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TAX JURISPRUDENCE

CASE LAW ALERT – MARCH 2024

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 Welspun Global Brands Ltd vs DCIT - I.T.A. No.2073/Mum/2022 (Mumbai Tribunal)	Whether the passing of draft assessment order as prescribed under section 144C(1) of the Act is mandatory in case of an eligible Taxpayer? Whether the Taxpayer can be estopped from challenging the assessment order which was passed on the basis of the admission by the Taxpayer itself? & Whether on the waiver/admission/undertaking of the Taxpayer for not challenging the draft order before the Ld. DRP u/s 144C of the Act, the AO is competent to pass the assessment order under section 92CA(4) of the Act without passing a draft assessment order as prescribed u/s 144C of the Act may be?	Procedure laid down u/s 144C(1) is mandatory. Failure to follow the same would be a jurisdictional error and not merely procedural error or irregularity. Passing final assessment order without providing draft assessment order is a complete contravention of the section 144C of the Act resulting into an incurable illegality making such order bad in law and without jurisdiction. There may be waiver/ admission/ undertaking of the Taxpayer for not challenging the draft order before the Ld. DRP, but still the AO is not empowered to pass the assessment order under section 92CA(4) of the Act directly, without passing a draft assessment order as mandated u/s. 144C(1).

Indirect Tax		
M/s Sri Shanmuga hardwares Electricals vs State Tax Officer (Writ Petition Nos. 3804, 3808 & 3813 of 2024 and W.M.P.Nos. 4105, 4107, 4110, 4111, 4116 & 4119 of 2024)	ITC claim cannot be denied solely on the ground that such claim of ITC is not reflected in GSTR-3B, and such claims of ITC is referred in GSTR-2A and GSTR-9.	The Hon'ble Madras High Court in the case of SRI SHANMUGA HARDWARE ELECTRICALS allowed the claim of ITC when such ITC is not reflecting in GSTR-3B and remanding the case back to the assessing officer for re-consideration of the Input Tax Credit (ITC) claims, which were initially denied because they were not reflected in the GSTR-3B returns, despite being ITC available in GSTR-2A and claimed in GSTR-9 returns. Further, Court held that the assessing officer should not deny an ITC claim solely on the basis that it was not claimed in the GSTR-3B returns, without examining all relevant documents and allowing the registered person to substantiate their claim.
MINDRILL SYSTEMS AND SOLUTIONS PVT. LTD. [04/WBAAAR/APPEAL/2023 dated 08.08.2023]	Whether input tax credit against inward supply of input/input service used for construction of immovable property can be claimed, in case such construction expenses are: i. Capitalized in books ii. Not capitalized in books	WBAAAR modified the order of WBAAR and ruled that ITC for the purpose of construction "is blocked in all occasions" and thus shall not be available irrespective of whether the construction expenses have been capitalised or not.

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

DIRECT TAX

M/s Welspun Global Brands Ltd vs DCIT - I.T.A. No.2073/Mum/2022 (Mumbai Tribunal)

Facts in brief & issues involved:

- 'Welspun Global Brands Ltd.' ("Taxpayer") is engaged in the business of trading in home textile products and during the A.Y 2011-12, it has entered into international transactions with its AE and earned Rs. 15 Cr.
- Transfer pricing officer ("TPO") has proposed adjustment of Rs.10.02 crores
- During the course of assessment, AO during the course of assessment proceedings, asked the Taxpayer as to why the arm's length price for the transaction be not computed by enhancing the by Rs.10.02 crores
- In reply to the same, the Taxpayer submitted that it does not wish to file any objections before the DRP, however it shall file an appeal before the CIT(A).
- Based on Taxpayer's claim that is did not wish to file objection against DRP, the AO did not passed draft order u/s 144C(1) and directly passed the final assessment order under Section 143(3) r.w.s 92CA(4) making Transfer pricing addition of Rs. 10.02 Cr as proposed by the TPO and Rs. 6.17 Cr on account disallowance under section 14A.
- The Taxpayer challenged the order before CIT(A) who partly allowed appeal.
- Being aggrieved by the order of CIT(A), the Taxpayer and revenue both filed appeals before ITAT.

Contention of the taxpayer:

- The Taxpayer filed additional grounds of appeal stating that AO failed to pass a draft assessment order u/s. 144C(1) and has directly passed the final assessment order, resulting in a substantive lapse on part of the AO. Accordingly, the final assessment order is bad in law as the said order suffers from a jurisdictional error as the mandatory procedure stipulated in section 144C of the Income-tax Act, 1961 has not been followed by the AO.

Observation and Decision of the Mumbai ITAT:

- The ITAT on placing the reliance on the decisions of jurisdictional High Court in the case of **SHL India Pvt. Ltd vs DCIT (2021) 128 taxmann.com 426, Commissioner of Income-tax Vs Andrew Telecommunications Pvt Ltd (2018) 96 taxmann.com 613 and in the case of International Air Transport Association vs DCIT (2016) 68 taxmann.com 246** held that the provisions of section 144C clearly mandates that the Assessing Officer is required to pass and furnish a draft assessment order in the first instance and therefore failure to follow the procedure would be a jurisdictional error and not merely procedural error or irregularity. Such order would be illegal and without jurisdiction and entail the final assessment order as void ab-initio sans jurisdiction. Even the provisions of section 292B cannot confer and validate the jurisdiction on the AO, which is otherwise non-existing. Hence passing of the draft assessment order is mandatory.

- Further, the ITAT on placing reliance on the decision of the jurisdictional High Court in the case of **Principal Commissioner of Income-tax-15 Vs Lion Bridge technology Pvt. Ltd (2018) 100 taxmann.com 413, Kolkata Tribunal in the case of Linc Pen & Plastics Ltd vs DCIT (2023) 148 taxman.com 273, and Calcutta High Court in the case of CIT Vs Bhaskar Mittal (1994) 73 taxmann.437,** the Taxpayer cannot be estopped from challenging the assessment order, which is otherwise based on the waiver/ admission/ undertaking of the Taxpayer. Further even if there is waiver/admission/undertaking of the Taxpayer for not challenging the draft order before the Ld. DRP, but still the AO is not empowered to pass the assessment order under directly, without passing a draft assessment order.

- Furthermore, the ITAT referred to the legal maxim "*Nullus commodum capere potest de injuria sua propria*" which mandates that a person who by manipulation of a process, frustrates the legal rights of others, should not be permitted to take advantage of his wrong or manipulations. ITAT also observed that if Taxpayer's claim is allowed then it shall amount to 'unjust enrichment'. However, placing reliance on the Jurisdictional HC judgments and

considering the mandate of the law u/s 144C if the AO proposes to make any variation which is prejudicial to the interest of such Taxpayer, then in the first instance, is required to pass a draft proposed order of the assessment. Hence, final assessment order passed has been quashed.

NASA Comments:

- This judgement again re-iterate the position that AO is not empowered to pass final assessment order without passing a draft assessment order as mandated under Section 144C(1) in case of an eligible Taxpayer. Further, ITAT held that even though the Taxpayer has waived its legal right of objecting against the additions, the AO is supposed to follow the mandatory provision of section 144C of the Act.

INDIRECT TAX

M/s Sri Shanmuga Hardware's Electricals vs State Tax Officer (Writ Petition Nos. 3804, 3808 & 3813 of 2024 and W.M.P.Nos. 4105, 4107, 4110, 4111, 4116 & 4119 of 2024).

Facts in brief & issues involved:

- The petitioner carries on trade in electrical products and hardware contended that they had filed NIL GSTR-3B return, erroneously and inadvertently, for the assessment year 2017-18, 2018-19 and 2019-20, However, due to filing of NIL GSTR-3B return they were not able to claim any Input Tax Credit (ITC), **hence they claimed the said ITC through form GSTR-9** after the said ITC was reflecting in GSTR-2A**.**
- The Assessing officer after rejecting the claim of such ITC through GSTR-9 has passed the order therein on the ground that such ITC is not claimed through GSTR-3B and not eligible to claim in GSTR-9. Therefore, tax is payable along with interest and penalty under Section 74 of the CGST Act 2017.,
- Further, the petitioner has challenged the order passed by the Assessing officer in Hon'ble Madras High Court through Writ petition.

Contention of the petitioner:

- The petitioner has claimed that they had filed the NIL Return in GSTR-3B for the FY 2017-18,2018-19 and 2019-20 erroneously and inadvertently, due to which they were not able to claim any Input Tax Credit (ITC) in GSTR-3B. **Hence, they claimed the said ITC through form GSTR-9** because the petitioner is of the opinion that they are eligible to claim ITC as the ITC is reflecting duly in form GSTR-2A and the petitioner is in position of all the relevant documents which make him eligible for claiming ITC.
- Further petitioner also states that eligible ITC which were not claimed thorough GSTR-3B due to NIL filing of GST Return exceeded the total tax liability payable.

Contention of the Respondent:

- Respondent submits that the petitioner should have availed himself of the statutory remedy and not approached this Court.
- He further submits that the burden of proof is on the registered person to establish ITC eligibility. Since such burden was not discharged by the petitioner, he submits that no interference is called for with the orders impugned herein.

Observation and Decision of Hon'ble Madras High Court:

- Hon'ble Madras High Court impugned orders herein are quashed, and these matters are remanded for reconsideration.
- Further, held that when the registered person asserts that he is eligible for ITC once the ITC is reflecting in GSTR-2A and such claim of ITC is done through GSTR-9 returns and not through GSTR-3B return, the assessing officer should examine whether the ITC claim is valid by examining all relevant documents, including by calling upon the registered person to provide such documents. In this case, it appears that the claim was rejected entirely on the ground that the ITC is not claimed through GSTR-3B returns and claimed through GSTR-9 despite of the fact the ITC is reflecting in GSTR-2A.

NASA Comments:

- The Hon'ble Madras High Court reiterated that the registered person is eligible to claim the ITC in GSTR-9 of the Financial Year if the registered person erroneously and inadvertently makes the mistake while filing their GSTR-3B of the said financial year. Once the said ITC is reflecting in GSTR-2A and registered person have all the relevant document with them for the conditions of eligibility.
- Question here arises that whether the case law can be used in the case where the registered person receiving notices disallowing the ITC on the ground that the ITC is claimed after the period mentioned under section 16(4) of CGST Act 2017?

Mindrill Systems and Solutions Private Limited [TS-48-AAAR(WB)-2024-GST]

Facts in brief & issues involved:

- M/s Mindrill Systems and Solutions Pvt Ltd ("**Respondent**") had sought advance ruling from WBAAR on the issue whether input tax credit ("ITC") against inward supply of input/ input service used for construction of warehouse can be claimed and utilized to pay tax on the outward supply of services provided by way of renting of warehouse in case such construction expenses are:
    I. capitalized in books, and
    II. not capitalized in books
- WBAAR held that since the respondent constructed a warehouse from pre-engineered steel structures and let it out, the construction has attained a 'permanent status' and therefore, ITC is not admissible for construction expenses to the extent they are capitalized in books. However, where construction expenses are not capitalized in books, the claim of ITC is admissible.
- Assistant Commissioner, Shibpur Division, Howrah CGST & CX Commissionerate ("**Applicant**") filed instant appeal before WBAAAR against the above advance ruling on the grounds that the WBAAR has erred by restricting the input tax credit to the extent of construction expenses only which are capitalised in books of accounts.

- WBAAAR modified the order of WBAAR and ruled that ITC shall not be available irrespective of whether the construction expenses have been capitalised or not.

Contention of Applicant:

- The applicant contented that the issue involved in the instant case is related to admissibility of credit of input tax charged on supplies received by the respondent taxpayer. The WBAAR has erred by restricting the input tax credit to the extent of construction expenses only which are capitalised in books of accounts.
- The applicant further contented that clause (d) of sub-section (5) of section 17 of the GST Act restricts input tax credit for construction of immovable property which deals with original construction.
- Explanation given under clause (d) of sub-section (5) of section 17 of the GST Act clarifies that construction work includes re-construction/renovation/ additions/ alterations / repairs and in these cases the availability of input tax credit is restricted only to the extent of capitalization.
- In the instant case, the respondent made an original construction work in form of a warehouse to let it out. Hence, irrespective of whether the construction expenses have been capitalised or not, the input tax credit shall not be available to the applicant taxpayer.

Contention of Respondent:

- Respondent taxpayer contended that there is no concept of "original construction" in clause (d) of sub-section (5) of section 17 of the GST Act and it does not debar a person from claiming ITC on non-capitalised construction/ reconstruction / renovation / additions / alterations / repairs expenses relating to immovable or movable property used in the course of or furtherance of business.
- Section 17 of the GST Act deals with apportionment of credit and blocked credits. Clauses (c) and (d) of sub-section (5) of section 17 of the GST Act deal with non availability of credit relating to immovable property in certain situation.

- Upon plain reading of the provisions of section 17(5)(d) of the Act, it is amply clear that said provision in no manner deals with ITC on non-capitalised expenses relating to immovable or movable property used in the course of or furtherance of business.
- Therefore, the tax-payer is entitled to claim ITC on non-capitalised expenses relating to godown / warehouse given on rent.

Ruling by AAAR

- WBAAAR explained that for the purpose of construction, the law is unambiguous in the main clauses (c) and (d) to sub-section (5) of section 17 of the GST Act. it is only the Explanation part, where the law extends the ineligibility criteria for Input Tax Credit to the arena of re-construction, renovation, additions, alterations or repairs and that too conditionally, i.e. Input Tax Credit for such portion of the expenses pertaining to re-construction, renovation, additions, alterations or repairs which are capitalized stands ineligible.
- WBAAAR opined that the respondent has constructed one warehouse and let it out. This being a "construction", will attract the provisions of the clauses (c) and (d) to sub-section (5) of section 17 of the GST Act and not the Explanation part for determining the eligibility criteria for Input Tax Credit. Thus, the input tax credit for such construction shall not be available to the respondent.

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