Deloitte.

Tax Alert | Delivering clarity

8 November 2021

Commission received for recruitment of Indian students for foreign universities not liable for payment of service tax

The Central Excise and Service Tax Appellate Tribunal (CESTAT), New Delhi, has held that commission received by Indian sub-contractor from foreign contractor for recruitment of Indian students for foreign universities would be considered as export of services and not 'intermediary' services.

Facts of the case

- The appellant[1] is a subsidiary of M/s IDP, Australia in India.
- The National Code of Australia requires Australian universities to recruit students of high quality. Accordingly, the universities entered into an agreement with M/s IDP, Australia for this purpose.
- The universities pay a certain percentage of the tuition fee to M/s IDP, Australia for the services.
- M/s IDP, Australia has entered into an agreement with the appellant to help recruit students from India, for which M/s IDP, Australia paid a commission to the appellant.
- The appellant treated the services provided by it to IDP, Australia as export of services under the erstwhile service tax law.
- However, the Directorate General, Central Excise Intelligence (DGCEI) was of the view that the appellant was acting as an 'intermediary' between M/s IDP, Australia and the students, and was liable to discharge service tax on the commission received.

Contentions of the appellant

- The appellant is not arranging or facilitating provision of 'student recruitment services' but is providing the 'student recruitment services' on its own account to its foreign counterpart, who, in turn, provides the services to the universities.
- The appellant has no privity of contract with the foreign universities, it only has a contract with M/s IDP, Australia. For the services it renders, the appellant receives consideration only from IDP Australia.
- IDP Australia has a contract with the foreign universities for getting the students and receives a percentage of the fees paid by the students as commission and acts as the main contractor.

[1] Service Tax Appeal No. 52540 of 2016

- The appellant acts as sub-contractor as per an agreement with M/s IDP, Australia and received commission from it.
- It was also pointed out that the jurisdictional authorities had also issued a show cause notice (SCN) on this issue. However, the SCN was dropped and the services were held to be export of services. Accordingly, DGCEI cannot take a different view on the same issue which has been raised and settled by the Department itself for the earlier period.

Contentions of the Revenue authorities

- The National Code of Australia recognises IDP Australia as an education agent and the appellant as sub-contractor of that agent. Hence, there is a tripartite arrangement between the three parties.
- The main service is student recruitment service which is being provided by IDP Australia to Australian universities and the appellant is arranging and facilitating this main service in India.
- Accordingly, the appellant is an intermediary between IDP Australia and the students and is liable to pay service tax on the commission received.
- The Revenue authorities submitted that the period covered in the present case is different to the period for which the earlier SCN was issued. The principles of *res-judicata* would not apply to the instant case.

Observations and ruling of the CESTAT

- The appellant recruits or facilitates students in India but does not get any remuneration from Australian universities.
- Only M/s IDP, Australia received the fee for the students recruited by Australian universities which are recommended by the appellant.
- There was no evidence presented by the Revenue authorities to show that the appellant is liasoning or acting as intermediary between the foreign universities and IDP Australia.
- The DGCEI has raised a demand on an issue which was already settled by the jurisdictional authorities. Hence, it should not have issued a SCN for a subsequent period.
- The services provided by the appellant were held to be export of services and the demand raised by DGCEI was set aside.

Our comments

The ruling of the CESTAT bears a distinction between services provided by a sub-contractor vis-à-vis an intermediary. Privity of contract is an important factor when determining whether the services would fall within the scope of intermediary services. Importantly, the recent circular issued under the GST law relating to intermediary services coupled with the above ruling is likely to settle similar issues pertaining to both GST law as well as the erstwhile service tax law, currently pending before various appellate forums and proceedings at adjudication stage.

Deloitte.