National Conference on GST organised by GST & Indirect Tax Committee - ICAI

Landmark judgements under GST

An analysis of the Apex Court decisions marking significant changes in GST Law.

V. SRIDHARAN, SENIOR ADVOCATE.

Decisions Covered

- Union of India v. Mohit Minerals [2022-VIL-30-SC]
- Commissioner v. Northern Operating Systems (P) Ltd. [2022-VIL-31-SC-ST]
- Union Of India & v. VKC Footsteps India Pvt Ltd. [2021 (9) TMI 626]
- Radha Krishan Industries v. State of Himachal Pradesh[2021 (4) TMI 837]

Union of India v. Mohit Minerals
[2022-VIL-30-SC]

ISSUES

- In CIF Contracts –
  - The foreign exporter has the privity of contract with the foreign shipping line.
  - The importer in India has no contractual nexus with the foreign shipping line.
  - The foreign exporter is the person liable to pay ocean freight to the foreign shipping line.

- Vide Entry 9(ii) of Notification No. 8/2017, the service of ocean freight was made taxable.

- Vide Entry 10 of Notification No. 10/2017 – IGST (R), the importer was made liable to pay tax on the above transportation services provided by the foreign shipping line.

- The vires of the above RCM entry was challenged before the Hon'ble Gujarat High Court on the primary ground that 'importer' is not the recipient of service in case of CIF Imports.

Arguments by the Revenue

- Section 2(107) read with Section 24(iii) of the CGST Act – Notification specifically identifies the importer as a taxable person who is liable to pay tax on a reverse charge basis
  - 2. (107) "taxable person" means a person who is registered or liable to be registered under section 22 or section 24;
  - 24. Compulsory registration in certain cases –

    (iii) persons who are required to pay tax under reverse charge;

- CIF transaction of import goods and IGST on ocean freight – independent levies and not qualify as composite supply

- Section 2(93)(a) – "person who is liable to pay the consideration" will not apply.

Arguments by the Revenue

- Section 2(93)(c) – Recipient is importer who does not pay for ocean freight but receives the benefit of transportation

  "(c) where no consideration is payable for the supply of a service, the person to whom the service is rendered.

  And any reference to a person to whom a supply is made shall be construed as a reference to the recipient of supply……"

- Section 13(9) of the IGST Act –
  - (9) The place of supply of services of transportation of goods, other than by way of mail or courier, shall be the place of destination of such goods.

- Thus, the importer in India is the beneficiary of ocean freight service.

Arguments by the Respondent - assessees

- Government cannot specify the person liable to pay GST under RCM through a Notification. That has been fixed under Section 9(3) of the IGST Act as the “recipient” of service.
- Section 9(4) also provides for payment of tax by “recipient” of service.
- Since, the service of ocean freight is for consideration, the person liable to pay tax can only be the foreign exporter, who is the person liable to pay freight.
- Section 13(9) is relevant only to determine POS and not recipient of supply
- Ocean freight has already been included in the value of goods as a composite supply for purpose of levy of IGST. [Section 2(30) read with Section 2(93), and Section 8]

Decision of the Hon'ble Supreme Court

- The recommendation of GST is not binding on the Parliament and State Legislature, though it is binding on the Government.

- Section 13(9) provides that place of supply of service by way of ocean transport is the place of destination of goods.
- In the present case, the destination of goods is India where the importer is situated who will take delivery the goods.
- Thus, in essence the supply of transportation service is 'made' to the importer who will be deemed to be the recipient. Thus, the Notification is not *ultra vires* the Act.

Decision of the Hon’ble Supreme Court

- **However,** the impugned levy is in violation of the principle of ‘composite supply’.
- Indian importer is already paying IGST on the ‘composite supply’ of goods at the time of import.
- Hence a separate levy on the Indian importer for the ‘supply of services’ by the shipping line would be in violation of Section 8 of the CGST Act.

Issues

- CBIC has decided not to file review petition.
- Refund claims to be filed for tax already paid.
- Application of the decision on taxability of Ocean Freight on the following imports:-
  - Non-taxable supplies (on which CVD is paid like crude) or
  - Exempted supplies (on which no IGST is paid like agricultural commodity).
- Position under Service tax regime.
- Impact on imports made on FOB basis.
- Impact of treating more than one person as recipient.
- Impact of treating beneficiary as recipient ignoring contractual recipient.

Commissioner v. Northern Operating Systems (P) Ltd.

[2022-VIL-31-SC-ST]

Brief Facts

- M/s Northern Operating Systems Pvt. Ltd. ('NOSPL') entered into Agreements with its Group Companies located abroad, to provide general back office and operational support.
- NOSPL also entered into Secondment Agreements with their Group Companies for secondment of employees.
- NOSPL issued an Employment Letter to the seconded employee stipulating all the terms of the employment.
- Selected employees were seconded to NOSPL who continued to be on the payroll of the Group Company for the purpose of social security/retirement benefits.

Brief Facts

- Employees so seconded received their remuneration and other expenses from the Group Company.
- The Group Company raised Debit Notes on NOSPL to recover the expenses of salary, bonus etc. and all these expenses without any mark-up, were reimbursed by NOSPL.
- NOSPL issued Form 16 to the seconded employees. The employees filed income tax return in Form 24Q. The employees also contributed to the provident fund.
- Extended period of limitation was invoked for the period October 2006 to September 2010.

Issues

- Whether the overseas Group Companies provided manpower supply service to NOSPL?

- What is the consideration for having provided manpower recruitment or supply service?

Arguments by the Revenue

- The arrangement with the Group Company was one of a contract for service. The overseas Group Companies provided services through its employees to NOSPL.
- The temporary control by NOSPL over the manner of performance of seconded employees does not diminish the fact that the real employer of such employees was the overseas Group Company.
- The limited control by NOSPL allowed for only the return of seconded employees to the overseas employer in case of dissatisfaction and NOSPL could not impose sanctions, such as cut salary etc.
- The contract between the parties was essential for supply of services by the concerned overseas Group Company to NOSPL and therefore, it is a taxable service.

Arguments by the Assessee (1)

- The taxable service of manpower recruitment or supply agency services covers two activities i.e. recruitment of manpower and supply of manpower.
- The service becomes a taxable service only if provided by a manpower recruitment or supply agency. The Group Companies are not in the business of supplying manpower and therefore no recruitment or supply agency. ***[Commissioner v. Nissin Brake India Pvt. Ltd. - 2019 (24) G.S.T.L. J171 (S.C.)]***
- Employer-employee relationships are outside the scope of Manpower Recruitment services both prior and post July 2012.
- Service tax is leviable only on the gross amount charged by the service provider and not on the salaries paid to the expats.

Arguments by the Assessee (2)

- There is no mark-up charged by the overseas Group Company as evidenced by the debit notes raised by them. Cost or expenses reimbursed does not represent the gross value of taxable services ***[Union of India v. Intercontinental Consultants and Technocrats Pvt. Ltd – 2018 (10) G.S.T.L. 401 (S.C.)]***

- The demand pertaining to the period October 2006 to September 2010 was hit by limitation as the same cannot be invoked on account of favourable orders for the subsequent periods.

- The services received by NOSPL would qualify as input services and NOSPL was eligible to avail credit and claim refund in terms of Rule 5 of the Cenvat Credit Rules, 2004. Therefore, the entire exercise results in revenue neutrality.

Observations of Hon’ble Apex Court (1)

- NOSPL had operational or functional control over the seconded employees.
- However, the seconded employees continued to be on the payrolls of the overseas employer and since the seconded employees were not performing the jobs related to employer’s business, NOSPL had to necessarily reimburse the salaries to the overseas employer.
- There is no single determinative factor while deciding whether an arrangement is a contract for service or contract of service.
- The overseas entity deploys its employee in relation to its business and upon cessation of the agreement, the seconded employees return to their foreign employer or are deployed on some other secondment.
- The quid pro quo for the secondment agreement is the benefit of experts for limited period.

Observations of Hon’ble Apex Court (2)

- With respect to the argument of revenue neutrality for setting aside the demand, the precedential value in the decisions of **SRF Ltd. v. Commissioner - 2016 (331) E.L.T. A138 (S.C.)** and **CCE, Pune v. Coca-Cola India Pvt. Ltd., 2007 (213) E.L.T. 490 (S.C.)** is limited.

- The revenue was not justified in invoking the extended period of limitation to fasten liability as there were previous orders of the Tribunal and NOSPL’s own favorable order for subsequent period.

Way forward – General Issues

- What is to be done for future transactions?
- Go back to drawing board, review all secondment agreements and identify the factual similarities/ dissimilarities vis-à-vis the facts before the Hon'ble Supreme Court
- Whether the factum of payment (salary) being made directly to the employee in India will make any difference?

Way Forward – Past Period – Service Tax

- If service tax is paid today, can refund be claimed?
  - Section 142(3) of the CGST Act:-

    Every claim for refund filed by any person before, on or after the appointed day, for refund of any amount of CENVAT credit, duty, tax, interest or any other amount paid under the existing law, shall be disposed of in accordance with the provisions of existing law and any amount eventually accruing to him shall be paid in cash, notwithstanding anything to the contrary contained under the provisions of existing law other than the provisions of sub-section (2) of section 11B of the Central Excise Act, 1944: (1 of 1944.)
- If service tax demand has been made invoking extended period – Can the same be defended?
- Any argument available against payment of interest?

Way Forward – Past Period - GST

- What should be the position adopted for tax not paid in the GST regime?
- If tax is paid today, can ITC be availed? If yes, on the basis of what document?
- Can ITC be utilized for payment of tax?
- Cross Charge between different registrations under GST – Whether to include employee costs?

UNION OF INDIA & ORS. VERSUS VKC FOOTSTEPS INDIA PVT LTD.

[2021 (9) TMI 626]

Issue

- Whether in case of inverted rated structure, can the taxpayer get a refund accumulated input tax credit availed on input services under Section 54(3) of the CGST Act?

- Whether Rule 89(5) retrospective amendment is ultra vires Section 54(3) of the CGST Act?

Section 54(3) – Refund of tax.

(3) Subject to the provisions of sub-section (10), a registered person may claim refund of **any unutilised input tax credit** at the end of any tax period:

Provided that no refund of unutilised input tax credit shall be allowed in **cases** other than–

(i) zero rated supplies made without payment of tax;

(ii) where the credit has accumulated on account of **rate of tax** on inputs being higher than the rate of tax on output supplies (other than nil rated or fully exempt supplies), except supplies of goods or services or both as may be notified by the Government on the recommendations of the Council:

…

Rule 89(5) – As introduced

(5) In the case of refund on account of inverted duty structure, refund of input tax credit shall be granted as per the following formula:-

Maximum Refund Amount = {(Turnover of inverted rated supply of goods and services) x Net ITC ÷ Adjusted Total Turnover} - tax payable on such inverted rated supply of goods and services.

Explanation.- For the purposes of this sub rule, the expressions “Net ITC” and “Adjusted Total turnover” shall have the same meanings as assigned to them in sub-rule (4).

Net ITC as per Rule 89(4) –

(B) "Net ITC" means input tax credit availed on **inputs and input services** during the relevant period other than the input tax credit availed for which refund is claimed under sub-rules (4A) or (4B) or both;

Rule 89(5) – Post 2018 Amendment (Retrospective)

(5) In the case of refund on account of inverted duty structure, refund of input tax credit shall be granted as per the following formula:-

Maximum Refund Amount = {(Turnover of inverted rated supply of goods and services) x Net ITC ÷ Adjusted Total Turnover} - tax payable on such inverted rated supply of goods and services.

Explanation: For the purposes of this sub-rule, the expressions –

(a) Net ITC shall mean input tax credit availed on **inputs** during the relevant period other than the input tax credit availed for which refund is claimed under sub-rules (4A) or (4B) or both; and

(b) "Adjusted Total turnover" and "relevant period" shall have the same meaning as assigned to them in sub-rule (4)

History

- In 2019, the Division Bench of the Gujarat High Court in the matter of **VKC Footsteps India Private Limited** upheld the challenge to Rule 89(5) and held that it is ultra vires the Section 54(3) of the CGST Act, 2017.

- On the other hand, a division bench of the Madras High Court in the case **of Tvl. Transtonnelstroy Afcons Joint Venture Vs Others** upheld Rule 89(5) of the CGST Rules and restricted the refund of input tax credit only on the input goods.

- With contradictory judgments coming from the Madras High Court and the Gujarat High Court, the matter reached the Supreme Court for finality.

Arguments by the Revenue along with UOI

- The distinction between the Goods and Services is reasonable and not arbitrary. Goods and services are distinct at the constitutional level as well,
- If the intention was to allow refund on input service, the same could have been specified clearly and expressly, which is missing.
- The expression employed in the main clause of Section 54(3) is ‘claim’ whereas the provisos restrict this ambit by the use of the expression ‘allowed’
- The main clause of Section 54(3) uses the expression “a registered person may claim refund” while on the other hand, the three provisos have employed a restrictive expression or a negative expression, that is, “no refund of unutilized ITC shall be allowed”;

Arguments by the Assessee

- The intention and the objective of the GST was to allow seamless flow of input tax credit.
- Section 54(3) of the CGST Act, 2017 uses the words “any unutilised input tax credit”. “Any” means “all” unutilized input tax paid on both the input goods and input services.
- The proviso indicates the ‘cases’ in which refund will be eligible. The expression ‘cases’ means situations or circumstances;
- Clause (ii) of the first proviso commences with the expression “where” which signifies that what follows will be a situation or aspect of something;
- Clause (ii) of the proviso uses the words “on account of” which means by reason of or because of.

Observations of Hon’ble Apex Court (1)

- Refund is not a constitutional right but a statutory right and therefore, the legislature, in its wisdom, and through statute, can decide how the refund is to be granted.
- Under proviso (ii) to Section 54(3) of the CGST Act, 2017, the legislature has used the word “inputs” which, as defined in the act, means only input goods. Therefore, there is no disharmony between Rule 89(5) of the CGST Rules and Section 54(3) of the CGST Act. If the legislature had any intention of giving the credit of tax paid on input goods and input services, the legislature would not have restricted the scope of refund in inverted duty structure to only “inputs”.
- Rule 89(5) was framed under Section 164 of the CGST Act and therefore, Rule 89(5) is not without jurisdiction.

Observations of Hon’ble Apex Court (2)

- An inequitable and discriminatory provision in tax legislation does not make it discriminatory per se. The court observed that input goods and input services constitute two different classes and therefore, the argument that equals are being treated unequally does not hold water.
- The Supreme Court did acknowledge that the formula in Rule 89(5) of the CGST Rules 2017 is inequitable and therefore, urged the GST Council to take the necessary corrective action.

Rule 89(5) – Post 2022 Amendment

(5) In the case of refund on account of inverted duty structure, refund of input tax credit shall be granted as per the following formula:-

Maximum Refund Amount = {(Turnover of inverted rated supply of goods and services) x Net ITC ÷ Adjusted Total Turnover} - {tax payable on such inverted rated supply of goods and services x **(Net ITC÷ ITC availed on inputs and input services)}.**

Explanation: For the purposes of this sub-rule, the expressions –

(a) Net ITC shall mean input tax credit availed on inputs during the relevant period other than the input tax credit availed for which refund is claimed under sub-rules (4A) or (4B) or both; and

(b) "Adjusted Total turnover" and "relevant period" shall have the same meaning as assigned to them in sub-rule (4)

Issues

- The basic objective and purpose of implementing GST has been frustrated:
  - Sticking credit at the hands of supplier to exporter. Taxes will also get exported.
  - An assessee having more backward integration will have more advantage than an assessee purchasing immediate inputs for manufacture.
  - An assessee having multiple line of business will be benefit than an assessee having single business.
- Whether amendment in the formula is retrospective?
  - Circular No. 181/13/2022-GST dated 10.11.2022 clarified that the amendment will apply prospectively in respect of refund claims filed on or after 05.07.2022.

Radha Krishan Industries v. State of Himachal Pradesh

[2021 (4) TMI 837]

Issue

- Whether provisional attachment can made under Section 83 of the Himachal Pradesh Goods and Service Tax Act, 2017 and Rule 159 of Himachal Pradesh Goods and Service Tax Rules, 2017?

- Whether a writ petition challenging the orders of provisional attachment was maintainable under Article 226 of the Constitution before the High Court?

Section 83 – Provisional attachment to protect revenue in certain cases. (As introduced)

(1) Where during the pendency of any proceedings under section 62 or section 63 or section 64 or section 67 or section 73 or section 74, the Commissioner is of the opinion that for the purpose of protecting the interest of the Government revenue, it is necessary so to do, he may, by order in writing attach provisionally any property, including bank account, belonging to the taxable person in such manner as may be prescribed.

(2) Every such provisional attachment shall cease to have effect after the expiry of a period of one year from the date of the order made under sub-section (1).

Section 83 - Provisional attachment to protect revenue in certain cases. (After amendment in 2021)

(1) Where, after the initiation of any proceeding under Chapter XII, Chapter XIV or Chapter XV, the Commissioner is of the opinion that for the purpose of protecting the interest of the Government revenue it is necessary so to do, he may, by order in writing, attach provisionally, any property, including bank account, belonging to the taxable person or any person specified in sub-section (1A) of section 122, in such manner as may be prescribed.

(2) Every such provisional attachment shall cease to have effect after the expiry of a period of one year from the date of the order made under sub-section (1).

Rule 159 - Provisional attachment of property

(1) Where the Commissioner decides to attach any property, including bank account in accordance with the provisions of section 83, he shall pass an order in FORM GST DRC-22 to that effect mentioning therein, the details of property which is attached.

(2) The Commissioner shall send a copy of the order of attachment in FORM GST DRC-22 to the concerned Revenue Authority or Transport Authority or any such Authority to place encumbrance on the said movable or immovable property, which shall be removed only on the written instructions from the Commissioner to that effect. and a copy of such order shall also be sent to the person whose property is being attached under section 83.

(3) Where the property attached is of perishable or hazardous nature, and if the person, whose property has been attached, pays an amount equivalent to the market price of such property or the amount that is or may become payable by such person, whichever is lower, then such property shall be released forthwith, by an order in FORM GST DRC-23, on proof of payment.

Rule 159 - Provisional attachment of property

(4) Where such person fails to pay the amount referred to in sub-rule (3) in respect of the said property of perishable or hazardous nature, the Commissioner may dispose of such property and the amount realized thereby shall be adjusted against the tax, interest, penalty, fee or any other amount payable by such person.

(5) Any person whose property is attached may file an objection in FORM GST DRC-22A to the effect that the property attached was or is not liable to attachment, and the Commissioner may, after affording an opportunity of being heard to the person filing the objection, release the said property by an order in FORM GST DRC- 23.

(6) The Commissioner may, upon being satisfied that the property was, or is no longer liable for attachment, release such property by issuing an order in FORM GST DRC- 23.

Arguments by Department

- The petition should be dismissed in existence of an alternate remedy.
- The necessary prerequisites for triggering Section 83 of the HPGST Act were complied with.
- The Appellant had not sought any prior stay on the orders of provisional attachment and thus, it is not conceivable that the business of the Appellant has become paralyzed due to these orders.

Arguments by Assessee

- Writ Petition is maintainable as there is no alternate remedy.
- The power of provisional attachment under Section 83 of the HPGST Act is a drastic power which must be exercised with extreme care and caution.
- Further, bank accounts should be attached as the last resort when no other immovable asset is available.
- The provisional attachment made prior to initiation of proceedings were without jurisdiction and violative of Section 83.

Observations of the Hon’ble Supreme Court (1)

- The Joint Commissioner while ordering a provisional attachment under section 83 was acting as a delegate of the Commissioner in pursuance of the delegation effected under Section 5(3).
- Thus, an appeal against the order of provisional attachment was not available under Section 107 (1)
- The writ petition before the High Court under Article 226 of the Constitution challenging the order of provisional attachment was maintainable.

Observations of the Hon’ble Supreme Court (2)

- The power to order a provisional attachment of the property of the taxable person including a bank account is draconian in nature and the conditions which are prescribed by the statute for a valid exercise of the power must be strictly fulfilled.
- The exercise of the power for ordering a provisional attachment must be preceded by the formation of an opinion by the Commissioner that it is necessary so to do for the purpose of protecting the interest of the government revenue.
- There should be tangible material that the Assessee is likely to defeat the demand, if any.
- The expression “necessary so to do for protecting the revenue” implicates that the interests of the government revenue cannot be protected without ordering a provisional attachment.

Observations of the Hon’ble Supreme Court (3)

- Under the provisions of Rule 159(5), the person whose property is attached is entitled to dual procedural safeguards: (a) An entitlement to submit objections on the ground that the property was or is not liable to attachment; and (b) An opportunity of being heard; There has been a breach of the mandatory requirement of Rule 159(5) and the Commissioner was clearly misconceived in law in coming into conclusion that he had a discretion on whether or not to grant an opportunity of being heard;.
- The Commissioner is duty bound to deal with the objections to the attachment by passing a reasoned order which must be communicated to the taxable person whose property is attached;
- A final order having been passed under Section 74(9), the proceedings under Section 74 are no longer pending as a result of which the provisional attachment must come to an end.

Way forward

- Whether bank account is a property which can be attached?
- Whether the balance lying at the date of order is attached or even subsequent credits are also liable to be attached?
- Attachment of CC/OD account -
  - Bindal Smelting v. ADG, DGGI, 2020-VIL-17-P&H

Thank You