ECONOMIC
LAWS
PRACTICE
ADVOCATES & SOLICITORS

RECENT DEVELOPMENTS IN DIRECT & INDIRECT TAX

Contents

DIRECT TAX - RECENT CASE LAWS

Bombay High Court[1] holds that the Assessee is not liable to deduct tax at source on account of retrospective amendments.

FACTS OF THE CASE

- Assessee made payments during the previous year (FY 2009-10) aggregating to INR 6,94,32,433 to non-residents. The payment was made towards sampling and analysis of cargo at the destination port along with professional / consultancy charges.
- The Assessee did not deduct any tax on the payments made to the non-residents since the Assessee was of the view that the services were analytical and professional in nature. It hence did not fall within the ambit of Fees for technical services **("FTS")** under the IT Act and under tax treaty. Additionally, as the services were rendered outside India, the Assessee was of the belief that the same would neither accrue nor arise in India under Section 9 of the IT Act.
- The Assessing Officer (AO) and CIT(A) rejected the contentions of the Assessee and held that analytical and professional services fell within the ambit of FTS. Further, it has contended that in view of Explanation to Section 9 introduced vide Finance Act 2010 (w.r.e.f 01.06.1976), the requirement of actual rendition of services in India was not necessary for the purpose of taxation.
- On further appeal by the Assessee, Income Tax Appellate Tribunal (ITAT) held that although the payments fell within the ambit of FTS, the Assessee was not liable to deduct tax. In light of the same, the AO filed an appeal before Hon'ble Bombay High Court.

RULING OF THE HIGH COURT

- Hon'ble Bombay High Court relied on ruling of Hon'ble Supreme Court[2], which dealt with two legal maxims, "lex non cogit impossibilia" (i.e. the law does not demand the impossible) and "impotentia excusat legem" (i.e. when there is a disability that makes it impossible to obey the law, the alleged disobedience of law is excused) and accordingly, agreed with the Tribunal's decision that Assessee could not be expected to deduct tax at source from payments that became taxable owing to retrospective amendments.
- In light of the above, Hon'ble Bombay High Court holding the doctrine of impossibility agreed with the ITAT's decision and held that even though the consideration was in the nature of FTS, Assessee was not liable to withhold tax in India.

ELP Comments

The Hon'ble Bombay High Court ruling reiterates the tax position that taxpayers cannot be expected to comply with TDS provisions where income is taxable in India on account of retrospective amendment.

ITAT[3] provides benefit of India-Mauritius tax treaty based on Tax Residency Certificate ("TRC")

FACTS OF THE CASE

- India Property (Mauritius) Company **("Assessee")** was a Mauritius entity and engaged in the business of investment activities. The Assessee held a valid TRC and Global Business License-I issued by the Financial Services Commission, Mauritius.
- During the year under consideration, the Assessee transferred shares of Indian Companies and thereby earned long term capital gains aggregating to INR 152.61 Crores. The Assessee claimed the capital gains as exempt under

[1] Sociedade De Fomento Industrial Pvt. Ltd [TS-483-HC-2024(BOM)]
[2] Engineering Analysis Centre of Excellence (P.) Ltd v CIT [2021] 125 taxmann.com 42 (SC)
[3] India Property (Mauritius) Company [TS-514-ITAT-2024(DEL)]

Article 13(4) of the India-Mauritius tax treaty by relying on the TRC and filed return of income claiming a refund of the taxes withheld.

- The AO, pursuant to the directions of Dispute Resolution Panel **("DRP")**, denied the benefit of treaty by alleging that it was a mere conduit entity without any economic substance on account of (i) consideration being immediately transferred in the form of buyback and dividend, (ii) absence of operating expenses or director remuneration, (iii) majority of directors were based outside Mauritius. The Assessee preferred an appeal against the said order before ITAT.

RULING OF THE ITAT

- The ITAT held that the TRC obtained by the Assessee was valid and the investments were held for a substantial period. Further, it was held that the Assessee was the legal and beneficial owner of the investments and could not be called a fly by night operator created merely for tax avoidance purposes.
- Additionally, the ITAT agreed with the contentions of the Assessee that since it is an investment company, the day-to-day administrative activities are outsourced basis the wisdom and discretion of the Assessee. The ITAT further held that the AO cannot question the genuineness of the business operations of the Assessee without establishing that administrative activities which are being shown by the assessee are on sham basis. Further, it was held that the Assessee was an investment fund and remittance of funds on immediate basis was in accordance with the business model.
- The ITAT was of the view that the duration for which the investments were held and commercial expediencies of the investments was material. Further, the conduit status cannot be presumed based on immediate transfer of funds post disinvestment because the funds under investments were to be returned ultimately along with gains.
- The ITAT also relied on the judgement of Hon'ble Supreme Court[4] which held that when the whole endeavour of the Government of India is to procure investment in a joint venture and infrastructure projects for the benefit of economy then attributing a malice to investment funds like the assessee is not justified.
- Thus, in absence of any evidence with AO to rebut the presumption of genuineness of business activity on the basis of TRC held by the Assessee, the ITAT held that Assessee was eligible to claim benefit of tax treaty.

ELP Comments

This is a welcome ruling for taxpayers. The taxpayers will be able to claim tax treaty benefit basis the TRC unless the revenue provides concrete evidence that an investment through a tax havenwas merely to claim tax exemptions and the entity is a conduit or the transaction lacks commercial rationale.

ITAT[5] quashes reassessment and holds that Section 28(iv) of the IT Act cannot be invoked in respect of shares held as investments

FACTS OF THE CASE

- Hero group (including the Assessee) entered into a JV with the Honda group and incorporated Hero Honda Motors Ltd. ('HHML') wherein both Hero group and Honda group held 26% of the stake (including Assessee's stake of 17.33%). During the year 2010, based on mutual discussion between Assessee and Honda group, it was decided that Honda would exit the JV by selling its entire stake to Hero group.
- The 26% stake held by Honda in HHML (JV) was agreed to be taken over by Hero Group through erstwhile Hero Investment Pvt. Ltd. (Assessee) in an off-market deal amounting to INR 3,841.83 crores i.e. INR 739 per share for 5.19 crore equity shares.

[4] Union of India v. Azadi Bachao Andolan [2003] 132 Taxman 373/263 ITR 706 (SC)
[5] Hero Motocorp Ltd. (as successor of Hero Investment P. Ltd.) [TS-534-ITAT-2024(DEL)]

- Subsequently, reassessment proceedings were initiated under Section 147 of the IT Act on account of purchase of shares from Honda Group by the Assessee. The reassessment order dated 29.12.2018 was passed after making an addition of INR 3,644.85 crores under section 28(iv) of the Act, alleging the same to be a "benefit" accrued to the assessee on acquisition of 26% stake in HHML from Honda, at discount.
- On further appeal, CIT(A) vide order dated 28.03.2023, agreed to the contentions of the assessing officer in toto and dismissed the appeal of the assessee. The Assessee preferred an appeal against the said order before ITAT.

RULING OF THE ITAT

- The ITAT, after examining various material available on record, held that reassessment was bad in law as there was no failure on the part of the Assessee to furnish full and material facts. The ITAT further held that making the same set of information as basis of recording of reasons u/s 148 of the Act, is merely a change of opinion.
- On merits, the ITAT observed that provisions of Section 28(iv) of the IT Act do not apply as the Assessee held shares in the capacity of promoter shareholder and not for the purpose of trading, and the Assessee has been consistently showing the shares as long-term capital investment in the books of accounts and balance sheet. Further, the ITAT observed that the alleged benefit (on account of discounted price of shares) was a monetary benefit, and by relying on the decision of the Hon'ble Supreme Court[6] held that prior to amendment to Section 28(iv) by Finance Act, 2023, Section 28(iv) of the IT Act was not applicable to monetary benefits.
- In light of the above, the ITAT observed that any benefit that may arise on account of the said transactions falls within the capital field. Also, when there was no business income from the selling shares held as investments, provisions of Section 28(iv) of the IT Act cannot be invoked.

ELP Comments

This ruling reiterates the legal position that review of assessment on account of change in opinion is impermissible. Additionally, the ruling provides relief to the taxpayer from applicability of Section 28(iv) to non-business transactions.

[6] CIT v. Mahindra and Mahindra Ltd. [2018] 302 CTR 213

CIRCULARS & NOTIFICATIONS

S. No	Reference	Particulars
		Customs
1	**Notification No. 40/2024-Customs dated July 29, 2024**	The Central Government has amended Notification No. 22/ 2022-Customs to revise the rate of Customs duty applicable on specific goods, under the UAE-India Comprehensive Economic Partnership Agreement.
		Foreign Trade Policy
2	**Public Notice No. 14/2024-25 dated July 16, 2024**	With an aim to strengthen the ease of doing business, the Directorate General of Foreign Trade (DGFT), has reduced the composition fee from 3% to 1%. This is for cases where the Advance Authorization holder has fulfilled the export obligation ('EO') in terms of quantity, but failed to fulfil the value addition requirement.
3	**Public Notice No. 15/2024-25 dated July 25, 2024**	In its efforts to streamline the Export Promotion Capital Goods ('EPCG') Scheme, the DGFT has introduced the following key changes: ▪ The time period for submitting installation certificates has been increased from 6 months to 3 years. ▪ The process for extending the EO period has been simplified. ▪ The Authorisation Holder seeking an extension of EO period can now opt for either (a) 2 extensions of 1 year each; or (b) a single extension of 2 years(a new option that was previously unavailable). All decisions by the Policy Relaxation Committee regarding EO extensions and the regularization of exports will be implemented with a uniform composition fee.
		Goods and Services Tax (GST)
4	**Notification S.O. No. 3048(E) dated July 31, 2024**	▪ The Central Government has established the Goods and Services Tax Appellate Tribunal (GSTAT), effective from September 1, 2024. *[Note that there is a typographical error in the notification which erroneously indicates date as September 1, 2023]* Further, the said notification constitutes the Principal Bench of the GSTAT at New Delhi and several State Benches.

INDIRECT TAX - RECENT CASE LAWS

Calcutta HC holds that the AA in one state cannot place reliance on advance ruling pronounced in another State[7]

FACTS OF THE CASE

- The Petitioner is engaged in providing Goods Transport Agency (GTA) service, *inter alia* to Indian Oil Corporation Limited ('IOCL'). GST was discharged under the reverse charge mechanism (RCM) by IOCL for the services. The Adjudicating Authority raised various observations and contentions and basis this, proposed to recover GST from the Petitioner. One of the allegations was failure to discharge GST on GTA service. Additionally, the Adjudication Authority also imposed penalty under Section 74 of the Central Goods and Services Tax Act (CGST Act), which is applicable only in case of allegation of fraud or any willful misstatement or suppression of facts.
- The matter was litigated before the Appellate Authority ('AA'). The AA failed to consider various submissions of the Petitioner. However, the AA dropped the allegation of fraud and thus, proposed to continue the adjudication under Section 73 of the CGST Act.
- The Petitioner, pursuant to disposal of the appeal, secured a declaration from IOCL confirming that IOCL had received GTA services from the Petitioner and discharged GST thereon under the RCM.
- The Petitioner filed an instant Writ Petition before the Hon'ble Calcutta High Court, owing to the failure of AA to consider the submissions made by the Petitioner. Further, the Petitioner argued that reliance placed by the Adjudicating Authority on the Advance Ruling pronounced by Goa Authority ('AAR') (for one of the issue under dispute in the present proceedings) was misplaced in so far the GST authorities in one state cannot place reliance upon the AAR of another state.

RULING OF THE HIGH COURT

- On the issue of levy of GST on GTA service, the Hon'ble Calcutta High Court observed that if IOCL had issued the declaration on time, no demand would have persisted against the Petitioner. Given this, the matter was remanded to the Adjudicating Authority.
- Further, regarding the scope of reference made to Goa AAR, the Hon'ble Calcutta High Court held that the demand raised by the Adjudicating Authority basis such ruling is misplaced as (a) AAR pronounced in Goa cannot automatically apply to a taxpayer registered in West Bengal; and (b) while the said ruling might bind the department in Goa and the party that sought the ruling, it does not bind third-party taxpayers in other states.

Karnataka AAR held that 'Rapido' qualifies as an e-commerce operator - liable to pay GST[8]

FACTS OF THE CASE

- Rapido (The Applicant) provides a technology platform for booking 2/3-wheel rides through third-party drivers. The Applicant earns revenue in the form of subscription charges from drivers. The passengers make payment of the fare directly to the driver and the Applicant is not involved in the settlement of this payment.
- The Applicant now proposes to launch a subscription-based app service for independent 4-wheel cab drivers and an optional pay-per-use ride monitoring fee to improve passenger safety.
- In light of the above, the Applicant sought an Advance Ruling on the following issues:
  - Whether the Applicant qualifies as an Electronic Commerce Operator ('ECO')?
  - Whether services provided by independent 2/3/4-wheel cab drivers to the passengers, using the 'Rapido' app amounts to supply made by the Applicant? If yes, whether the Applicant is liable to pay GST on such supply under Section 9(5) of the CGST Act?

[7] Sarkar Diesel vs Deputy Commissioner, State Tax [(2024) 20 CENTAX 465]
[8] M/s Roppen Transport Services Pvt. Ltd. [Advance Ruling No. KAR ADRG 36/2024]

- What is the applicable HSN and GST rate on the ride monitoring fee?

- The Applicant contended that to qualify as an ECO, the services are required to be supplied through it. However, in the instant case, services are merely initiated by the Applicant and not supplied through it. Hence, the Applicant cannot be held to be an ECO.
- Further, the Applicant has contended that the person qualifying as an ECO has control over the fare paid to the supplier since it can charge and collect the tax on supply of services. Owing to this, the burden of tax is transferred from the supplier of services to the ECO. However, in the instant case, this condition is not fulfilled as the Applicant has no control over the fare paid to the supplier. Thus, it cannot collect and pay tax on behalf of the supplier.
- Basis the above, the Applicant argued that it does not qualify as ECO liable to deposit GST in terms of Section 9(5) of the CGST Act.

RULING OF THE AAR

- The AAR held that the 'Rapido' app facilitates fare negotiation and ride logistics through the mobile app. Given this, the AAR held that the Applicant qualifies as an ECO in terms of Section 2(45) of the CGST Act.
- Furthermore, AAR held that services provided by independent cab drivers through the 'Rapido' app are squarely covered under the notified category of services for which ECO is liable to pay tax under Section 9(5) of the CGST Act.

  Additionally, the AAR held that the services of ride monitoring should be classified under security consulting services and attracts a 18% GST rate.

ELP Comments

Multiple rulings on similar transaction, pronouncing divergent views, has created significant ambiguity. This has resulted in numerous app-based service providers to seek clarity on their GST obligations. Industry leaders have also approached the Ministry of Finance for guidance and resolution on the taxation of their services.

Telangana HC holds that the department cannot penalize a taxpayer for using an alternative portal for filing return[9]

FACTS OF THE CASE

- The Petitioner had obtained a centralized service tax registration in the State of Maharashtra under the erstwhile law. Further, under GST law, the Petitioner has obtained State-wise registration in various States, including in Maharashtra and Telangana.
- Upon introduction of GST regime, the unutilized ITC appearing as closing balance in the service tax return as on June 30, 2017, was required to be transitioned to the GST regime. In terms of Section 140 of the CGST Act, the Petitioner attempted to claim transitional ITC by filing Form GST TRAN - 1 return in the State of Maharashtra. However, due to a technical glitch, the return could not be filed.
- Consequently, the Petitioner filed Form GST TRAN - 1 return in the State of Telangana (where the Petitioner's branch is located), claimed the ITC, and transferred the same to the Maharashtra GSTN on the same day.
- The Petitioner received a pre-show cause notice contending that the transitional ITC availed by the Petitioner through THE Form GST TRAN - 1 return filed in the State of Telangana was ineligible. It was therefore required to be reversed, along with interest and penalty. This was on the argument that the Petitioner's centralized registration under the erstwhile law was in the State of Maharashtra and thus, the Petitioner should have filed the Form GST TRAN - 1 return in the State of Maharashtra.

[9] Standard Chartered Bank vs. Principle Commissioner of Central Tax [(2024) 20 Centax 449]

- Despite the Petitioner's explanation provided in response to pre-show cause notice, the Respondent issued a Show Cause Notice (SCN) and, dissatisfied with the Petitioner's reply, proceeded to issue the Order. Aggrieved with the Order, the Petitioner filed the instant Writ Petition.

RULING OF THE HIGH COURT

- The Hon'ble Telangana High Court observed that it was undisputed that the Petitioner faced a technical glitch on the Maharashtra GST Portal, which led to filing Form GST TRAN - 1 return in the State of Telangana. Since the Petitioner's registration number/ Permanent Account Number was the same nationwide, in terms of Section 140 of the CGST Act, Form GST TRAN - 1 return can be filed through any State.
- Further, the Hon'ble Telangana High Court emphasized that the department must ensure a functional portal. If a technical glitch compelled the Petitioner to file the return through the State of Telangana, the Petitioner should not be penalized. Consequently, the Hon'ble Telangana High Court allowed the writ petition.

ELP Comments

This ruling reaffirms the principle that the Department cannot benefit from its own mistakes. It is particularly relevant in instances where procedural lapses occur due to technical glitches or defaults on the Department's part. Reference in this regard is made to the ruling pronounced by Madras High Court[10], wherein it was held that refund of ITC cannot be denied for technical glitches in GSTN software.

Karnataka HC quashes GST demand notice issued to the company after amalgamation [11]

FACTS OF THE CASE

- Pursuant to the National Company Law Tribunal's order dated June 13, 2017, Trelleborg Sealing Solutions (India) Pvt. Ltd. ('Amalgamating Company') amalgamated with Trelleborg India Pvt. Ltd. ('Amalgamated Company'). Consequently, the GST registration of the Amalgamating Company was cancelled effective from November 29, 2021.
- Despite the cancellation, the Amalgamating Company received a pre-show cause notice pertaining to the tax period from FY 2017-18 to FY 2019-20. In response, the Petitioner informed the department on the Amalgamation. Unsatisfied with the response, the department proceeded to issue the SCN to the Amalgamating Company.
- In light of the above, the instant Writ Petition was filed before the Hon'ble Karnataka High Court to determine whether GST proceedings can be initiated against the Amalgamating Company.

RULING OF THE HIGH COURT

- The Hon'ble Karnataka High Court, relying on the ruling of Hon'ble Supreme Court[12] held that once a company amalgamates and ceases to exist, proceedings cannot continue against the Amalgamating Company. The Hon'ble High Court further held that the tax authorities can pursue proceedings against the appropriate entity, as permitted by law.

ELP Comments

The Hon'ble High Court's decision underscores that legal proceedings cannot be maintained against a non-existent entity and affirms that such proceedings should be quashed. Consequently, any actions taken in this regard are deemed legally unsustainable. Further, this ruling is aligned with the provisions of Section 87(2) of the CGST Act, which provides that two or more companies shall be treated as distinct companies for the period up to the date of the NCLT order. Registration certificates of the said companies shall be cancelled with effect from the date of the said order.

[10] Mehar Tex vs Commissioner of Central GST & CX and others [2021 (5) TMI 487]
[11] Trelleborg India Pvt. Ltd. vs. State of Karnataka [(2024) 20 Centax 355]
[12] Principal Commissioner of Income Tax, New Delhi vs. Maruti Suzuki (India) Limited [2020 (18) SCC 331]

Madras HC held that procedural irregularity should not prevent the assessee from receiving legitimate export incentives[13]

FACTS OF THE CASE

- The Petitioner is a 100% Export Oriented Unit ('EOU'). The Petitioner has imported goods by claiming benefit of exemption and has exported goods on payment of Goods and Service Tax ('IGST') during the period January 2019 to September 2020.
- During export of goods, the Petitioner has filed shipping bills on the ICEGATE portal of the customs authorities. These shipping bills were considered as the refund application for the purpose of Rule 96 of the CGST Rules. Subsequently, the Petitioner discovered that it had mistakenly claimed refund of IGST paid under Rule 96(10) of the Central Goods and Service Tax Rules ('CGST Rules'), instead of under Rule 89 of the CGST Rules.
- Consequently, the Adjudicating Authority issued the Order confirming the recovery of the refund amount along with interest and penalty. This was on the argument that the Petitioner had incorrectly availed the refund of IGST under Rule 96(10) of the CGST Rules, which prohibits exporters who have claimed benefit of exemption on imports from claiming refund of IGST paid on exports. The Adjudicating Authority contended that the Petitioner ought to have claimed refund under Rule 89 of the CGST Rules.
- Aggrieved with the Order, the Petitioner filed an instant Writ Petition. Pursuant to the admission of the Writ Petition, the Petitioner had reversed the proportionate amount of INR 1,15,00,000 along with interest of INR 49,59,000 and contended that the amount of INR 21,35,08,672 which was otherwise eligible for refund under Rule 89 of CGST Rules, should be granted to them.

RULING OF THE HIGH COURT

- The Hon'ble Madras High Court, relying on the ruling of the Hon'ble Supreme Court[14], held that procedural irregularities should not obstruct the grant of legitimate export incentives. Consequently, the Order was set aside and the case was remanded back to the Respondent for a fresh consideration, directing an examination of the exports made by the Petitioner for the grant of a refund under Rule 89 of the CGST Rules.

ELP Comments

This is a significant ruling and has a far reaching impact on the industry. Various investigations are on-going for alleged violation of Rule 96(10) of the CGST Rules. This ruling eases the compliance burden on the tax-payer, whereby refund already received under Rule 96(10) may be considered as refund under Rule 89 of the CGST Rules.

We trust you will find this an interesting read. For any queries or comments on this update, please feel free to contact us at insights@elp-in.com or write to our authors:

Rohit Jain, Deputy Managing Partner, Email *– rohitjain@elp-in.com*

Mitesh Jain, Partner, Email *- miteshjain@elp-in.com*

Adarsh Somani, Partner, Email – *adarshsomani@elp-in.com*

Sahil Kothari, Associate Partner, Email – *sahilkothari@elp-in.com*

Jishaan Jain, Associate Partner, Email *- jishaanjain@elp-in.com*

Pragya Koolwal, Senior Associate, Email – *pragyakoolwal@elp-in.com*

Ketal Chandaliya, Associate, Email *- ketalchandaliya@elp-in.com*

[13] Shobikaa Impex Pvt Ltd vs. Union of India & ors. [TS-425-HC(MAD)-2024-GST]
[14] Commissioner of Sales Tax, Uttar Pradesh vs Auriaya Chamber of Commerce, Allahabad [1986 (3) SCC 50]

ECONOMIC LAWS PRACTICE
ADVOCATES & SOLICITORS

MUMBAI

9th Floor, Mafatlal Centre
Vidhan Bhavan Marg
Nariman Point, Mumbai 400 021
T: +91 22 6636 7000

DELHI NCR

NEW DELHI

DR Gopal Das Bhawan, 16th Floor,
28, Barakhamba Road,
New Delhi – 110 001.
T: +91 11 41528400

NOIDA

9th Floor, Berger Tower, Sector 16 B,
Noida, Uttar Pradesh - 201301.
T: +91 120 6984 300

AHMEDABAD

C-507/508, 5th Floor, Titanium Square
Thaltej Cross Roads, SG Highway,
Ahmedabad - 380054
T: +91 79460 04854

PUNE

202, 2nd Floor, Vascon Eco Tower
Baner Pashan Road
Pune 411 045
T: +91 20 4912 7400

BENGALURU

6th Floor, Rockline Centre
54, Richmond Road
Bengaluru 560 025
T: +91 80 4168 5530/1

CHENNAI

No 18, BBC Homes, Flat-7 Block A
South Boag Road
Chennai 600 017
T: +91 44 4210 4863

GIFT CITY

GIFT CITY Unit No. 605,
Signature, 6th Floor Block 13B,
Zone – I GIFT SEZ, Gandhinagar 382355

elplaw.in

insights@elp-in.com

/elplaw.in

/ELPIndia

/company/economic-law-practice

https://elppodcast.buzzsprout.com/