
ELP
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DIRECT TAXATION

RECENT CASE LAWS

Transaction in bogus shares involves a colorable device

Arihant Kumar Jain (ITA No. 5342/Del./2018) (Delhi ITAT)

- The taxpayer, an individual, earned long term capital gains (**LTCG**) from the sale of certain shares of Kappac Pharma Ltd. and claimed exemption under Section 10(38) of the Income-tax Act, 1961 (**IT Act**). These shares were purchased from a private party in cash and not from a recognized stock exchange and were subsequently declared under the Income-tax Disclosure Scheme-2016 (**IDS**).
- The aforesaid transactions were effectuated when there was a country-wide investigation conducted to unearth the organized racket of generating bogus LTCG from 2010 to 2014 under which numerous cases were detected. Individuals who were beneficiaries of such bogus entries of LTCG amounting to several crores were identified. The Chairman & Managing Director and other Directors of Kappac Pharma Ltd. had also on oath agreed that they provided bogus LTCG.
- The Assessing Officer (**AO**) was of the opinion that the sale consideration was received by the taxpayer from sale of penny stock where actual source of credit was unaccounted cash. The AO thus, treated the credit in the bank account of the taxpayer as unexplained income under Section 68. On appeal, the Commissioner of Income Tax (Appeals) [CIT(A)] deleted the additions made by the AO. Aggrieved, the Revenue preferred an appeal before the Income-tax Appellate Tribunal (**ITAT**), Delhi.
- The ITAT observed that the Securities and Exchange Board of India (**SEBI**) had suspended the dealing in shares of Kappac Pharma Ltd. and had also taken action against its promoters and stockbrokers. The ITAT also observed that when a company is consistently incurring a loss, no man of ordinary prudence would invest in such a company and hence the entire transaction was held to be ingenuine.
- The ITAT relied upon the ruling of Hon'ble Supreme Court in case of ***CIT vs. Durga Prasad More [(1972) 82 ITR 540]*** wherein it was held that Revenue should look into the surrounding circumstances to find out the reality of a transaction.
- In view of the above, the ITAT held that the transaction entered by the taxpayer failed to satisfy the test of human probabilities. Thus, the disallowance made by the AO on account of exempt LTCG claimed by the assessee under Section 10(38) of the IT Act was upheld.

ELP Comments:

Tax planning will be considered legitimate if it is within the four corners of law. If a transaction which on careful examination reveals ingenuity, then it shall be regarded as a colourable device and result in addition to income or disallowance of expense. With the introduction of General Anti Avoidance Rules, it would be interesting to see how these rules are applied to transactions which result in avoidance of taxes.

Rejects writ petition involving FEMA violations as alternate remedy was available

Greenstar Fertilizers Limited (W.P.No.23219 of 2021 and WMP.No.24518 of 2021) (Madras HC)

- The taxpayer, a company was subject to scrutiny assessment wherein an inter-corporate deposit (**ICD**) received from a non-resident entity was added to the taxpayer's income and payment for high sea sales in Indian currency was treated as external commercial borrowings.
- The taxpayer filed a writ petition before the Hon'ble Madras High Court pleading violation of principles of natural justice and contending that the additions involved matters relating to Foreign Exchange Management Act, 1999 (**FEMA**) and that the AO has exceeded its jurisdiction. The Revenue contended that the additions were on account of merit and hence did not warrant interference in a writ jurisdiction. Further, Revenue proceeded based on the material on record, and hence it did not exceed its jurisdiction.
- The Hon'ble Madras High Court dealt with all the issues raised in the writ petition and arrived at the conclusion that it is not a fit case for interference in the writ jurisdiction based on the following:
  - On the additions involving ICD and high seas sales, it was held that these issues are entirely a factual exercise. These were clearly matters within the ambit of an appeal and dis not warrant interference in the writ jurisdiction.
  - On excess jurisdiction, it was held that it is not a case of excess jurisdiction, as the Order has dealt with the income-tax consequences under the IT Act and not with FEMA consequences.
  - On violation of principles of natural justice, it was held that as the taxpayer never contended during the proceedings that the time provided for filing submissions was inadequate, there was no violation of the principles of natural justice.
- Additionally, on the alternative remedy rule, the Hon'ble Madras High Court referred to the ruling of the Hon'ble Supreme Court in case of ***ACCE vs. Dunlop India ([1985] 1 SCC 260)***, wherein it was held that when it comes to fiscal statutes, alternate remedy rule has to be applied with utmost rigour. The interference in writ jurisdiction on the teeth of alternate remedy will be only under exceptional circumstances and none of the exceptional circumstances are attracted in the case on hand.
- Thus, the taxpayer was directed to prefer a statutory appeal before the CIT(A) under Section 246A of the IT Act.

Writ Petition allowed when there is violation of principles of natural justice

Pravin Kumar Pathi (W.P.Nos.23474, 23477 & 23480 of 2021 and 24716, 24718 & 24720 of 2021)

- The taxpayer was subjected to assessment under Section 153C of the IT Act and the AO passed an assessment order without considering the taxpayer's response (which was filed against the notice issued under Section 142(1) of the IT Act). Being aggrieved by the said order, the taxpayer preferred a writ petition before the Hon'ble Madras High Court over violation of the principles of natural justice. AO objected the said petition on the grounds that the taxpayer had availability of statutory appeal before CIT(A) as an alternative remedy.
- The High Court observed that the alternate remedy rule is not an absolute, but it is a rule of discretion and a self-imposed restraint on writ jurisdiction - which should be applied with utmost rigor on fiscal statutes. Further, the High Court took note of a decision of the Hon'ble Supreme Court in ***Commercial Steel Limited (Civil Appeal No. 5121 of 2021)*** which outlines the exceptions to the alternate remedy rule and held that when the case falls in exception, a Writ Court enjoys the discretion to interfere depending on the facts and circumstances of the case.
- Relying on the above decision, the High Court held that violation of principles of natural justice is an exception to the alternate remedy rule which is the main contention in the taxpayer's submission. Further, the Hon'ble High Court also remarked that if the ground of violation of natural justice was made before CIT(A) then the matter would be sent back to the AO which would cause further delay and uncertainty to the taxpayer.
- In view of the above, the Hon'ble High Court allowed the writ petition and held that the above case falls within the exceptions to the general rule of preferring statutory appeal over writ remedy.

ELP Comments:

The principle of non-maintainability of writ petitions in situations where there is an alternate remedy available has been discussed in both the above cases. High Courts will exercise its writ jurisdiction only in an exceptional situation and one of this is violation of principles of natural justice. In both the above cases i.e., ***Greenstar Fertilizers Limited*** and ***Praveen Kumar***, writ petitions were filed before the same High Court and one was rejected and the other was allowed. In the former, none of the exceptional situations got attracted, whereas in the latter it did. Both these rulings depict the consistent interpretation adopted by High Courts while exercising the writ jurisdiction.

Requirement to furnish Form 67 directory, while claiming foreign tax credit

Brinda RamaKrishna (ITA. No. 454/Bang/2021) (Bangalore ITAT)

- The taxpayer, an individual ordinary resident of India, worked in Australia from November 2017 to May 2019. The taxpayer offered the salary earned from services rendered in Australia to tax and claimed foreign tax credit (**FTC**) of taxes paid in Australia by filing a revised return. The taxpayer failed to submit Form No. 67 before filing the revised return of income and submitted it subsequently. The taxpayer's claim of FTC was denied as per the intimation under Section 143(1) of the IT Act. The taxpayer filed a rectification application against the said rejection. However, the AO rejected the rectification application stating that filing of Form No. 67 before the due date of return is a mandatory condition for claiming benefit of FTC.
- On appeal, CIT(A) upheld the order of the AO and rejected the taxpayer's contention that filing Form No. 67 is a procedural requirement and non-compliance of the same will not disentitle FTC.
- On further appeal, the Bangalore Bench of ITAT held that Form No. 67 was not mandatory but a directory requirement and accepted the taxpayer's contentions that:
  - Central Board of Direct taxes (CBD') under Rule 128 of the Act does not have the power to prescribe a condition for disallowance of FTC, thus, the provisions of Rule 128 are procedural in nature;
  - Rule 128 nowhere stipulates that if Form No. 67 is not filed within the prescribed time, relief under Section 90 of the IT Act would be denied; and
  - Violation of procedural norms do not extinguish the substantive right of claiming FTC.
- ITAT reiterated that the Double Taxation Avoidance Agreement (**DTAA**) overrides the provisions of the IT Act, and the Rules cannot be contrary to provisions of the IT Act.
- Thus, the taxpayer's appeal was allowed by the ITAT by holding that the requirement to furnish Form No. 67 is directory in nature and that Rule 128 does not provide for disallowance of FTC on non-furnishing of Form No. 67 within the prescribed time.

Services inextricably linked to mining activities covered by exclusion of Fees for technical Services (FTS) and hence not taxable

INTECSEA Asia Pacific Sdn Bhd (ITA No. 5577/Del/2018)

- The taxpayer, a company incorporated in Malaysia, is engaged in providing engineering consultancy services to companies engaged in the business of prospecting/extraction/mining of mineral oils, natural gas etc. Basis the nature of services, the taxpayer offered tax under Section 44BB of the IT Act. However, the AO held that the income is taxable as FTS under Section 9(1)(vii) of the IT Act. Further, on appeal before the CIT(A), it was held that services of "attending meetings with employer/contractor" and "providing office space to employer/contractor" are not related to mining or like projects and hence income is taxable under Section 44DA of the IT Act.
- Being aggrieved by the order of CIT(A), the taxpayer filed an appeal before the ITAT. The ITAT on analyzing the scope of work held that the taxpayer's work fell under 'mining or like project', since it was essential for the development and exploration of oil and gas fields.

- ITAT remarked that the activities need not itself be of mining or like nature so long as they are related to 'mining or like project' as has been clarified in the CBDT Circular No. 1862 dated October 22, 1990. The circular provided that the expressions 'mining projects' or 'like projects' in Explanation 2 to Section 9(1) of the IT Act would cover rendering of services like imparting of training and carrying out drilling operations for exploration of and extraction of oil and natural gas.
- ITAT accepted the taxpayer's contention that Section 44DA applies only if the income - in the first place - falls within the definition of FTS under Section 9(1)(vii); however, in the present case since the services are covered by the exclusion in Section 9(1)(vii), they did not qualify as FTS and thus fell outside the ambit of Section 44DA of the IT Act.
- In view of the above, the ITAT allowed the taxpayer's appeal and held that the scope of work relating to "attending meetings with employer/contractor" and "providing office space to employer/contractor" are inextricably linked with the contract of design and engineering of submarine pipeline which is taxed under Section 44BB of the IT Act.

Organizing Indian Premier League (IPL) is not dilutive of the fundamental objects and hence Section 12A/12AA registration is valid

Board of Control for Cricket in India (ITA No.3301/Mum/2019)

- The taxpayer was granted registration as a charitable institution under Section 12A of the IT Act. During the year, the taxpayer applied for fresh registration due to amendments made in the Memorandum of Association for incorporating the recommendations made by the Justice Lodha Committee. The amendment allowed the taxpayer to carry out any activity which could be conveniently carried out directly or indirectly to enhance the value or render profitable or generate better income/revenue from any of the properties, assets and rights.
- This application was rejected by the AO under Section 12A(1)(ab) read with Section 12AA on the grounds that IPL is a money-making exercise in the garb of promoting cricket. As per the AO, the taxpayer squarely fell within the proviso to Section 2(15) (i.e. charitable purpose for commercially exploiting the game of cricket through franchise agreements for conducting IPL).
- On appeal, ITAT observed that Section 12A(1)(ab) gets triggered not merely on modification in the objects of the taxpayer but when the modifications do not conform to the conditions of registration. Further, on comparative analysis of the clauses of the modified memorandum with pre-modification memorandum, the ITAT noted that the changes are approved by the Hon'ble Supreme Court which also reiterated that the taxpayer carries out public functions and is subject to the rigors of public law. The taxpayer is thus subject to the general principles of reasonableness and fairness and the basic principles of accountability and transparency. Therefore, the ITAT noted that such changes cannot dilute the fundamental objective of promoting the game of cricket and cannot deviate from the objects as set out in the pre-amendment memorandum.
- Accordingly, the ITAT held that "*the very foundation of the approach implicit in the impugned order is thus wholly unsustainable in law, and clearly misconceived*".
- The ITAT accepted the taxpayer's submission that the object of the taxpayer is the promotion of cricket and it enjoys the power of holding IPL for achieving its objective. Whether the power results in pecuniary gains or not, is a different aspect, since Section 12A(1)(ab) only requires examination of the objects and not the powers.
- Further, reliance was placed on Amritsar ITAT ruling in ***Kapurthala Improvement Trust (ITA No. 732 [Asr] 2013)*** wherein it was held:

"considerations about the possibilities of the first proviso to Section 2(15) coming into play affecting the grant, decline or withdrawal of registration under section 12AA will thus lead to wholly avoidable undue hardships to the assessee, will be unworkable in practice and be contrary to the scheme of the Act."

- In view of the above, the ITAT held that the proviso to Section 2(15) of the IT Act is meant to deny the benefits of exemption under Section 11 as per Section 13(8) of the IT Act, but not to cancel the registration under Section 12A or 12AA of the IT Act. Further, it was held that proviso to Section 2(15) is applied annually whereas the grant of registration is a one-time exercise and accordingly, the taxpayer was entitled to the continuation of its registration.

Draft Assessment order as per Section 144C mandatory even in remand cases

Cisco Systems Capital (India) Pvt Ltd (ITA No.128/2021)

- The taxpayer is engaged in the business of leasing & financing. For the concerned year, an original assessment order under Section 143(3) read with Section 144C was passed against which the Principal Commissioner of Income-tax initiated revision proceedings under Section 263 of the IT Act. The ITAT quashed and remanded the matter for re-adjudication. Thereafter, AO passed the final order under Section 143(3) of the IT Act without passing the draft assessment order.
- The taxpayer filed an appeal before CIT(A) questioning the validity of the assessment order that was passed before passing the draft assessment order. While the CIT(A) dismissed the appeal; the ITAT, however, allowed the taxpayer's appeal. The AO objected to this by way of an appeal before the Hon'ble High Court of Karnataka.
- The taxpayer contended before the High Court that in the second round of appellate proceedings, the AO had failed to appreciate the mandate of Section 144C which postulated that AO shall in the first instance forward a draft of the proposed order of assessment to the taxpayer for acceptance or filing of objections. The High Court rejected AO's contention that CBDT Circular No.9/2013 dated November 19, 2013 mandates applicability of Section 144C only when there is a variation in income or loss returned by the taxpayer. Since no such variation was involved in the second round of appellate proceedings, there was no requirement to pass a draft order.
- The High Court admonished the incorrect interpretation by the AO of the phrase 'at the first instance' and observed that passing of draft assessment order was quintessential before issuing the final order. Further, the High Court placed reliance on ***JCB India Ltd (85 taxmann.com 155)*** and ***C-Sam (India)(P.) Ltd (84 taxmann.com 261)***, wherein against similar arguments advanced by the AO, it was categorically observed that even in remand proceedings it was mandatory to pass a draft assessment order under Section 144C. Also, issuance of final assessment order sans the draft order was bad in law.
- Accordingly, the Hon'ble High Court held that the assessment order passed by AO under Section 143(3) of the IT Act is *void ab-initio,* as breach of provisions of Section 144C would result in violation of principles of natural justice.

Unexplained investment in India by non-resident from income earned outside India is not taxable under Section 69

Rajeev Suresh Ghai (ITA No. 6290/Mum/2019)

- The taxpayer is a non-resident Indian settled in the UAE for the last three decades. AO based on the Investigation Wing's report, found that during the year, the taxpayer paid cash to one Ahuja Builders towards investment in residential flats in Mumbai and received certain sums in cash and also interest on the amounts paid. The AO made the addition of the sum paid by taxpayer under Section 69 as unexplained investment and also interest received on loan under Section 68 of the IT Act. The CIT(A) deleted the addition made by the AO and being aggrieved by the same, the AO filed an appeal before the ITAT.
- The ITAT observed that the basic nature of the transaction was that the taxpayer paid some unaccounted monies to a builder which were brought to tax by a legal fiction. Here, the trigger for taxability was investment in the immovable property which was also unexplained. Accordingly, the ITAT noted that income here is not an income from the immovable property, but an income said to have been invested in an immovable property. If the AO could establish that the investment was made from income generated in India, the situation would have been materially different.
- The ITAT rejected the argument that Article 22(1) of India-UAE treaty provides for taxability of income arising from immovable property. The said plea was contextually irrelevant as the case before the ITAT did not deal with income from immovable property, but an income said to have been invested in an immovable property.
- The ITAT noted that classification of an income and taxation of an income is an inherent part of the treaty mechanism and unless an income fits in the treaty description of that income, it cannot be subjected to tax as such. The ITAT also held that income could not be taxed in India since its neither a resident jurisdiction nor a source jurisdiction and at best can be an investment jurisdiction. An investment jurisdiction anyway does not have any bearing on the taxation of income.
- In view of the above, the ITAT dismissed the appeal of the TO.

NOTIFICATION/CIRCULARS

S.No.	Reference	Particulars
1.	**Notification No. 132/2021**	CBDT in exercise of the powers conferred by Section 285B read with Section 295 of the IT Act vide Notification No. 132/2021 dated November 23, 2021 has revised Form No. 52A - Statement to be furnished to the Assessing Officer under Section 285B of the IT Act, in respect of production of a cinematograph film.
2.	**CBDT vide order Notification No. 129/2021**	CBDT vide order Notification No. 129/2021 dated November 1, 2021 has notified e-settlement scheme to deal with pending settlement applications wherein the applicants were unable to withdraw the applications and it has been allotted or transferred to an Interim Board.
3.	**CBDT via press release dated November 1, 2021**	CBDT via press release dated November 1, 2021, rolled out new Annual Information System (**AIS**) that will provide a comprehensive view of information relating to interest, dividend, securities transactions, mutual fund transactions, foreign remittance information etc. for a particular taxpayer. The AIS will also display a simplified Taxpayer Information Summary (**TIS**) for each taxpayer which shows aggregated value for the taxpayer for ease of filing return, a facility to submit online feedback in case the taxpayer finds the information to be incorrect and such other information.

INDIRECT TAXATION

RECENT CASE LAWS

Cenvat credit of outdoor catering service is ineligible post April 1, 2011

Toyota Kirloskar Motor Pvt Ltd. v. The Commissioner of Central Tax [TS-506-SC-2021-EXC]

FACTS OF THE CASE

- The assessee had a canteen facility for its employees within the factory premises as mandated under the Factories, Act, 1948 and the Rules made thereunder. The assessee engaged an outdoor caterer to provide food and beverage inside the canteen facility. The assessee availed Cenvat credit of the service tax charged by the outdoor caterer in respect of the period post April 4, 2011.
- The department denied the Cenvat credit on the ground that services provided in relation to outdoor catering (when such services are used for personal use or consumption of any employee) was excluded from the definition of input service under Rule 2(l)(C) of the Cenvat Credit Rules, 2004 (**CCR**) with effect from April 1, 2011.
- The assessee argued that expenses incurred in respect of the canteen services is included towards the total cost of the product and it is mandatory under the Factories, Act, 1948 and the Rules made thereunder to establish the canteen facility. Hence, the bar under Rule 2(l)(C) of the CCR will not apply.

JUDGEMENT

- The Hon'ble Supreme Court held that even though the expenses incurred in respect of the canteen services is included towards the total cost of the product and is mandatory under the Factories, Act, 1948, the fact remains that the canteen has been established primarily for personal use or consumption of the employees.
- The taxing statute must be construed strictly, and the Court cannot add or substitute words in the statutory provisions while interpreting the statutory provision. Therefore, credit is ineligible in respect of outdoor catering service in view of the bar contained in Rule 2(l)(C) of the CCR post April 1, 2011.

Online filing cannot be insisted in respect of refund applications under GST

Laxmi Organic Industries Limited vs. UOI and Others [2021 (12) TMI 63 - BOMBAY HIGH COURT]

FACTS OF THE CASE

- The assessee failed to furnish 'Statement 5B' along with the Goods and Service Tax (**GST**) refund applications filed online. Subsequently, the same was filed manually. However, the refund applications were returned without being processed with an instruction that in terms of Circular No. 125/44/2019-GST dated November 18, 2019 (**the impugned Circular**), refund application must be filed online on the common portal. The same must be processed electronically with effect from September 26, 2019.
- The assessee argued that Rule 97A of the Central Goods and Services Tax Rules, 2017 (**CGST Rules**) permits

filing of refund application manually and hence, the impugned Circular is ultra vires. On the other hand, the Department agued the proper officer is bound by the impugned Circular in terms of Section 168 of the Central Goods and Services Tax Act, 2017 (**CGST Act**).

JUDGEMENT

- The Hon'ble High Court held that since Rule 97A contains a non-obstante clause, the plain and simple construction of the said Rule is that despite Rule 89 providing for electronic filing of applications for refund, any reference to electronic filing of an application on the common portal shall include manual filing of the said application.
- Further, it was held that Section 168 of the CGST Act will have no application if the Circular is contrary to any statutory rule and hence, the impugned Circular will have no application in the case of refund application filed manually. Resultantly, the letter returning the refund applications of the assessee was set aside and the assessee was permitted to file the refund application manually.

Officers appointed under Orders of Commissioner of State Tax are 'proper officers' under GST

MAA Geeta Traders v. Commissioner of Commercial Tax and Anr. [2021 (12) TMI 119 - ALLAHABAD HIGH COURT]

FACTS OF THE CASE

- The assessee challenged the adjudication order passed under Section 74(9) of the U.P. Goods and Services Tax Act, 2017 (**UPGST Act**) by the Deputy Commissioner, Commercial Tax (Deputy Commissioner) on the ground that the Commissioner of State (Commissioner) Tax has not sub-delegated this function to the Deputy Commissioner under Section 5(3) of the UPGST Act.
- Reliance was placed on the decisions of the Hon'ble Supreme Court in ***Commissioner of Customs v. Sayed Ali and Anr, [2011 (3) SCC 537]*** **and** ***Canon India Private Limited v. Commissioner of Customs [AIR 2021 SC 1699].***
- The department argued that the Deputy Commissioner is a proper officer in view of Office Orders dated July 1, 2017 and November 19, 2018, both issued by the Commissioner in exercise of powers vested under section 2(91) read with Section 4(2) of the UPGST Act.

JUDGEMENT

- The Hon'ble High Court held that the Deputy Commissioner is an officer of the State tax in view of the proviso to Section 3 of the UPGST Act. This provides that officers appointed under the Uttar Pradesh Value Added Tax Act, 2008 shall be deemed to be the officers appointed under the provisions of the UPGST Act.
- As to the description of a "proper officer", by virtue of section 2(91) of the UPGST Act, it has to be either the "Commissioner" himself and/or the officer of the "State tax", who may have been assigned that function by the Commissioner.
- The Office Orders dated July 1, 2017 and November 19, 2018 were issued by the Commissioner, empowering the Deputy Commissioner to exercise powers under Section 74 of the UPGST Act. Non-recital of Section 5(3) of the Act in either of those orders is inconsequential and even extraneous to the valid exercise of power made by the Commissioner. The power was admittedly existing, and it is seen to have been exercised. It is not shown to have been exercised in contravention of any statutory provision or principle of law. Hence, the validity of the power exercised would remain by established firm and undoubted.
- The decisions of the Hon'ble Supreme Court in ***Sayed Ali and Anr (supra)*** **and** ***Canon India Private Limited***

(supra) were distinguished. In this regard, it was held that, under the Customs Act, 1962 (**Customs Act**), an officer of customs cannot hold any jurisdiction in his favor unless a specific entrustment/sub-delegation was first made in his favor by issuance of a Notification under section 6 of that Customs Act. Therefore, though the Commissioner of Customs (Preventive) and the Additional Director General, Directorate of Revenue Intelligence became customs officers by virtue of Notification dated May 2, 2012 read with earlier Notification dated March 7, 2002 , in the absence of any further notification issued under section 6, they could not act as a "proper officer" to adjudicate a dispute under section 28 of the Customs Act, 1962.

- This is similar in the context of the CGST Act, for any officer of the Central Government who may become an officer under the said Act by virtue of his appointment made under section 4(1) of the Act. The officer would remain dependent on a further notification that may be issued under section 6 of the Act, regarding function assignment/sub-delegation made in his favor, by the State Government, before he may act as a "proper officer under the Act.
- However, that requirement and condition of law would not attach to an officer of the "State tax". As noted above, undisputedly, the Deputy Commissioner is an officer of the State Tax whose function assignment has been made in terms of section 2(91) read with sections 4(2) and 5(3) of the Act, by virtue of Office Order dated July 1, 2017 read with further Office Order dated November 19, 2018.

Section 130 of the CGST Act provides for provisional release of goods

State Tax Officer v. Y Balakrishnan [2021 (12) TMI 123 - KERALA HIGH COURT]

FACTS OF THE CASE

- The State Tax Officer issued Show Cause Notices (**SCN**) proposing to confiscate goods and conveyances and levying penalty under section 130 of the Act on goods owned by the assessee. The assessee filed a writ petition challenging the same on the ground that the goods were not liable for confiscation and that perishable goods cannot be detained indefinitely. It was claimed that the goods were liable to be released on a provisional basis, upon execution of a bond or a bank guarantee.
- In the said writ petition, the Hon'ble High Court passed an interim order directing the State Tax Officer to release the goods on payment of the amounts contemplated under section 130(2) of the CGST Act. Subsequently, a review petition was filed by the Department contending that Section 130 of the CGST Act does not contemplate provisional release of goods.
- Based upon the contentions raised in the review, the following three questions were framed for consideration by the Hon'ble High Court: (i) Whether the provisions of Section 130 of the Act contemplate any provisional release of goods? (ii) Whether the amount payable for release of the goods under Section 130 of the Act is only a fine or is it a fine, a penalty and tax to be paid together for securing release of the goods? (iii) What is the basis or rate for calculating the fine under section 130 of the Act?

JUDGEMENT

- It was held that the provisions of Section 130 of the Act contemplate release of goods on payment of fine in lieu of confiscation at two stages (i) during the process of adjudication, under section 130(2) and, (ii) post-adjudication under section 130(7) of the Act. At the time of release of goods under section 130(2) of the Act, the owner of the goods is required to pay the fine in lieu of confiscation alone, while penalty tax and other

charges can be paid after adjudication. The basis for calculating the fine in lieu of confiscation under section 130 of the Act is only the market value as defined under section 2(73) of the Act.

Royalty and dead rent are not subject to service tax under forward charge

The Mining Engineer v. Comm. of GST & CE, Alwar (Vice-Versa) [2021 (12) TMI 3 - CESTAT NEW DELHI]

FACTS OF THE CASE

- The Mining Engineer, Department of Mines and Geology, Government of Rajasthan (the assessee) , was issued SCNs demanding service tax under forward charge under the category of "Renting of Immovable Property Service" for the period July 1, 2012 to March 31, 2016. This was with respect to lease agreements entered by the assessee for grant of mining rights.
- The Department contended that the definition of "renting" as provided under Section 65B (41) of the Finance Act, 1994 (**the Finance Act**) includes renting of land for mining purposes. 'Renting of Immovable Property Services' was included in the 'declared services' under Section 66E. The negative list under Section 66D excludes support services provided by the Government to business entities. Support services as under Section 65B(49) includes renting of immovable property. As per Rule 2(1)(d)(E) of Service Tax Rules, 1994 and Notification No.30/2012-ST dated June 20, 2012, the liability to pay service tax, in respect of renting of immovable property provided by the Government is cast upon the person who provides the service and not upon the recipient of the service.
- In the present case, the assessee has entered into lease agreements for grant of mining rights. This activity of leasing of land for mining purposes is nothing but 'Renting of Immovable Property Service'. The assessee being the owner of the minerals lying under the surface, royalty/dead rent is a charge by the owner of minerals, in consideration of the exploitation/removal of mineral resources by the lessee or lease holder. Reliance was placed on decision of the Hon'ble High Court of Rajasthan in ***Udaipur Chambers of Commerce and Industry v. The UOI and Ors. [2017 (10) TMI 975 - RAJASTHAN HIGH COURT]***
- On the other hand, the assessee contended that the grant of mining rights is a sovereign right of the Government, and it is neither 'Renting of Immovable Property' nor a 'Support Service'. Royalty and dead rent are collected by the assessee, Government, for removal or consumption or sale of mineral, which is a movable property, and not against rent for use of barren land or surface area which is an immovable property. The surface rent for use of land for purpose of mining is paid to State Revenue Department. Further, reliance was placed on Education Guide dated June 20, 2012 wherein it was clarified that support services will not include service of granting of mining rights provided by Government.

JUDGEMENT

- The circular/clarification/instructions issued by the Board are binding on the Revenue and hence, support service cannot be regarded as including service of granting of mining rights provided by Government.
- In any case, support service is defined to mean infrastructural, operational, administrative, logistic, marketing or any other support of any kind comprising functions that entities carry out in ordinary course of operations themselves (but may obtain as services by outsourcing from others for any reason whatsoever and shall include advertisement and promotion construction or works contract, renting of immovable property, security, testing and analysis).
- Only those services which fit into the category of services which business entities can render by themselves

can find place in the means part and includes part of the definition. In other words, the middle part fixes the category of services that would fall within the 'means part' and 'includes part' of the definition. The activity of lease of land solely for mining purposes is in the nature of exercise of sovereign right and is not a service that entities can carry out by themselves. Therefore, the service of renting of immovable property would not fall within the definition of 'support service' and hence, it is covered by Section 66D(a)(iv) of the Finance Act under the negative list.

- The decision in ***Udaipur Chambers of Commerce & Industry and Ors. (supra)*** was distinguished as it pertained to the period post March 31, 2016 wherein 'support service' in Section 66D(a)(iv) was replaced with 'any service'.

LCDs classifiable under CTH 9013 as LCD and not as part of the end-product

Harman International (I) Pvt. Ltd. v. Commissioner of Customs [2021 (11) TMI 958 - CESTAT MUMBAI]

FACTS OF THE CASE

- The assessee imported Liquid Crystal Display (**LCD**) classifying it under tariff item 90138010 as LCD attracting nil rate of basic customs duty (**BCD**) vide Notification No. 24/2005. The said goods were used by the assessee in the manufacture of car audio assemblies which are in-turn being used in automobiles.
- Revenue was of the view that the imported goods being part of car audio assembly (classifiable under heading 8519) are classifiable under 85229000 dealing with parts and accessories suitable for use solely or principally with the apparatus of headings 8519 or 8521 attracting BCD at merit rate.

JUDGEMENT

- The Tribunal held that there is nothing available on record to show that the imported goods are solely meant for use as part of a car audio assembly. This was based as per the submissions made by the revenue and also literature available (which describes the imported goods as "**LCD Module**"). The Tribunal held that the term is wide enough and cannot be limited to mean the part of a car audio assembly.
- Chapter Note 2(a) stipulates those parts and accessories which are goods included in the heading of the said Chapter, i.e. Chapter 90, are to be classified in their respective headings. Heading 9013 specifically covers LCDs and in view of Note 2(a), LCDs are to be classified in its respective heading, specifically tariff item 90138010.
- Therefore, the imported goods are rightly classifiable under specific tariff item 90138010 and not under general entry 85229000. Reliance was placed inter alia on ***Secure Meters Ltd. v. Commissioner of Customs [2015 (5) TMI 241 - Supreme Court]*** and ***Samsung India Electronics Pvt Ltd., v. Commissioner of Customs [2015 (10) TMI 2258 - CESTAT NEW DELHI].***

Value on which VAT paid cannot be included in the value of works contract service

Touchstone Infrastructure and Solutions Pvt. Ltd. v. The Comm. of CT and CE [2021 (11) TMI 695 - CESTAT CHENNAI]

FACTS OF THE CASE

- The assessee who is engaged in providing works contract service, provided the given service under a composite contract without splitting the value into goods and services. The assessee remitted Value Added Tax (**VAT**) under the Tamil Nadu Value Added Tax Act read with Rule 8(5)(d) on 70% of the contract value. Service tax was paid on the remaining 30% of the value during the period pre and post June 30, 2012.
- The department demanded differential service tax at the rate of 4% of the contract value in terms of Rule 3 of the Works Contract (Composition Scheme for payment of Service Tax) Rules, 2007 (**Composition Scheme**) for the period upto June 30, 2012. In respect of the period post June 30, 2012, differential service tax was demanded by treating the taxable value of service as 70% of the contract value as per Rule 2A(ii)B of the Service Tax (Determination of Value) Rules, 2006 (**ST Valuation Rules**).

JUDGEMENT

- The Tribunal held that service tax rate of 4% as per the Composition Scheme is an option available to the assessee and hence, the same cannot be imposed by the Department. Consequently, the demand of service tax prior to July 1, 2012 was set aside.
- In respect of period post June 30, 2012, it was held that, where the value has already been split as per the State law and VAT has been paid on the goods component of the composite works contract, no service tax can be levied on such component again taking recourse to Rule 2A(ii) of the Valuation Rules. The demand for the period w.e.f. July 1, 2012 was also set aside on this ground. Reliance was placed on the decision of the Apex Court in ***Safety Retreading Co. (P) Ltd. v. Commissioner of Central Excise [2017 (48) S.T.R. 97 (S.C.)].***

Refund arising out of re-assessed BoE cannot be rejected basis non filing of appeal

Brightpoint India Pvt. Ltd. v. Commissioner of Customs [2021 (11) TMI 285 - CESTAT MUMBAI]

FACTS OF THE CASE

- The issue involved in the present case is whether refund claimed by the assessee can be rejected on the ground that no appeal was filed by the assessee against the Bills of Entry under Section 128 of the Customs Act (when the said Bills of Entry were re-assessed by way of amendment under Section 149 of the Customs Act).
- The assessee contended that since the re-assessment has been done by the Department thereafter, there is no reason or occasion to file an appeal against the re-assessment of the Bills of Entry (especially since neither side is aggrieved with it).
- The Department relied upon the JUDGEMENT in ***ITC Limited v. Commissioner of Central Excise [2019 (9) TMI 802 - Supreme Court]*** wherein it was held that the assessee cannot come directly with a refund unless and until the assessment of Bills of Entry is challenged and decided in favor of the assessee.

JUDGEMENT

- It was held by the Hon'ble Tribunal that once the Bills of Entry have been re-assessed and the refund has taken place, there is no reason for an appeal to be filed.
- The ***ITC Ltd. (supra)*** case directly supports the assessee case as without challenging the assessment, Revenue on their own re-assessed the Bills of Entry. Once the reassessment is acceptable to both the sides the question of filing the appeal does not arise. Therefore, the refund claimed by the assessee is in order.

ADVANCE RULING

Supply of goods made outside India prior to February 1, 2019 will be subject to GST

In re: M/s. SPX Flow Technology India Pvt. Ltd., [2021 (12) TMI 166 - APPELLATE AUTHORITY FOR ADVANCE RULING, GUJARAT]

FACTS OF THE CASE

- The assessee received a purchase order from its customer in Bangladesh for supply of goods. The assessee sourced the goods from its parent company in Poland which supplied the goods directly to the customer in Bangladesh. The Polish company raised the invoice in the name of the assessee and the assessee in turn raised invoice in the name of the customer in Bangladesh.
- The Authority for Advance Ruling (**AA**) held that the transaction entails supply of goods by the assessee to the customer in Bangladesh which will partake the character of inter-State supply and hence, the same will be subject to GST during the period prior to the introduction of paragraph 7 of Schedule III, i.e., prior to February 1, 2019. Schedule III paragraph 7 deems 'supply of goods from a place in the non-taxable territory to another place in the non-taxable territory without such goods entering India' as not constituting supply under GST.
- The assessee has challenged the Advance Ruling before the Appellate Authority for Advance Ruling (**AAAR**) primarily on the ground that the levy of GST will not apply in the present case where the transaction is carried out outside India by virtue of Section 1 of the CGST Act/Integrated Goods and Services Tax Act, 2017 (**IGST Act**) which provides that the said statutes extend to the whole of India. Reliance was inter alia placed on decisions in ***Mohit Minerals Pvt Ltd. v. UOI and Other [2020 (1) TMI 974 - GUJARAT HIGH COURT]*** and ***SAL Steel Ltd. and Other v. UOI [2019 (9) TMI 1315 - GUJARAT HIGH COURT].***

ADVANCE RULING

- The AAAR held that, in the present case, the supply involves movement from the premises of the vendor located outside India to the buyer of the assessee located outside India. Therefore, the place of supply in this case is outside India since the movement of goods terminates for delivery at the premises of the buyer located outside India as per Section 10(1)(a) of the IGST Act.
- In the present case, the assessee is supplying the goods, therefore, the assessee is the supplier, whose principal place of business is located in India. The charging Section, viz. Section 5 of the IGST Act does not provide any exclusion from levy of IGST to goods, which are not within India, as has been contended by the assessee. As the supplier (assessee) is located in India and the place of supply is outside India, the transaction of supply of goods to buyer in case of 'trading in foreign countries' would be treated as supply of goods in the course of inter-State trade or commerce. Paragraph 7 of Schedule-III of the CGST Act cannot be considered to have retrospective effect as the legislative intent is quite clear.
- Decisions in ***Mohit Minerals Pvt Ltd.(supra)*** **and** ***SAL Steel Ltd. and Other (supra)*** were distinguished on the ground that the said cases pertained to a situation where both the supplier and recipient were located outside India.

Top-up and parental insurance premium recovery from the employees not subject to GST

a) In Re: The Tata Power Company Limited [2021 (11) TMI 398 - AUTHORITY FOR ADVANCE RULING, MAHARASHTRA]

FACTS OF THE CASE

- The assessee has taken a group health insurance policy providing group insurance (**Mediclaim**) cover to their employees for which a master insurance policy is issued by the insurance company to the assessee. Further, the assessee has also formulated a Health and Wellness Policy wherein employees are given an option to opt for an additional insurance for themselves as well as for their parents, for which the assessee company has taken a separate top-up insurance and parental Insurance from the insurance company.
- The assessee initially pays the entire premium along with taxes and then the said premium is recovered from the respective employees. The question posed before the AAR was whether the recovery of an amount towards top-up and parental insurance premium from the employees amounts to a supply exigible to GST.

ADVANCE RULING

- The AAR noted that the assessee is not in the business of providing insurance coverage. Secondly, providing of employee insurance or parental insurance cover is not a mandatory requirement (under any law) for the time being in force and therefore, non-providing employee insurance or parental insurance coverage would not affect its business by any means. Therefore, after referring to the definition of business under Section 2(17) of the CGST Act, it was held that the activity of recovery of an amount towards insurance premium from the employees cannot be treated as an activity done in the course of business or for the furtherance of its business and resultantly it does not constitute supply exigible to GST.
- Reliance was placed on the Advance Rulings in ***In Re: M/s. Jotun India Pvt. Ltd. [2019 (10) TMI 482 [AUTHORITY FOR ADVANCE RULING, MAHARASHTRA]*** and ***In Re: Posco India Pune Processing Center Private Limited [2019 (2) TMI 63 - AUTHORITY FOR ADVANCE RULING, MAHARASHTRA].***

NOTIFICATION/CIRCULARS

S.No.	Reference	Particulars
		GST
1.	**Notification No. 14/2021-Integrated Tax (Rate) dated November 18, 2021** (Amends Notification No. 1/2017 – Integrated Tax (Rate) dated June June 28, 2017)	▪ Prescribes GST at the rate of 12% on certain textile and textile products and garments falling under chapter 50, 51, 52, 53, 54, 55, 56, 58, 59, 60, 63, 64 w.e.f. January 1, 2022 as specified in the Notification. ▪ Currently, they are mostly taxed at the rate of 5%. The amendment has been made primarily to address the inverted duty structure existing in textile industry.
2.	**Notification No. 15/2021-Integrated Tax (Rate) dated November 18, 2021** (Amends Notification No. 8/2017 – Integrated Tax (Rate) dated June 28, 2017)	▪ Hikes GST rate in respect of construction services of various types provided to Governmental authority or Government entity currently taxed at the rate of 5% or 12% to standard rate of 18% w.e.f. January 1, 2022. ▪ Services by way of job work in relation to textiles and textile products attracts GST at the rate of 5%. Exception has been carved out in respect of job work services by way of dyeing or printing of the said textile and textile products which will attract GST at the rate of 12% w.e.f. January 1, 2022.
3.	**Notification No. 16/2021-Integrated Tax (Rate) dated November 18, 2021** (Amends Notification No. 9/2017 – Integrated Tax (Rate) dated June 28, 2017)	▪ Exemption in respect of pure services and composite supply of goods and services of goods provided to Governmental authority or Government entity by way of any activity in relation to any function entrusted to a Panchayat under Article 243G of the Constitution or in relation to any function entrusted to a Municipality under Article 243W has been withdrawn w.e.f. January 1, 2022. ▪ Exemption in respect of specified types of passenger transport services withdrawn w.e.f. January 1, 2022 when the same is supplied through an electronic commerce operator (**ECO**) and the liability to pay GST is on such ECO.
4.	**Notification No. 17/2021-Integrated Tax (Rate) dated November 18, 2021** (Amends Notification No. 14/2017 – Integrated Tax (Rate) dated June 28, 2017)	▪ The following services added w.e.f. January 1, 2022 as services where GST shall be paid by the ECO when such services are supplied through it: – Passenger transport services by motorcycle, omnibus or any other motor vehicle in addition to already notified services, viz. radio-taxi, motorcab, maxicab. – Supply of restaurant service other than the services supplied by restaurant, eating joints etc. located at specified premises. Specified premises means premises providing hotel accommodation service having declared tariff of any unit of

		accommodation above INR 7500 per unit per day or equivalent.
5.	**Circular No. 165/21/2021-GST dated November 17, 2021**	Clarifies that invoice without Dynamic Quick Response (**QR**) code can be issued to a recipient located outside India for supply of services, where payment is received in convertible foreign exchange or in Indian Rupees wherever permitted by the Reserve Bank of India, as such dynamic QR code cannot be used by the recipient located outside India for making payment to the supplier.
6.	**Circular No. 166/22/2021-GST dated November 17, 2021**	▪ Time limit of 2 years will not apply with respect of refund of excess balance in electronic cash ledger. ▪ Self-declaration/certificate from Chartered Accountant/Cost Accountant with respect to unjust enrichment is not required in such cases. ▪ Amount deducted as Tax Deducted at Source/Tax Collected at Source and credited in electronic cash ledger is equivalent to cash deposit and any such unutilized amount is refundable as excess balance in the electronic cash ledger. ▪ The relevant date for purpose of filing of refund claim for refund of tax paid on deemed exports would be the date of filing of return, related to such supplies, by the supplier, irrespective of whether refund claim is lodged by the supplier or recipient.
Customs		
1.	**Notification No. 52 /2021-Customs dated November 3, 2021**	Amends Notification No. 18/2019-Customs dated July 6, 2019 w.e.f. November 4, 2021 reducing Road and Infrastructure Cess on Petrol and Diesel to INR 13 per litre and INR 8 per litre from the earlier rate of INR 18 per litre.
2.	**Notification No. 65/2021-Customs (ADD) dated November 11, 2021**	Rescinds Notification No. 34/2016 - Customs (**ADD**) dated July 14, 2016 to remove levy of anti-dumping duty (**ADD**) on Medium Density Fiberboard.
3.	**Notification No. 66/2021-Customs (ADD) dated November 11, 2021**	Imposes ADD on Imports of Untreated Fumed Silica from China.
4.	**Notification No. 67/2021-Customs(ADD) dated November 12, 2021**	Imposes ADD on "measuring tapes" originating in or exported from Singapore and Cambodia.

	Foreign Trade Policy	
1.	**Trade Notice No. 22/2021-22 dated November 2, 2021**	▪ Last date to file online application under MEIS, SEIS, RoSCTL and RoSL is December 31, 2021. ▪ Exporters to note that after December 31, 2021, the Online IT system will not be operational and no applications/claims under the mentioned schemes can thereafter be submitted. It has also been notified that the facility for filing applications, with a late cut provision, would also not be available and all applications will get time barred after December 31, 2021.
2.	**Trade Notice No. 24/2021-22 dated November 15, 2021**	Extends the date for mandatory electronic filing of Non-Preferential Certificate of Origin through the Common Digital Platform to January 31, 2022.
3.	**Trade Notice 25/2021-22 dated November 19, 2021**	▪ Para 2.05(e) of the Foreign Trade Policy (**FTP**) requires an importer/exporter to annually update Importer Exporter Code (**IEC**) details. ▪ All IECs which have not been updated after January 1, 2014 shall be de-activated w.e.f. December 6, 2021. For IEC re-activation after December 6, 2021, the IEC holder may navigate to the DGFT website and update their IEC online. Upon successful updation, the given IEC shall be activated again and transmitted accordingly to Customs system with the updated status.
4.	**Trade Notice No. 27/2021-2022 dated November 30, 2021**	▪ A new online common digital platform for issuance of Registration Cum Membership Certificate (**RCMC**)/Registration Certificate (**RC**) has been developed which would be single point of access for all exporters/importers and issuing agencies. The given platform shall be available at the following URL: https://dgft.gov.in. ▪ Applications for RCMC/RC may be submitted through the common platform w.e.f. December 6, 2021. Submission and issuance of RCMC/RC by the issuing agencies through their system may parallelly continue up to February 28, 2022 or until further orders.
	Central Excise	
1.	**Notification No.9/2021-Central Excise dated November 3, 2021**	Amends Notification No. 04/2019-Customs dated July 6, 2019 w.e.f. November 4, 2021 reducing Road and Infrastructure Cess on Petrol and Diesel to INR 13 per litre and INR 8 per litre from the earlier rate of INR 18 per litre.
2.	**Notification No. 02/2021-Central Excise**	▪ Every manufacturing unit engaged in the manufacture or production of Petroleum Crude notified as class of persons who are allowed to take centralized registration under Rule 9(2) of the

	(N.T.) dated November 10, 2021	Central Excise Rules, 2017. Prior intimation shall be given before starting commercial production at any additional premises subsequent to obtaining such registration.
3.	**Circular No.1079/03/2021-CX dated November 11, 2021**	▪ Pre-SCN consultation is not mandatory for recovery of tax/duty where fraud, collusion, willful misstatement, suppression of facts or contravention of any other provisions of the Central Excise Act, 1944 or the Finance Act, 1994 with intent to evade payment of tax is alleged.

NEWS/LEGISLATIVE UPDATES

- Central Board of Indirect Taxes and Customs (**CBIC**) issues guidelines dated November 2, 2021 for disallowing debit of electronic credit ledger under Rule 86A of the CGST Rules.
  - The Commissioner, or an officer authorized by him, not below the rank of Assistant Commissioner, must form an opinion for disallowing debit of an amount from electronic credit ledger in respect of a registered person, only after proper application of mind considering all the facts of the case, including the nature of prima facie fraudulently availed or ineligible input tax credit and whether the same is covered under the grounds mentioned in sub-rule (1) of rule 86A, the amount of input tax credit involved; and whether disallowing such debit of electronic credit ledger of a person is necessary for restricting him from utilizing/passing on fraudulently availed or ineligible input tax credit to protect the interests of revenue.
  - The power must not be exercised in a mechanical manner and careful examination of all the facts of the case is important to determine case(s) fit for exercising power under rule 86A.
  - Proper authority for the purpose of Rule 86A:

Total amount of ineligible or fraudulently availed input tax credit	Officer to disallow debit of amount from electronic credit ledger under rule 86A
Not exceeding INR 1 crore	Deputy Commissioner/Assistant Commissioner
Above INR 1 crore but not exceeding INR 5 crore	Additional Commissioner/Joint Commissioner
Above INR 5 Crore	Principal Commissioner/Commissioner

  - The "reasons to believe" for blocking the credit shall be duly recorded by the concerned officer in writing on file before he proceeds to disallow debit of amount from electronic credit ledger. The amount disallowed should not be more than the amount of input tax credit which is believed to have been fraudulently availed or is ineligible.
  - As the restriction on debit of electronic credit ledger is resorted to protect the interests of the revenue and the said action also has bearing on the working capital of the registered person, it should be endeavored that in all such cases, the investigation and adjudication are completed at the earliest, well within the period of restriction, so that the due liability arising out of the same can be recovered from the said taxable person and the purpose of disallowing debit from electronic credit ledger is achieved.
- CBIC has issued Instruction dated November 23, 2021 regarding import of wireless equipment by Telecom Service Providers (**TSPs**) on the basis of self-declaration:
  - As a part of the Ease of Doing Business initiative, the Department of Telecommunications (**DoT**) vide OM F.No. R-11017/02/2021-PP, dated 21.10.2021 has eased the manner of license processing for import of wireless equipment by Telecom Service Providers.
  - As per the modified procedure, importers shall apply to DoT thirty days prior to the arrival of shipment. On such application, the license can be automatically generated on self-declaration basis by the importer through a portal developed by DoT named Saralsanchar.
  - The said facility has been made available with effect from November 15, 2021. While integration with ICEGATE for transmission of WPC licenses/approvals is underway, the Customs Officers can verify the authenticity of the certificate by scanning the QR code in the certificate to get an appropriate link to verify details of such certificate on Saralsanchar Portal.

We hope you have enjoyed reading this update. For further information please write to us at insights@elp-in.com or connect with our authors:

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