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TAX JURISPRUDENCE

CASE LAW ALERT – JULY 2022
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EXECUTIVE SUMMARY OF JUDGEMENTS / ADVANCE RULINGS UNDER DIRECT AND INDIRECT TAXES

We are pleased to draw your attention to following important decisions which might be useful for you to take call on tax position.

Case & Citation	Issue Involved	Decision
Direct Tax		
Flipkart Internet Private Limited [TS–503 -HC-2022 (KAR)]	Whether application u/s 195(2) of the Act can be made by the payer for reimbursement of salaries on cost-to-cost basis to seconded employees?	Application u/s 195 is tentative and hence, petitioner is permitted to invoke this section as its object is in the safeguard of assessee. Further, application u/s 195 of the Act can be made by the person making the payment.
	Whether secondment of employees would have a conclusive bearing on whether payment made is FIS to determine its taxability and deduction of TAS thereby?	Irrespective of the fact whether the services are rendered by seconded employees; to construe under FIS, technology has to be made available as per Article 12 of DTAA.
Indirect Tax		
Mahendra Feeds and Foods. Vs. Deputy Commissioner of GST [2022-TIOL-824-HC-MAD-GST]	Whether ITC can be denied to the petitioner if there is an ITC mismatch and the same is first time communicated to the petitioner through SCN?	Honorable Madras High Court held that ITC mismatch can be communicated through SCN.
Baroda Medicare Private Limited [2022-TIOL-24-AAAR-GST]	Whether supply of occupational health check-up services by the hospital (through nursing staff,	Gujarat AAAR modified the ruling given by Gujarat AAR and held that supply of occupational health check-up

	doctors, paramedical staff on hospital's payroll) to different corporates i.e. providing health check-up service, ambulance facility, and allied medical services to employees of such corporates and also the camps conducted for health check-up outside the hospitals, can be treated as Health Care service and thereby not taxable under CGST / SGST ?	services by the hospital can be treated as Health Care Services and exempted under GST in terms of notification for exempt services.

The brief analysis of above referred decisions and rulings are given below.

DIRECT TAX

Case 1 – Flipkart Internet Private Limited [TS-503-HC-2022 (KAR)]

Facts in brief & Issue Involved:

- Petitioner is engaged in the business of providing IT Solutions & Support Services for e-commerce industry, made payments to Walmart INC, USA as reimbursement of salaries on cost-to-cost basis of deputed expatriate employees for which the petitioner sought NIL TDS certificate u/s 195 of the Act.

- The Assessing Officer, held that the application was not maintainable & thereby rejected it on the following grounds:

    - Section u/s 195(2) of the Act provides for determination of appropriate portion of sum chargeable to tax and does not contemplate "NIL deduction" hence recourse is to be made u/s 197 of the Act.

    - Further, there is no employer-employee relationship between the petitioner & the seconded employee.

    - Services rendered by seconded employees are technical services under Income tax Act and DTAA as these employees were offered senior positions in Management and had expertise in managerial and consultancy skills and therefore, would fall under the ambit of FTS as per Article 12(4) of DTAA.

    - Mere deduction of TAS (Tax at Source) as per section 192 doesn't obviate the need to deduct TAS u/s 195 as TAS is to be deducted on gross payment & not only the income.

    - Seconded employees remained the employees of Walmart INC even during the period of secondment.

Contentions of Petitioner:

- Section 195 of the Act envisages to deduct TAS only when the 'sum paid' to Non-resident is 'chargeable to tax' hence petitioner is not required to deduct TAS. For this, reliance was placed on decision of Supreme Court in the case of GE India Technology Private Limited V. CIT and another [(2010) 10 SCC 29].

- The services of seconded employees cannot fall under FIS in the absence of make available of technical know-how, experience to petitioner.

- Reimbursement of cost of salaries without any mark-up cannot be charged as income under the Act. For this, reliance was placed on the decision of Supreme Court in the case of A.P. Moller Maersk A S (2017) 5 SCC 651 and decision of Karnataka High Court in the case of CIT vs. Kalyani Steel Ltd (2018) 254 Taxmann 350.

- Petition has made reimbursement of salaries to the seconded employees and once these payments are salaries, the same falls outside the purview of FIS as per Article 12 and 16 of DTAA.

- Further, since the provisions of DTAA are more beneficial to petitioner as compared to the Act, DTAA would prevail over the domestic law.

- As per the Master Services Agreement entered by petitioner with Walmart, petitioner was granted unconditional right to terminate seconded employees; hence it was real and economic employer of seconded employees.

Observations & Decision of the High Court

- Section 197 of the Act is distinct from section 195(2) of the Act as section it would come into operation on application by the recipient of an income whereas application u/s 195 of the Act is at the instance of person making the payment. Thus, the court rejected the contention of revenue that application u/s 195(2) is not maintainable.

- Since the determination u/s 195 or 197 of the Act by grant of certificate is tentative in nature, the petitioner must be permitted to invoke such provision as its object is to safeguard the assessee.

- The fact that employees seconded have the "requisite experience, skill or training capable of completing the services as contemplated in the secondment agreement, is insufficient to treat it as "FIS" dehors the satisfaction of "make available".

- Since services rendered by seconded employees doesn't make available any technology to recipient which is sine qua non for FIS hence not taxable as FIS as per India USA DTAA no TDS is to be deducted u/s 195 of the Act.

- Section 195 of the Act specifically uses term "any other sum chargeable under the provisions of this Act" for TDS deduction unlike other sections where it envisages to deduct TDS on "any sum paid to resident". Hence, the court rejected the plea of revenue to deduct TDS on gross amount.

- Further, the relationship of petitioner and seconded employees during the period of secondment is significant in deciding the real employer and the pre and post conditions to secondment will not alter this relationship.

- The petitioner issues the appointment letter, the employee reports to the petitioner, and the petitioner has power to terminate the services of the employee hence petitioner is the real employer.

- Hon'ble Court also distinguished the decision of Supreme Court in the case of Centrica [(2014) 227 Taxmann 368 (SC)].

- Hon'ble Court, thereby, directed the Revenue to issue certificate u/s 195(2) of the Act.

NASA Comments:

- Whether the secondment of employee constitutes service PE/FIS is matter of litigation, hence, taxpayer should file an application before the AO to determine the taxability of the same. Further, its factual aspect like skill of the employee, country of DTAA (whether make available clause is there or not), drafting of agreement, issue of engagement letter etc. should be compared vis-à-vis facts of the judgement before taking any position in the matter.

INDIRECT TAX

Case 1 – Mahendra Feeds and Foods. Vs. Deputy Commissioner of GST [2022-TIOL-824-HC-MAD-GST]

Facts in brief & Issue Involved

- Petitioner had availed Input Tax Credit ('ITC') for the FY 2017-18 and 2018-19 based on invoices issued by suppliers.

- According to revenue, ITC claimed by petitioner was a wrong claim as there was a complete mismatch of ITC due to supplier not paying tax on his outward supplies or not showing the same in their returns or accounts.

- GST Department issued a SCN requiring the petitioner to explain the said ITC mismatch. Petitioner replied to the SCN and thereafter Order-in-Original was passed in favour of revenue. Aggrieved by said order, petitioner filed a writ petition challenging the order.

Contentions of the Petitioner

- Petitioner contended that before issuance of SCN, department was obliged to first communicate the mismatch to both the supplier and recipient as provided under section 42(3) of CGST Act. SCN cannot be issued as a very first communication.

- Further, petitioner replied to SCN stating that supplier has paid the tax and therefore he is entitled to claim the said ITC.

Observations & Decision of High Court

- After receipt of SCN, if at all the petitioner wanted to rectify the ITC mismatch, he would have submitted the supporting documents to substantiate that output tax had been paid by the supplier, which he failed to do. It can very well be construed that the mismatch has not been rectified. Therefore, the ITC claimed by the petitioner is wrong and accordingly the same has to be reversed.

- The show cause notice issued to the petitioner itself is a communication within the meaning of section 42(3) of the CGST Act as mismatch was found by the Revenue and same can be communicated only by way of SCN.

NASA Comments

- This judgement may encourage practice of issuing SCN directly for recovery of tax due on account of mismatch of ITC instead of giving opportunity of rectifying such mismatch before issue of SCN. This practice may result into additional work on the part of department as well as assessee.

Case 2 – Baroda Medicare Private Limited [2022-TIOL-24-AAAR-GST]

Facts in brief & Issue Involved

- Appellant is running 3 multispecialty hospitals under the Brand name 'Sunshine Global Hospitals' at Manjalpur, Vadodara and Surat.

- Appellant sought an advance ruling on following questions:

    - Whether the supply of medicines, surgical items, implants, consumables, and other allied services and items provided by the hospital through their hospital

in-house pharmacy is part of the composite supply of health care treatment and thus not taxable under CGST/SGST?

- Whether the supply of Occupational Health Check-up (OHC) service by the hospital i.e. nursing staff, Doctors, Paramedical staff on hospital's payroll, working in different corporate for providing health check-up service, ambulance facility, and allied medical services to their employees and also the camps conducted for health check-up outside the hospitals, to be treated as Health Care service and hence not taxable under CGST / SGST?

- In case of question (i), Gujarat AAR held that it amounts to a composite supply of in-patient healthcare services and thereby, exempted from GST.

- In case of question (ii), Gujarat AAR held that the appellant will be liable to pay GST under 'Human Health and Social Care Services'.

- Aggrieved by the said ruling of GAAR in respect of question (ii), appellant filed an appeal before Gujarat Appellate Authority for Advance Ruling (GAAAR).

Contentions of the Appellant

- Appellant referred to explanatory notes to the scheme of classification of services (Group 99931) and submitted that services provided by the appellant merit classification under Service Code 999312 as far as occupational health check-up is concerned which is very well covered within the purview of Sr. No. 74 of exempt notification No. 12/2017-Central Tax (Rate) 28th June 2017.

- Occupational Health Check-up services is not in the nature of Social Services but is Health Care Services.

- Appellant placed its reliance on judgement of European Court of Justice in the case of Peter d'Ambrumenil, Dispute Resolution Services Ltd. Vs. CCE [2012]

- Appellant referred to the definition of "Health Care Services" given at clause (zg) of Para 2 of the said exemption notification and submitted that the entire scheme and objective of Occupational Health Check-up is nothing but medical examination of a patient.

- In order to claim benefit of exemption, what is important is that the said Health Care Services must be supplied by a clinical establishment, an authorized medical practitioner or paramedics. To whom the said services should be provided, is not a condition for claiming exemption.

- In service tax regime, taxable service provided or to be provided by any hospital, nursing home or multi-speciality clinic referred in sub-clause (zzzzo) of clause (105) of section 65 of the Finance Act, 1994 were fully exempted.

Observations & Decision of Appellate Advance Ruling Authority

- Gujarat AAAR stated that AAR has failed to examine as to whether the description of service (well covered under SAC 999312) provided by the appellant is covered within the description of service given at Sr. No. 74 of the said exemption notification.

- It is evident that the services by way of Occupation Health Check-ups or preventive care are not covered by social services mentioned in the explanatory notes of SAC 9993 i.e. "Human Health and Social Care Services"

- In service tax regime, service tax was made applicable on Occupational Health Check-up Services which was subsequently exempted by the Government vide Notification No. 30/2011-ST dated 25th April 2011, which the AAR has failed to appreciate.

- Further, the definition of Health Care Service in GST regime is very similar when compared to Finance Act, 1994. Thus, supply of Occupation Health Check-up Service by the hospital should be treated as Health Care Service and thereby exempted under GST in terms of Entry 74 of exemption notification.

NASA Comments

- This is absolutely well reasoned and welcome ruling by AAAR and it removes doubts as to availability of exemption entry relating to healthcare services to occupational health check-up services provided to business entities whether provided in the premises of clinical establishments or outside of clinical establishments.

- Ruling by AAR is binding only on applicant and its jurisdictional officer. It does not have general binding precedence value.

We will be glad to provide any elaboration or elucidation you may need in this regard.

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