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Analysing developments impacting business

SUPPLIERS RESPONSIBLE TO CLASSIFY AND DETERMINE GST RATE OF GOODS | SUPREME COURT

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In a recent decision, the Hon'ble Supreme Court has held that since liability to pay tax under the Goods and Services Tax (**GST**) regime is on the supplier, the bidder/supplier must make inquiries and make an informed decision as to what would be the relevant Harmonised System (**HS**) classification of the goods and the applicable rate of tax. A tender or bidding process cannot be invalidated if the buyer has not specified applicable tax rate or bidders have adopted a different tax rate.

Background:

Diesel Locomotive Works (**DLW**), Varanasi - a Government of India entity issued a Notice of Invitation (**NOI**) for procurement of 'Turbo Wheel Impeller Balance Assembly'. M/s Bharat Forge Limited (**BFL**) participated in the tendering process and submitted its bid by applying GST at 18% and was ranked at L4 as per the procedure prescribed under the Public Procurement Policy of the Government of India. Other bidders in the tendering process who were ranked ahead of BFL applied the GST at the rate of 5% by adopting a different HS classification. BFL filed a writ petition before the Allahabad High Court contending that merely by adopting a wrong HS classification/ tax rate, they were denied benefits of 'Make in India' initiative of the Government of India, and therefore sought a direction to DLW to mention the correct HS classification of the product in the bidding document so that a level playing field is provided to all bidders.

The Hon'ble Allahabad High Court held that HS classification is integral to the tendering process. It further held that if the GST value is to be added in the 'base price' to arrive at the 'total price' of offer in a tender and is used to determine *inter-se* ranking in the selection process, it would be required to mention correct HS of the product in the NOI.

Being aggrieved with the above decision, Union of India filed the present SLP before the Supreme Court. The Apex court allowed the appeal and set aside the order of the High Court.

Key observations made by the Supreme Court are summarized as under:

- In case of a bid, the liability to pay tax under the GST regime is on the supplier. The supplier should determine the relevant HS classification and the rate of tax applicable. In a tender, the goal of the bidder ordinarily is to emerge successful and bag the contract. Similarly, the purchaser (being a government entity) is generally bound to accept the lowest bid, but for the reasons fair and legal.

- In the name of providing a level playing field, the State should not be obliged to undertake the ordeal of finding out the correct HS and the tax applicable for the product, which they wish to procure.
- This is more so because the liability to pay tax is squarely on the supplier and there are adequate safeguards and authorities under the GST law to best secure the interests of the revenue.
- GST, being an indirect tax, while it is open to a bidder to pass it on to the buyer (the appellant), nothing stands in the way of the bidder to partly or wholly, absorb the tax.

Basis the above, Hon'ble Supreme Court held that there is no duty on DLW to provide clarification on HS classification.

In addition to the above, the Apex Court also observed that the supplier of the goods and services, ie the successful bidder, is liable to pay the GST by filing returns and carrying out self-assessment. In order to ensure that the successful bidder pays the proper tax and to further ensure that there is no tax evasion, it is necessary that, **in all cases**, a copy of the document by which the contract is awarded containing all material details be forwarded to the concerned jurisdictional GST officer.

Comments:

While the aforesaid decision discussed in detail the tendering process and recognizes the independence of bidder for applying HS classification and rate of tax at the time of bidding process, it also emphasized the importance of determining appropriate classification and tax on the product at the time of bidding by mandating the tendering authority to share a copy of the contract with the jurisdictional GST officer of the successful bidder. Although the observation made by Supreme Court in in relation to DLW, the principle laid down by it would have far reaching impact on other Government tenders.

- *Dinesh Kumar Agrawal (Executive Director), and Pranay Sahay (Principal Associate)*

For any queries please contact: editors@khaitanco.com

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