

ANALYSIS OF JUDGEMENT OF HON.
GUJARAT HIGH COURT IN THE CASE OF
GUJARAT CHAMBER OF COMMERCE AND
INDUSTRY V/S UNION OF INDIA DATED
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REASON FOR DISPUTE

- ▶ Section 2(102) of the GST Acts defines “service” to include anything other than goods.
- ▶ Hence it is a very wide definition
- ▶ The term “supply” has also been defined under Section 7 of the GST Acts by using the inclusive form of definition.
- ▶ The exclusion contained in Entry no. 5 of Schedule III to the GST Acts refers only to “sale of land”.
- ▶ Therefore the question arose as to whether in case of long term leasehold land, permanent assignment of leasehold rights in land can be taxed under the GST Acts.

DIFFERENCE BETWEEN LEASE AND ASSIGNMENT OF LEASEHOLD RIGHTS

- ▶ Section 7 of the GST Acts defining scope of supply expressly includes "lease".
- ▶ Grant of lease different from assignment of leasehold rights.
- ▶ In a lease or sub-lease transaction, the lessor retains reversionary interest in the property.
- ▶ In assignment of leasehold rights, the entire rights in the property are transferred lock, stock and barrel.
- ▶ Applicability of judgement restricted to transaction of assignment of leasehold rights.

WHAT WAS UNDERSTOOD AS “SERVICE” UNDER THE FINANCE ACT?

- ▶ In order to determine taxability of assignment of leasehold rights under the GST Acts, the High Court traced legislative history of the issue.
- ▶ It was noted that the definition of “service” under the Finance Act, 1994 excluded any transaction of transfer of title in immovable property.
- ▶ Judgement of Tribunal in the context of transfer of development rights in land was also taken into consideration.
- ▶ It was observed that it was this legal position that was carried forward under the GST Acts and Entry no. 5 of Schedule III to the GST Acts was required to be interpreted in this light.

STATEMENT OF OBJECTS AND REASONS OF GST BILL

- ▶ Hon. High Court relied upon the statement of objects and reasons for introduction of the Goods and Services Tax Bill in the Parliament wherein it was stated that the object was to subsume earlier taxes
- ▶ It was thus inferred that the idea was not to impose a new tax but to replace old taxes with a consolidated tax and therefore the earlier concept of what would constitute “service” would continue to be relevant.
- ▶ Reliance placed in this regard on the observation of Hon. Gujarat High Court in the case of *Munjaal Manishbhai Bhatt v/s Union of India (2022)* 104 GSTR 419 (Guj.)

THE MINUTES OF GST COUNCIL MEETING RELIED UPON

- ▶ In order to further buttress this reasoning, the High Court took cognizance of agenda to 5th GST Council meeting and the minutes of the 7th GST Council meeting.
- ▶ The agenda provided for proposal to impose GST on immovable property on the ground that there was no constitutional embargo in proposing such levy.
- ▶ It was observed that levy of stamp duty was on different aspect of the transaction.
- ▶ However in the meeting, considering the views of different States, it was decided to defer this proposal.

DIFFERENT CONNOTATIONS OF “PROPERTY”

- ▶ Definition of the term “property” as contained in corpus juris secundum was considered. The term was defined as depending on the context in which it is used.
- ▶ Firstly it is applied to external things that are objects of rights or estates i.e. the things that are the object of ownership and secondly it is applied to the rights or estates that a person may acquire in or to things.
- ▶ In legal parlance “property” is used to designate right of ownership or aggregate of rights to possess, use, enjoy and dispose of a thing and to exclude everyone else from interfering it.
- ▶ From this perspective, leasehold rights are nothing but interest in immovable property as per Section 105 read with Section 108(j) of the Transfer of Property Act, 1882.
- ▶ Sale of “land” should therefore include sale of “interest in land”.

“PROFIT A PENDRE”

- ▶ In so far as the transaction of assignment of leasehold rights along with appurtenant structure is concerned, it was held by Hon. High Court that this would constitute transfer of “profit a pendre” i.e. benefits arising out of land.
- ▶ Reliance was placed in this regard on the judgement of Hon. Supreme Court in the case of Anand Behera v/s State of Orissa AIR 1956 SC 17 as well as State of Orissa v/s Titaghur Paper Mills Co. Ltd. (1985) Supp. SCC 285.
- ▶ Benefits arising out of land are immovable property and therefore also the transaction would not be taxable.

FINAL CONCLUSION

- ▶ Thus, by assigning various reasons and upon interpretation of provisions of the GST Acts as well as its legislative history, it was held that assignment of leasehold rights was not a "supply" under the GST Acts.
- ▶ Principle of strict and literal interpretation of taxing statutes was reiterated.
- ▶ The show cause notices and orders levying such tax on assesseees were quashed and set aside.

EFFECT OF JUDGEMENT IN OTHER STATES

- ▶ At least in so far as the State of Gujarat is concerned, the authorities cannot impose tax on assignment of leasehold rights as the judgement of Hon. Gujarat High Court will be binding.
- ▶ What will be the impact of this judgement on assessments in other States? Whether judgement of Hon. Gujarat High Court binding?
- ▶ Judgement of Hon. Supreme Court in the case of Kusum Ingots & Alloys Ltd. v/s Union of India and Another (2004) 6 SCC 254

WHETHER SUPPLIER CAN STILL COLLECT TAX?

- ▶ With the general perception being that the Government is likely to challenge the judgement before Hon. Supreme Court, question is whether it is open for the supplier to collect tax on assignment of leasehold rights to safeguard his interest?
- ▶ Section 31 – Tax invoice to be issued in case of taxable supply
- ▶ Whether tax invoice can be issued and tax can be paid under protest till issue is settled by Hon. Supreme Court?

WHETHER TAX ALREADY PAID CAN BE REFUNDED?

- ▶ As a result of judgement of Hon. Gujarat High Court, refund can be claimed of tax already paid in respect of assignment of leasehold rights.
- ▶ However the refund application will be governed by provisions of Section 54 of the GST Acts.
- ▶ Time limit of 2 years will apply.
- ▶ Further, if tax is collected and paid then refund application can be filed only by a person who has actually borne the burden of tax.

EFFECT OF STAY OF JUDGEMENT

- ▶ If the Government challenges the judgement of Hon. Gujarat High Court and if suppose Hon. Supreme Court stays the operation of judgement, what would effect of such stay?
- ▶ Whether binding nature of judgement diminishes as a result of stay of operation?
- ▶ Whether demand gets revived as a result of stay?
- ▶ Following judgements are relevant:
 - (a) Shree Chamundi Mopeds Ltd. vs Church of South India Trust Association (1992) 3 SCC 1
 - (b) Principal Commissioner of Central Excise v/s Space Telelink Ltd. 2017 (355) ELT 189 (Del.).

WHETHER INPUT TAX CREDIT ADMISSIBLE?

- ▶ Since it was held by Hon. Gujarat High Court that the transaction of assignment of leasehold rights is not taxable, it did not go into the question of admissibility of input tax credit.
- ▶ If tax is charged then input tax credit should be admissible.
- ▶ Restrictions in clauses (c) and (d) of Section 17(5) would not be applicable as the service is not used for construction of immovable property.
- ▶ If assignment along with building, then there cannot be any scope of dispute.

ANALYSIS OF JUDGEMENT OF HON.
SUPREME COURT IN THE CASE OF BHARTI
AIRTEL LTD. V/S THE COMMISSIONER OF
CENTRAL EXCISE, PUNE DECIDED ON
20.11.2024.

ISSUE INVOLVED

- ▶ The issue before Hon. Supreme Court in the case of Bharti Airtel Ltd. (supra) was whether cellular service providers are entitled to claim Cenvat credit of duty paid on procurement of parts of telecommunication towers or not.
- ▶ While Hon. Bombay High Court had taken a view that mobile towers are immovable property and therefore Cenvat credit was not admissible, Hon. Delhi High Court took a view that the mobile towers are moveable property exigible to Cenvat credit. Matters from both these High Courts reached the doors of Hon. Supreme Court.
- ▶ The primary objection of the revenue for admissibility of credit was that telecommunication towers were immovable property and therefore Cenvat credit was not admissible in respect of such towers.

PARAMETERS LAID DOWN BY HON. SUPREME COURT

- ▶ Hon. Supreme Court has discussed the meaning of the phrase “immovable property” in detail. The definition of the phrase immovable property under the General Clauses Act, 1897 and the Transfer of Property Act, 1882 was considered.
- ▶ Thereafter the definition of the phrase “attached to earth” as given in Section 3 of the Transfer of Property Act, 1882 was referred to and analyzed in light of earlier judicial pronouncements.
- ▶ Hon. Court ultimately culled out the following 6 parameters for determining whether anything was “immovable property” or not –
 - ▶ (1) Nature of annexation
 - ▶ (2) Object of annexation
 - ▶ (3) Intendment of the parties
 - ▶ (4) Functionality test
 - ▶ (5) Permanency test
 - ▶ (6) Marketability test.

HOW PARAMETERS APPLIED TO FACTS OF THE CASE

- ▶ Applying these parameters, Hon. Supreme Court came to a conclusion that mobile towers were not immovable property.
- ▶ It was observed that mobile towers were brought to the site in completely knocked down condition and it was possible to dismantle the towers and take them to other sites.
- ▶ It was further observed that while the dismantling would entail some damage at the site, the damage would only be to components such as cables and there would not be any damage to the towers per se.
- ▶ It was held that the mobility and marketability of the towers would be retained. Hon. Supreme Court conclude that the affixation to the earth was only to maintain stability of the tower and to keep it wobble free.
- ▶ It was therefore held that Cenvat credit could not be denied to the cellular companies in respect of mobile towers by considering them to be immovable property.

APPLICABILITY TO GST REGIME

- ▶ Clauses (c) and (d) of Section 17(5) of the GST Acts disallow input tax credit in respect of works contract services/goods and services used in the construction of immovable property except plant and/or machinery.
- ▶ The entire dispute before Hon. Supreme Court in the case of Safari Retreats Pvt. Ltd. (supra) was the scope of the phrases “plant and machinery” as well as “plant or machinery” appearing in clauses (c) and (d) of Section 17(5).
- ▶ However whether something is plant and/or machinery would be relevant provided that what is being constructed is an immovable property. In other words clauses (c) and (d) of Section 17(5) of the GST Acts would get triggered only if what comes into existence is an immovable property. If no immovable property comes into existence then there cannot be an embargo on input tax credit under clauses (c) and (d) of Section 17(5) of the GST Acts.
- ▶ Therefore pre-fabricated buildings, temporary sheds, etc which qualify as moveable property as per the parameters laid down by Hon. Supreme Court in the case of Bharti Airtel Ltd. (supra) and therefore they will be eligible for claim of input tax credit under the GST law.
- ▶ Moreover, even if a particular thing is attached to a building, if the attachment is not permanent in terms of what has been held by Hon. Supreme Court, then input tax credit in relation to such thing can be claimed. For instance, air-conditioners while being attached to buildings would not become part of immovable property since they are easily detachable and therefore input tax credit in respect of air-conditioners would be available.

THANK YOU !