
Gujarat High Court holds that an Indian subsidiary providing services to its parent outside India cannot be treated as establishment of a “distinct person” to deny benefit of exports

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In brief

In a recent writ petition¹ filed before the Gujarat High Court, it has been held that a subsidiary company in India providing services to its parent entity outside India would not be treated as the establishment of a “distinct person” and the benefit of export of service cannot be denied to them. The High Court has quashed the impugned show cause notice (SCN) issued by the Revenue Authorities, and as the SCN was issued without jurisdiction, the writ petition is maintainable under Article 226 of the Indian Constitution.

In detail

Facts

The petitioner is a company located in India and engaged in the business of providing consulting engineering services to its holding company located outside India, for which it has claimed the benefit of ‘export of services’ without payment of tax. Based on the observations of the service tax audit officer, a SCN was issued to the petitioner challenging the position adopted with respect to the export of services on the ground that the service recipient, i.e., the foreign parent company, is merely an

establishment of the same company.

Petitioner’s contentions

- The SCN is ultra vires and contrary to the provisions of the Finance Act, 1994 (Finance Act) and the Service Tax Rules, 1994 (ST Rules) framed thereunder, as the fundamental underlying principle for the exclusion of services provided by a service provider to its establishment in a non-taxable territory is that “one cannot render service to one’s own self.”
- Such a treatment would be against public interest, as it

would act as a deterrent to the thrust given to the export of services through various schemes such as “Served from India Scheme” and “Make in India.”

- The Revenue Authorities are seeking to bring within the ambit of service tax law, all services provided by any Indian Company to its holding company / group companies outside India in an arbitrary manner, although they would qualify as ‘export of service’, which is not liable for service tax.
- Explanation 3 to section 65B (44) of the Finance Act,

¹ R/Special Civil Application No. 12626 of 2018

read with Rule 6A of the ST Rules, stipulates the term “establishment” to mean a branch or agency or a representational office. The parent company is neither a branch nor an agency nor a representational office of the petitioner. The petitioner and the parent company are distinct legal entities.

Revenue’s contentions

- The writ petition is not maintainable under Article 226 of the Constitution of India, as it is challenging the issuance of the SCN, which is yet to be adjudicated by the competent authority.
- The issuance of SCN does not create a cause of action for filing a writ petition under Article 226 of the Constitution of India. It does not amount to an adverse order that affects the right of any party, unless the SCN has been issued by a person having no jurisdiction to do so, which is not so in the present case.
- Relying on some judgments by the Supreme Court,² the Revenue also contended that the SCN only expresses a *prima facie* opinion and the petitioner has failed to make a case of non-application of mind by the competent authority to issue the SCN.

High Court’s decision

The Gujarat High Court, while allowing the writ petition and quashing the SCN, held that the services rendered by the petitioner to its parent company outside India should be considered as “export of service”

as per Rule 6A of the ST Rules. Some of the key observations and rationale provided by the High Court are as follows:

Maintainability of writ

- It was held that the SCN has been issued without jurisdiction and the petition is maintainable under Article 226 of the Constitution of India by relying on the following Supreme Court decisions in the context of maintainability of writ, where an alternate remedy is available:
 - In a Supreme Court,³ decision, it was held that “the High Court has imposed upon itself certain restrictions one of which is that if an effective and efficacious remedy is available, the High Court would not normally exercise its jurisdiction. But the alternative remedy has been consistently held by this Court not to operate as a bar in at least three contingencies, namely, where the writ petition has been filed for the enforcement of any of the Fundamental Rights or where there has been a violation of the principle of natural justice or where the order or proceedings are wholly without jurisdiction or the vires of an Act is challenged.” The Supreme Court affirmed this position in several other decisions.⁴
 - However, in another decision, the Supreme Court⁵ held that the existence of an adequate

legal remedy was a factor to consider in the matter of maintainability of writs (also reiterated in another decision⁶). However, this proposition was qualified by the words, “unless there are good grounds therefore,” which indicate that an alternative remedy would not operate as an absolute bar and a writ petition under Article 226 of the Constitution of India could still be entertained in exceptional circumstances.

Other key observations

- The SCN is not tenable in law, as it is issued by invoking section 73 of the Finance Act, for extending the time limit for issuance of SCN on the ground of alleged wilful mis-statement or suppression of facts, when the petitioner cannot be said to have made any wilful mis-statement or suppressed any facts.
- The Revenue Authorities have assumed the jurisdiction on mere misinterpretation of the provisions of Explanation 3(b) to section 65B(44) of the Finance Act read with Rule 6A of the ST Rules. By no stretch of imagination can it be said that the petitioner rendering services to its parent company located outside India was service rendered to its other establishment, to deem it as a “distinct person,” as per the said Explanation.
- The petitioner, which is a company incorporated in India under the provisions of the Companies Act, 1956 and its holding company incorporated

² Special Director v. Mohd Ghulam Ghouse [2004] (164) ELT 141 (SC); Assistant Collector of Central Excise, Chandan Nagar, West Bengal v. Dunlop India Limited and Ors [1985] (19) ELT 22 (SC); Union of India and another v. Kunisetty Satyanarayana (Civil Appeal No.

5145 of 2006); Binani Cement v. Union of India [2014] (313) ELT 27 (Gujarat)

³ Whirlpool Corporation v. Registrar of Trademarks [1998] 8 SCC

⁴ The State of Uttar Pradesh v. Mohammad Nooh [1958] AIR 86; A. V. Venkateswaran, Collector of Customs Bombay v. Ramchand Sobhraj Wadhvani

and Another [1961] AIR 1506; Calcutta Discount Co. Limited v. ITO, Companies Dist [1961] AIR 372

⁵ Rashid Ahmed v. Municipal Board, Kairana [1950] AIR 163

⁶ K.S. Rashid and Son v. The Income-Tax Investigation Commission [1954] AIR 207

in Germany, are both distinct persons. Therefore, they cannot be treated to be establishments of the same company being distinct artificial juridical persons.

The takeaways

This is a welcome judgement by the Gujarat High Court, where it has intervened by allowing the writ petition filed by the petitioner and quashing the SCN issued by the Revenue Authorities. While the decision is pronounced in the context of

erstwhile service tax laws, as the provisions pertaining to the “export of services” (particularly, the condition relating to distinct persons) is same under the goods and services tax (GST) law, this decision assumes importance under GST too.

Therefore, this judgement is expected to discourage Revenue Authorities from issuing notices, disallowing export benefit where Indian companies provide services to foreign group companies, by alleging that they

are establishments of a distinct person. This decision is also expected to discourage ground-level GST officers from contesting/ rejecting GST refund claims filed by service exporters (particularly, in case of IT/ ITeS, BPO sector) on the ground that services are provided to establishments of the same entity.

Let's talk

For a deeper discussion of how this issue might affect your business, please contact your local PwC advisor

Our Offices

Ahmedabad

1701, 17th Floor, Shapath V,
Opp. Karnavati Club,
S G Highway,
Ahmedabad – 380051
Gujarat
+91-79 3091 7000

Bengaluru

6th Floor
Millenia Tower ‘D’
1 & 2, Murphy Road, Ulsoor,
Bengaluru – 560 008
Karnataka
+91-80 4079 7000

Chennai

8th Floor
Prestige Palladium Bayan
129-140 Greams Road
Chennai – 600 006
Tamil Nadu
+91 44 4228 5000

Hyderabad

Plot no. 77/A, 8-2-624/A/1, 4th
Floor, Road No. 10, Banjara Hills,
Hyderabad – 500034
Telangana
+91-40 44246000

Kolkata

56 & 57, Block DN.
Ground Floor, A- Wing
Sector - V, Salt Lake
Kolkata – 700 091
West Bengal
+91-033 2357 9101/
4400 1111

Mumbai

PwC House
Plot No. 18A,
Guru Nanak Road (Station Road),
Bandra (West), Mumbai – 400 050
Maharashtra
+91-22 6689 1000

Gurgaon

Building No. 10, Tower - C
17th & 18th Floor,
DLF Cyber City,
Gurgaon – 122002
Haryana
+91-124 330 6000

Pune

7th Floor, Tower A - Wing 1,
Business Bay, Airport Road,
Yerwada, Pune – 411 006
Maharashtra
+91-20 4100 4444

For more information

Contact us at
pwctr.knowledgemanagement@in.pwc.com

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