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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		
Checkmate Services (P.) Ltd. v. CIT [143 taxmann.com 178 (SC)]	Whether the taxpayer is entitled to claim deduction of delayed deposits of employees' contribution towards provident fund / super annuation fund (EPF/ ESI) u/s 36(1)(va) of Income Tax Act, 1961?	Honorable Supreme Court, while dismissing taxpayer's appeal, held that an essential condition for admissibility of claim of deposit of employees' contribution towards EPF/ ESI is that such amounts should be deposited on or before the due dates prescribed under the respective statutes.
Indirect Tax		
Oasis Realty vs Union of India [Writ Petition No.: 23507 of 2022 dt. 16th September 2022]	Whether GST credit lying under Electronic Credit Ledger (ECRL) can be utilized to pay pre-deposit amount which is 10% of the tax amount under dispute arising out of an impugned order?	Honorable Bombay High Court ruled that since the amount payable are towards output tax, the credit balance available in electronic credit ledger can be utilized to pay pre-deposit.
Troikaa Pharmaceuticals Ltd. [2022-TIOL-106-AAR-GST]	Whether GST shall be applicable on the amount recovered from employees or contractual workers, when provision of third-party canteen service is obligatory under section 46 of the Factories Act, 1948?	GST is not leviable on the food provided to the employees, which is collected from them and paid to the Canteen service provider. However, GST is payable on the canteen services relatable to contractual workers.

	Whether input tax credit of GST paid on food bill of the Canteen Service Provider shall be available, since providing this canteen facility is mandatory as per the Section 46 of the Factories Act. 1948?	ITC on GST paid on canteen facility is admissible to the applicant subject to condition that burden has not been passed on to employees. However, ITC on GST paid for canteen facility on food supplied to contractual workers is ineligible.

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

DIRECT TAX

Case 1 – Checkmate Services (P.) Ltd. v. CIT [143 taxmann.com 178 (SC)]

Facts in brief & Issue Involved

- Taxpayer had belatedly deposited employees' contributions towards EPF and ESI, considering the due dates under the relevant statutes.

- Assessing Officer ('AO') observed that while section 36(1)(va) of the Act is applicable to employees' contributions, section 43B is applicable to employers' contributions.

- Since the employees' contributions were not deposited before the due date prescribed in the relevant statutes, the AO made disallowance of the same.

Contentions of Taxpayer

- Section 43B of the Act covers both employer's as well as employees' contributions which the taxpayer is statutorily obliged to make as an employer. This section starts with a "non-obstante clause". Hence, it overrides the statutory due date provided in section 36(1)(va) of the Act and provides for due date of filing of return of income for both employers and employees' contributions.

Contentions of Revenue

- Income Tax Act has always differentiated between employees' contributions and employer's contributions. While section 36(1)(va) of the Act covers employees' contributions, section 43B of the Act covers employer's contributions and both provide for different due dates for the purpose of claiming tax deduction.

Observations & Decision of Honorable Supreme Court

- In the Alom Extrusions case, the impact of amendment in section 2(24)(x) and section 36(1)(va) of the Act was not considered.

- The expression "due date' in terms of explanation to section 36(1)(va) of the Act is the date by which such amounts had to be credited by the employer prescribed in the concerned enactments such as EPF/ESI Acts.

- It is evident that the intent of the Legislature was that sums referred to in clause (b) of Section 43B of the Act i.e. "sum payable as an employer, by way of contribution" refers to the contribution by the employer. The reference to "due date" in the second proviso to Section 43B of the Act was to have the same meaning as provided in the explanation to Section 36(1)(va) of the Act.

- The words "any sum payable by the assessee as an employer by way of contribution to any provident fund or superannuation fund or gratuity fund or any other fund for the welfare of the employees" covers only employers' contributions to these funds to be borne and paid by employer out of his income, and not employees' contributions to these funds deducted by employer out of employees' income/salary.

- Non-obstante clause in section 43B of the Act cannot be interpreted as overriding section 36(1)(va) of the Act and cannot be interpreted to mean that employer will get deduction in respect of employees' contributions deposited after the due date u/s 36(1)(va) of the Act but on or before the due date prescribed under section 43B of the Act i.e. due date of filing return of income.

- Deduction under section 36(1)(va) of the Act can be allowed only if employees contribution is deposited within the due date prescribed in the relevant statutes.

NASA Comments

- Finance Act 2021 has inserted Explanation 2 to section 36(1)(va) of the Act to clarify that the provisions of section 43B of the Act shall not apply and shall be deemed never to have been applied for the purposes of determining the "due date" under section 36(1)(va) of the Act. It also introduced Explanation 5 to section 43B of the Act clarifying that the provisions of section 43B shall not apply and shall be deemed never to have been applied to a sum received by the taxpayer from any of his

employees to which section 2(24)(x) of the IT Act applies. This amendment is effective from 1st April 2021.

- The present SC ruling upholding minority views of the Hon. Gujarat and Kerala High Courts in favour of the tax authorities effectively endorses Finance Act 2021 amendment and makes it clarificatory in nature.

- Taxpayers may need to revisit their pending litigations and analyse the impact of this decision on the matters pending before different authorities.

INDIRECT TAX

Case 1 – Oasis Realty vs Union of India [Writ Petition No.: 23507 of 2022 dt. 16th September 2022]

Facts in brief & Issue Involved

- Petitioner had filed an appeal against the order restricting the utilisation e-credit balance to pay the mandatory pre-deposit under Section 107(6) of the Maharashtra Goods and Services Tax Act, 2017 (MGST Act) required for filing the appeal before the Appellate Authority.

- Respondent had passed an order stating that Petitioner has to pay pre-deposit through Electronic Cash Ledger (ECL) and not through the Electronic Credit Ledger (ECRL).

- Section 49(4) restricts the usage of the amount available in the ECRL only for payment of output tax under GST and hence ECRL balance cannot be utilised for payment of pre-deposit stipulated in Section 107(6)(b).

- Aggrieved by the order passed by Respondent, Petitioner filed a writ petition before the Honorable Bombay High Court.

Observations & Decision of Honorable High Court

- Section 107(6) of the MGST Act requires payment of 10% of the disputed tax for admission of appeal.

- Term used in Section 107(6) of MGST Act is 'paid' and not 'deposited'. Section 49(3) & (4) of MGST Act provide manner of utilising the balance lying in the Electronic Cash Ledger and Electronic Credit Ledger, respectively for making payments. Hence payment of pre-deposit can be made either through ECL or ECRL.

- Section 49(4) of the MGST Act allows payment of 'tax' through the ITC balance in the ECRL. Thus, the pre-deposit can also be paid through the ECRL as Section 107(6) requires paying 'tax in dispute', where the word 'tax' means Integrated Tax, Central Tax or State Tax and not only tax self-assessed in the returns.

- Rule 86(2) of MGST Rules provides for debiting ECRL to the extent of discharge of any liability in accordance with the provisions of Section 49 of the MGST Act. Further, output tax in relation to a taxable person is defined in Section 2(82) of the MGST Act as the tax chargeable on the taxable supply of goods or services or both but excludes tax payable on the reverse charge mechanism. Therefore, any payment towards output tax can be made by utilisation of the amount available in the ECRL.

- Taxpayer is, thus, entitled to utilize the balance in the ECRL to pay 10% of tax in dispute (pre-deposit of tax) as required by Section 107(6) of MGST Act.

NASA Comments

- Honorable Orissa High Court in case of M/s Jyoti Construction Vs. Deputy Commissioner of CT & GST held that the pre-deposit cannot be discharged from Electronic Credit Ledger Balance.

- Above favorable decision of Honorable Bombay high court will provide a great relief to taxpayers in the Maharashtra Jurisdiction and taxpayers disputing demands can file the appeal utilising the ECRL without adversely impacting their liquidity.

Case 2 – Troikaa Pharmaceuticals Ltd. [2022-TIOL-106-AAR-GST]

Facts in brief & Issue Involved

- Applicant is engaged in the business of pharmaceutical products and provides canteen facilities to its employees and workers as mandated under the Factories Act, 1948.

- Applicant has arranged for food (lunch and dinner) through an external agency which supplies the food to the company's employees and the contractual workers.

- The food supplier raises an invoice as per the agreed billing frequency (i.e. on the basis of the actual number of food plates consumed) by charging 5% GST thereon.

- Applicant provides canteen facility at a subsidized rate to its employees and contractual workers and bears 50% of food cost and recovers the balance 50% from its employees.

- Applicant has sought an advance ruling on the following questions:

    - Whether GST shall be applicable on the amount recovered by them from employees or contractual workers, when provision of third-party canteen service is obligatory under section 46 of the Factories Act, 1948?

    - Whether input tax credit of GST paid on food bill of the canteen service provider shall be available, since providing this canteen facility is mandatory as per Section 46 of the Factories Act, 1948?

Contentions of Applicant:

- Applicant is not the supplier of food to employees and contract workers but is only providing canteen facility as a facilitator.

- Neither any intent to make profit nor any element is being retained as profit from the amount recovered from the employees pay out as their share.

- There is no reciprocity and direct and immediate link / nexus between supply of foods made by the third-party canteen service provider to employees and recovery of amount from the employees and contract workers to treat it as consideration received by applicant against any supply which is liable to GST.

- As per clause I of schedule III of GST Act 2017, services by an employee to the employer in the course of or in relation to his employment shall not be treated as supply and hence such services are out of the purview of GST.

- Further, CBIC vide its press release dated 10th July 2017 clarified that the intention of the government is not to treat all transactions as "Supply" unless they are carried out in the normal course of the business activities

- Thus, canteen services, which is undertaken in the course of employment or in connection with employment has been specifically excluded from the ambit of supply.

Discussions by and Observation of AAR:

Applicability of GST on the amount recovered from employees:

- CBIC, vide Circular No. 172/04/2022-GST dated 06.07.2022, clarified that any perquisites provided by the employer to its employees in terms of contractual agreement are in lieu of the services provided by employee to the employer in relation to his employment and thus, will not be subjected to GST. Hence, activities provided by applicant to its employees is not a supply.

Applicability of GST on the amount recovered from contractual workers:

- The contractual workers are not the 'employees' as they are not on the pay roll of the company.

- CBIC, in Circular No. 172/04/2022-GST dated 6th July 2022, clarified that perquisites provided by the employer to the employee in terms of contractual agreement entered into between the employer and the employee will not be subjected to GST.

- The test for establishing an employer-employee relationship is decided by several factors, including, among others who appoints the workers; who pays the salary / remuneration; who can take disciplinary action; etc.

- In given case, applicant has paid gross amount to the labour contractor and such labour contractor is an employer paying the wages to the workers being employees and also deducting Provident Fund. Therefore, it evident that the instant case does not pass the test of employer-employee relationship and is therefore does not fall under the ambit of entry I of Schedule III of CGST Act.

- To sum up, the supply of food by the applicant is 'Supply of Service' by the applicant to their contractual worker/s. The cost, which is recovered from the salary of contractual worker, as deferred payment is 'consideration' for the supply and GST is liable to be paid.

ITC on canteen charges for food supplied to employees:

- Proviso of section 17(5)(b) of CGST Act stipulates that ITC shall be available on the GST paid where it is obligatory to provide a benefit for an employer to its employees in terms of any law for the time being in force. In view of the above clarification, ITC of the GST paid on canteen charges is available to the applicant on the food supplied to the employees of the applicant.

ITC on canteen charges of food supplied to contractual worker:

- In the instant case there is no employer – employee relation between the applicant and contractual workers. Hence, it is not obligatory on the applicant to provide canteen facility to the Contractual workers as per the provisions of CLRA Act. Thus, applicant is not eligible to the ITC on food supplied to the contractual worker under Section 17(5)(b) of CGST Act 2017.

NASA Comments

- 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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