30 October 2024

EY Tax Alert

HC validates "Nil value" for import of services absence self-invoice in light of CBIC Circular

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Executive summary

This Tax Alert summarizes the recent Delhi High Court (HC) ruling[1] disposing Writ Petitions in a batch matter on valuation of import of services relating to secondment of employees from overseas entity.

Revenue had sought to tax the service by including in transaction value, the consideration by way of expenses incurred in foreign currency (salary paid by overseas company and recovered from Indian entity) and in Indian Rupees (salary paid to expats in India).

The key observations of the HC are:

- Although payments were made, no invoices were generated by Indian entity for services provided by related foreign entities.
- Para 3.7 of Circular 210/4/2024-GST clarified that where no invoice is generated by Indian entity for services rendered by its foreign affiliate, the value of such services can be deemed as "Nil" and treated as open market value as per the second proviso to rule 28.
- In view of the above and in light of the explicit terms of the Circular, the value of the service rendered would have to be treated as "Nil".
- In one of the cases, the taxpayer had not only paid tax on a reverse charge basis but had also taken credit of the same. Once the position to govern all assessees pan-India came to be clarified by the CBIC, the continuation of penalty proceedings or for that matter the imposition of interest would not sustain.

Accordingly, HC quashed the show cause notices to the extent the issue relates to secondment of employees.

[1] TS-697-HC(DEL)-2024-GST

Background

- Assessee, registered under Goods and Services Tax (GST) in various States, entered into an individual employment agreement with employees of its overseas parent entity.
- A Show Cause Notice (SCN) was issued by Revenue demanding tax, interest and penalty from assessee for placement of foreign expatriates in India, treating it as import of services from the parent entity.
- Such SCN was issued following the Supreme Court (SC) decision in case of Northern Operating Systems[2] wherein it was held that secondment of employees to an Indian entity is considered as manpower supply by overseas group company and thus, liable to tax.
- Aggrieved, assessee filed a writ petition before the Delhi High Court (HC).

Assessee's Contentions

- The judgment in Northern Operating System could not be *ipso facto* applied to all cases disregarding specific factual scenario.
- For transactions between related parties, second proviso to Rule 28 of the Central Goods and Services Tax Rules, 2017 (CGST Rules) stipulates that when the recipient is entitled for full input tax credit (ITC), the value declared in the invoice shall be deemed to be open market value (OMV) for goods and services.
- Circular No. 210/4/2024 – GST issued by CBIC, at para 3.7 clarified that if a foreign affiliate renders services to a related domestic entity and where full ITC is available to the recipient, the value declared in the self-invoice by the domestic entity may be deemed as OMV as per the second proviso to Rule 28.

  Circular further clarified that in case where no invoice is issued, the value of such services may be treated as 'Nil' and regarded as OMV..
- Basis the abovementioned clarifications, the impugned SCN would not be sustainable.

Revenue's Contentions

- Assessee has admitted that the seconded employees are from its overseas parent company, hired for a short period before being repatriated. Thus, there is no employer-employee relationship between the assessee and seconded employees.
- This assertion is also supported by the employment contract between the assessee and seconded employee.
- The transaction value of supply of manpower service shall be the total consideration actually paid or payable by the assessee including the expenses incurred in foreign currency (salary paid by Overseas Group Company in Japan and charged from the assessee) as well as in Indian Rupees (salary paid to expats in India).

High Court's Ruling

- Para 3.7 of the Circular clarified that where no invoice is raised by related domestic entity for services rendered by its foreign affiliate, the value of such services is deemed to be 'Nil' and treated as OMV under second proviso to Rule 28.
- In the present case, although payments were made, no invoices were raised by the assessee for services provided by related foreign entities.
- While the correctness of the position as advocated in terms of the Circular may be questioned on the ground of whether it would be consistent with the statutory provisions or may be viewed as being contentious or contrary to the intent of the second proviso to Rule 28 itself, the Court is constrained to proceed further on the basis thereof. The Court so observed since it may possibly be asserted that the Circular is founded on the tenuous thread of parties choosing to either generate an invoice or simply avoid doing so.
- However, in the present matters, it is not for this Court to be boggled by or question the wisdom of the CBIC as the Circular in any case binds the Department.
- In the facts of the present writ petitions, it is conceded that no invoices were generated. In view of the above and in light of the explicit terms of the Circular, the value of the service rendered would have to be treated as "Nil".
- In one of the cases, the taxpayer had not only paid the tax on a reverse charge basis but had also taken credit of the same. Once the position to govern all assessees pan-India came to be clarified by the CBIC, the continuation of penalty proceedings or for that matter the imposition of interest would not sustain.
- In light of the stand taken by the CBIC, the taxpayer would have stood absolved from all tax liabilities and implications flowing from the Act.
- Accordingly, HC quashed the SCNs to the extent the issue relates to secondment of employees.

[2] (2022) 17 SCC 90

Comments

a. This is the first ruling wherein the HC has examined valuation aspect of secondment arrangement in light of Circular No. 210/4/2024.

b. Reading of the HC ruling, suggests that the relevance of second proviso to Rule 28 is not qua payment but qua the self-invoice.

c. It is relevant to note that the Circular referred to the case where services are provided on free of cost basis. It remains to be seen whether CBIC amends the Circular to clarify that Nil value basis no self- invoice being generated would apply only in case of supplies without commercial consideration.

d. Businesses, who have already paid tax along with interest and availed ITC of the tax so paid, may explore the possibility of claiming refund of interest, basis the ruling.

e. One will need to evaluate implication of HC ruling on various other services provided by related entities outside India to their Indian affiliates.

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