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TAX JURISPRUDENCE

CASE LAW ALERT – MAY 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		
M/s Shree Balaji Concepts [TS-393-ITAT-2022(PAN)]	Whether amendment by the Finance (No. 2) Act, 2019 extending the benefit contained in proviso to section 201(1) for sum paid to non-resident is retrospective in nature?	Hon'ble Tribunal held that the amendment has to be given retrospective effect since the same has been brought into the statute only to remove the anomaly which was created in the statute.
Indirect Tax		
Mohit Minerals Private Limited [TS-246-SC-2022-GST]	Whether IGST is leviable on Ocean freight services in case of CIF imports of goods?	Import transaction on CIF basis is a composite supply of goods. GST levy on service aspect (ocean freight) of such transaction violates principles of 'composite supply' enshrined u/s 2(30) r.w. section 8 of the CGST Act. Such levy is struck down as it leads to double taxation.
Northern Operating Systems Private Limited [2022-TIOL-48-SC-ST-LB]	Whether Indian company is a recipient of manpower supply liable to service tax under reverse charge on secondment of employees from overseas group entities?	Overseas group companies providing skilled employees, on secondment basis, to its Indian counterparts amounts to manpower supply and the Indian company would be liable to pay service tax under reverse charge as recipient of such services.

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

DIRECT TAX

Case 1 – M/s Shree Balaji Concepts [TS-393-ITAT-2022(PAN)]

Facts in brief & Issue Involved

- The taxpayer is a Partnership Firm.
- During AY 2012-13, the taxpayer purchased an immovable property from two non-residents on 17th September 2011 for a total consideration of INR 10 crores. However, the taxpayer did not deduct any tax on this amount.
- Assessing Officer ("AO") held that the taxpayer was required to deduct tax at source u/s 195 of the Act. Accordingly, the AO held the taxpayer as "assessee in default" and levied tax of INR 2,26,60,000 u/s 201(1) of the Act and interest of INR 1,22,36,400 u/s 201(1A) of the Act.
- The learned CIT(A) confirmed the additions made by the AO.
- Being aggrieved, the taxpayer filed an appeal before the Tribunal.

Contentions of Appellant

- The taxpayer submitted that the payees i.e. the two non-resident sellers of the property have disclosed the consideration received in their respective returns of income filed by them before the tax authorities.
- It was further submitted that the beneficial relaxations allowed to the resident payees as per first proviso to section 201(1) should be applied to the non-residents as well, which otherwise would be discriminatory in nature.
- The taxpayer contended that the amendment brought in by the Finance (No. 2) Act, 2019 extending the benefit contained in proviso to section 201(1) for sum paid to non-resident w.e.f. 1st September 2019 has to be given retrospective effect from the

inception since the said amendment has been brought into the statute only to remove the anomaly which was created in the statute.

- Hence, the taxpayer cannot be held to be an "assessee in default" as per the first proviso to section 201(1) of the Act.

Observations & Decision of the ITAT

- Honorable Tribunal observed that the payees had filed their returns of income disclosing the consideration

- It held that the amendment in proviso to section 201(1) wherein the benefit has also been extended to the payments made to non-residents is meant for removal of anomaly, is required to be given retrospective effect.

- Therefore, the taxpayer cannot be held as an "assessee in default" and the demand of INR 2,26,60,000/- raised by the AO u/s 201(1) of the Act needs to be deleted.

- As regards the issue of levy of interest u/s 201(1A), the AO was directed to recompute interest from the date the tax was deductible to the date of furnishing returns of income by the non-resident payees.

NASA Comments

- The present ruling clarifies that the amendment in proviso to section 201(1) is retrospective in nature and can be applied in case of non-resident payees as well. However, it is important that the non-resident payees file their returns of income and disclose the income on which tax is not deducted. Otherwise, the taxpayer will be held to be an assessee in default and will be subjected to penal consequences.

INDIRECT TAX

Case 1 – Mohit Minerals Private Limited [TS-246-SC-2022-GST]

Facts in brief & Issue Involved

- Respondent had imported non-coking coal on CIF basis.
- The services of shipping line in these CIF contracts are availed by the non-taxable exporter who engages and pays a foreign shipping line of their choice, without the involvement of the importer located in India.
- Notification No. 8/2017 – IGST(Rate) and Notification 10/2017 – IGST(Rate), levying IGST on service of ocean freight transportation on CIF imports at 5% under reverse charge on the importer of goods, was challenged as ultra vires the IGST Act.
- Honorable Gujarat High Court struck down the impugned levy against which the Union filed a special leave petition before Honorable Supreme Court.

Contentions of the Respondent

- Respondent contended that Section 5(3) and Section 5(4) of IGST Act are merely machinery provisions and not the charging sections. In the absence of deeming fiction, transportation services cannot be termed as a supply.
- The Indian importer does not have privity to the CIF contract between the foreign exporter and the shipping line. Importer of goods is only the recipient of goods and not the recipient of ocean transportation services. Section 5(3) of the IGST Act does not empower the government to deem a person as recipient of service.
- Services received outside India cannot be treated as supply and taxed in India as the transaction involved does not have any territorial nexus with India.

- The impugned notifications are against the concept of composite levy as it artificially vivisects the transaction into a separate supply of goods and separately supply of transportation service.

Observations & Decision of Honorable Supreme Court

- The impugned notifications are validly issued under section 5(3) and 5(4) of the IGST Act. Section 5(4) and not section 5(3) enables the government to specify class of taxable persons as the recipients thereby creating a deeming fiction. Lack of mention or an incorrect reference to issue notification does not vitiate the exercise of such power.

- The IGST Act and the CGST Act define reverse charge and prescribe the entity that is to be taxed for these purposes. The specification of the recipient, in this case the importer, by Notification No. 10/2017 – IGST(Rate) is only clarificatory. The Government by notification did not specify a taxable person different from the recipient prescribed in Section 5(3) of the IGST Act for the purposes of reverse charge.

- The language employed in Section 2(93)(a) of the CGST Act clearly stipulates that when consideration is payable for the supply of services, the recipient would mean the person who is liable to pay that consideration. However, when no consideration is payable for the supply of service, Section 2(93)(c) states that the recipient shall be the person to whom the service is rendered. In a CIF transaction, the foreign exporter contracts with a foreign shipping line. The service of shipping is rendered by the foreign shipping line to the foreign exporter and the consideration is accordingly payable by the latter to the former. However, since the ultimate beneficiary of such services is the Indian importer, he is treated as the recipient of service as per section 2(93)(c) of the CGST Act.

- On a conjoint reading of Sections 2(11) and section 13(9) of the IGST Act along with Section 2(93) of the CGST Act, the import of goods in a CIF contract constitutes an "inter-state" supply which can be subject to IGST where the importer of such goods would be the recipient of shipping service.

- Determination of value of supply only through rules and not by notification is an unduly restrictive interpretation. Thus, the impugned Notification 8/2017 – IGST (Rate) cannot be struck down for excessive delegation when it prescribes 10 per cent of the CIF value as the mechanism for imposing tax on a reverse charge basis

- Transaction does have a nexus with the territory of India. Firstly, the destination of goods is India and thus, a clear territorial nexus is established with the event occurring outside the territory; and secondly, the services are rendered for the benefit of the Indian importer.

- The impugned levy imposed on the "service" aspect of the transaction is in violation of the principle of "composite supply" enshrined under Section 2(30) read with Section 8 of the CGST Act. Since the Indian importer is liable to pay IGST on the "composite supply", comprising of supply of goods and supply of services of transportation, insurance, etc. in a CIF contract, a separate levy on the Indian importer for the "supply of services" by the shipping line would be in violation of Section 8 of the CGST Act.

- For the reasons stated above, the appeals are accordingly dismissed.

NASA Comments

- It is a big relief to the taxpayers wherein the Honorable Supreme Court has struck down the levy of IGST on Ocean freight in case of CIF imports. The levy was struck down on the principles enshrined in the composite supply.

- The taxpayers will be eligible for refund of amounts earlier paid on such transactions subject to the principles of unjust enrichment. The onus will be on the claimant to prove that he has neither passed on the incidence of tax to other person nor has claimed input tax credit of such tax paid under reverse charge.

- It may be noted that all other contentions of the taxpayer were categorically denied by the Honorable Supreme court. Had it not been a composite supply of goods, GST levy on such transaction would have been held valid as an import of service for a

consideration wherein the importer of goods would have been liable to pay GST as the recipient of services.

- The implications of the judgment on Cross-border transactions involving supply of services wherein the beneficiary of services is an Indian entity will have to be scrutinized minutely pursuant to this judgment.

Case 2 – Northern Operating Systems Private Limited [2022-TIOL-48-SC-ST-LB]

Facts in brief & Issue Involved

- The respondent, i.e., Northern Operating Systems Private Limited, had entered into an agreement with its overseas group companies to provide general back office and operational support wherein the said overseas group companies were required to depute its employees (seconded employees) to the respondent.

- The seconded employees worked under instructions and directions of the respondent. While such employees continued to remain on payroll of the overseas group companies, for all practical purposes the respondent was the employer.

- The seconded employee would receive their salary, bonus, social benefits, out of pocket expenses and other expenses from the overseas group companies. The group companies would raise a debit note on the respondent to recover such amounts without any markup.

- Allegations of the revenue is that the assessee has failed to discharge the service tax under the category of manpower recruitment or supply agency service with regard to employees being seconded to the assessee by the overseas company.

Contention of the Petitioner (Service Tax Department)

- Activity of providing skilled manpower, on secondment basis, which works under the supervision and control of the assessee for a fixed period of time on temporary basis, falls within the domain of the manpower recruitment service or supply agency service

within the meaning of section 65(88) read with section 65(105) of the Finance Act, 1994.

- The seconded employee will remain employed by the original employer (overseas company) during the secondment, and will, following the termination of the secondment return to the original employer and hence the employee does not become integrated into the hosts organization (assessee' s organization)

- The obligation of the service provider would cease once employees were recruited and seconded. Hence the liability of the service tax under section 65 (105)(k) would be triggered at that event.

- There is no exclusive clause in the Finance act, 1994 that restricts the taxability of service of manpower recruitment or supply agency, when salaries were drawn by the respondent in respect of the manpower so supplied and TDS under the Income Tax Act, 1961 had been affected thereof.

Contention of the Respondent

- Service would become taxable only when it is provided by a manpower recruitment or supply agency. In the present case the group companies are not engaged in the business of supplying manpower.

- It was averred that post July 2012, by virtue of Section 65(44) of the Act, the services provided by an employee to an employer in the course of employment was kept out of the ambit of 'service'.

- Seconded employees are contractually hired by the respondent and are under their own control and supervision.

- Respondent submitted that in order to determine the value of taxable services for charging service tax, the gross amount charged for providing the services is to be determined. However, in the present case the demand of the service tax is being computed on the salaries and allowances paid to the seconded employees.

- Respondent argued that even if the service tax is paid, the entire amount would be refunded as input credit to the assessee, in cash, as per Rule 5 of the CENVAT Rules read with Rule 6A of the Service Tax Rules,1994.

- Respondent placed its reliance on the following case laws:

    - SRF Ltd. v. Commissioner [2016-TIOL-84-SC-CX]; and

    - Commissioner of Central Excise v. Coca Cola India Private Limited [2007-TIOL-245-SC-CX]

Observations & Decision of Honorable Supreme Court

- The main issue that arises is whether the overseas group company or companies, with whom the respondent has entered into agreements, provides manpower services for the discharge of assessee's functions through seconded employees.

- The Apex Court considered various relevant tests to reach the conclusion that no test of universal application can yield correct result, therefore, a conglomerate of tests is to be applied to the fact and circumstances of each case to determine the nature of the contract.

- On perusal of the letter of understanding between the respondent and employees, the Court observed that nowhere in it was it mentioned that the seconded would be treated as employees of the assessee.

- The terms of employment of the seconded employees is as per the policy of the overseas company and after completing specific assignments these employees are to return to their overseas employer. It also noted that apart from paying the basic salary, a hardship allowance of 20% of the basic salary was paid to these employees by the overseas employee for working in India.

- The Court held there was no employer-employee relationship between the Indian company and the seconded employees and that the Indian company was a service recipient of manpower supply.

NASA Comments

- The ratio laid down by Honorable Supreme court will apply in GST regime with equal force.

- Based on this decision, the department may implicate that secondment or salary allocation arrangements between domestic entities is a supply liable to GST. The possibilities of huge litigations cannot be denied. It will be advisable for business entities to revisit the position taken by them on this issue.

- Trade will be saddled with huge service tax and interest liability where cases are pending before different forums and also GST and interest liability from July 2017 onwards.

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

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