

TDS amount cannot be included in taxable value for levying service tax - CESTAT

15 September 2021



Summary

Central Excise and Services Tax Appellate Tribunal (CESTAT), Chennai observed that to comply with the income tax provisions, as per the accounting practice, the appellant has grossed up the tax deducted at source (TDS) amount with the actual consideration. The TDS is paid/deposited to the government by the appellant out of a statutory liability. Such activity of deducting the tax at source is a legal obligation and the amount so deducted cannot be taken as consideration for services rendered. Thus, CESTAT held that TDS amount cannot be included in the taxable value and set aside the demand.

Facts of the case

- The appellant¹ is engaged in the manufacture of motor vehicles and internal combustion (IC) engines.
- It had received technical consultancy services and project consultancy services from various service providers who were not having offices in India. Therefore, it had paid service tax under reverse charge mechanism on value excluding the tax deducted at source (TDS).
- The Department was of the view that the TDS portion should be included in the taxable value for discharging service tax. Thereafter, the demand for differential service tax, along with interest and penalty, was confirmed². Aggrieved, the appellant filed an appeal before the CESTAT³.
- **TDS to be borne by service recipient:** Based on the conditions mentioned in the agreement, it is agreed by the parties that TDS has to be borne by the appellant who is the service recipient.
- **TDS amount grossed up with actual consideration:** To comply with the income tax provisions, as per the accounting practice, the appellant has grossed up the TDS amount with the actual consideration⁵.
- **Deducting TDS is a legal obligation:** TDS is paid/deposited to the government by the appellant out of a statutory liability. Such activity of deducting the tax at source is a legal obligation and the amount so deducted cannot be taken as consideration for services rendered.
- **Amount agreed by parties shall be consideration:** The amount on which the parties have reached a consensus ad idem

CESTAT's observation and ruling⁴

¹ M/s. T.V.S. Motor Company Limited

² Order-in-Original No. 03/2013 dated 30.01.2013

³ Appeal No. 41077 of 2013

⁴ Final order no. 42277-42278/2021 dated 31 August 2021

⁵ Section 195 of the Income Tax Act, 1961

can only be the consideration for the services. Further, the amount of tax deducted varies and depends upon the rate in force. There is no agreement by the parties with regard to the amount of TDS that has to be deducted.

- **Compliance with statutory provisions cannot be considered as rendering of service:** There is no consent from the foreign counterpart to reduce his consideration by deducting the income tax liability from the agreed consideration. The appellants have thus grossed up the TDS and complied with the statutory obligation.
- **TDS amount not includable in taxable value:** The activity of deducting tax at source is an obligation under the statute. When the TDS is grossed up and borne by the assessee and the service provider receives only the actual consideration agreed between parties, in our view, the TDS amount cannot be included in the taxable value.

- **Demand set aside:** There is no liability to pay the differential tax, the issue of cum-tax benefit has no relevance and the demand confirmed cannot sustain and requires to be set aside.

Our comments:

Similar judgements were pronounced earlier by the Chennai⁶ and Mumbai⁷ benches of the CESTAT, wherein it has been categorically held that when the TDS amount has been borne by the assessee and only the consideration for the services as agreed upon by the parties has been paid to the service provider, the same cannot be included in the taxable value for determining the service tax liability.

Under the GST law, the value of taxable supply has been defined to include any taxes, duties, cesses, fees and charges levied under any law for the time being in force. Thus, it would be interesting to see whether the criteria laid down by the CESTAT would hold good even under the GST regime.

⁶ M/s. Hindustan Oil Exploration Co. Ltd. and M/s. Indian Additives Ltd.

⁷ M/s. Magarpatta Township Development and Construction Co. Ltd.

Contact us

To know more, please visit www.grantthornton.in or contact any of our offices as mentioned below:

NEW DELHI National Office, Outer Circle, L 41, Connaught Circus, New Delhi - 110001 T +91 11 4278 7070	NEW DELHI 6th Floor, Worldmark 2, Aerocity, New Delhi - 110037 T +91 11 4952 7400	BENGALURU 5th Floor, 65/2, Block A, BagmaneTridib, Bagmane Tech Park, CV Raman Nagar, Bengaluru - 560093 T+91 80 4243 0700	CHANDIGARH B-406A, 4th Floor, L&T Elante Office Building, Industrial Area Phase I, Chandigarh - 160002 T +91 172 4338 000	CHENNAI 9th Floor, A Wing, Prestige Polygon, 471 Anna Salai, Mylapore Division, Teynampet, Chennai – 600035 T +91 44 4294 0000
DEHRADUN Suite No 2211, 2nd Floor, Building 2000, Michigan Avenue, Doon Express Business Park, Subhash Nagar, Dehradun - 248002 T +91 135 2646 500	GURGAON 21st Floor, DLF Square, Jacaranda Marg, DLF Phase II, Gurgaon - 122002 T +91 124 462 8000	HYDERABAD 7th Floor, Block III, White House, Kundan Bagh, Begumpet, Hyderabad - 500016 T +91 40 6630 8200	KOCHI 6th Floor, Modayil Centre Point, Warriam Road Junction, MG Road Kochi - 682016 T +91 484 406 4541	KOLKATA 10C Hungerford Street, 5th Floor, Kolkata - 700017 T +91 33 4050 8000
MUMBAI 11th Floor, Tower II, One International Center, SB Marg Prabhadevi (W), Mumbai - 400013 T +91 22 6626 2600	MUMBAI Kaledonia, 1st Floor, C Wing, (Opposite J&J Office), Sahar Road, Andheri East, Mumbai - 400069 T +91 22 6176 7800	NOIDA Plot No 19A, 2nd Floor, Sector - 16A, Noida - 201301 T +91 120 485 5900	PUNE 3rd Floor, Unit No 309-312, West Wing, Nyati Unitree, Nagar Road, Yerwada Pune - 411006 T +91 20 6744 8800	

For more information or for any queries, write to us at gtbharat@in.gt.com



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