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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		
Music Broadcast Private Limited [TS-466-HC-2023(BOM)]	Issue No. 1: Whether payment made towards compensation for premature termination of contract be held as capital or revenue in nature? Issue No. 2: Whether taxpayer is eligible for depreciation on payment made for restricting the counterparty not competing against taxpayers' similar business for another 2 ½ years (non-compete fees) being Intangible asset?	**Issue No. 1:** The Hon'ble High court relying on the apex court ruling in the case of Ashok Leyland held that the taxpayer saved money that it would have had to incur in the relevant AY and for few more years hence compensation paid for premature termination of contract would be an allowable deduction. **Issue No. 2:** It is further held that payment made towards non-compete agreement provides enduring benefit by protecting its business against competition would fall within the expression "any other business or commercial rights of similar nature" and would be eligible for depreciation
Indirect Tax		
Cube Highways and Transportation Assets Advisor Pvt Ltd [TS-399-HC(DEL)-2023-GST]	Refund of accumulated ITC on export of services without payment of tax was rejected on the grounds that the independent consultancy	Hon'ble High Court of Delhi held that the petitioner was at all times an **independent service provider** contracting with its overseas group entity on

	services provided by petitioner was an intermediary service as per section 2(13) of the IGST Act and hence not an export of service u/s 2(6) of the Act.	**principal-to-principal basis** and was not intended to be an agent or partner. Hence, rendering of consultancy services cannot be considered as 'Intermediary Services' or services as an 'Intermediary'. The Hon'ble High Court directed the authority to process the petitioner's claim for refund as expeditiously as possible and preferably with in a period of eight weeks from date of order.

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

DIRECT TAX

Case 1 – Music Broadcast Private Limited [TS-466-HC-2023(BOM)]

Facts in brief & Issue Involved:

- The taxpayer was engaged in the business of advertising through the intermittent breaks of various programs casted on "Radio City" channel. For rendering the services, the taxpayer entered into an agreement with Star India Pvt. Ltd. (SIPL) for procurement of advertisements.
- A dispute arose between SIPL and taxpayer which resulted in the taxpayer paying compensation of Rs. 12.60 Crs towards Advertisement and Agency Sales Termination Agreement (ASTA) and Rs.19.40 Crs in terms of Restrictive Covenant Agreement (RCA) for not competing against taxpayers' similar business for another 2 ½ years.
- The AO disallowed both the expenses treating the same as Capital in nature. Subsequently, CIT(A) reversed the decision of the AO with regard to compensation paid in terms of ASTA and upheld the decision of AO regarding amount paid in terms of RCA as non-compete fees.
- Aggrieved by the Order passed by CIT(A) on issue of payment made to SIPL for premature termination of Advertising Sale Agreement, the taxpayer filed an Appeal before the Hon'ble Income Tax Appellate Tribunal (ITAT). The Hon'ble ITAT concurred the view expressed by CIT(A).
- The issue under consideration which arose out of appeal filed before Hon'ble High court by Revenue was whether payment made for termination of contract by way of compensation would be an allowable deduction in computing the total income of taxpayer and whether payment towards non-compete fees is to be treated as revenue or capital in nature.

Observations and Decision of the Hon'ble Bombay High Court:

- As regards the first issue the High Court observed that when an expenditure is made with a view to bringing into existence an asset or an advantage for the enduring benefit of a trade, there is good reason for treating such an expenditure as properly attributable not to revenue but to capital.

- Where the termination of the agreement is on account of business consideration and as a matter of commercial expediency it cannot be said that by terminating the agreement, the taxpayer acquired any enduring benefit or any income yielding asset.
- By terminating the services, taxpayers not only saved on the expenses that it would have had to incur in the relevant previous year but also for few more years to come. Therefore, it will not be correct to say that by avoiding certain business expenditure, the company can be said to have acquired enduring benefits or acquired any income yielding asset.
- Hence, the Hon'ble High Court relying on the Apex Court ruling in the case of Commissioner of Income Tax V/s. Ashok Leyland Ltd (1972) 86 ITR 549 (SC) held that CIT(A) as well as the ITAT, was correct in allowing payment on account of termination of agreement to SIPL as revenue expenditure.
- As regards issue of allowability of depreciation on intangible asset being non-compete fees, the Hon'ble High Court relied on ruling of Division Bench in the case of PCIT V/s. Piramal Glass Ltd. Judgment dated 11.6.2019 in IT Appeal No.556 of 2017 (followed by Principal Commissioner of Income Tax V/s. India Medtronic (P) Ltd Judgment dated 30.9.2021 in IT Appeal No.1453 of 2017) wherein it was held that the expression "or any other business or commercial rights of similar nature" used in Explanation 3 to sub-section 32(1)(ii) is wide enough to include the present situation.
- The Hon'ble High Court further held that by paying amount as non-compete fees under the RCA, the rights acquired by taxpayer was not only giving it enduring benefit but also protected taxpayer's business against competition, that too from a person who had closely worked with taxpayer. Hence, no perversity was observed in the findings of ITAT and accordingly, the said ground was dismissed.

NASA Comments: -

- The Hon'ble High Court has reconfirmed the legal position that a revenue expenditure incurred which satisfies the test of commercial expediency should be allowed as an admissible deduction.

- Further, the allowability of non-compete fees as revenue expenditure and/or depreciation on the same has been subject matter of debate whereby contradicting views are expressed by various courts.
- Thus, it is necessary to analyse the relevant clauses of the agreement to conclude if payment entails any enduring benefit or enhances the profit earning capacity and accordingly treatment should be adopted for claiming such amount as a revenue expenditure or an asset eligible for depreciation. Hence, the importance of proper drafting of the non-compete agreement.

INDIRECT TAX

Case 1 – Cube Highways and Transportation Assets Advisor Pvt Ltd v/s Assistant Commissioner CGST Division & Ors [TS-399-HC(DEL)-2023-GST]

Facts in brief & issues involved:

- Cube Highways and Transportation Assets Advisor Pvt Ltd ("the Petitioner") is engaged in the business of rendering investment advisory services related to the investment by non-resident group companies in the target companies in India, which are engaged in the transportation sector.
- The petitioner and I Squared Asia are group companies of I Squared Capital which has 19 projects in India with a long-term concession to build toll highways on BOT (Build, Operate and Transfer) basis.
- The petitioner filed its application for refund of unutilized ITC in case of export of services without payment of IGST as per section 54(3) of the CGST Act for the financial years 2018-19 to 2020-21, which were rejected by the Adjudicating Authority (AA).
- The petitioner was denied refund of unutilized ITC in case of export of services without payment of IGST on essentially three grounds:

  - First, that the petitioner is an 'Intermediary' in respect of the services provided by it to I Squared Asia.

  - Second, that the place of supply of services provided by the petitioner was in India by virtue of section 13(3)(b) of the IGST Act. Hence the services rendered by the

petitioner did not qualify as export of services under Sub-section (6) of Section 2 of the IGST Act.

- And third, that the place of supply of services provided by the petitioner was in India by virtue of section 13(4) & 13(7) of the IGST Act.

- Aggrieved by the said order, the petitioner filed an appeal under Section 107 of the CGST Act before the Appellate Authority which was also rejected on the same grounds.

- Aggrieved with the impugned refund rejection order the petitioner filed writ for the financial years 2018-19 to 2020-21 before the Hon'ble Delhi High Court.

Contentions of Petitioner

- The petitioner is engaged in the provision of Management Consultancy services in Investment Advisory and Marketing Survey and Advisory services to entities located outside India. The Company provides update on market information, market trends and businesses, legal and regulation information / environment in India to entities outside India. Its services inter-alia includes identifying potential opportunities for investments in India, analysing investment returns and related risks, preparing report etc. basis which the overseas entity makes a decision whether to make a particular investment or not.

- The petitioner had filed responses to the show cause notices received for F. Y 2018-19 to 2020-21 in respect of refund application of unutilized ITC in case of export services setting out the nature of services and provided a copy of the Agreement with I Squared Asia in terms of which services were rendered. It was contended on behalf of the Revenue that petitioner is a part of a group of companies, and some of those companies have projects in India; however, there is no material on record, which even remotely suggests that petitioner had rendered any services other than advisory services. The petitioner had also provided invoices which indicated that it was charging "market services and advisory fee".

- Clauses 2 and 3 of the Service Agreement relating to appointment of service provider and the scope of services sets out that petitioner at all times was required to act as an independent service provider and the Agreement with I Squared Asia

was on principal-to-principal basis. It was expressly specified in the said Clause that the petitioner is not intended to be an agent or partner of I Squared Asia.

- Similarly, the last paragraph of Clause 3 of the Agreement clearly states that the petitioner could at "no point in time can represent or reflect to anyone that it has the authority to negotiate and conclude the terms on behalf of I Squared Asia or its affiliates".
- The petitioner also claimed that place of supply as per section 13(3)(b), 13(4) and 13(7) of the IGST Act is inapplicable in the said case.
- In view of the above, the petitioner prays that the orders impugned in the present petitions are liable to be set aside.

Observations & Decision of Honorable High Court

- The Hon'ble Delhi High Court (HC) observed that the principal questions to be addressed are whether in the context of services rendered by the petitioner to I Squared Asia under the Agreement, the petitioner is an 'Intermediary' and whether its services are covered u/s 13(8)(b) and / or u/s 13(4) and / or u/s 13(3)(b) of the IGST Act.
- HC observed that there is no real dispute as to the nature of services rendered by the petitioner as it as per the services covered under the Agreement. Referring to the relevant clauses of the Supply Agreement between the parties, HC observed that the petitioner was engaged to render Advisory Support Services to I Squared Asia where petitioner at all times was an independent service provider contracting with, I Squared Asia on principal-to principal basis and is not intended to be an agent or partner of the I Squared Asia.
- HC remarked that it is not easy to discern the import of the reasoning of the Adjudicating Authority as merely because I Squared Asia may have on the basis of advisory services given by the petitioner, made the investments in entities in India, cannot be construed to mean that the petitioner had rendered the advisory services as an 'Intermediary'.
- HC clarified that the petitioner is the service provider. It is rendering the advisory services directly to I Squared Asia and is not acting as a facilitator for providing such services.

- In regards applicability of section 13(3)(b), HC stated that same is equally inapplicable because it relates to services which are supplied to an individual and which require physical presence of the recipient (or a person acting on his behalf) with the supplier of the services. There is no allegation that the petitioner has rendered any services to an Individual. Plainly, the Adjudicating Authority has misunderstood the nature of services covered u/s 13(3)(b).

  In regards applicability of section 13(4), HC explained that the supply of services contemplated under the said Clause are those that are supplied directly in relation to an immovable property which includes services supplied by experts and estate agents, supply of accommodation by a hotel, inn, guest house, club or campsite, grant of rights to use immovable property, carrying out construction work, architects, or interior decorators. But in present case, the petitioner is rendering advisory services to I Squared Asia who repeatedly filed submissions before the concerned authorities explaining that it is rendering advisory services to overseas group companies with respect to investment avenues in transportation sector after performing its own analysis and due diligence.

  In regards applicability of section 13(7), HC stated that concededly, the petitioner has not rendered any services in more than one state or union territory as envisaged in section 13(7) of the IGST Act.

- Based on aforesaid observations, the petitioner's writ petitions were allowed, and the impugned orders were set aside, and the Adjudicating Authority was directed to process the petitioner's claim for refund as expeditiously as possible and preferably within eight weeks from the date of the order.

NASA Comments

- The Delhi High Court's ruling in the above-mentioned case sets an important precedent for companies seeking GST refunds on Advisory support services to overseas group entity. It highlights the need for understanding the nuances of intermediary services as defined under the IGST Act.

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