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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		
CIT (International Taxation) Vs. Alibaba.Com Singapore E-Commerce Private Ltd. [TS-361-HC-2023(BOM)]	Whether subscription fees received by taxpayer is chargeable to tax as a business income/ fee for technical services (FTS)?	The taxpayer did not have any business connection/ PE in India and hence, subscription fees is not chargeable to tax either as a business income or also as per DTAA between India – Singapore, subscription fees is not FTS.
Indirect Tax		
Gargo Traders Vs Joint Commissioner Commercial Taxes (State Tax) [2023-TIOL-670-HC-KOL-GST]	Whether Petitioner is entitled to avail ITC on purchases from a supplier whose registration has been cancelled from a retrospective date	The High Court set aside the impugned order which rejected the eligibility of ITC; directing the Respondent to reconsider petitioners' claim by taking into account the documents relied upon by the petitioner and passing a reasoned and speaking order after giving an opportunity of hearing to the petitioner.
Vedmutha Electricals India Pvt Ltd. [2023-TIOL-92-AAR-GST]	Whether the applicant is eligible to take full credit of GST charged in Tax invoice issued by supplier and GST was paid by such supplier to government even though later commercial / financial	Applicant is eligible to take full credit of GST charged on the tax invoice and paid by such supplier to government even though later financial/ commercial credit note is issued for part invoice value and no reversal of proportionate ITC is required.



	credit note is issued for part amount of invoice.	
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The brief analysis of above referred decisions and rulings are given below.

Case 1 – CIT (International Taxation) Vs. Alibaba.Com Singapore E-Commerce Private Ltd. ('Taxpayer') [TS-361-HC-2023(BOM)]

Facts in brief & Issue Involved:

- ♦ The taxpayer, a group entity of Alibaba group, incorporated in Singapore. The entire control and management were in Singapore and was also holding Tax Resident Certificate ('TRC') of Singapore.
- ♦ Taxpayer has availed Web Hosting and related service from "Alibaba.com Hong Kong Ltd" (company incorporated in Hong Kong). Alibaba.com Ltd. (the holding company) is the owner of IPR and copyright with respect to trademark "Alibaba" and Alibaba logo and owns domain name of Alibaba.com. The server which hosts the website are located in California USA. Only the website is operated by Alibaba.com Hong Kong Ltd.
- ♦ The website facilitates Indian entities to do business online by subscribing to taxpayer's portal for which it charges subscription fees. Indian subscribers subscribe to the taxpayer's service / facility agreement for which it charges service fee. Through this subscription, the Indian subscribers place their storefront and have their products advertised.
- ♦ The Assessing Officer ('AO') held that "Alibaba" is the trademark of Alibaba.com Hong Kong Ltd. as the website is registered in Hong Kong and not in Singapore and hence, entire activities are carried from Hong Kong and since, India and Hong Kong do not have DTAA, treaty benefits will not be applicable. Hence, AO assessed subscription fees partly as business income and partly as FTS.

Contentions of Taxpayer:

- ♦ The taxpayer contended that it has a very limited role which is merely confined to providing facility of posting information about the product and services in electronic form. It alone is the economic owner of subscription fees received from Indian subscribers and it receives the revenue in its own right and not on behalf of Alibaba


Hong Kong Ltd. Hence, subscription fees cannot be assessed as business income or FTS.

Contentions of Revenue:

- ♦ The taxpayer is not eligible to claim benefit of India Singapore DTAA, because it is only an intermediary between Indian subscribers and Alibaba. com Hong Kong Ltd. The taxpayer has no presence in Singapore and entire management as well as services provided to Indian subscribers is through Alibaba.com Hong Ltd and since, India and Hong Kong do not have DTAA, treaty benefits will not be applicable. The taxpayer also has a business connection and dependant agency PE in India (Infomedia Ltd.) and hence, subscription fees have to be assessed as business income.

Observations & Decision of the Hon'ble Bombay HC:

- ♦ The Hon. Bombay HC, by concurring with the findings of Tribunal, held as under:
 - If AO was so convinced that entire activity in India to various subscribers was actually carried out by Alibaba.com Hong Kong Ltd and not by taxpayer, then he should have assessed Alibaba.com Hong Kong Ltd and not the taxpayer.
 - The taxpayer alone is the economic owner of subscription fees received from Indian subscribers and it receives the same in its own right and not on behalf of Alibaba.com Hong Kong Ltd.
 - Infomedia has entered into several collaborations with other partners like taxpayer and it was compensated by taxpayer at "arms- length price" for providing services and hence, it is an independent entrepreneur. In terms of proviso to explanation 2 of section 9(1)(i), taxpayer cannot be said to have business connection in India in the form of Infomedia Ltd and hence, subscription fees cannot be assessed as a business income. The High Court held that once the income cannot be taxed as business income in India under section 9(1)(i), then it is not necessary to go into DTAA.
 - As regards chargeability of subscription fees as FTS, the Hon. Bench held that the services provided by taxpayer were merely that of displaying / storing of data of Indian subscribers which represents provision of services for standard



facility and not for “rendering of any technical, managerial or consultancy services” in terms of Explanation 2 of section 9(1)(vii) and hence, subscription fees cannot be assessed as FTS.

NASA Comments:

- ♦ It is well settled position that if the taxpayer has engaged an independent third party service provider, who is acting in the ordinary course of business and compensated at “arms- length price”, activities carried out by non-resident taxpayer through such third party would not constitute business connection in India.

INDIRECT TAX

Case 1 – Gargo Traders Vs Joint Commissioner Commercial Taxes State Tax & Ors dated June 12, 2023 [2023-TIOL-670-HC-KOL-GST]

Facts in brief & issues of Petitioner

- ♦ M/s Gargo Traders (hereinafter referred to as 'Petitioner') is a registered taxable person which has claimed ITC on supplies made by M/s Global Bitumen ('supplier') amounting to Rs. 11,31,513/- for the period 01.04.2018 to 31.03.2019.
- ♦ The adjudicating authority discovered that the supplies received by M/s Global Bitumen are fake and non-existing and the bank accounts opened by the supplier is based on fake documents. Also, the supplier no longer existed as its GST registration was cancelled retrospectively, which covered the transaction date resulting in the adjudicating authority denying ITC claim of the purchases to the petitioner.
- ♦ The petitioner preferred an appeal to the Joint Commissioner of State Tax against the adverse order. However, the said appeal was also rejected, and the order passed by the Adjudicating Authority is withheld. The petitioner aggrieved has filed the present writ application challenging the order passed by Joint Commissioner, State Tax, West Bengal.

Contentions of Petitioner

- ♦ The petitioner has filed supplementary affidavit by enclosing tax invoice cum challan dated 12th November 2018, debit note dated 12th November, 2018, e-Way Bill dated 12th November, 2018, transportation bill dated 12th November, 2018 and statement of bank account of HDFC Bank of the petitioner showing the transaction made by the petitioner in favour of the supplier.
- ♦ The Petitioner submitted that the authorities have not considered the relied upon documents submitted. From the said documents, it is crystal clear that the petitioner has purchased the goods from the supplier and had transported the said goods and also transferred the amount through bank in the account of the supplier.
- ♦ The petitioner relied upon unreported judgment passed in WPA 23512 of 2019 (M/s. LGW Industries Limited & Ors. -vs- Union of India & Ors.) - 2021-VIL-868-CAL dated

13th December, 2021 [2021-TIOL-2308-HC-KOL-GST] and the Judgment reported in 2023 SCC OnLine Del1412 (Balaji Exim -vs- Commissioner, CGST & Ors.) - 2023-VIL-181-DEL = 2023-TIOL-333-HC-DEL-GST.

Observations & Decision of Honorable High Court

- ♦ The Court observed that the respondent authority has not considered the documents submitted by the petitioner and has solely relied on cancellation of supplier's registration. From the documents submitted, it was clear that there was no failure on their part to comply with statutory obligations.
- ♦ At the time of the transaction, the supplier's name was available in the government records and the petitioner paid the transaction amount including tax through bank and not cash.
- ♦ The Court set aside the impugned order, directing Respondent to consider the grievance of the petitioner afresh by taking into consideration of the documents which the petitioner intends to rely in support of his claim. The Respondent shall dispose of the claim of the petitioner by passing a reasoned and speaking order after giving an opportunity of hearing to the petitioner within a period of eight weeks from the date of receipt of copy of this order.

NASA Comments

- ♦ The High Court Ruling brings a sigh a relief to the genuine Taxpayers at large who are burdened with ITC mismatch notices received from the Department on account of retrospective cancellation of suppliers' registration.

Case 2 – M/s Vedmutha Electricals India Pvt Ltd [2023-TIOL-92-AAR-GST]

Facts in brief & Issue Involved

- ♦ M/s Vedmutha Electricals India Private Limited (Applicant) registered under GST in the state of Andhra Pradesh is engaged in the business of supplying various electronic items. The applicant purchases various electronic items from M/s. Gold Medal Electricals Private Limited (hereinafter referred to as 'supplier').
- ♦ The supplier Issued Tax Invoice in terms of Rule 46 of CGST Rules, 2017 for the outward supply, and charged GST on such taxable value, calculated in terms of Section 15 of CGST Act, 2017.
- ♦ The applicant received discounts/ incentives which are in the form of after sale discounts like turnover discount, quantity discount, cash discounts, additional scheme discounts etc. And for such discounts/Incentives, the supplier issues commercial/financial credit notes without GST. The credit notes are accounted by the applicant and disclosed in their income tax returns as well.
- ♦ The said discounts are neither recorded in the invoice issued by the supplier nor the discounts are established in terms of an agreement entered at or before the time of such supply. Supplier has also filed affidavit stating that they don't reduce GST liability on account of financial/commercial credit note.
- ♦ Applicant has sought an advance ruling as to whether they are eligible to take full credit of GST charged in Tax invoice issued by supplier where GST was paid by such supplier to government even though later commercial/ financial credit note is issued for part amount of invoice and whether the applicant is required to reverse the ITC proportionately to the extent of financial/ commercial credit note issued by supplier.

Contentions of Applicant

- ♦ The applicant submits that Section 9 provides that GST shall be levied on the value as determined under Section 15 of GST Act. As per section 15, the value of supply of goods or services or both shall be the transaction value, which is the price actually paid or payable for the said supply to unrelated recipients. And such value should be reduced to the extent of discount which is given, before or at the time of the supply if such discount has been duly recorded in the invoice issued in respect of

such supply and in case the discount is given after the supply has been effected, if such discount is established in terms of an agreement entered into at or before the time of such supply and specifically linked to relevant invoices. As the discounts and incentives are not recorded in the invoice and the discount given is a post-sale discount not established in terms of an agreement entered into at or before the time of supply, the transaction value remains the commercial price which is charged by the supplier at the time of issuing tax invoice. Further, supplier has also filed affidavit stating that they don't reduce GST liability on account of financial/commercial credit note. Therefore, the ITC as is attributable to the discount is not to be reversed by the applicant.

- ♦ All the eligibility conditions for availing ITC as prescribed under section 16 are being satisfied by the applicant. Also, the case is not falling under the second provision of Sec 16(2) of the Act as there is no failure to pay the supplier any amount towards the value of supply. In this regard, reliance is placed on the decision of:

Appellate Authority for Advance Ruling in MRF Ltd reported at- 2019-TIOL-61-AAAR-GST = 2019 (27) G.S.T.L. 578 (App. A.A.R.- GST).

- ♦ Thus, the applicant is of the view that he is eligible for full amount of ITC without any requirement of reversal of proportionate ITC on issue of financial/commercial credit notes issue by the supplier.

Observations & Decision of AAR


- ♦ On examination of the transaction between the applicant and their supplier, it is found that the supplier is issuing a tax invoice on the supply of goods to the applicant and the applicant is taking ITC on the same. The applicant is issued commercial credit note or financial credit notes without GST. The credit notes are duly accounted in the book of accounts of the applicant and in their income-tax returns as well.
- ♦ For the applicability of provisions of 15 (3) (b) there should be prior agreement and a link established with the relevant invoices. No such co-relation between the credit notes issued by the supplier to the applicant is found except credit note mentioning the scheme and the goods for which the credit note is being given. In absence of such specific Information, the benefit of lessening the value of discount from the transaction value as per the provisions of 15 (3) (b) is not allowed and therefore the

contention of the applicant is correct in not reducing ITC as there is no corresponding reduction of outward liability at the end of the supplier.

- ◆ Further reference to the Circular No 92/11/2019-GST can be made which further clarifies the questions raised by the applicant. The Circular clarified that secondary discounts shall not be excluded while determining the value of supply as such discounts are not known at the time of supply and the conditions laid down in clause (b) to sub-section (3) of section 15 of the said Act are not satisfied.
- ◆ The amount received by the applicant is in the form of post supply discount by the supplier and it will not affect transaction value between the supplier and the applicant. For the same reasons, the applicant is eligible to take full credit of GST charged in the tax invoice and is not required to reverse the ITC to the extent of financial/commercial credit notes issued by the supplier.

NASA Comments

- ◆ Ruling by AAR is binding only on applicant and its jurisdictional officer. It does not have a general binding precedence value, but it may have persuasive value.
- ◆ However, it is pertinent to note that the judgment also speaks of scenarios where financial credit notes are used as a conduit to transfer input tax credit fraudulently, by raising an Invoice for a higher value to transfer ITC and then reducing the transaction value through financial credit note. In case such a misutilization of financial credit note is noticed, the same shall be liable for penalties under section 132(b).



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