

GST applicability on the TDS portion in case of import of service

1. Introduction

In the commercial world, it is not uncommon that sums may be paid tax-free (especially in case of sums paid to foreign parties), where tax is borne by payer himself. In said cases, a question would arise for computation of Goods and Services Tax (GST). Whether consideration and consequentially transaction value would include tax borne by payer is a question? This issue was also arisen in the case of **Magarpatta Township Development & Construction Co. Ltd. v. CCE [2016] 68 taxmann.com 285 (Mumbai - CESTAT)** in the Pre- GST Regime.

These issues require deep deliberation and therefore, this article is an attempt in this direction.

2. Issue under consideration_: Whether GST is payable on reverse charge basis on the TDS amount in case of payments made for import services where the invoice is raised net of TDS

3. Legal Backing:

3.1. Pre GST Regime

Magarpatta Township Development and Construction Co. Ltd reported in 2016 TIOL 660 CESTAT MUM

Facts

Section 67, read with section 66A, of the Finance Act, 1994, Rule 7 of the Service Tax (Determination of Value) Rules, 2006 and section 195A of the Income-tax Act, 1961 - Valuation of taxable services - Services received from outside India - Period prior to 1-7-2012 - Assessee-builder availed services of foreign architect - As per contract, income-tax was to be borne by assessee - Department demanded service tax under reverse charge on amount paid to foreign architect, after adding TDS/income-tax - Assessee argued that as per rule 7(1), service tax was payable on amount actually paid to foreign architect (viz. invoice amount, net of TDS/income-tax)

Held

As per erstwhile rule 7(1), in case of services received from outside India, value is equal to 'actual consideration charged for services provided or to be provided' - In this case, assessee had paid 'consideration as raised in invoice/bill' and had borne income-tax himself and said TDS/income-tax was not paid as consideration - Hence, service tax was rightly payable only on invoice amount [Paras 7 to 11] [In favour of assessee]

Similar Judgement includes:

Raigad vs. Jawaharlal Nehru Port Trust P. Ltd 2015 (40) STR 533 (Tri-Mum)

3.2. Other possible arguments taken into consideration :

3.2.1.appellant did not recover the amount of Income tax from the Foreign Service provider and hence it cannot be treated as consideration for services received.

3.2.2.the agreement entered into by the appellant with the foreign architect, amount to be paid to the foreign architect should be net of taxes.

3.2.3.appellant had discharged the consideration as charged in the invoice/bill.

3.2.4.there was nothing on record to indicate that the appellant had recovered the amount of Income tax paid by them (on such amount paid to the Foreign Service provider) and any other material to hold that the amount paid is consideration for services received from the service provider etc.

3.3. These judgements/arguments were based on combined reading of section 67 of the Finance Act 1944 and Rule 7 of service tax (Determination of Value) Rules 2006.

Section 67 states that the valuation of services *in a case where the provision of service is for a consideration in money, be the gross amount charged by the service provider for such service provided or to be provided by him.*

Rule 7 stated *Actual consideration to be the value of taxable service provided from outside India.*

Hence, it **was** pretty clear in case the invoice don't include TDS amount then, it is not part of valuation what is charged will be liable to tax up to June 30th, 2012.

3.4. With effect from 1st July Rule 7 as stated above has been omitted. Therefore, from 1st July, 2012 applying provisions of section 67(1)(ii) and definition of consideration in normal sense as per the Contract Act and inclusive definition of consideration in section 67 itself, it appears that TDS, being a statutory payment on behalf of the foreign company, would form part of the 'consideration' charged/received by the foreign company and therefore, same shall be included in the value of taxable service.

3.5. GST Regime

3.5.1. Section 15(1) of the CGST Act:

15. (1) The value of a supply of goods or services or both shall be the transaction value, which is the price actually paid or payable for the said supply of goods or services or both where the supplier and the recipient of the supply are not related and the price is the sole consideration for the supply.

3.5.2. Definition of consideration as per section 2(31) of the CGST Act:

(31) "consideration" in relation to the supply of goods or services or both includes—

- (a) any payment made or to be made, whether in money or otherwise, in respect of, in response to, or for the inducement of, the supply of goods or services or both, whether by the recipient or by any other person but shall not include any subsidy given by the Central Government or a State Government;
- (b) the monetary value of any act or forbearance, in respect of, in response to, or for the inducement of, the supply of goods or services or both, whether by the recipient or by any other person but shall not include any subsidy given by the Central Government or a State Government:

Provided that a deposit given in respect of the supply of goods or services or both shall not be considered as payment made for such supply unless the supplier applies such deposit as consideration for the said supply;

3.5.3. Section 15 (2)(b) of the CGST Act, 2017

any amount that the supplier is liable to pay in relation to such supply but which has been incurred by the recipient of the supply and not included in the price actually paid or payable for the goods or services or both. This aspect was not present earlier.

3.6. Relevant provisions under the Income-Tax Act, 1961

3.6.1. Tax deducted is income received.

198. All sums deducted in accordance with the foregoing provisions of this Chapter shall, for the purpose of computing the income of an assessee, be deemed to be income received:

Provided that the sum being the tax paid, under sub-section (1A) of section 192 for the purpose of computing the income of an assessee, shall not be deemed to be income received.

3.6.2. Income payable "net of tax".

195A. In a case other than that referred to in sub-section (1A) of section 192, where under an agreement or other arrangement, the tax chargeable on any income referred to in the foregoing provisions of this Chapter is to be borne by the person by whom the income is payable, then, for the purposes of deduction of tax under those provisions such income shall be increased to such amount as would, after deduction of tax thereon at the rates in force for the financial year in which such income is payable, be equal to the net amount payable under such agreement or arrangement.

4. Conclusion:

- 4.1. The service provider's income is subjected to income tax for services rendered in India. Such tax is discharged by the recipient as per provisions of the Income Tax Act by way of TDS i.e. TDS is just a method to discharge tax liability of supplier by the recipient.
- 4.2. TDS is *actually payable* by the recipient as per the contract. The liability of tax is discharged by the recipient on supplier's behalf and such a tax is also booked as an expense in the books of accounts of the recipient hence, it is an expense which is incurred by the importer and the same was not included in the price actually paid or payable for the goods or services or both.
- 4.3. TDS is payable *in respect of* supplies of services procured and hence it is a consideration as defined in section 2 (15) of the CGST Act. The same view is supported in [2009] 18 STT 312 (NEW DELHI - CESTAT) Commissioner of Central Excise, Jaipur-I vs. Louis Berger International Inc.
- 4.4. Further, in terms of section 9(3) of the CGST Act all the provisions of this Act shall apply to such recipient as if he is the person liable for paying the tax in relation to the supply of such goods or services or both covered by that section. Thus, by such legal fiction the consideration inclusive of income-tax deducted at source shall be assessable value for the purpose of the Act in the hands of the recipient. Since the terms spoke that the price of contract payable was net of taxes and taxes, if any payable, in addition to the price of contract was payable by the payer thereon as price of the contract; hence, in view of such factual aspect, the tax payable in India was to form part of contract price. Thus, consideration charged for the service provided shall include income-tax deducted at source as per terms of contract and is in accord with section 9 (3) of the CGST Act for the reason that net price of contract agreed to be paid to foreign consultant was to include income deducted at source thereon to be price also.
- 4.5. In light of the above underlined provisions in the GST regime, **the withholding tax will be liable to be subjected to GST**. The same view was supported by TVS Motor Company Limited[2012] 25 taxmann.com 475 (Chennai - CESTAT)
- 4.6. Also it would be pertinent to make a note that GST paid on reverse charge basis on TDS part is eligible for availment of credit subject to provisions related to availment of credit in the GST Laws thereby leading to no loss.

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