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TAX JURISPRUDENCE

CASE LAW ALERT – SEPTEMBER 2023

VOL -2

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		
Nearby Pte. Limited vs. ACIT-International Taxation [TS-503-ITAT-2023(Mum)]	Whether revenue has power to tinker with the full value of consideration on sale of unquoted shares arrived by the applying Discounted Cash Flow method which is more than value arrived by applying Net Asset Value method.	The Hon'ble Mumbai Tribunal, in case of Nearby Pte. Limited has held revenue cannot tinker with the DCF based consideration on sale of share which is more than NAV.
Indirect Tax		
TVL. RAJA STORES [W.P.(M.D.).No. 15291 of 2023]	Whether audit u/s section 65 of the CGST act can be conducted after a business has been permitted to close?	Hon'ble High Court of Madras held that the authorities had failed to conduct an audit while the business was operational, they could not do so after it had closed.
M/s. Orient Cement Limited [Advance Ruling No. KAR ADRG 27 of 2023]	Whether ITC on procurement of Goods distributed as promotional schemes is available and whether distribution of such goods can be regarded as 'supply'?	Karnataka AAR ruled that ITC can be claimed on goods procured for distribution to dealers under promotional schemes and such distribution would be treated as 'supply'.

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

Case 1 – Nearby Pte. Limited [TS-503-ITAT-2023(Mum)]

Facts in brief & Issue Involved:

- ◆ The taxpayer is a Singapore Company and has acquired an Indian company named M/s Groupon India P Ltd (“herein after called as company”) from M/s Groupon Holdings B V in India on 31.07.2015 by purchasing 2,62,237 shares having face value of Rs. 10/- each at Rs. 5,774/- per share.
- ◆ After the above initial investment, the taxpayer has made an additional investment by purchasing shares from October 2015 onwards from time to time in various quantities. The subsequent share purchases were made up to October 27th, 2017, and have been made at a price of Rs. 14,361/- per share i.e., at a premium of Rs. 14,351/- per share.
- ◆ On 30th November 2017, the taxpayer has entered into an agreement with M/s. Little Internet Pvt Ltd for selling its entire holdings at a price of Rs 7,094/- per share, in lieu of receipt of 83,86,133 equity shares of Little Internet Pvt Ltd at Rs. 265 per share. Accordingly, the taxpayer has computed Long Term Capital Gain of Rs. 5,18,13,460/- and short-term capital loss of Rs. 28,15,31,742/-.
- ◆ The Assessing Officer (“AO”) has observed that the last purchase of shares was made at Rs. 14,361/- per share on 27th October 2017. However, the taxpayer has sold all shares at Rs. 7,094/- per share on 30th November 2017 i.e., within a span of one and half month and that to at a price of which is almost 50% lower than the purchase price. Accordingly, the AO has re-computed capital gains by adopting Fair Market Value (“FMV”) at Rs. 14,361/- per share.
- ◆ Aggrieved by the above action of AO the taxpayer filed an appeal before the Hon’ble Mumbai Tribunal.

Contention of the taxpayer:

- ◆ Taxpayer has submitted that FMV of shares is required to be determined as per Rule 11UAA only when full value of consideration received or accrued is less than FMV.
- ◆ Taxpayer contended that provisions of section 50CA would be applicable in its case since it is sale of unquoted shares and therefore by applying provisions given under Rule 11UA the sale value of shares has been determined by taking valuation report wherein the valuer has arrived as FMV under Discounted Cash Flow method which is Rs. 7,094/- per share.
- ◆ Taxpayer has also submitted that the company was continuously making losses and therefore FMV by applying Net Asset Value (“NAV”) method comes to negative value of Rs. (-) 630.29 per share. Accordingly, the taxpayer has submitted that sale consideration offered by it is more than FMV computed as per NAV method and therefore should be accepted.
- ◆ Taxpayer has also submitted that there is not much improvement in book value of shares between 31.03.2017 and 31.03.2018. Further the taxpayer has also contended that the value of share considered while computing capital gains is 13 times more than NAV value per share.
- ◆ The taxpayer submitted that it has incurred capital loss and therefore requirement of availing DTAA benefit does not arise.

Contention of the Revenue:

- ◆ The very first apprehension of the revenue is that the taxpayer has sold the share of the company within a short span of one and half months and that too at a reduced price which is almost less than 50% of purchase price.
- ◆ The AO also observed that the taxpayer for arriving at value of shares as per NAV method has considered Balance Sheet as on 31.03.2017 whereas the date of transaction is 30.11.2017 and therefore is not correct in view of provisions given

under Rule 11UA which state that valuation should be made on the date of transfer. Further, the valuation based on DCF method is taken on 10.12.2017 while the shares were sold on 30.11.2017 which is not acceptable.

- ◆ Further, the valuer has prepared the valuation report based on financial projections made available by the management and the taxpayer has not provided any supporting of such financial projections. Accordingly, the AO rejected the valuation considered by the taxpayer.
- ◆ Further, the AO in the absence of Tax Residency Certificate has denied that benefit of DTAA provisions.

Observation and Decision of Tribunal:

- ◆ The Hon'ble tribunal has observed that the shares are sold to an independent third party as per the agreement of sale/transfer.
- ◆ The Revenue has not disproved the submission of taxpayer that the FMV as on 30.11.2017 or 31.03.2018 will not exceed the sale price of Rs.7,094/- share as there is not much difference in financial position of the company.
- ◆ The Hon'ble tribunal has noted that the taxpayer has got a sale price of Rs.7,094/- per share, which was many times more than the value arrived at under NAV method and hence there was no reason to suspect and reject the valuation done under DCF method and accepts contention of the taxpayer that full value of consideration of Rs.7,094/- received is more than the FMV of (-) Rs.630. 29/- per share hence, there was no reason to tinker with the full value of consideration declared by the taxpayer.

NASA Comments: -

- ◆ Although this judgement is in favor of the taxpayer, the revenue can challenge the valuation of shares both in relation to purchase and sale of shares. Thus, taxpayers must be vigilant while entering into such transactions.

INDIRECT TAX

Case 1 – TVL. RAJA STORES [TS-411-HC(BOM)-2023-GST]

Facts in brief & issues involved:

- ◆ The petitioner is a partnership firm which is the registered taxpayer under the Goods and Services Tax Act, 2017
- ◆ The petitioner intended to close his business and submitted a petition before the authorities. The authorities after considering the same vide order dated 03.03.2023 have allowed the petitioner to close his business with effect from 31.03.2023.
- ◆ However, the petitioner did not fulfil its obligation to pay the collected taxes. Subsequently, the authorities issued a show cause notice for conducting the audit u/s section 65 of the CGST Act.
- ◆ In response, the petitioner sought an adjournment but eventually filed the present writ petition before this Court, challenging the said show cause notice.

Contentions of Petitioner

- ◆ The petitioner argued that under Section 65 of the CGST Act, audits are meant for registered businesses. Since their business was closed and registration cancelled, the authorities have no jurisdiction to conduct an audit.

Contentions of Department

- ◆ The authorities countered that the business was registered during the period for which the audit was intended, hence they were within their rights to conduct the audit.

Observations & Decision of Honorable High Court

- ◆ The High Court observed that Section 65 refers to audits for registered businesses "for such period," "at such frequency," and "in such manner."
- ◆ The authorities had failed to conduct an audit while the business was operational, they could not do so after it had closed.

- ◆ However, this will not preclude the department from initiating assessment proceedings for the said concern under Sections 73 and 74.

NASA Comments

- ◆ This ruling clarifies that businesses that have officially closed are not subject to GST audits, though the court leaves room for assessment proceedings under Sections 73 and 74 of the CGST Act.
- ◆ The judgment underscores the importance of jurisdictional limits in tax audits, thus providing crucial guidance for both businesses and tax authorities.

Case 2 – Orient Cement Limited (AAR No. KAR ADRG 27/2023)

Facts in brief & issues of Applicant

- ◆ M/s. Orient Cement Limited (“the Applicant”) is engaged in the manufacturing and supply of cement. The Applicant offers various sales promotional schemes to the dealers which helps to achieve the sale targets.
- ◆ One such scheme is the “Monthly / Quarterly Discount Scheme”, wherein if the dealer purchases a certain quantity of cement as per specified slabs, he gets a discount per bag, and higher the discount, higher the eligibility to earn gold coins.
- ◆ The Applicant had approached the AAR seeking a ruling in whether ITC can be claimed on the distribution of gold coins/ white goods, and further will such activity fall under “Permanent transfer or disposal of business assets where ITC has been availed on such assets” and accordingly, will be considered as Supply under Schedule-I of CGST Act, 2017 or Supply U/s 7 of the CGST Act,2017.

Contentions of Applicant

- ◆ The Applicant contended that gold coins supplied to the dealers are an incentive to promote and enhance the sales of the company and thus supplied in the course of furtherance of the business. The gold coins/white goods are given under a contractual obligation. Thus, it cannot be termed a gift.

- ◆ The applicant also states that the distribution of gold coins and white goods cannot be regarded as a permanent transfer or disposal of business assets as the said clause is applicable only on those goods which are items of Balance Sheet and are permanently transferred or disposed off.
- ◆ Further, the said distribution cannot be regarded as a supply under Section 7 of the Act as there is no consideration received by the applicant for such gold coins and white goods.

Observations & Decisions of AAR

- ◆ The AAR noted that the applicant is issuing these gold coins and white goods as incentives as per the agreement reached between himself and the recipients. It is only issued subject to the fulfillment of certain conditions and stipulations. "Gift" is something that is given without any conditions and stipulations. Hence the same cannot be covered under the scope of 'gift' making ITC will be available on the same.
- ◆ Further, the AAR observed that the term "assets" includes "inventory" and since these goods are procured in the course of business it would be covered under the scope of "business assets". Nowhere in Schedule I it is stated that these business assets should be capitalized.
- ◆ The AAR also observes that as supply of said goods is based on achieving marketing targets by dealers and said achievements would constitute an inducement from the dealer or in other words non-monetary consideration paid by the dealer to the applicant for such supply.
- ◆ Hence obligation to distribute gold coins and white goods to the dealers as part of achieving the target would be regarded as a supply, as per entry 1 of the Schedule I as well as per Sec 7 of the CGST Act 2017.

NASA Comments

- ◆ This ruling upholds the distinguishment of target-driven promotional products qua gifts and accordingly asks to charge GST as well as allows input tax credit on such gifts, however, it contradicts previous judgments/ Advance Rulings, and the industry should await further clarification from the GST Council on this matter.

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