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Recent Rulings by Courts and Authorities

Supreme Court

Applicability of service tax on interchange fee confirmed with differing views of the Bench on treatment in the hands of the respective banks / parties

In a recent case of ***Commissioner of GST and Central Excise vs. Citi Bank***[1]**,** the Hon'ble Supreme Court evaluated the taxability of interchange fees in the hands of the issuing bank. In this case, the respondent (i.e., an issuing bank) received SCNs[2] for non-payment of service tax on interchange fee for the period October 2007 to March 2015 under the widened definition of 'credit card services' under Section 65(33a) and Section 66B(44) of the Service Tax Law[3].

While the Commissioner confirmed the liability to pay service tax, the Tribunal set aside the orders passed by the Commissioner by relying upon an earlier favourable decision of the Tribunal in the case of ABN Amro Bank.[4] The revenue authorities thereafter challenged the Tribunal's order before the Supreme Court. The respondent contended that interchange fee is in the nature of interest earned in the credit transaction and hence, not liable to service tax. The respondent also contended that the acquiring bank had paid service tax on MDR[5], which included the component of interchange fee and therefore, seeking service tax from issuing bank would lead to double taxation.

The Division Bench comprising of Justice K.M. Joseph and Justice S. Ravindra Bhat, took a split view and delivered two separate decisions.

As per Justice K.M. Joseph, the activity of the respondent squarely falls under the ambit of taxable services. He observed that interchange fee cannot be treated as 'interest' or 'transaction in money'. A service is performed by the issuing bank in relation to settlement of the amount transacted through the card, and it is only with the approval of the issuing bank that the acquiring bank permits the purchase, using the card. The issuing bank takes the 'risk' of validating a transaction, for which it earns a fee. He stated that 'issuing bank(s)' and 'acquiring bank(s)' are rendering separate services and service tax is a value added tax, therefore, payable on each separate service. The concept of value added tax cannot mean that if tax is already paid by the acquiring bank on MDR, the respondent should be called upon to pay service tax all over again, leading to double taxation. Justice K.M. Joseph remanded the matter to the Tribunal to provide an opportunity to the respondent to produce material to show that the acquiring bank has discharged the service tax liability on the interchange fee (being a part of MDR).

While Justice S. Ravindra Bhat concurred with the view of Justice K.M. Joseph that the activity of the issuing bank falls within the ambit of taxable service and the same cannot be treated as an 'interest' or a 'transaction in money',

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1 Commissioner of GST and Central Excise vs. Citi Bank, (2021)133 taxmann.com 162 (SC)
2 Show cause notice
3 Chapter V of Finance Act, 1994 (as amended from time to time)
4 ABN Amro Bank vs. Commissioner of Central Excise and Customs, 2018 (7) TMI 1750 - CESTAT ALLAHABAD
5 Merchant discount rate

he, however, disagreed with the view that the issuing bank provided a separate service. He observed that the role of the issuing bank in the service provided by the acquiring bank to the merchant establishment was part of a single unified service falling under clause (iii) of section 65(33a) of the Service Tax Law and cannot be split as separate components. He held that the issuing bank is not required to pay service tax separately on the interchange fee as, it forms part of the MDR.

JSA Comments: While the Division Bench has given differing view, it is clear that that once tax is paid by the acquiring bank on interchange fee (as part of MDR), it cannot be again collected from issuing bank since that would lead to double taxation. However, it remains to be evaluated whether a single service should be split into separate components for the purpose of taxation. This ruling is likely to have an impact on various that are integrated in a manner where different components of such service may be inseparable from each other. A conclusive view on the same is awaited.

High Court

Validity of Section 16(2)(c) of the CGST Act[6]: Benefit of ITC[7] allowed subject to verification of documents relating to the transaction

In the case of ***LGW Industries and Others vs. Union of India[8],*** the petitioner, being the purchaser of goods, was denied the benefit of ITC under Section 16(2)(c) of the CGST Act, which states that availment of ITC by recipient of a supply is contingent upon payment of tax by the supplier. The revenue authorities issued SCN contending that the suppliers were fake and non-existent, and the petitioner did not verify the genuineness and identity of suppliers before undertaking transactions. The petitioners contended that it undertook necessary due diligence to the extent possible and all purchase invoices were duly reflected in GSTR-2A. Petitioners further submitted that they have paid the consideration and GST[9] through proper banking channel and there was nothing else the petitioners could do to ascertain the genuineness of the suppliers. The petitioners in support of their contention relied upon rulings under the erstwhile regime (VAT[10]) wherein, the purchaser was allowed the benefit of ITC even when the supplier of goods failed to pay GST to the Government without any fault of the purchaser.

Given the above, the High Court remanded the matter back to the revenue authorities to consider the documents relied on by the petitioner to prove genuineness of its purchases (including payment of value of goods and GST thereon to suppliers). The High Court held that if purchases are found to be genuine and were undertaken prior to cancellation of registration, benefit of ITC should be allowed to the petitioners.

The High Court observed that the issue in present case does not merit consideration of constitutional validity of Section 16(2)(c) of the CGST Act.

Authority for Advance Ruling ("AAR") / Appellate Authority for Advance Ruling ("AAAR")

Recovery of notice-period pay, parents' medi-claim premium, canteen charges, etc. from employees, subject to GST

In the matter of ***Bharat Oman Refineries Limited[11]***, the applicant was engaged in the business of refining of crude oil. The applicant sought Advance Ruling on several employee related issues which were evaluated by the AAR. The ruling issued by the AAR was challenged before the AAAR and the key observations of the AAAR are as follows:

6 Central Goods and Services Tax Act, 2017
7 Input tax credit
8 LGW Industries and Others vs. Union of India, 2021 (4) TMI 280 - CALCUTTA HIGH COURT
9 Goods and Services Tax
10 Value added tax
11 Bharat Oman Refineries Ltd., 2021 (12) TMI 999

(i) Whether GST is applicable on recovery of notice pay from an employee by the employer in lieu of notice period under Clause 5(e) of Schedule II of the CGST Act?

AAR held that GST is applicable on recovery of notice pay from an employee under clause 5(e) of Schedule II of CGST Act as, the employer is tolerating the act or situation of the employee not giving the notice for the agreed period of 30 days before leaving the service.

However, the AAAR held that notice pay is a form of compensation received by an employer for employee's premature exit and the same does not qualify as service of tolerating an act by employer. AAAR relied on the decision in the case of ***GE T &D India Ltd***[12] wherein it was observed that the employer cannot be said to have rendered any service and has merely facilitated the exit of the employee upon imposition of a cost upon him for the sudden exit. Therefore, AAAR held that GST is not payable on notice pay recovery.

(ii) Whether GST is applicable on the amount of premium of Group Medical Insurance Policy recovered for non-dependent parents of employees and retired employees on actual basis?

The AAR noted that Section 2(17)(b) of the CGST Act defines 'business' in an inclusive manner and includes all activities incidental and ancillary to trade, manufacture, profession or any other similar activity. AAR also observed that the Applicant did not act as a pure agent of insurance company but acted on principal-to-principal basis. Accordingly, AAR held that GST is payable on the recovery of insurance premium.

However, AAAR observed that the activity of providing medi-claim policy for the employees' non-dependent parents/ retired employees through insurance company neither satisfies the conditions of Section 7 to be held as "supply of service" nor is covered under the term "business" of Section 2(17) of CGST Act. Accordingly, facilitating medical insurance services to non-dependent parents and retired employees by recovering premium at actuals, cannot be considered as 'supply of service' under the CGST Act.

(iii) Whether GST is applicable on recovery of nominal amount for availing the facility of canteen?

AAR held that the recovery of nominal amount from employees for canteen facility will get covered under the broad definition of 'business' and hence, subject to GST.

However, it was observed that the applicant is required by law[13] to maintain canteen facilities for its employees and only facilitates this service without making any profit on such services. Therefore, AAAR held that the said service is not subject to GST.

(iv) Whether GST is applicable on recovery of telephone charges from the employees over and above the fixed rental charges payable to BSNL?

AAR held that recovery of telephone charges from the employees over and above the fixed rental charges will get covered under the broad definition of 'business' as the transaction is ancillary to the main business of the Applicant and hence, liable to pay GST.

However, AAAR held that the activity of providing telephone facility to employees through BSNL neither satisfies conditions of Section 7 to be held as "supply of service" nor it is covered under the term "business" of Section 2(17) of CGST Act and therefore, not subject to GST.

(v) Whether full ITC is available to the applicant in respect of inputs and input services pertaining to supply as mentioned in the aforementioned paras?

AAAR held that ITC of GST paid on telephone charges recovered from employees would not be available to the appellant as they are not providing any outward supply of telephone services and the facility is also not attributable to the purposes of their business in terms of Section 17(1) of the CGST Act. Further, ITC on GST paid to insurance provider will not be available as then same is excluded by virtue of Section 17(5) of the CGST Act whereas, ITC on GST paid to the canteen service provider will be available where the same is obligated under any law.

[12] GE T & D India Limited vs. Deputy Commissioner of Central Excise, 2020 (1) TMI 1096 - MADRAS HIGH COURT
[13] Section 46 of the Factories Act, 1948.

Agreement to sell cannot be treated as supply

In the case of ***Mohammad Arif Mohammad Latif*** [14]**,** the applicant was engaged in the trading of tendupatta, purchased from the Federation[15] and governed by the agreement executed by the applicant with the Federation. Some of the important clauses of the agreement are as follows:

i. The successful bidder was required to verify and establish the quality and usefulness of the goods for the purpose for which the said goods were to be procured. On acceptance of the quality, the payment for the same was to be made in instalments for subsequent delivery.

ii. In case the bidder was not able to make the payment, the goods were to be stored in the godown of the Federation in joint custody (of the Federation and successful bidder) till such time, the payment for the same was made in full.

iii. The goods were insured by the Federation, under the joint name of the Federation and the successful bidder, at the cost of the successful bidder.

The applicant paid the first two instalments (out of total four instalments) based on the invoices issued by the Federation. A fire took place in the godown and destroyed the goods stored therein. The claim for insurance was filled by the Federation and the insurance proceeds were received by the Federation. Subsequently, the Federation directed the applicant to pay the subsequent installments for the goods destroyed in the fire, after appropriating and adjusting the claim received from the insurance company. While computing the amount to be paid by the applicant, the Federation included GST, treating the destroyed goods to "have been supplied".

The AAR evaluated whether an "agreement to sale" amounts to "sale" as covered under Section 7 of CGST Act. AAR observed that supply under GST can only be of goods in existence and taking joint custody of goods by applicant shall not amount to supply if the invoice of the said transaction is not issued. Further, the AAR observed that the supply of goods cannot happen without the movement of possession of goods from one person to another. The provisions for ascertaining 'time of supply' and 'place of supply' also corroborates that CGST Act envisages delivery of goods, whether physically or constructively, by delivery of documents of title of goods supplied.

AAR also highlighted that the expression "agreed to be made" under Section 7 of the CGST Act poses a serious problem, if it were to be interpreted that mere agreement to sale gives rise to supply. Drawing a distinction between treatment of advance for supply of goods and services, the Authority inferred that an "agreement to sell" does not mean supply as, an "agreement to sell" becomes a supply only upon the sale of the goods since the definition of supply includes "sale". It was also observed that neither the risk in the goods nor the property in the goods were passed to the applicant as on date of fire and therefore, the risk remained with the Federation.

Vouchers are taxable as supply of goods and cannot be treated as actionable claims

In the case of ***Premier Sales Promotion Pvt. Ltd.,*** the applicant is involved in the business of providing marketing and support services, which is tailored based on customer requirements. During the course of business, the applicant received orders for supply of e-vouchers wherein, e-vouchers were sourced for such customers, basis the orders received and acted as an intermediary for buying and selling the e-vouchers.

The AAR[16] observed that actionable claims are unsecured debts, or it is a beneficial interest in a moveable property which can be enforced in a civil court. It was noted that vouchers are not covered under the ambit of actionable claims as, the same are not debt. The AAR held that vouchers squarely fall under para 1(a) of Schedule II of the CGST Act which states that, any transfer of title in goods is supply of goods and the same would be taxable at 18%.

The above was affirmed by the AAAR[17] wherein it was observed that the applicant is not the issuer of vouchers but a mere trader of the vouchers. The AAAR distinguished the ruling in the case of Kalyan Jewellers India Ltd.[18] wherein it was held that the gold voucher is not goods but an instrument for consideration as, the issuer of the

[14] Mohammad Arif Mohammad Latif, 2021 (12) TMI 321 Authority for Advance Ruling, Madhya Pradesh
[15] Madhya Pradesh State Minor Forest Produce (Trading and Development) Cooperative Federation Limited
[16] Premier Sales Promotion Pvt. Ltd., TS-384-AAR(KAR)-2021-GST
[17] Premier Sales Promotion Pvt. Ltd., TS-714-AAAR(KAR)-2021-GST
[18] Kalyan Jewellers India Ltd., TS-131-AAAR(TN)-2021-GST

voucher and supplier of the goods was the applicant itself. Therefore, the AAAR held that buy and sell of vouchers is supply of goods and not an actionable claim.

JSA Comments: The provisions of the GST Law clearly provides that the GST is payable on the underlying supply and not on the issuance of the voucher itself. Also, Section 13 of the IGST Act[19] provides for the vouchers to take the colour of the underlying supply of goods as well as services, as the case may be. Therefore, covering vouchers under the ambit of supply of goods does not withstand the test of law and can be challenged.

Notifications

Amendments to the CGST Act

Notification No. 39/2021-Central Tax dated December 21,2021

Union Budget 2021 amended and inserted various provisions under the CGST Act through the Finance Act, 2021, which are notified vide this notification (effective from January 1, 2022). The key amendments are as follows:

(i) Section 7 to include transaction between association and its member within the ambit of supply.

(ii) Section 16 amended to allow ITC only if supplier uploads invoices/ debit notes in Form GSTR-1 of the supplier and same are communicated to recipient i.e., ITC cannot be availed if the concerned transaction is not reported in GSTR 2B.

(iii) Explanation to Section 74 amended to exclude deemed conclusion of proceedings under Section 129 (Detention, seizure and release of goods and conveyances in transit) and Section 130 (Confiscation of goods or conveyances and levy of penalty) of the CGST Act.

(iv) Section 129 amended to enhance penalty to 200% instead of 100% in cases of detention, seizure and release of goods and conveyance in transit.

Extending the tenure of the National Anti-Profiteering Authority ("NAPA")

Notification No. 37/2021- Central Tax dated December 1, 2021

The tenure of NAPA has been increased by an additional one year. Therefore, NAPA will now remain in force till November 2022.

Amendment to the CGST Rules[20]

Notification Nos. 37/2021- Central Tax, 38/2021-Central Tax and 40/2021 – Central Tax dated December 29, 2021

CGST Rules are amended to be aligned with the amendments made to the CGST Act (effective from January 1, 2022). The key amendments are as follows:

- Rule 36(4) has been substituted to provide that ITC will not be available to the registered person unless such invoice and debit note has been reflected in GSTR 2B of said person.
- The due date for filing annual return in Form GSTR 9 and reconciliation statement in Form GSTR 9C for FY 2020-21 extended to February 28, 2022.
- Rule 142 that provides for the issuance of notice and order for demands under the CGST Act has been amended to the effect that if the concerned person makes the payment of penalty as specified in the notice issued under Section 129(3) (i.e., 200% of the tax payable in the general case) within a period of seven days from the date

[19] Integrated Goods and Services Tax Act, 2017
[20] Central Goods and Services Tax Rules, 2017

of issuance of notice but before the issuance of the order and intimate the officer in FORM DRC 03 then the officer is to issue an order in FORM DRC 05 concluding the proceedings in respect of the given notice.

- New Rule 144A has been inserted to provide for the recovery of the penalty imposed under Section 129 (E-way bill violations) if not paid voluntarily within 15 days from the receipt of the order. The said recovery shall be made by way of an auction of the goods/conveyance that have been seized. Rule 154 has been substituted to provide for the appropriation of the sale proceeds.
- Rule 159 has been amended to provide that the copy of the order of provisional attachment in FORM GST DRC-22 to be sent to the person whose property is being attached. Further, FORM GST DRC-22A has been notified in which the person whose property is being attached can file the objections before the Commissioner against the given attachment.
- Scope of Form GST DRC 03 widened to include payment of GST on account of issuance of Form GST DRC 01A, mismatches between Form GSTR 1 and Form GSTR 3B and Form GSTR 2B and Form GSTR 3B, etc.
- Various other amendments to the CGST Rules such as, Aadhar Authentication for taxpayers, prescription of RFD-01 for refund of taxes paid in wrong head, etc. are made.

Alignment of HSN[21] under Customs and GST[22]

The WCO Convention on Harmonized Commodity Description and Coding System has published HS 2022 to facilitate standardization of trade documentation and transmission of data across signatory countries. HSN also forms the basis of the Customs Tariff as well as GST Tariff in India. Therefore, the CBIC[23] has issued various notifications under the GST Law and Customs Law for alignment of the HSN as per HS 2022, and an 8-digit correlation document for the purpose of transition.

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21 Harmonised System of Nomenclature
22 Notification No. 18/2021 – Central Tax (Rate) dated December 28, 2021 and Notification Nos. 55, 56,58,59, 60/2021 – Customs dated December 29, 2021
23 Central Board of Indirect Taxes and Customs