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TAX JURISPRUDENCE

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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		
Wipro Limited [CA No. 1449 of 2022 (SC)]	Whether the requirement of furnishing declaration to the assessing officer u/s 10B(8) of the Act before the due date of filing the return of income u/s 139(1) of the Act is mandatory or directory?	Hon'ble Supreme Court has held that the requirement of furnishing declaration to the assessing officer u/s 10B(8) of the Act before the due date of filing the return of income u/s 139(1) is to be mandatorily complied with.
Indirect Tax		
Coral Manufacturing Works India Private Limited [ON.12/AAR/2022]	Whether Input Tax Credit of GST paid on works contract service received is admissible to the extent of steel, cement and other consumables used at actual for construction of factory building which is an integrated factory building with gantry beam over which crane would be operated?	Construction of 'Integrated Factory Premises' will not be considered as foundation of 'Plant and Machinery' and hence any ITC related to steel, cement and consumables is not admissible.
Bhopal Smart City Development Corporation Limited [2022-TIOL-27-AAAR-GST]	Whether GST is leviable on sale of developed plot of land?	AAAR overturned the ruling of AAR and held that sale of developed plot of land is liable to GST under 'construction services'.

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

DIRECT TAX

Case 1 – Wipro Limited [CA No. 1449 of 2022 (SC)]

Facts in brief & Issue Involved:

- Taxpayer is a 100% export-oriented unit ("EOU") engaged in the business of running a call center and IT Enabled & Remote Processing Services.

- Being EOU, taxpayer was eligible for tax exemption u/s 10B of the Act. Taxpayer filed its return of income for AY 2001-02 on 31st October 2001 declaring loss of INR 15,47,76,990 and along with the return of income it annexed a note stating that being 100% EOU it was entitled to claim exemption u/s 10B of the Act and therefore no loss was being carried forward.

- Thereafter, as per provision of section 10B(8) of the Act, taxpayer filed declaration on 24th October 2002 with the Assessing Officer ("AO") stating that they don't want to claim benefit u/s 10B of the Act. Subsequently, on 23rd December 2002 the taxpayer filed a revised return of income claiming carry forward of losses u/s 72 of the Act.

- AO rejected the claim of carry forward of loss on the ground that the taxpayer did not furnish the declaration in writing before the due date of filing of return of income i.e. by 31st October 2001, which is the requirement of section 10B(8) of the Act.

- Being aggrieved, the taxpayer filed an appeal before the Commissioner of Income-tax Appeals ("CIT(A)"). The CIT(A) upheld the order passed by the AO.

- In further appeals, the ITAT and the High Court decided the issue in favor of the taxpayer. Being aggrieved, the Revenue filed an appeal before the Supreme Court.

Contentions of Petitioner (i.e. revenue):

- Declaration u/s 10B(8) of the Act was filed beyond the due date of filing return of income and hence taxpayer was not entitled to carry forward the losses u/s 72 of the Act.

- It was also contented that revised return u/s 139(5) can be filed only to remove error or omission and cannot be filed for altogether a new claim. Reliance was placed on the decision of CIT vs Andhra Cotton Mills Limited [291 ITR 404 (AP)].

- It was further argued that with the original return the taxpayer had annexed note wherein it had stated that *"the company is registered as 100% EOU and it is entitled for exemption u/s 10B of the Act. No loss is therefore carried forward"*. Therefore, filing subsequent declaration and withdrawing exemption of section 10B was afterthought to carry forward the losses.

- It was also submitted that filing declaration under section 10B(8) of the Act is mandatory and not procedural requirement. It was submitted that non-filing of declaration before the due date of filing return of income would result into denial of the option to opt out of Section 10B provisions of the Act.

- Further, since section 10B of the Act is an exemption section which falls in chapter III of the Act, the condition seeking an exemption are required to be strictly complied with. Reliance was placed on the decision of Calcutta Knitwears [(2014) 6 SCC 444] and Commissioner of custom (Import) vs Dilip Kumar & Company [(2018) 9 SSC 1].

Contentions of Respondent (i.e. taxpayer):

- High Court, relying on the decision in the case of Moser Baer India Limited, has rightly held that the requirement of filing the declaration by the time limit is directory as non-filing of the declaration within the time limit does not envisage any consequence.

- Section 80 of the Act only requires that an assessee should file a return claiming carry forward of loss before the last date for submitting the return. Taxpayer filed

the original return in time declaring the loss thereby complying with Section 80 of the Act.

- The validity of the revised return is wholly immaterial and irrelevant as it was not necessary for the exercise of option u/s 10B(8) of the Act.

- Section 10B(8) of the Act itself expressly and unequivocally gives the Appellant the right to change his option.

- Reliance was placed on a catena of decisions wherein it was held that the requirement of submission of the document is mandatory, but the stipulation that it should be filed along with the return of income is only directory.

- Section 10B is a deduction provision and not an exemption provision as held in the case of CIT v. Yokogawa India Ltd. [(2017) 2 SCC 1].

Observations & Decision of the Supreme Court

- The wording of Section 10B(8) of the Act is very clear and unambiguous. For claiming the benefit u/s 10B(8) of the Act, the twin conditions of furnishing the declaration to the AO in writing and that the same must be furnished before the due date of filing the return of income u/s 139 of the Act are required to be fulfilled. In a taxing statute, the provisions are to be read as they are and the exemption provisions are to be literally construed.

- Taxpayer filed its original return u/s 139(1) and not u/s 139(3) of the Act. Therefore, the revised return filed by the appellant u/s 139(5) of the Act can only substitute its original return and cannot transform it into a return u/s 139(3) of the Act, to avail the benefit of carrying forward or set-off of any loss u/s 80 of the Act.

- Revised return can be filed in a case where there is an omission or a wrong statement. Filing a revised return to take a contrary stand and/or claim the exemption which was specifically not claimed earlier while filing the original return of income is not permissible.

- As per the settled position of law, an assessee claiming exemption must strictly and literally comply with the exemption provisions. Chapter III and Chapter VIA of the Act operate in different realms and principles of Chapter III, which deals with "incomes which do not form a part of total income", cannot be equated with mechanism provided for deductions in Chapter VIA, which deals with "deductions to be made in computing total income".

- The SLP filed against the decision of the Delhi High Court in the case of Moser Baer (supra) has been dismissed as withdrawn due to there being low tax effect and the question of law has specifically been kept open. The same cannot be held against the revenue.

- For the above stated reasons, Hon'ble Supreme Court held that for claiming the benefit u/s 10B(8) of the Act, the twin conditions of furnishing a declaration before the AO and that too before the due date of filing the original return of income u/s 139(1) of the Act are to be satisfied and both are mandatorily to be complied with.

NASA Comments:

- The present ruling clarifies that the substantive right to opt out u/s 10B(8) of the Act warrants strict and timely compliance. This decision is in contradiction to various decisions under other provisions of the Act wherein the courts have held that the requirement of filing a declaration is mandatory but the time limit within which the same is to be filed is directory.

INDIRECT TAX

Case 1 – Coral Manufacturing Works India Private Limited [Order No.12/ARA/2022 dated 13th March 2022]

Facts in brief & Issue Involved

- Applicant is in process of completing the establishment of a factory to manufacture and supply wind operated electricity generators.

- Applicant has paid GST on building materials as well as works contact services towards construction of immovable property in form of integrated factory building with pillars and gantry beams.

- Applicant has approached the AAR to ascertain eligibility of ITC on steel, cement and other consumables involved in works contract service received for reinforcing the 'foundation/structural support'.

Contentions of the Applicant

- Applicant claimed that the concrete foundation, earthwork foundation, plinth beams, and tie beams are essential to support mounting, operations of crane and other capital goods like rail which are fixed over the concrete arms for smooth travel of the crane.

- Such stronger foundation and structure support are used to bear the additional load/range of force, to fix the apparatus and machinery and to support the pressure that may arise to the structure on account of the movement of the overhead cranes.

- The construction of said foundation and structural supports involved the use of steel, cement and other building materials by way of the work contract service received for the erection of the immovable property and the side walls are to strengthen for bearing the load and hence should be considered as foundation for "Plant and Machinery'.

- Applicant contented that the inward supplies such as steel, cement and other consumables used for civil structure towards construction of foundation and structural support to plant and machinery are not excluded in the explanation u/s 17 under "any other civil structure" of the CGST Act.

- Section 17(5) (c) & (d) of CGST Act makes it clear that the construction of plant and machinery which are fixed to the earth by foundation or structural support is outside the list of 'blocked credits'.

- As such foundation or structural support (bearing the load of factory wall) and roof are essential to install the plant and machinery of the overhead cranes, the GST suffered for such inward supplies are eligible as the same will be capitalising in books of accounts as "Plant and Machinery" and not as "Immovable property".

Observations & Decision of Advance Ruling Authority

- AAR observed that the factory is nothing but a building for machinery to be placed and any kind of foundation and walls are part of factory building.

- The entire construction of the 'Integrated factory premises' which strengthen the wall or increase the volume/size of plinth beam, etc are part of civil structure of factory and cannot be claimed as foundation to 'Plant and Machinery'.

- The incremental foundation/beam is to be considered as 'any other civil structure" and not the foundation for the Plant and Machinery which can be considered as eligible along with the 'Plant and Machinery' based on explanation u/s 17 of CGST Act.

- Works contractor has issued the invoices for entire 'works' which means the invoices for steel, cement or of any other consumables have not been established in the name of the applicant and therefore, the pre-condition for availment of credit is also not satisfied.

NASA Comments

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

Case 2 – Bhopal Smart City Development Corporation Limited [Madhya Pradesh AAAR [2022-TIOL-27-AAAR-GST]

Facts in brief & Issue Involved

- Respondent is a Public Sector Undertaking with a sole objective of planning and implementing "Smart City Project" in Bhopal.

- Respondent intends to carry out development activities on plot of land such as 24*7 water supply and power, underground utility corridor, ICT infrastructure, smart street lighting, automated solid waste system etc. and sell such plots of land for a lumpsum consideration (without bifurcation between value of land and development activities).

- The remaining construction activities (including civil foundation) on developed plot will be carried out by allottee / buyer on their own account and cost.

- Respondent had sought advance ruling for taxability of sale of developed land before Madhya Pradesh Advance Ruling Authority which, vide order dated 22nd November 2021, ruled that sale of developed land does not amount to supply and hence not liable to GST.

- Aggrieved by the above advance ruling, jurisdictional officer had preferred an appeal to Appellate Authority for Advance Ruling.

Contentions of the Appellant (i.e. jurisdictional officer)

- Monetary value of facilities provided like water, road, electricity supply line, drainage line etc. is charged and included in the sale value of developed plot of land.

- Respondent is not just transferring land but also transferring development works done on that plot.

- Ruling pronounced by AAR does not give due consideration to Hon'ble Supreme Court's decision in case of M/s Narne Construction Pvt. Ltd. [2013(29) STR3 (SC)].

Contentions of the Respondent (i.e. assessee)

- Para 5(b) of schedule II of CGST Act levied tax on building only where there is requirement of issuance of completion certificate by competent authority.

- Sale of land as well as sale of building [subject to para 5(b) of Schedule II to CGST Act] is outside the ambit of GST vide Entry 5 of Schedule III.

- As per Section 2(k) of MP Land Revenue Code, 1959, development work on plot of land being sold is also subsumed in the land itself. Development work shall not have separate identity.

- As per section 15(2) of CGST Act, anything done by the supplier at the time of delivery of goods is part of value of goods.

- Value of development work shall form part of value of sale of land which is outside the ambit of GST vide entry 5 of Schedule III to CGST Act.

- Hon'ble Supreme Court's decision in case of M/s Narne Construction Pvt. Ltd. Vs. Union of India [2013-29-STR3] was in context of Consumer Protection Act and hence the ratio of said judgement would not apply to taxation laws.

- Value addition in sale price of land does not alter the basic character of transaction of sale of land.

Observations & Decision of Appellate Advance Ruling Authority

- Sale of barren land and sale of developed plot of land are totally two different things. Former is not suitable for human inhabitation while the later suits the daily requirements of people making it inhabitable.

- Entry 5(b) of Schedule II to CGST Act provides that 'construction of a complex, civil structure or a part thereof…' shall be deemed as supply of service.

- Development work done on a plot of land is a part of construction of complex which is being developed thereon

- Cost of development activities forms a substantial chunk of the cost of Complex which is going to be built on this land.

- The development activities have been undertaken with the aim of developing the land into a complex and these activities are a part of construction of complex being developed.

- Amount spent by respondent was to inflate the value of land and to change its character.

- Even though, while doing the development work, the prospective buyer was not known to the respondent, but whoever the buyer would have been, the respondent has offered him a service for a consideration which has been included in the price of the land.

- Process of developing plot of land is preparatory part of construction of structure proposed to be built on that piece of land.

- It has been fairly settled by Apex Court's judgement in case of M/s. Narne Construction that activity of development of land involving offer of plots for sale to its customers with an assurance of development of infrastructure / amenities, lay-out approvals etc. is a 'service'.

- Sale of developed plot of land shall be taxable as construction services under GST at the rate prescribed under Sr. No. 3 of N/No. 11/2017 – CT(R) dt. 28th June 2017 (as amended). Further, Para 2 of the said notification provides abatement towards land value and lays down mechanism for quantification of service portion in sale of developed plot.

NASA Comments

- 47th GST Council had recommended Government to clarify that sale of land after levelling, laying down of drainage lines etc. is a sale of land and does not attract GST. The said clarification is not yet issued by the Government. GST Council's recommendation clearly indicates legislative intent of not levying GST on sale of developed lands. However, till government issues clear circular laying out clearly that the sale of developed plot is not taxable, the uncertainty as to taxability of developed plots will continue. It may make a sense for supplier to bifurcate the consideration separately for land and development, to minimise the tax exposure.

- Ruling by AAAR 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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