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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		
TDK India Pvt. Ltd. ('Taxpayer') vs. DCIT [TS-393-ITAT-2023(Kol)]	Whether circular issued by Central Board of Direct Taxes (CBDT) overrides protocol to the Double Taxation Avoidance Agreement (DTAA)?	Hon'ble Kolkata ITAT held that the assessee has rightly deducted tax at source @ 10% on the basis of MFN clause in the Protocol to the DTAA and that no notification is required to be issued by the Government of India in Order to make a protocol applicable. Protocol to DTAA is integral and indispensable.
Indirect Tax		
M/s Thirumalakonda Plywoods [(2023) 8 Centax 276 (A.P.)]	a. Whether by virtue of imposition of time limit for claiming Input Tax Credit (ITC), Section 16(4) CGST Act, 2017 violated Article 14, 19(1)(g) and 300A of the Constitution of India and thereby, liable to be struck down? b. Whether Section 16(2) of the GST Act, 2017 would prevail over 16(4) of GST Act, 2017 and thereby if the conditions laid down in Section 16(2) of the GST Act,	Hon'ble High Court of Andhra Pradesh held that time limit prescribed for claiming ITC under section 16(4) of APGST Act/CGST Act, 2017 is not violative of Articles 14,19(1)(g) and 300-A of Constitution of India. Section 16(2) of APGST/CGST Act, 2017 has no overriding effect on section 16(4) as both are not contradictory with each other; they operate independently.

	2017 are fulfilled, the time limit prescribed under Section 16(4) of the GST Act, 2017, 2017 for claiming ITC will pale into insignificance? c. Whether the acceptance of Form GSTR-3B returns of March 2020 filed on 27.11.2020 by the petitioner with a late fee of Rs.10,000/- will exonerate the delay in claiming the ITC beyond the period specified under Section 16(4) of the GST Act, 2017?	Mere acceptance of Form GSTR-3B returns with late fee will not exonerate delay in claiming ITC beyond period specified under section 16(4) of APGST/CGST Act, 2017.
Shree Renuka Sugars LTD [(2023) 8 Centax 235 (Guj.)]	Whether supplementary refund claim can be filed for the left-out amount if initially lower amount of refund was erroneously lodged for unutilised ITC in case Zero rated supply?	Hon'ble High Court of Gujarat held that said refund claim of petitioner could not be rejected outrightly merely on technicality when substantive conditions were satisfied and directed the respondent to allow petitioner to furnish manually the refund applications for refund of left out amount.

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

DIRECT TAX

Case 1 – TDK India Pvt. Ltd. ('Taxpayer') vs. DCIT [TS-393-ITAT-2023(Kol)] [ITA 393-399/Kol/2023]

Facts in brief & Issue Involved:

- The taxpayer, primarily engaged in manufacture and supply of capacitors and soft ferrite cores, has availed services in the areas of procurement, controlling, logistic coordination, quality management, HR, environment protection and industrial safety, organization, etc. from TDK Electronics Components S.A. (TDK Spain), a tax resident of Spain.
- As per the provisions of section 115(1)(b)(B) of the Act and based on definition of 'fees for technical services' the aforesaid services rendered by TDK Spain to the taxpayer would be liable for deduction of tax at source at the rate of 10.608 percent (10 percent Tax + 2 percent Surcharge + 4 percent Cess).
- The taxpayer deducted tax at source at the rate of 10 per cent under the provisions of Article 13 read with Protocol appended below the Indo-Spain tax treaty.
- Upon receipt of intimations for default in TDS payments for all quarters in 2 financial years, the taxpayer filed rectification petition u/s 154 with TDS Reconciliation Analysis and Correction Enabling System (TRACES). TRACES passed the Order u/s 154 of the Act and raised the demand for all the quarters.
- Aggrieved, the taxpayer preferred an appeal before the CIT(A), who consequently held that the taxpayer is not entitled to get benefit of the protocol appended below the tax treaty, as no notification under section 90 of the Act has been issued by the CBDT with respect to the India Spain treaty specifying lower rate of tax to be deducted at spurce under article 13 of the tax treaty by following the Circular No 3/ 2022 dated 3rd February, 2022. Further, CIT(A) held that circular issued by CBDT is binding on him and accordingly, upheld the orders passed by the TRACES.
- Aggrieved by the order of the CIT(A), the taxpayer filed an appeal before the Hon'ble Income Tax Appellate Tribunal (ITAT).

Contentions of Taxpayer:

- As per the Act, the prescribed rate of TDS 10% plus applicable surcharge and cess on income on non-resident arising from fees for technical services is 10.608 per cent. Article 13 of the Tax Treaty provides that fees for technical services would be taxable at the rate of 20 percent on gross basis in the contracting state in which they arise.
- In cases where under any Convention or Agreement between Indian and a third state which is a member of the Organization for Economic Cooperation and Development (OECD), India limits its taxation at source on royalties or fees for technical services to a lower rate, the same rate shall also apply to India Spain DTAA.
- By virtue of the Protocol, the taxpayer referred to the India-Portugal and India-Sweden Tax Treaties which provide for fees for technical services were subject to 10 per cent tax rate and thereby, withheld tax on the same rate while making payment to TDK Spain.
- The taxpayer referred to the Circular N0. 3/2022 dated 3rd February, 2022 issued by the CBDT. The Circular states that the benefit of MFN clause will only be applicable in the event the Government of India has issued a separate notification extending the benefit of the second treaty into the treaty with the first state as required by section 90(1) of the Act and contended that the requirement for issuance of separate notification by the Government of India is clearly redundant and, in any event, it does not whittle down or override the benefits which are otherwise envisaged in paragraph 7 of the protocol to the Tax Treaty.
- The CIT(A) has erred in applying the circular to whittle down or override the benefits which are otherwise envisaged in the protocol to the aforesaid bilateral tax treaty. Further, the Ld. CIT(A) has held that the aforesaid Circular has retrospective effect and would be applicable to issues prior to the date of issuance of the Circular.

Contentions of Revenue:

- The taxpayer ought to have deducted tax at a higher rate and is not entitled to the benefit of the Protocol appended to DTAA as no notification under Section 90 has been issued by the CBDT with respect to the aforesaid DTAA specifying lower rate of tax to be deducted at source.

Observations and Decision of the Hon'ble ITAT:

- Relying on a co-ordinate Bench decision, Hon'ble ITAT held as under:

  The protocol to the DTAA is an integral and indispensable part of the tax treaty and furthermore, the benefit of lower rate as prescribed in the protocol for fees for technical services under the relevant tax Treaty is not dependent on any further unilateral action or issuance of notification by the respective Governments to make it applicable.

- The ITAT also held that in case the rate of tax is adopted as per the DTAA, then no surcharge and education cess is to be applied over and above the tax rate since the tax rate as per the DTAA is held to be all-inclusive of such surcharge and education cess.

- The ITAT held that the rate of tax applicable in the case of the assessee is 10% and since the assessee has rightly deducted the tax at source @ 10%, it cannot be treated as an assessee in default and accordingly, allowed the assessee's appeal.

NASA Comments:

- It is essential to consider all aspects of international taxation while making remittances to Non-residents and also consider benefits available to the taxpayer under DTAAs including MFN clause and Multilateral Instruments.

- This decision along with Pune ITAT's decision in the case of GRI Renewable Industries S.L. vs DCIT now upholds the view that in presence of MFN clause in the respective DTAAs, the benefit of lower rate can be availed. However, this issue is heard before the Hon'ble Supreme Court, order for which is awaited.

INDIRECT TAX

Case 1 – M/s Thirumalakonda Plywoods [(2023) 8 Centax 276 (A.P.)]

Facts in brief & issues involved

- Thirumalakonda Plywoods ("the Petitioner") is a proprietor engaged in the business of hardware and plywood.
- The petitioner received email from the revenue department ("the Respondent") stating that they have availed ITC for March 2020 after the last date prescribed for availing ITC for the relevant period i.e on or before 20.10.2020.
- Petitioner submitted reply wherein they submitted that payment of late fee for delay in filing the return exonerates them from the time limit and also challenged notice with detailed submissions.
- A Show Cause Notice ("SCN") was issued by the respondent and an opportunity of personal hearing was given to the Petitioner.
- In compliance with the SCN the Petitioner filed a reply stating that the SCN is not in accordance with the provisions of the GST Act and Rules, 2017. The respondent did not consider the reply submitted by the Petitioner and passed an order ("the Impugned Order"), holding that the Petitioner made an irregular claim of ITC of an amount of INR 4,78,626 with INR 11,24,994 towards tax, penalty and interest.
- Aggrieved with the impugned order the petitioner filed writ before the Hon'ble Andhra Pradesh High Court for the questions as elaborated in summary above

Contentions of Petitioner

- Input Tax Credit is a "statutory right" which an assessee is entitled to claim. placing stumbling blocks by way of imposing time limit under Section 16(4) of the APGST / CGST Act, 2017 from claiming such right tantamount to violation of Article 14, 19(1)(g) and 300A of the Constitution of India.
- Section 16(2) of CGST Act, 2017 which commences with a "non-obstantee" clause would override Section 16(4) of the said Act, meaning thereby, if the conditions

mentioned in Section 16(2) are complied with by an assessee, he will be entitled to claim ITC without reference to the time limit prescribed under Section 16(4).

- Once Department permits the petitioner to file return with late fee, the petitioner cannot be deprived of the right of ITC on the sole ground that claim was made beyond the period prescribed under Section 16(4)

Observations & Decision of Honorable High Court

- Input tax credit - Constitutional validity

  Hon'ble High Court while analyzing the argument of the petitioner that Section 16(4) of APGST/CGST Act, 2017 violates Article 14, 19(1)(g) and 300-A of the constitution of India held that the said argument has no vitality for the following undermentioned reasons:

  - ITC is a mere concession/rebate/benefit but not a statutory or constitutional right and therefore imposing conditions including time limitation for availing the said concession will not amount to violation of constitution or any statute.
  - Operative spheres of section 16 and constitutional provisions under article 14, 19(1)(g) and 300-A are different and, hence, infringement does not arise.

  Thus, time limit prescribed for claiming ITC under section 16(4) of APGST Act/CGST Act, 2017 is not violative of articles 14, 19(1)(g) and 300-A of Constitution of India.

- Input tax credit - Eligibility and conditions - Overriding effect of section 16(2) and section 16(4)

  Hon'ble High Court stated that Section 16(2) is not an enabling provision but a restricting provision and what it restricts is eligibility which was otherwise given under section 16(1).

  The non obstante clause in Section 16(2) is followed by a negative sentence "*no registered person shall be entitled to the credit of any input tax in respect of any supply of goods or services or both to him unless*". This negative sentence pellucidly tells that unless the conditions mentioned in Section 16(2) are satisfied, no credit will be eligible. Hon'ble high court referred to the decision of the Apex court in case of R.S. Raghunath.

Further section 16(2) provides eligibility conditions while section 16(4) imposes time limit, both these provisions have no inconsistency between them.

Thus, the argument that 16(2) overrides 16(4) is not correct; they operate independently.

- Input tax credit - Eligibility conditions - Late fees in filing return versus ITC claim beyond time limit

  Hon'ble high court held that the conditions stipulated in section 16(2) and (4) are mutually different and both will operate independently. Hence, mere filing of return with a delay fee will not act as a springboard for claiming ITC.

  Collection of late fees is only for purpose of admitting returns for verification of taxable turnover of petitioner but not for consideration of ITC.\

NASA Comments

- Hon'ble High Court expressly held that ITC is a concession/benefit/rebate and not a statutory right. The legislature can impose certain conditions. Further, both Section 16(2) & 16(4) of the CGST Act will operate independently.
- Taxpayers are advised to ensure timely availment of credits.

Case 2 – Shree Renuka Sugars LTD [(2023) 8 Centax 235 (Guj.)]

Facts in brief & Issue Involved

- Shree Renuka Sugars LTD ("the Petitioner"), is a company engaged in sugar industry. The petitioner has been selling and supplying sugar and allied products within the country and also exporting to foreign countries.
- The Petitioner has refund claims of unutilized ITC during the period of 11 months in Financial Year 2020-2021 and 2021-2022 of a sum aggregating to Rs. 1,10,67,67,172/- as per rule 89 of the GST Act. However, the petitioner erroneously

lodged claims for a lower amount of Rs. 1,00,47,38,439/- due to inadvertent arithmetical error. The said refund was sanctioned and paid.

- After Realizing the error, the petitioner lodged supplementary refund claims for the left-out amount of refund Rs. 10,20,28,733/-.
- The Respondent rejected the supplementary refund on the ground that the refund application made by the petitioner was not valid under "any other" category.
- The Petitioner filed a reply explaining why "any other" category was mentioned in the refund application, and that the refund has been claimed only of that amount which was left out while making the application with incorrect calculations.
- The respondent passed orders rejecting the claim without giving the opportunity of hearing to the petitioner.
- Aggrieved by the decision of the Respondent, Petitioner filed the petition regarding the same.

Contentions of Applicant

- The refund filed for the period of 11 months was erroneously lodged for a lower amount due to an inadvertent arithmetical error.
- Since one refund application has already been filed of the concern period for which refund has been sanctioned another application for the remaining amount of refund due to the arithmetical error for the same category of accumulated ITC is not possible to be uploaded on the common portal. Hence the petitioner had no option but to upload the supplementary application under "any other" category.
- All other substantive conditions are satisfied as per rule 89 and Sub-Sections (3) and (14) of Section 54 of the CGST Act.
- The Petitioner relied on the following decisions in support of their contention among others:
  - Bombardier Transportation India Pvt. Ltd. v. Directorate General of Foreign Trade, reported in 2021 (377) ELT 489 (Guj.)

Observations & Decision of High Court

- Hon'ble High Court held that it is settled law that the benefit which otherwise a person is entitled to once the substantive conditions are satisfied cannot be denied due to a technical error or lacunae in the electronic system.
- The said claim of the petitioner for refund of the left-out amount of Rs. 10,20,28,733/- cannot be rejected outright merely on technicality and that too when the substantive conditions are satisfied without scrutiny by the respondent in accordance with law.
- The petition was allowed by the high court and instructed the respondents authority to accept the GST refund applications subject to satisfaction of other conditions such as time limit and ITC eligibility etc.

NASA Comments

- This decision by Hon'ble High Court could bring a sigh of relief among the taxpayers as it very well clarifies the issue that taxpayers are not barred from filing a second GST refund application for the same period if there is a lacuna in the first refund application.

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