

## INTERPRETING BASIC PROVISIONS OF GST THROUGH JUDICIAL DECISIONS



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### 1. Recipient vis-à-vis Agent - West Bengal Agro Industries Corporation Ltd. (Order No. 15/WBAAR/2022-23 dated 22nd December, 2022) (WB)

**The applicant working as a “Project Implementing Agency” is covered within the meaning of “recipient” making supplies to the State Government Department is required to issue a separate tax invoice for the entire contract value and not merely for the fees/commission.**

Facts:

The applicant is a Government undertaking that undertakes civil works as “Executive Agency or Project Implementing Agency” entrusted by various Administrative Departments of Government of West Bengal in the development of rural infrastructure.

On receiving a request for submission of an estimate from any Administrative Department, the applicant prepares and submits the estimate for financial and administrative approval. After getting the approval, the applicant enters into an agreement with the concerned Department. The applicant, thereafter, invites tenders and enters into an agreement with the selected supplier / contractor.

The applicant further appoints different suppliers / contractors to get the work done. The applicant monitors and supervises the work to ensure that it conforms to the specifications.

It is the contention of the applicant that the property in goods used in execution of works is directly transferred from contractor to the Department concerned and the role of the applicant is similar to an “agent”. Therefore, the applicant is required to issue tax invoice only for Agency fees.

The question raised by the applicant is – Whether the applicant is required to issue a tax invoice to the State Government on the contract value as determined by the Administrative Department where the applicant is acting as “Project Implementing Agency”?

#### **Ruling:**

The Authority observed that the applicant enters into an agreement with the contractor and so is liable to pay the consideration to the contractor. The Authority referred to the definition of “recipient of supply of goods or services or both” which has been defined under section 2(94) of CGST Act, 2017 to include an agent acting as such on behalf of the recipient in relation to goods or services or both supplied. In this context, the authority ruled that the applicant being an agent shall be the recipient of supply provided by contractor.

In view of the above findings, the Authority held that there are two separate supplies: the first one by the contractor to the applicant and the second one by the applicant to the department concerned though there is no value addition in respect of the second supply and ruled that the applicant while working as a 'Project Implementing Agency' is making supplies to State Government Department/ Directorate and therefore is required to issue tax invoice on the contract value as determined by the department.

**Comments:**

It is essential to note that the ruling while holding that the applicant is rendering a separate supply and therefore, needs to issue a tax invoice for the entire contract value has simultaneously held the applicant to be an agent. There seems to be a contradiction to that extent.

In this context, it is essential to refer Circular No. 159/15/2021 – GST which states that sub-contracting for a service is not an intermediary service. *“The supplier of main service may decide to outsource the supply of the main service, either fully or partly, to one or more sub-contractors. Such sub-contractor provides the main supply, either fully or a part thereof, and does not merely arrange or facilitate the main supply between the principal supplier and his customers, and therefore, clearly is not an intermediary”.*

Therefore, in my humble view, in the instant case, there is a separate supply between the applicant and the Department and the applicant on the Contractor on the rationale that –

- a) The Applicant has entered into two separate contracts on principal basis and is not merely acting as a facilitator of supply of main service
- b) Essentially, the applicant has sub-contracted the entire service to the Contractor and therefore, is not an agent in line with the clarification referred above.

However, the ruling is relevant in cases where an agent is acting on behalf of the supplier while receiving and rendering services. In such cases, the agent, on one hand discharges liability on the supplies rendered on behalf of the principal and on the other hand, claims input tax credit on the services received on behalf of the principal for rendering such services. This is on account of inclusion of “agent” within the definition of supplier as well as recipient of goods or services or both. For instance, this practice is typical in the case of shipping agents.

## 2. **Modern Insecticides Ltd. vs. Commissioner CGST [2023 (78) GSTL 423 (P & H.)]**

**Date of Order: 19th April, 2023**

**Amount deposited during search operation cannot be considered as voluntary and when no proceedings under section 74(1), the amount is liable to be refunded.**

**Facts:**

The petitioner is a manufacturer and exporter of pesticides. A search was conducted by the respondent at the factory premises of the petitioner on 5<sup>th</sup> March, 2020 and seized all the records lying there. The respondents created an artificial shortage of goods without conducting an actual stock count involving GST at Rs.34,04,855. Petitioner, under pressure from the respondents, deposited the said amount along with a penalty of Rs.5,10,728.

A second search was conducted on 15<sup>th</sup> January, 2021 wherein the Chartered Accountant and the Director of the petitioner were detained. They were released on deposit of Rs.2.15 crore paid by reversal of ITC and withdrawal of pending refund claim.

While multiple notices asking for voluminous details and summons were issued in the intervening period, no proceedings under section 74 were initiated. Being aggrieved, the petitioner preferred this petition seeking a refund of the amounts deposited in the absence of issuance of any show cause notice. It was the contention of the respondent that since the amount is deposited voluntarily, the question of refund does not arise. Respondent contended that the investigation is still under process and the necessary order under section 74(9) and 74(10) would be issued after completion.

Held:

Hon'ble High Court relying on the decision of *Delhi High Court in the case of Vallabh Textiles v. Senior Intelligence Officer and others, 2022 (145 taxmann.com 596)*, wherein the provisions of section 74(1) of CGST Act, 2017 were examined along with Rule 142 of CGST Rules, 2017 and Government Instructions dated 25<sup>th</sup> May, 2022 issued by CBIC held that the deposit cannot be taken to be voluntary. It held that since no proceedings under section 74 (1) of the CGST Act have been initiated till date, as per Rule 142 (1A) of CGST Rules, 2017, the department cannot even issue Form GST DRC-01A to ask the petitioner to make payment of tax, interest and penalty due. Accordingly, the respondents were directed to refund the amount of Rs.2.54 crore along with applicable interest.

Comments:

The above judgement while referring to the instructions by CBIC which were issued keeping in view the observations of Gujarat High Court in the case of *Bhumi Associate v. Union of India, 2021 (124 taxmann.com 429)* has elaborated on it. As per the judgment passed in *Bhumi Associate's case (supra)*, even if the assessee wants to make voluntary payment in the prescribed form, he/she should be advised to file the same the day after the search has ended and the concerned officers have left the premises of the assessee. The Court observed that the above instructions and observations have been made so that no unnecessary harassment is caused to the assessee.

The above referred decisions are important to note as safeguards in the light of ongoing proceedings and investigations being conducted.

### 3. **Dharmendra M. Jani v. Union of India [2023 151 taxmann.com 91 (Bombay)]**

**Date of Order: 6<sup>th</sup> June, 2023**

**Provisions of section 13(8)(b) and section 8(2) of IGST Act, 2017 are valid, legal and constitutional but to be confined in their operation to provisions of IGST Act only.**

Facts:

The petitioner is engaged in marketing and promotion services to customers located outside India. The Indian purchaser directly places an order on the overseas customer and overseas customer raises an invoice for sale on the Indian purchaser. The petitioner merely acts as an intermediary and received commission from the overseas customer in convertible foreign exchange.

As per section 13(8)(b) of IGST Act, 2017, the place of supply in case of an intermediary is the location of the service provider. Section 8(2) provides that supply of services where the location of supplier and place of supply of services are in the same State or Union Territory shall be treated as intra-state supply. Therefore, the services of the petitioner that are essentially export of services are subjected to tax as intra-state supply. The petitioner paid tax under protest and preferred this petition questioning the Constitutional validity of section 13(8)(b).

Earlier, the two-member bench was split in its decision and therefore the matter was referred to a third member.

Held:

The third member held that the provisions of section 13(8)(b) and section 8(2) are valid, legal and constitutional provided the provisions are confined in their operation to the IGST Act, 2017 and the same cannot be made applicable for levy of tax on services under CGST and MGST Acts.

**Comments:**

Confining the operation of provisions of section 13(8)(b) to IGST Act, 2017, an inference may be drawn that intermediary services provided by a supplier to an overseas customer shall not be liable to CGST and SGST and may not be liable to be IGST as well. Considering that levy of IGST is only on inter-state supplies and by virtue of section 8(2) read with section 13(8)(b), intermediary services are intra-state supplies.

The matter will be now placed before the Division bench for a final determination on the issue.

