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Indian subsidiary engaged in providing software services to its foreign holding cannot be treated as merely establishment of a ‘distinct person’ – Delhi HC

27 September 2023

Summary

The Delhi High Court (HC) has held that the services provided by an Indian subsidiary to its parent company qualify as exports, and the subsidiary cannot be treated as the establishment of a 'distinct person'. The HC has cited the Central Board of Indirect Taxes and Customs' (CBIC's) circular, which clarifies that the supply of services by a subsidiary/sister concern/group concern of a foreign company incorporated in India to the establishments of the said foreign company located outside India, would not be treated as merely the establishment of distinct persons. Further, the HC has ruled that the respondent's submission that the petitioner acted as an intermediary is invalid since the services provided by the petitioner are on its own account and not facilitated by the provision of services from any third-party services provider.

Facts of the case

- Xilinx India Technology Services Private Limited (the petitioner) is a registered export-oriented unit (EOU) engaged in the export of information technology software services to its holding company. With respect to such services, the petitioner claimed the benefit of the export of services and filed a refund application.
- The department issued a show cause notice (SCN) and rejected the refund application on the ground that the petitioner and its holding company are the establishments of a single person, and hence, the services did not constitute as export of services.

Petitioner's contentions:

- The petitioner submitted that it was incorporated as an independent entity in India, and its supplies to its holding companies should be considered export of services.
- The petitioner referred to the CBIC's Circular No.161/17/2021-GST, which clarifies that a subsidiary incorporated in India under the Companies Act 2013 and its holding company incorporated outside India are independent entities. Therefore, they should not be treated as mere establishments of a distinct person.

Respondent's contentions:

- The respondent denied the petitioner's refund request without referring to the circular. Further, the respondent considered the petitioner as an intermediary, and hence, the services provided by the petitioner to its parent company would not qualify as exports.

Delhi HC's observations and order (W.P.(C) 11413/2023, Order dated 1 September 2023):

- **Interpretation of an independent entity:** The HC relied upon the SC's decision in the case of Bacha F. Guzdar, wherein it was held that the identity of an incorporated company is separate from that of its shareholders. Accordingly, the HC held that the petitioner is a distinct and independent legal entity.

- **Service provided by subsidiary company qualifies as export of service:** The HC cited the circular (supra) and held that there is no dispute that the services provided by a subsidiary of a foreign firm to its holding are not covered under Section 2(6)(v) of the IGST Act. Therefore, services provided by the petitioner to its parent company qualify as export of service.

- **Services provided on own account:** The HC noted that the services provided by the petitioner are on its own account and not facilitated by the provision of services from any third-party services provider. Therefore, the respondent's submission that the petitioner acted as an intermediary is invalid, considering the

petitioner provided services on a principal-to-principal basis.

Our comments

Under the service tax regime, the Gujarat HC, in the case of Linde Engineering India Pvt. Ltd., held that a company incorporated in India and its holding company incorporated outside India are both distinct persons. Therefore, being distinct artificial juridical persons, they cannot be treated as merely the establishments of the same company, and hence, the benefit of the export of services should be available. Although the decision pertains to the erstwhile regime, an analogy can be drawn under the GST regime, considering similar provisions.

Recently, the Tamil Nadu Authority for Advance Ruling (AAR), in the case of Luksha Consulting Private Limited, also held the same view.

The present ruling is in line with the above and will set precedence in similar matters. In this ruling, the Delhi HC was displeased with the department's manner of passing the impugned order without considering the settled law and further emphasised that these actions by the department not only increased the unnecessary cost of tax litigation but also eroded taxpayers' trust in the tax department. Hence, this ruling may discourage the Revenue authorities from issuing notices without carefully examining the relevant facts and provisions.

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