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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		
Union of India v. Ashish Agarwal [138 taxmann.com 64]	Whether notice issued under the old provisions of Section 148 on or after 1st April 2021 is valid?	Supreme court agreed with the views taken by various High Courts wherein it was held that any notice issued for reopening after 1st April 2021 should have been issued under the new provisions of reopening. Hence the notices issued under the old provisions are bad in law. However, Supreme Court in exercise of extraordinary power under Article 142 of the Constitution held that all the notices issued after 1st April 2021 under old provisions was a bonafide mistake by the department and hence all the notices issued under the old provision after 1st April 2021 shall be deemed to be the notice issued under Section 148A i.e. as per the new provisions.
Indirect Tax		
The Singareni Collieries Company Ltd. [2022-TIOL-54-AAR-GST]	Whether receipt of liquidated damages constitute consideration for supply under GST Law and consequently leviable to GST?	Liquidate damages and penalties received by applicant due to breach of conditions of contract are liable to GST.

MEK Peripherals India Pvt. Ltd. [Order No. GST-ARA-59/2020-21/B-56]	Whether incentives received from the oversea supplier will be treated as Trade Discount or Export of Services?	Incentives received from overseas suppliers will neither be considered as Trade discounts nor Export of Services under GST.

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

DIRECT TAX

Case 1 – Union of India v. Ashish Agarwal [(2022) 138 Taxmann.com 64]

Facts in brief & Issue Involved

- Taxpayer was in receipt of the notice for reopening under Section 148 (old provisions) from the department after 1st April 2021. Department issued the notice based on extension provided under Taxation and other laws (Relaxation and Amendment of certain provisions) Act 2020 ("TOLA").

- Taxpayer challenged the notice by way of writ before the Hon'ble Allahabad High Court on the ground that the Finance Act 2021 has amended the provisions relating to reopening of assessment provided in section 147 to 151 with effect from 1st April 2021 and the old provisions of reopening no more in existence from that date. Hence all notices issued under the old provision are bad in law.

- Hon'ble High Court agreed with the submission of the Taxpayer and held that from 1st April 2021 the new provisions of section 148 come into existence and the department should have followed the procedure laid down in Section 148A. In absence of following the due procedure, the notices issued are bad in law, and needs to be quashed.

- Various other High Courts were also in agreement with the view taken by the Allahabad High Court that the notice issued under the old procedure without following the procedure as per 148A shall be bad in law and hence to be quashed.

- Aggrieved by the judgment of various High Courts, the department filed an appeal before the Hon'ble Supreme Court.

Contentions of Taxpayer

- Taxpayer argued that approximately 90,000 reassessment notices have been issued under the old provision after 1st April 2021 and more than 9000 writ petitions are before various high courts. Various high courts have taken a similar view and set aside the notices issued after 1st April 2021.

Observations & Decision of the Hon'ble Apex Court

- Apex Court held that under the new provisions of reopening, the entire procedure has been streamlined and simplified. Before the issuance of the reopening notice, necessary enquires are to be made by the assessing officer. Further, at every stage approval from higher authorities is required.

- Hon'ble Apex court also agreed with the views taken by various High Courts that the beneficial provisions inserted by Finance Act 2021 shall be available to the Taxpayer provided the procedure mentioned under Section 148A are duly followed by the department.

- However, at the same time, the Apex Court despite agreeing with the view of the High Courts, held that if the view is accepted then there shall be no re-assessment proceeding even though the same is permissible under the Act. The revenue cannot be made remediless and the objective and purpose of the reassessment proceeding cannot be ignored just because the revenue issued notices under the old provision of the Act.

- Hence, in exercise of the powers as per Article 142 of the Constitution, the Apex Court modified the order of the High Court as follows:

    - All the notices issued under the old provisions shall be deemed to be issued under Section 148A of the Act. i.e. under the new provisions

    - The respective assessing officer shall within thirty days from the date of order provide to the assessee the information and material relied upon by the revenue. The Taxpayer shall reply to the notice within two weeks

    - All the defence points which may be available to the taxpayer under Section 149 or to the assessing officer under the Finance Act 2021 shall be kept open or shall be available

- The order of this court shall modify/ substitute all the order passed by the respective High Courts quashing the similar notices whether those are in appeal before us or not.

- The court also held that the present order shall be applicable PAN India and shall be applicable to all the order passed/pending before the High court so as to avoid further 9,000 appeals before the Apex Court.

NASA Comments

- After the order of Supreme Court, CBDT vide circular dated 11th May 2022 issued instructions for standardized implementation of the judgment of the Hon'ble Supreme Court.

- Article 142 of the Constitution empowers the Supreme Court to pass such "decree or order as may be necessary for doing complete justice between the parties. It is very rare that Supreme Court exercises power under Article 142 of the Constitution in tax matter.

- There is a lot of confusion as to whether the timelines of amended section 149 shall be read along with the extension as per TOLA or not i.e. whether the assessing officer can do reopening of AY 2013-2014 and AY 2014-2015. CBDT through its circular interpreted that the reopening can be done for AY 2013-2014 and AY 2014-2015 (if escapement exceeds INR 50 Lakhs). However, the supreme court ruling does not specifically mention that timelines of amended section 149 shall be read along with TOLA extension. It may be possible for the taxpayer to argue that at the time of TOLA, amended section 149 was not there in statute, hence TOLA should not apply to amended section 149.

- CBDT instructions are binding on the Department only and not on the taxpayer or any courts.

INDIRECT TAX

Case 1 – The Singareni Collieries Company Ltd. [2022-TIOL-54-AAR-GST]

Facts in brief & Issue Involved

- Applicant is entering into contracts with host of vendors / suppliers for extraction of coal and is recovering liquidated damages and penalties for lapses in their performance (i.e. delays and / or under-performance).

- Applicant sought an advance ruling in respect of following:

    - Whether liquidated damages / penalties received by applicant can be regarded as consideration for supply and consequently liable to GST?

    - Whether liquidated damages / penalties should be treated as price adjustment to the main supply?

Observations & Decision of Advance Ruling Authority

- Section 55(1) and (3) of Indian Contract Act, 1872 provides that failure to perform the contract at the agreed time renders it voidable at the option of the opposite party and such party can recover compensation for loss occasioned by it on account of such non-performance.

- In view of Entry 5(e) of Schedule II to CGST Act, liquidated damages and penalties amount to consideration for tolerating an act or situation arising out of contractual obligation.

- 'Consideration' defined u/s 2(31)(b) of CGST Act includes the monetary value of an act or forbearance.

- Toleration of an act or a situation under an agreement constitutes supply of service and the consideration or monetary value thereof is exigible to tax at 18%. Thus, liquidated damages / penalties received by applicant due to breach of conditions of the contract is liable to GST.

NASA Comments

- Similar rulings have been pronounced by AAR in case of Achampet Solar Pvt. Ltd. (TSAAR Order No. 07/2022-Telangana) and Maharashtra State Power Generation Co. Ltd. (GST-ARA- 15/2017-18/B-30; dt. 08/05/2018)

- Another school of thought is that the liquidated damages is not a consideration for supply as the purpose of agreeing to payment of liquidated damages between the parties is only to ensure performance and not for tolerating of an act.

- Levy of GST on liquidated damages has been an issue from inception of GST law and even in earlier regime under Service Tax. There are foreign as well as domestic jurisprudence holding that liquidated damages is not liable to tax.

- As ruling of AAR does not have binding precedence, one must take a considered call looking at the facts of the case, agreement with suppliers and the relevant provisions.

Case 2 – MEK Peripherals India Pvt Ltd [Order No. GST-ARA-59/2020-21/B-56]

Facts in brief & Issue Involved

- Applicant is a reseller of Intel products which they purchase from various Distributors of Intel Inside US LLC (IIUL).

- Applicant had entered into an agreement with IIUL, pertaining to a non-binding Plan of Record Target (POR Target), under which the Applicant will earn certain incentives directly from IIUL as a percentage of performance to quarterly goal on eligible intel products.

- Applicant sought an advance ruling in respect of following:

    - Whether the incentive received from IIUL can be considered as Trade Discount?

    - If not treated as Trade Discount, whether it is consideration for any supply?

- If it is considered as supply, then whether it will qualify as export of services?

Applicant's submissions

- Relying on decision of Mumbai Tribunal in case of M/s. Sharyu Motors vs Commissioner of Service Tax [2016(43) STR 158 (Tri-Mumbai)], applicant submitted that incentives cannot be treated as Business Auxiliary Services as incentives are only trade discount extended for achieving the targets.

- Incentives are received from IIUL post procurement of goods and these discounts are linked to invoices. Thus, in terms of Section 15(3)(b) of CGST Act, these post supply discounts are to be deducted from the value of supply.

- If the impugned transaction does not amount to discount, then it may be considered as consideration for supply of services which shall qualify as export of services as defined u/s 2(6) of IGST Act.

Observations & Decision of Advance Ruling Authority

- Applicant purchases goods from distributors and does not receive the discounts from said distributors. There is no sale transaction between applicant and IIUL and hence incentives received from IIUL cannot be treated as discount u/s 15 of CGST Act. Incenvtives cannot be treated as trade discount because supply of goods is undertaken by distributors and not IIUL.

- Facts of Sharyu Motors case are not similar to facts of given case and hence ratio of said decision is not applicable.

- If distributors would have given discount to applicant, then may be such a case would have been covered u/s 15(3) of CGST Act. However, there is no such discount received from the distributors.

- The only reason that the applicant is receiving any incentive is because of an increase in business of IIUL. In absence of any supply of goods between IIUL to applicant, it appears that IIUL is paying incentives to applicant for receiving marketing services which would augment sale of Intel products in the country. Thus, amounts received

by the applicant cannot be considered as Trade Discount received but the incentive received for providing marketing services to IIUL.

- Section 2(6) of the IGST Act defines the term "Export of Service" and one of the conditions stipulated therein is that the place of supply should be outside India.

- Applicant is providing marketing services in respect of goods that are made physically available by IIUL, through its distributors, to the applicant. Thus, in terms of Section 13(3)(a) of IGST Act, the place of provision of services shall be the location of the supplier of services i.e. the applicant which is in India. Hence, condition for export of services as laid down u/s 2(6) of IGST is not fulfilled and impugned transaction does not qualify as export of services.

NASA Comments

- Conclusion by AAR that activities of applicant fall u/s 13(3) of IGST Act seems to be incorrect. It transaction is treated as service it should fall u/s 13(2) of IGST Act. Consequently, place of supply will be place where service recipient is located and hence, it would be covered under export of services.

- Under service tax regime, judiciary has time and again held that incentives received from manufacturers / suppliers cannot be considered as consideration received against services supplied to said manufacturers / suppliers but are to be treated as trade discounts. The only distinguishing fact in the present ruling is that incentive is received from IIUL rather than from distributors.

- 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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