



ECONOMIC
LAWS
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RECENT DEVELOPMENTS IN DIRECT & INDIRECT TAX

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DIRECT TAX - RECENT CASE LAWS

Mumbai ITAT¹ holds that burden of proof cannot be discharged to the hilt by the Assessee in case of addition as unexplained cash credit

FACTS OF THE CASE

- The Assessee obtained a loan of INR 5 Crore from Safal Developers Pvt. Ltd. The same was added as unexplained cash credit under Section 68 of the Income Tax Act, 1961 (“IT Act”) by the Assessing Officer (“AO”).
- The Assessee contended that the loan was taken for business purposes through banking channel from an existing company. It also stated that it had announced a new building project and received advance of INR 87.75 Crores from his clients.
- The AO treated the loan as a paper transaction and bogus by stating that the company was a paper company and that the Assessee did not discharge the onus cast upon it to prove it otherwise.

RULING OF MUMBAI ITAT

- Mumbai ITAT held that the addition under Section 68 of the IT Act was unsustainable on the following grounds:
 - The primary onus was discharged by the Assessee by filing ITR, bank statements, ledger account and annual accounts which established that the lender was not a paper company.
 - Further, once the identity of the creditors, the genuineness of the transactions with the creditors, and the creditworthiness of the creditors vis-a-vis the transaction with the creditors is proved by the Assessee, the burden of proof shifts on the Revenue to prove that the amount belonged to the Assessee himself.
 - The burden of proof cannot be discharged to the hilt/ completely by the Assessee. The AO is empowered to carry out investigation if he has doubts on the legitimacy of the loan. However, if no discrepancy is found, addition cannot be made on mere suspicion.



ELP Comments

This ruling of the Mumbai ITAT holds that once the taxpayer has provided documents to support genuineness of the source of funds, unless AO establishes discrepancy in the details submitted, the AO cannot make any addition u/s 68 merely based on suspicion.

ITAT Delhi² holds that Arbitration award received for breach of contract shall be taxed as business income

FACTS OF THE CASE

- The assessee is a tax resident in Japan engaged in the business of providing information technology support services to various entities including Indian Associated Enterprises (AE).
- During the year under consideration, the assessee received INR 35,77,10,655 from MTNL for breach of contractual obligation as an arbitral award. The total figure of INR 35,77,10,655 comprised of two components - INR 32,97,07,175 representing principal portion of the compensation received in the arbitral award and INR 2,80,03,480/- representing interest earned on the compensation.
- The Assessee did not offer the principal portion of the compensation to tax since it represented business income of the Assessee which could not be taxed in India in absence of permanent establishment in India. The interest income was offered to tax at 10% as per India-Japan treaty.
- The AO held that the receipt was in the nature of income from other sources under the IT Act and ‘Other Income’ under Article 22(3) of the India-Japan treaty and brought the same to tax.

¹ TS-864-ITAT-2024

² TS-857-ITAT-2024

RULING OF DELHI ITAT

- The Assessee received the arbitral award for non-payment of dues for offshore supplies made. Hence it had to be construed only as business income of the assessee.
- Further, the decision of Mumbai ITAT³ relied on by the AO was overruled by the Hon'ble Bombay HC and hence decision of the Hon'ble Bombay HC was binding.
- The principal portion of the compensation received pursuant to an Arbitral Award in the sum of INR 32,97,07,175/- would have to be construed only as business income of the assessee as it arises out of contractual obligation of the business. Since there was no PE of the Assessee in India, the said receipt could not be charged to tax.
- With regard to the taxability of interest income, although the Assessee had voluntarily offered the interest on compensation to tax, ITAT held that it would not be taxable relying on the decision of the Hon'ble Supreme Court⁴ wherein it was held that such interest is only an accretion to the Assessee's receipts from the contracts and it was attributable and incidental to business.

**ELP Comments**

This ruling of Delhi ITAT holds that the amount received from settlement of any dues (including interest) shall partake nature of the revenue expected from underlying contract.

Kerala HC⁵ holds that income from sale of immovable property to be taxed under the head 'Capital Gains' and not 'Business Income'**FACTS OF THE CASE**

- The Assessee company owned a property which was let out on rent basis. The Assessee had declared the rent received from leased properties under the head 'Income from House Property' during various assessment years and the said view was accepted by the Department.
- However, for two Assessment Years (i.e. AY 2012-13 and AY 2015-16), the Department took a different view and assessed the rental receipts under the head 'Business Income'. Additionally, the amounts on the sale of the property were also assessed as business income and not as capital gains as declared by the Assessee.
- The Assessee challenged the order of AO before Commissioner of Income Tax, Appeals [“CIT(A)”]. CIT(A) allowed the appeal of the assessee and directed the AO to treat the rental income under the head 'Income from House Property' and the income from the sale of house property as 'capital gains'.
- The Department appealed against the order of CIT(A) before ITAT. The ITAT held that rental income was taxable as business income and sale of immovable property was also taxable as business income.
- The Assessee challenged the decision of ITAT before HC.

RULING OF KERELA HC

- Kerala HC held that the rental income was taxable under the head 'Income from house property' and income from sale of property was taxable as capital gains and not 'Business Income' based on the following reasons:
 - In the years prior to and subsequent to the AYs that fell for consideration in the appeals, the income of the appellant assessee had been assessed under the head 'Income from House Property' and not as 'Business income' and the same view was accepted by the Department.
 - Merely because in the said AYs (i.e. AY 2012-13 and AY 2015-16), the assessee sold of some of its properties, it could not be seen as having embarked upon a business of buying and selling properties in those years, even if it was authorized to do such business as per its Memorandum of Association. The said sale transactions

³ ACIT vs Ramona Pinto [ITA No. 582/Mum/2018]

⁴ CIT vs Govinda Choudhary & Sons [203 ITR 881 (SC)]

⁵ Knowell Realtors (India) Pvt. Ltd. v/s ACIT [ITA No. 38 of 2023]

could not have the effect of changing the very nature of the income earning activity consistently carried on by the assessee and accepted by the Department.

- With regard to the aspect of limitation, the HC held that the Tribunal did not have jurisdiction to consider a rectification application time barred by law. The Appellate Tribunal being a creature of the statute cannot extend its jurisdiction beyond what is expressly conferred on it under the statute.



ELP Comments

This ruling holds that uniformity and consistency in tax assessments should be ensured and in absence of change in circumstances, the income offered by the Assessee under a particular head cannot be re-characterised as such.

INDIRECT TAX - RECENT CASE LAWS

The Hon'ble Apex Court in its pivotal judgment⁶ addressed the contentious issue on eligibility of CENVAT credit on items like mobile towers and prefabricated buildings (PFBs) used for rendering telecom services

FACTS OF THE CASE

- Most of the batch matters before the Hon'ble Supreme Court in the present case pertained to Mobile Service Providers (MSPs) engaged in the provision of network/telecom services. For the provision of their services, the MSPs owned and operated infrastructure which inter-alia included Mobile towers and Pre-fabricated Buildings (PFBs), both of which were necessary for a smooth and uninterrupted supply of telecom services.
- These MSPs had paid excise duties on purchase of mobile towers and PFBs in CKD or SKD condition. CENVAT credit on the same was claimed and thereafter utilised for payment of service tax on outward supply of telecom services. Eligibility of the said CENVAT credit was the subject matter of the dispute in the said case.
- Validity of following conflicting judgments on the said issue was also considered by the Hon'ble Apex Court:
 - In **Bharti Airtel Ltd. v. Commissioner of Central Excise, Pune**⁷, the Hon'ble Bombay High Court held that mobile towers and PFBs are immovable and do not qualify as goods. It was also held that mobile towers and PFBs are not covered within definition of "capital goods" under Rule 2(a)(A) of the CENVAT Rules, or as "inputs" as per Rule 2(k) of the CENVAT Rules. It was observed that the said goods when affixed to the earth and erected, become immovable property, and such goods also cannot be considered components or accessories of the capital goods.
 - In **Vodafone Mobile Services Ltd. v. CST Delhi**⁸ the Delhi High Court held that the towers and PFBs are fastened to foundation to make it stable. They are capable of being unbolted and reassembled without any damage and can be relocated to another site accordingly the same are movable. The Hon'ble Court further held that the tower is essential component of the "capital good" viz. BTS and antenna and noted that the PFBs are accessories for placement of various BTS equipment. Therefore, CENVAT credit for the same would be allowed as these goods are covered within meaning of "capital goods".

ISSUE

- The questions before the Hon'ble Supreme Court framed were as following:
 - Are mobile towers and PFBs movable or immovable property for taxation purposes?
 - Do mobile towers and PFBs qualify as "capital goods" or "inputs" under the CENVAT Credit Rules, 2004?
 - Can MSPs claim CENVAT credit on these items for paying service tax on output services?

RULING OF THE HON'BLE SUPREME COURT

- The Hon'ble Supreme Court observed that as per Rule 3(1) of the CENVAT Rules, if mobile towers and PFBs qualify as "capital goods" or "inputs", CENVAT credit of the duties paid on its procurement can be availed and utilised for payment of output tax liability.
- The Hon'ble Supreme Court further observed that, mobile towers and PFBs can be considered as capital goods, if they qualify as "goods" *per-se*. After analysing the definition of "goods" under various acts such as Sale of Goods Act, 1930, Central Goods and Services Tax Act, 2017, Central Sales Tax Act, 1956, Customs Act, 1962 etc., the Hon'ble Supreme Court held that the items qualify as "goods" if the same are moveable.
- The Court also considered the definition of movable property given in Section 3(36) of the General Clauses Act, 1897 and meaning of immovable property as per Section 3 of the Transfer of Property Act, 1882. After due

⁶ Bharti Airtel Ltd. v. Commissioner of Central Excise, Pune 2024 (11) TMI 1042-SC

⁷ 2014 (35) S.T.R. 865 (Bom.)

⁸ 2019 (27) GSTL 481 (Del.)

consideration of the same, the Hon'ble Apex Court observed that, if the mobile towers and PFBs are not rooted in the earth, or embedded in the earth for the permanent enjoyment, then the same cannot be considered as immovable properties.

- To decide the issue of movability, the Hon'ble Supreme Court considered tests laid down by the Apex Court in catena of decisions such as: (i) **Solid and Correct Engineering**⁹, (ii) **Quality Steel Tubes (P) Ltd.**¹⁰, (iii) **Sirpur Paper Mills Ltd.**¹¹, (iv) **Triveni Engineering**¹².
- The Apex Court also held that, for determining the nature of property as being movable or immovable, following principles needs to be considered:
 - **Nature of annexation:** It needs to be ascertained the firmness with which a property is attached to the earth. Property shall be determined to be immovable if it is attached to the earth in a way that it cannot be removed or relocated.
 - **Object of annexation:** Property meant for permanent beneficial enjoyment of land shall be classified to be immovable. However, if the attachment is meant to facilitate the use of such item, then it is treated as movable even if it is attached to an immovable property.
 - **Intendment of parties:** If the intention is for the permanent attachment of the property, then it shall be treated as immovable. Conversely, if the parties intend for the attachment to be impermanent, then such property shall be treated as movable. The intention behind the attachment, whether express or implied, can be determinative of the nature of the property.
 - **Functionality test:** If the article is fixed to the ground to enhance the operational efficacy of the article and for making it stable and wobble free, it is an indication that such fixation is for the benefit of the article, and the property is movable.
 - **Permanency test:** Property capable of being dismantled and relocated without damage, the attachment cannot be said to be permanent, and the said property is treated as movable.
 - **Marketability test:** If the property is attached to the earth or immovable property and is capable of being removed or sold in the market, then the same shall be treated as movable.
- The Hon'ble Supreme Court observed that, in the present case, the antennas are affixed on the mobile towers for stability and to make the antenna wobble free. The towers and PFBs are brought to the site in CKD/SKD. The said items could be dismantled without any damage and without any change in its nature. Further, they can be shifted to different locations and also marketed and sold. The affixation of tower to the earth or building is not meant for permanent beneficial enjoyment of land or building, but for the stability of the antenna and the seamless transmission of signals.
- Considering the aforesaid observation and applying the provisions of various legislations and the tests laid down in various judicial precedents outlined above, the Hon'ble Apex Court held that mobile towers and PFBs are movable in nature and qualify as goods.
- Once the items in question were determined to be "movable", the Hon'ble Supreme Court thereafter analysed whether the same qualified as "capital goods" under Rule 2(a) (A) of the CENVAT Rules. The Court observed that the towers bring out the efficiency and the full potential of the antenna. Similarly, the PFBs enhance the functioning of the mobile antenna. Given this, it was held that the towers, parts thereof and PFBs can be considered to be accessories of capital goods viz. BTS and antenna which were covered within meaning of capital

⁹ [(2010) 5 SCC 122]

¹⁰ [(1995) 2 SCC 372 1995]

¹¹ [(1998) 1 SCC 400]

¹² [(2000) 7 SCC 29]

goods. Accordingly, the Hon'ble Supreme Court held that the mobile towers and PFBs can be treated as capital goods in terms of subclause (iii) of Rule 2(a)(A) of CENVAT Rules and CENVAT credit of the eligible duties paid was allowed.

- The Hon'ble Supreme Court further held that the tower and pre-fabricated buildings (PFBs) are "goods" and since these goods are used for providing mobile telecommunication services, the inescapable conclusion is that they would also qualify as "inputs" under Rule 2(k) for the purpose of credit benefits under the CENVAT Rules.



ELP Comments

The Supreme Court adopted a purposive and functional interpretation to classify towers and PFBs as movable property. By recognizing their integral role in telecom services and modular nature, the Court upheld their eligibility for CENVAT credit. This judgment settles the prolonged dispute on eligibility of CENVAT credit of mobile towers and PFBs under the erstwhile tax regime for the telecom industry.

The principles laid down by the Apex Court in the present judicial precedent as well as in the case of Safari Retreat would be relevant to analyse eligibility of credit in the Goods and Services Tax Regime. It may therefore be relevant for the industry to now revisit the position adopted for eligibility of credit in respect of capital goods including plant and/or machinery.

Madras High Court¹³ allows payment of Pre-Deposit from balance in Electronic Credit Ledger under the GST Regime.

BRIEF FACTS OF THE CASE ARE AS UNDER:

- The Petitioner was in the business of manufacturing and supplying passenger cars, parts, components and engines.
- The Petitioner was issued a show cause notice in Form DRC-01 proposing to demand the differential Goods and Services Tax ("GST") on account of tax liability difference between Form GSTR-1 and GSTR-3B returns filed for the period 2017 to 2018. Consequently, the demand along with interest and penalty were confirmed vide the Order-in-Original.
- The Petitioner filed an appeal against the Order-in-Original through the GST portal, paying 10% pre-deposit by utilising the balance in Electronic Credit Ledger. Consequently, a deficiency memo was issued directing the petitioner to make the payment from Electronic Cash Ledger.
- A Writ Petition was filed challenging the deficiency memo.

ISSUE

- Whether the 10% pre-deposit under Section 107(6) of the Tamil Nadu Goods and Services Tax Act, 2017 (TNGST Act) can be paid using the amount available in the Electronic Credit Ledger.

PETITIONER'S CONTENTION

- Section 49(4) of TNGST Act allows utilization of the amount available in the Electronic Credit Ledger for payment of output tax liability. Section 2(82) defines "output tax" as the tax charged on taxable supply but excludes tax payable under reverse charge mechanism ("RCM"). Therefore, any payment made towards output tax liability or payable as a consequence of any proceedings instituted under TNGST Act, can be made by debiting from the Electronic Credit Ledger.

¹³ Ford India Pvt Ltd Vs Office of Joint Commissioner [2024-TIOL-2016-HC-MAD-GST]

- **Circular No. 172/04/2022-GST dated 06.07.2022** issued by CBIC provides that, Electronic Credit Ledger can be utilized for payment of 10% of tax in dispute as pre-deposit under Section 107(6)(b) of TNGST Act, except in cases where the payment is in respect of the tax payable under RCM.

RESPONDENT'S CONTENTION

- Section 107(6) of TNGST Act does not state that the "pre-deposit" qualifies as "tax".
- The Petitioner paid pre-deposit through Electronic Credit Ledger, which has to be paid only through Electronic Cash Ledger as contemplated under Section 49 of TNGST Act.
- Under Section 49(3) of TNGST Act, the payments from the Electronic Credit Ledger are for the payment of output tax and should not be equated towards the payment of pre-deposit.

RULING OF THE MADRAS HIGH COURT

- Section 49(4) of TNGST Act provides that the amount available in the Electronic Credit Ledger "may" be used for making any payment towards output tax. The word used is "may" and not "shall", had "shall" been used it would mean that Electronic Credit Ledger shall be utilized only for the purpose of payment of output tax.
- Further, in the event the appellants do not succeed, the amount paid as pre-deposit would be utilized towards payment of output tax, thereby satisfying "payment towards output tax" phrase under Section 49(4) of TNGST Act. Therefore, by no stretch of imagination one can arrive at a conclusion that 10% of the amount paid as pre-condition for filing an appeal can be utilized for any purpose, other than the discharge of output tax liability.
- **Circular No. 172/04/2022-GST dated 06.07.2022** provides that input tax credit can be utilized not only for payment of the self-assessed output tax but also payable as a consequence of the proceeding instituted under the provisions of GST Laws. It further clarifies that to discharge the liability of 10% of the output tax liability in terms of Section 107(6) of TNGST Act, the amount can be remitted through Electronic Credit Ledger.
- The Hon'ble Madras High Court placing reliance in the case of **Oasis Realty**¹⁴, **Friends Mobile**¹⁵ and **Raiyan Traders**¹⁶ and the fact that the decision given in the case of **Flipkart Internet Pvt Ltd**¹⁷ has been stayed by the Hon'ble Supreme Court, the Hon'ble High Court held that the payment of pre-deposit can be made through Electronic Credit Ledger. Consequently, the Deficiency Memo was quashed the Writ Petition was allowed.



ELP Comments

The judgment underscores the taxpayer-friendly approach of the judiciary in GST matters. It harmonizes statutory provisions with administrative clarifications, ensuring smooth compliance. By affirming the permissive nature of Section 49(4) and endorsing CBIC clarifications, the Court facilitated flexibility for taxpayers while respecting legislative intent.

Given that various High Courts have now allowed payment of pre-deposit through Electronic Credit Ledger, it is relevant that the other states follow the same approach and reduce frivolous litigation, thereby facilitating ease of doing business.

¹⁴ 2023 (71) GSTL 158 (Bombay HC)

¹⁵ 2023(12) TMI 469 (Patna HC)

¹⁶ 2024-VIL-978 (Patna HC)

¹⁷ 2023-VIL-927 (Patna HC).

NOTIFICATION ISSUED BY DIRECTORATE GENERAL OF FOREIGN TRADE (DGFT)

Notification No. 40/2024-25 dated November 26, 2024, issued by DGFT - Syncing of ITC (HS), 2022-Schedule-1 (Import Policy) with Finance Act 2024 (No. 2 of 2024) dated 16.08.2024 - 40/2024-25 - Foreign Trade Policy

- Notification No. 40/2024-25 dated November 26, 2024, issued by the Directorate General of Foreign Trade (DGFT) amends "ITC (HS) 2022, Schedule-I (Import Policy)" to bring it in sync with the changes effectuated under the Finance Act 2024 (No.2 of 2024).

Notification No. 41/2024-25 dated November 29, 2024, issued by DGFT to amend the Import Policy conditions of ITC HS Codes 85423100, 85423900, 85423200, 85429000 and 85423300 covered under Chapter 85 of ITC (HS), 2022, Schedule-1 (Import Policy)

- Notification No. 41/2024-25 dated 29th November 2024, issued by the Directorate General of Foreign Trade (DGFT), amends the import policy for certain electronic integrated circuits and parts listed under Chapter 85 of ITC (HS), 2022, Schedule-I. Electronic integrated chips covered by ITC (HS) Code 85423100, 85423200, 85423300, 85423900 and 85429000 were previously subject to compulsory registration under the Chip Imports Monitoring System (CHIMS), are now exempted from this requirement with immediate effect.

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:

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