from the appellant dealer, it cannot be treated as used personal effect. In the writ petition filed by the appellant for interim release of detained goods, Ld. Single Judge hence refused to release the vehicle as an interim measure, other than by resort to Section 129 and directed adjudication by the detaining officer under section 129. Being aggrieved, the appellants filed the present appeal.

Held:

In deciding as to whether supply involved in the present case is in the course of inter-state trade or commerce, Hon'ble HC observed that to determine the place of supply of goods, what is relevant is that

the movement of goods should be occasioned by the transaction of supply, as evident from the words "where the supply involves movement of goods" used in Section 10(1)(a) of IGST Act, 2017. What is discernible is that the transaction of supply itself, should occasion the movement of the goods. When the person residing in one state goes to another state to buy goods for his own use, the supply with respect to such transactions terminates on the individual taking possession of the goods in that other state. The movement of the goods, after such sale is terminated and delivery is effected, whether it be inside the state or to outside that state, would be the prerogative of the purchaser, who owns the goods, in whom the property of such goods vests and such moment would not be occasioned by the sale transaction or the supply thereon.

As regards contentions regarding temporary registration in the name of buyer in Puducherry, HC noted that in *2016 (4) SCC 82 Commissioner of Commercial Taxes, Thiruvananthapuram vs. KTC Automobiles,* it was held that the registration of motor vehicle is post sale event. Accordingly, it was noted that the registration obtained by the appellant buyer in Puducherry and taking insurance cover in his name, establishes that the sale had been completed in Puducherry itself. HC categorically observed that had the vehicle been driven by the appellant purchaser from Puducherry to Kerala, there was no reason to upload e-way bill. Accordingly, it was held that as the sale made by the dealer and the service of transportation of the vehicle are quite distinct transactions; one of supply of goods and one of supply of services, the transport by the appellant dealer cannot be understood as one in the course of sale for the purpose of supply at purchaser's location in Kerala.

As regards next contention of revenue, that whether the brand new car taken for delivery by the 2nd appellant at Puducherry and transported to Kerala can be termed to be a used car and hence a used personal effect, High Court noted that a car on purchase from authorised dealer of manufacturer, with a registration taken is owned by the registered owner and looses its sheen of a brand new car. The minute a car is driven out of dealership, the price dips and it only has second-hand value which is not exigible to tax as per *Notification No. 8/2018-Central Tax (Rate) dated 25.01.2018*; which though levies tax on old and used motor vehicles, confines it to a positive margin on subsequent sale, from the purchase price. High Court further observed that the 2nd appellant purchaser came to the possession of vehicle on its retail sale and had taken out a registration albeit temporary, in his name, as also an insurance, the policy covering his risk as a registered owner of the vehicle. From the moment the vehicle is temporarily registered in the name of purchaser; it is deemed that he is keeping it in his possession for use on the roads and any liability incurred in such use as against third parties would be sole responsibility of registered owner i.e. the purchaser and not that of supplier i.e. authorised dealer of manufacturer.

Accordingly, HC held that the supply of new vehicle by its authorised dealer terminated on it being purchased by the 2nd appellant in Puducherry and the subsequent movement of goods was not occasioned by the reason of transaction of supply. The detention of goods was held to be illegal as the transactions has occasioned intra state sale and the transport is of used personal effects. Consequently, the writ petition was set aside.

LD/67/152

M/S Valmiki Consultants Pvt. Ltd

Vs.

Commissioner of Customs, Central Tax, Hyderabad (CESTAT-HYD)

05/10/2018

Tribunal held that the activity of India entity of providing student referral services to foreign universities falls out of ambit of 'intermediary services' and since such services are consumed by the foreign universities outside India, place of provision of such services would be outside India.

Facts:

The appellant is engaged in providing educational consultancy services for prospective students who aspire to study abroad and assist them in the form of logistical support in getting admission into foreign universities; which includes registration, assistance in getting visa and so on. The appellant was also conducting educational fairs at selective places to canvass for the foreign universities to attract students, who are interested in overseas studies and arranging spot admissions to them by Inviting foreign university delegates to such fairs. Appellant received commission/referral fees from the foreign universities

and no amount was collected by the appellant from students referred to foreign universities. Revenue alleged that appellant rendered 'intermediary services' to foreign universities and thus, place of provision of services rendered by the appellant would be in India in terms of Rule 9(c) of POPS Rules, 2012. Appellant submitted that the issue is no more res integra in light of decisions in *Sunrise Immigration Consultants Pvt. Ltd. Vs. CCE & ST Chandigarh - 2018-TIOL-1849-CESTAT-CHD* and *Study Overseas Global Pvt. Ltd. vs. CST [2017 (3)GSTL 443 (Tri-Del)] 2017-TIOL-2269-CESTAT-DEL.* Further, appellant submitted that they are not facilitating any education services which is the main service being provided by the foreign universities. Thus, the activity does not fall under the ambit of 'intermediary' as appellant is promoting awareness about the universities which is the only service provided by the appellant in the present case.

Held:

Hon'ble tribunal noted that the activity of the appellant is to locate the candidates who wants to study abroad, make a data base and refer the student's name to foreign universities; propagate to the future candidates the advantages of specific universities and studying in them and for rendering these services appellant gets paid by the foreign universities as per contractual agreement. Tribunal noted that in *Sunrise Immigration (Supra),* it was held that nature of service provided by the appellant is the promotion of business of their client, in terms, he gets commission which is covered under Business Auxiliary Service which is not the main service provided by the main service providers namely banks/university. As the appellant did not arrange or facilitate main service i.e. education or loan rendered by colleges/banks, the Tribunal held that in that circumstances, the appellant cannot be called as intermediary. In *Study Overseas Global Pvt Ltd. (Supra),* it was held that mere fact that the appellant has been promoting and marketing foreign universities within India and then getting prospective students enrolled for various courses in those universities does not mean that the services to foreign universities were consumed within India. There is no dispute that service recipients are foreign universities and they are located outside India and payment for such services has been received in foreign currency. Thus the Tribunal held that such services were provided from India and used outside India. Consequently, in the light of the said decisions, in present case, impugned demand was set aside.

Service Tax

LD/67/153

Srijan Realty (P) Ltd

Vs.

Commissioner of Service Tax

08/03/2019

Transaction of obtaining high-tension electric supply converting it to low-tension supply, and supplying it to the occupants, raising bills on such occupants and realising the electricity consumption charges from such occupants, is a service exigible to Service Tax under the Finance Act, 1994

The assessee, Srijan Realty (P) Ltd, operated a commercial complex under the name and style of "Galaxy Mall" at Asansol. The commercial complex has various occupants. It obtained electric supply from India Power Corporation Ltd. through a high-tension supply and supplied electricity to the various occupants and raised bills upon them. The assessee on receipt of electric supply redistributed the same to the occupiers of commercial complex. The assessee had installed sub-meters for the respective occupiers and based on the readings of such submeters, raised bills upon such occupiers.

The assessee contended that, the dominance purpose test should be applied to find out as whether the transaction was exigible to Service Tax or not. It relied upon SC ruling in *Bharat Sanchar Nigam Ltd Vs. Union of India (2006 Volume 2 S.T.R page 161)* and submitted that, applying such test, since, the transaction was eminently one of sale and the 'sale and the so-called service' being indivisible, then, the transaction was to be treated as a sale. Therefore, the Service Tax was not leviable. The Revenue, on the other hand, contended that assessee did not fall under exemptions provided under section 66D(k) and trading or a sale could be done by a person legally permitted to do so and the assessee was not legally authorised to redistribute electricity. Referring to the memorandum of understanding entered into between the assessee and the licensee, the Revenue submitted that the assessee was a consumer therefore, he could not be a trader and it had no approval from any of the State or the Central Authorities, to trade in electricity.

The HC opined that under the definitions as obtaining in Electricity Act, 2003, the assessee could not be said

to be a generating company and it had not claimed itself to be so. It also could not be said that, the assessee was engaged in the supply or trading of electricity as, the definition of 'supply' and 'trading' did not allow assessee to come within the same. It was further held that the activity of the assessee came within definition of 'service', and not within exclusions contained in Section 65B(44) and Negative list under section 66D. The activity of assessee, thus, could not be treated as a trade as it would violate the provisions of Electricity Act, 2003.

HC rejected the contention of the assessee that, its activity comes within the negative list of services defined in Section 66D particularly in view of Section 66D(e) and (k) and remarked *"...If, an activity which does not come within the negative list of services as defined in Section 66D of the Finance Act, 1994, such an activity is to be termed as a service exigible to tax under the Finance Act, 1994".* The High Court further held that the dominant purpose test as laid down in BSNL if at all applied would be against the assessee, in the facts of the case and in addition, the assessee could not take shelter of the ratio laid down in Larsen & Toubro Ltd (2016 Volume 1 Supreme Court Cases page 170).

Thus, the HC dismissed the assessee's writ and concluded that the transaction of obtaining high-tension electric supply converting it to low-tension supply, and supplying it to the occupants, raising bills on such occupants and realising the electricity consumption charges from such occupants, is a service exigible to Service Tax under the Finance Act, 1994.

Transfer Pricing

LD/67/154

Principal Commissioner of Income Tax

Vs.

J.P. Morgan Services India Pvt. Ltd

25.03.2019

HC dismisses Revenue's appeal against ITAT order determining ALP of non-US based AE transactions on the basis of determination contained in MAP in relation to its US-based AE-transactions observing that there was no distinction between the two

The Assessee, J.P. Morgan Services India Pvt Ltd, is a private limited company. In the ITRs filed by the assessee for the AY 2007-08, the question of determination of Arm's Length Price of the transaction entered into by the assessee with its international Associated Enterprises came up for consideration. The Assessee had 96% of its such transactions with its US based associated enterprise. The rest of the transactions were non US based transactions.

In relation to the US based transactions, the Government of India and that of United States of America entered into a Mutually Agreed Procedure for determining the tax to be levied in the two countries in relation to such transactions. This Mutually Agreed Procedure culminated into an order being formally passed in this regard. When it came to the question of determining the Arm's Length Price of assessee's similar transactions, which were non US based, the Tribunal by the impugned judgement, applied the same parameters and determined the Arm's Length Price on the basis of determination contained in MAP in relation to US based transactions.

Aggrieved, the Revenue preferred an appeal before the Bombay HC.

The assessee contended that ITAT had not automatically lifted parameters laid down in the MAP. Assessee further submitted that the MAP itself had been drawn after detailed consideration of the ALP and there was no material difference between the US based transactions and assessee's non US based transactions.

The Bombay HC noted ITAT's observation that there was no distinction between US and non-US based transactions and even orders by the authorities had made no such distinction. The HC opined that *"in absence of any other material on record, it would be doubtful whether the final culmination of the MAP can be projected in the determination of the Arm's Length Price in the mechanism envisaged under the Income Tax Act, 1961, that too, without any other adjustment or consideration."*

HC rejected Revenue's contention that this was the situation for the later assessment year and could not be accepted for the present assessment year. HC concluded that *"MAP has been drawn after the consideration of relevant aspects giving rise to transfer pricing adjustment and the CBDT in the later year agreed that such transfer pricing consideration in relation to US based transactions can be safely adopted for the purpose of the assessee's non-US based transactions..."* and hence HC rejected Revenue's appeal.