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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		
M/s. Google LLC vs JCIT (OSD) (IT) / DCIT (IT) [TS-73-ITAT-2023 (Bangalore)]	Whether reimbursement of salary of seconded employees will be taxable as fees for included services ("FIS") or fees for technical services ("FTS")?	Hon'ble ITAT held that the reimbursement of salary of seconded employees is not taxable as FIS / FTS relying upon the judgement of the Hon'ble High Court in case of Flipkart Internet (P.) Ltd vs DCIT.
Indirect Tax		
Karnani FNB Specialities LLP [2023-TIOL-30-AAR-GST]	Whether applicant is liable to reverse ITC to the extent of turnover relating to sale of alcoholic liquor for human consumption?	Applicant is required to reverse ITC under Rule 42 r.w. section 17(2) of CGST Act to the extent of turnover that relates to exempt supply of sale of alcoholic liquor for human consumption.
Pinstar Automotive India Private Limited [W.P. No. 8493 of 2023]	Whether ITC reversed by recipient be restored if the liability is made good by the defaulting Supplier?	The substantive liability is that of supplier and the protective liability is upon the recipient. GST authorities should restore the ITC reversed by the claimant if the liability is made good by the supplier.

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

Case 1 - M/s. Google LLC vs JCIT (OSD) (IT) / DCIT (IT) [TS-73-ITAT-2023(Bangalore)]

Facts in brief & Issue Involved

- ◆ The taxpayer is a foreign company incorporated in USA.
- ◆ During the years under consideration, the taxpayer had received payments in the nature of reimbursement of salary from Google India Private Limited ("GIPL") for seconding its employees to GIPL.
- ◆ The Assessing Officer ("AO") passed draft assessment orders taxing such reimbursements received from GIPL by characterizing the same as FTS as per Explanation 2 to section 9(1)(vii) of the Act as well as FIS as per Article 12(4) of the India-USA DTAA.
- ◆ Aggrieved by the above orders, the taxpayer filed objections before the DRP which were disposed off by rejecting all the contentions raised.
- ◆ Pursuant to disposal of objections by the DRP, final assessment orders were passed.
- ◆ Aggrieved by the final assessment orders, the taxpayer filed appeals before the Hon'ble Tribunal.

Contentions of Taxpayer

- ◆ The taxpayer relied upon the judgement of the Hon'ble jurisdictional High Court in the case of Flipkart Internet (P.) Ltd. vs. DCIT 288 Taxman 699 which was followed by the coordinate bench of the Hon'ble Bangalore Tribunal in the case of Biesse Manufacturing Co. (P.) Ltd. vs. ACIT (2023) 146 taxmann.com 242 and Goldman Sachs Services (P.) Ltd. vs. DCIT (2022) 138 taxmann.com 162.

Contentions of Revenue

- ◆ The arrangement between GIPL and the taxpayer is such that GIPL has required technical services from the taxpayer, which were to be provided through certain employees of the taxpayer, who were technical / managerial experts in their respective domains.
- ◆ In a normal course of action such an arrangement would be a service / contractual agreement between GIPL and the taxpayer.
- ◆ There is no employer-employee relationship between the seconded employees and GIPL.
- ◆ Since, these services are technical and managerial in nature and also, they provide and impart a skill set to the concerned manpower of GIPL for execution of technical and managerial jobs, such an arrangement would fall under India-USA DTAA and covered as FIS.

Observations & Decision of the Tribunal

- ◆ On perusal of clauses of assignment letter, the Hon'ble Tribunal observed as under:
 - The seconded employees worked only for GIPL and not for the taxpayer in any manner. Hence, the services provided by the seconded employees were solely for the benefit of GIPL.
 - The employees were required to report to GIPL and they were working under the supervision and control solely of GIPL. Being an employer, salary of such employees was ultimately incurred by GIPL.
 - Only from an administrative convenience standpoint, the taxpayer had agreed to make payment for the salaries of such seconded employees in their overseas bank accounts on behalf of GIPL and getting reimbursement of the same from GIPL on a cost-to-cost basis.

- Taxpayer was neither responsible nor assumed any risk for the work undertaken by the seconded employees for GIPL.
- Once seconded employees moved out of the US on secondment, he / she did not have employment guarantee upon return back to the US after the secondment period.
- ◆ The Hon'ble Tribunal further observed that the GIPL had duly deducted tax at source under Section 192 of the Act against salary and other allowances paid / payable to such seconded employees and deposited the same with the Government of India.
- ◆ Moreover, GIPL had obtained necessary registration for the said employees with Provident Fund and Foreigners Regional Registration Office and also made appropriate contributions towards social security benefits in India which forms part of their salary cost.
- ◆ Following the decisions cited above, the Hon'ble Tribunal held that the amounts paid by GIPL to the taxpayer as reimbursement of salary of seconded employees does not come within the purview of FTS / FIS under the Act or under India-USA DTAA.

NASA Comments

- ◆ The Bangalore Tribunal has reiterated the principle that mere reimbursement of salary of seconded employees on cost-to-cost basis will not be taxable as FTS / FIS.

Case 1 – Karnani FNB Specialities LLP – West Bengal AAR - [2023-TIOL-30-AAR-GST]

Facts in brief & Issue Involved

- ◆ Applicant is engaged in providing services of restaurant, Catering, banquet renting etc. It is also engaged in selling alcoholic liquor for human consumption.
- ◆ Applicant has sought advance ruling on whether ITC needs to be reversed to the extent of turnover that relates to sale of alcoholic liquor of human consumption.

Applicant's submissions

- ◆ ITC attributable to 'exempt supplies' is to be reversed as per formula prescribed under Rule 42 of CGST Rules.
- ◆ For a transaction to be termed as 'exempt supply', it must:
 - a. Be a supply of goods or services or both; and
 - b. It must either attract 'Nil' rate of tax or be wholly exempt from tax or be a 'non-taxable supply'.
- ◆ By virtue of Article 366 (12A), the scope of GST has been restricted, under the Constitution of India, to specifically exclude sale of alcoholic liquor for human consumption. Therefore, selling 'alcoholic liquor for human consumption' cannot be treated as a 'supply' as envisaged under the Act.
- ◆ The scope of 'non-taxable supply' must necessarily be limited to those supplies over which the legislature can exercise its legislative competence and impose tax. These may include supply of petroleum crude, high speed diesel, motor spirit, natural gas, and aviation turbine fuel.

- ◆ The legislature did not even intend to include sale of alcoholic liquor as "not leviable". Hence it does not fall under 'non-taxable supply'.
- ◆ In a situation where supply of alcohol is treated as a non-taxable or exempt supply, the applicant will have to reverse ITC resulting into applicant discharging GST liability on output supply of alcoholic liquor by way of reversal of ITC.
- ◆ CGST Act ought not to be interpreted in a manner where the applicant has to bear tax on such activity in an indirect manner where it is directly and expressly excluded from the scope of the statute.

Department's submissions

- ◆ Section 7(1) of the GST Act, 2017 define the term "supply" which includes all form of supply of goods or services or both such as sale, transfer, barter, exchange, license, rental, lease or disposal made or agreed to be made for a consideration by a person in course of furtherance of business. Supply of liquor for human consumption is also supply as per definition given in section 7(1) of the GST Act, 2017.
- ◆ Section 2(78) of the GST Act defines non-taxable supply as supply of any goods or services or both which is not leviable to tax under this Act or under the IGST Act. The definition given here is in consonance of article 366(12A) which only empowers to levy tax. So definition of non-taxable supply as per section 2(78) is complete and cannot be restricted and conditioned invoking article 366(12A) of Constitution. Hence, supply of liquor is non-taxable supply and thereby exempt supply requiring ITC reversal u/r 42 of CGST Rules.

Observations and ruling of AAR

- ◆ Section 17 of CGST Act allows a registered person to utilize input tax credit, to the extent of its eligibility, for making payment of output tax.

- ◆ Sale of alcoholic liquor for human consumption for a consideration by the applicant in the course or furtherance of business comes under the purview of supply as defined in section 7 of the GST Act.
- ◆ Article 366(12A) of the Constitution of India defines 'Goods and Services Tax' to mean tax on supply goods or services or both, except taxes on the supply of alcoholic liquor for human consumption. The specific exclusion delineates that tax shall not be levied on supply of alcoholic liquor for human consumption. Accordingly, section 9 of the GST Act which deals with 'Levy and collection' excludes levy of tax on the 'supply of alcoholic liquor for human consumption'.
- ◆ It follows from above that sale of alcoholic liquor for human consumption is a supply under the GST Act on which tax is not leviable. A supply of goods or services or both which is not leviable to tax is defined as 'Non-taxable supply' in clause (78) of section 2 of the GST Act.
- ◆ Since activities of selling of alcoholic liquor for human consumption by the applicant would be treated as 'non-taxable supply', it will be 'exempt supply' under the GST Act. Applicant is required to reverse input tax credit attributable to such exempt supply under section 17(2) of the GST Act read with rule 42 of the GST Rules.

NASA Comments

- ◆ Ruling by AAR is binding only on appellant and its jurisdictional officer. It does not have a general binding precedence value but it may have persuasive value.

Case 2 – Pinstar Automotive India Private Limited - Madras High Court - [W.P. No. 8493 of 2023]

Facts in brief & Issue Involved

- ◆ Petitioner has procured goods or services from various suppliers for which they have made payment of entire amount including tax.
- ◆ GST Registration of such suppliers has been cancelled and tax collected by them has not been remitted by them to the department.
- ◆ Petitioner has received notice from GST authorities directing reversal of ITC availed by it where tax on the same has not been deposited to the government by the supplier. Adjudicating authority adjudicated the said show cause notice and confirmed the demand vide order in original dated 27 July 2022.
- ◆ In response to the above adjudication order, petitioner preferred rectification application on the grounds that adjudicating authority had not considered various judicial precedents on the subject matter.

Contentions of the Petitioner

- ◆ They had fulfilled all the conditions stipulated under the Statute and had adduced proof for payment of consideration within a period of 180 days and therefore, they are eligible to avail ITC.
- ◆ The petitioner filed an application for rectification of errors apparent on the face of the record under Section 161 of the Act on the ground that GST authority failed to refer to following relevant decisions while passing order:
 - Arise India Limited V. Commissioner of Trade and Taxes [TS-314-HC 2017 (Del) – VAT];
 - Shri Ranganathar Valves Private Limited V. Assistant Commissioner [2020-TIOL-1611-HC-Mad-VAT];


- CC & CCE V. M/s. Juhi Alloys Limited [Excise Appeal No. 3625 3627 of 2010-Ex (SM), CESTAT, Delhi, dated 01.07.2013]; and
- Commissioner of Central Excise, Jalandhar V. M/s. Kay Kay Industries [AIT-2013-147-SC].

Observations & Decision of High Court

- ◆ Three suppliers of the petitioner had uploaded the invoices in GSTR-1, but no tax had been remitted by them, since GSTR 3B had not been filed by them.
- ◆ Section 16 of CGST Act lays down eligibility conditions for taking Input tax credit. One of the conditions is that the tax charged in respect of such supply has been actually paid to the Government in cash or through utilisation of ITC in respect of such supply. Hence, there is a mandate cast on the claimant of ITC to ensure compliance with the provision or else it will not be entitled to such ITC.
- ◆ Section 16 of CGST Act needs to be observed strictly so that there is no jeopardy to the interests of the revenue.
- ◆ However, where the tax liability has been met by way of reversal of ITC and similarly recovery is effected from the supplier as well, this would amount to a double benefit to the revenue.
- ◆ GST authorities should restore the ITC reversed by the claimant if the liability is made good by the supplier.
- ◆ Thus, the substantive liability falls on the supplier and the protective liability upon the purchaser.

NASA Comments

- ◆ This decision of Hon'ble High court emphasis the fact that primary responsibility to pay the tax is on the supplier. Section 16(2)(c) of CGST Act is only a mechanism to



protect the interest of revenue i.e. department can ask the recipient to reverse the ITC only as a protective measure and only after providing an opportunity of being heard.

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