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TAX JURISPRUDENCE

CASE LAW ALERT – JANUARY 2025
VOL- 1

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		
<u>PCIT-4 & ANR. vs M/s. Jupiter Capital Pvt. Ltd. (TS -09-SC-2025)</u>	Whether the reduction in share capital leading to proportionate reduction in the shareholding of a taxpayer would be covered under extinguishment of any right as per Section 2(47) of the Income Tax Act, 1961 ("the Act")?	The Hon'ble Supreme Court ("SC") held that reduction in share capital of a company would be covered under the expression "sale, exchange, or relinquishment of the asset" as per section 2(47) of the Act. The taxpayer's claim of loss on account of reduction in share capital of a company is allowable as long-term capital loss.
Indirect Tax		
<u>Gujarat Chamber of Commerce and Industry & Ors vs Union of India & Ors[C/SCA/11345/2023]</u>	Whether the transaction for assignment of long-term leasehold rights in land allotted by GIDC is chargeable to GST? Whether the assignee is eligible to take ITC of the GST paid on acquisition of leasehold rights?	The Hon'ble High Court of Gujarat held that sale and transfer of leasehold rights of land allotted by GIDC to a third-party assignee is considered as assignment of "immovable property." Consequently, such transactions would not be subject to levy of GST. In view of the above, question of eligibility of ITC does not arise.

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

DIRECT TAX

Principal Commissioner of Income Tax – 4 & ANR. vs. M/s. Jupiter Capital Pvt. Ltd. (Supreme Court of India) [TS-09-SC-2025]

Facts in brief & issues involved:

- ♦ The taxpayer is engaged in the business of investing in shares, leasing, financing and money lending.
- ♦ The taxpayer had made an investment in M/s. Asianet News Pvt. Ltd. ("ANNPL"), an Indian company engaged in the business of telecasting news, by purchasing 15,33,40,900 shares having face value of Rs 10/- each which constituted 99.88% of the total number of shares of ANNPL.
- ♦ ANNPL incurred losses due to which the net worth of the company got eroded and hence ANNPL filed a petition before the Hon'ble Bombay High Court for reduction of its share capital. The High Court ordered ANNPL for reduction in share capital from 15,35,05,750 shares to 10,000 shares. Consequently, the share of the taxpayer was reduced proportionately from 15,33,40,900 shares to 9,988 shares. Further, High Court also directed to pay a sum of Rs. 3,17,83,474/- to the taxpayer as consideration. Accordingly, during the year, the taxpayer claimed an amount of Rs. 1,64,48,55,840/- as Long-Term Capital Loss (LTCL) against the said reduction in share capital of ANNPL.
- ♦ However, the Assessing Officer (AO) disagreed with the taxpayer's claim of loss contending that the reduction in shares of ANNPL did not result in transfer envisaged u/s 2(47) of the Act.
- ♦ Aggrieved by the order of AO, the taxpayer preferred an appeal before the Commissioner of Income Tax CIT(A) wherein the CIT observed that as there was no effective transfer which could result in any real LTCL.
- ♦ However, Income Tax Appellate Tribunal (ITAT) reversed the order passed by CIT(A) based on the judgement of Hon'ble Supreme Court in the case of Kartikeya V. Sarabhai Vs. CIT.
- ♦ The revenue further filed an appeal before Hon'ble High Court wherein High Court affirmed the order passed by ITAT and dismissed Revenue's appeal. Aggrieved by the same, the revenue filed an appeal before the Hon'ble Supreme Court.

Contentions of the Petitioner:

- ♦ The revenue stated that extinguishment of rights would mean that the taxpayer has parted with those shares or sold off those shares to a second party. Whereas, in the instant case the taxpayer, has neither sold any shares nor has parted with these shares, as the taxpayer still holds shares in the ratio of proportionate percentage i.e. 99.88% even after reduction in capital.
- ♦ AO contended that reduction in shares of the subsidiary company did not result in the transfer of a capital asset as envisaged in Section 2(47) of the Act
- ♦ There is no extinguishment of rights as the reduction was only in the number of shares and not the face value and hence the taxpayer would not be entitled to claim long term capital loss.

Contentions of the Respondent:

- ♦ The taxpayer contended that the approved reduction as per the Hon'ble Bombay High Court in share capital resulted in extinguishment of part of the taxpayer's rights in the shares of ANNPL.
- ♦ As per the definition of transfer as per section 2(47) of the Act, the above relinquishment / extinguishment is considered as transfer.
- ♦ Therefore, the taxpayer contended that the reduction of share capital is transfer and claimed the loss placing emphasis on the decision of Kartikeya V. Sarabhai v. CIT.

Observation and Decision of the Hon'ble Supreme Court:

- ♦ The extinguishment of any right covers every possible transaction which results in the destruction, annihilation, extinction, termination, cessation or cancellation, by satisfaction or otherwise of all or any of the bundle of rights which the taxpayer has in a capital asset.
- ♦ As per section 66 of the Companies Act, 2013, companies can reduce share capital which affects shareholders rights proportionately.
- ♦ In case of Kartikeya V. Sarabhai v. CIT, the Supreme Court observed the following:
 - I. Section 2(47) of the Income Tax Act, 1961, which is an inclusive definition, *inter alia*, provides that relinquishment of an asset or extinguishment of any right there in amounts to a transfer of a capital asset.
 - II. The reduction of right in a capital asset would amount to transfer u/s 2(47) of the Act.

- ◆ Further, in the case of *Anarkali Sarabhai v. CIT*, it was observed that both reduction of share capital and redemption of shares involves purchase of its own shares by the company and hence it would amount to transfer u/s 2(47) of the Act.
- ◆ The Supreme Court held that the reduction in share capital, which results in the extinguishment of the shareholder's rights to the extent of the reduction, amounts to a transfer of a capital asset as transfer isn't limited to a sale and allowed the LTCL thereby dismissing Revenue's appeal.

NASA Comments:

- ◆ The taxpayers will have to evaluate the taxability in case of capital reduction wherein consideration has been received as the same will attract capital gains tax. Relinquishment of an asset or extinguishment of any right therein is taxable even if there is no sale.

INDIRECT TAX

Case 1 – Gujarat Chamber of Commerce and Industry & Ors vs Union of India & Ors [C/SCA/11345/2023]

Facts in brief & Issue Involved

- ◆ Suyog Dye Chemie Private Limited ("lessee"/"assignor") was allotted a land parcel by GIDC on long term lease basis for the purpose of industrial use. The lease deed executed between the lessee and GIDC permits the lessee to assign the leasehold rights and interest in the plot to any other person subject to approval of GIDC.
- ◆ Accordingly, lessee had assigned/sold the leasehold rights of the plots to a third party for consideration without charging GST based on the view that such transactions are in the nature of transfer of immovable property.
- ◆ Department had issued show cause notice to the lessee demanding GST on consideration received against assignment of leasehold rights.
- ◆ Aggrieved by the notices, the petitioner (*Gujarat Chamber of Commerce and Industry*) had filed the writ petition before the Hon'ble High Court of Gujarat.

Contentions of Petitioners

- ♦ The petitioner contended that assignment of leasehold rights must qualify the test of “supply” in order to be leviable to GST. The expression “supply” includes supply of goods or services or both in various forms, made or agreed to be made for a consideration by a person in the course or furtherance of business.
- ♦ The petitioner contended that the transaction of assignment involves transferring of absolute rights in the land and has nothing to do with the business of the assignor nor it is in the course or furtherance of business of an assignor.
- ♦ Further, assignment of leasehold rights constitutes absolute transfer of right in immovable property wherein the assignor steps out of the equation entirely due to sale, thus, there is no element of service in the transaction.
- ♦ Therefore, the said transaction does not fall within the purview of Section 7(1)(a) of the CGST Act, 2017 and consequently, it is not a “Supply of Services”.
- ♦ Petitioner submitted that attempt of the Department to encompass transfer of property within the meaning of service amounts to extending the meaning of the word “service” beyond its reasonable connotation in an anxiety to preserve the power of legislature.
- ♦ The term “immovable property” is not defined under the CGST Act, hence, the petitioner has relied upon the definitions in other enactments to argue that assignment of leasehold rights tantamount to transfer of immovable property.
- ♦ Petitioner submitted that transfer of lease by way of assignment attracts same stamp duty as that of a conveyance for transfer of immovable property. Thus, the assignment of leasehold rights of an immovable property is treated at par with transfer of immovable property under the Gujarat Stamp Act.
- ♦ Petitioner argued that the object of introducing GST regime was to subsume some of the indirect taxes so as to reduce cascading effect of taxes. However, the entries of stamp duty in the constitution were left untouched. This clearly depicts the legislative intent to keep any transfer of immovable property out of the scope of GST.
- ♦ The petitioner submitted that the proposed imposition of GST on assignment of leasehold rights lead to double taxation in as much as both stamp duty at rate equal to conveyance

of land as well as GST are imposed which will lead to cascading effect of taxes which is specifically sought to be avoided by introduction of the GST regime.

Contentions of Respondents

- ♦ The Respondent contended that leasehold rights with respect to the immovable property is an "interest" in the immovable property. Such interest is an intangible estate and does not have any physical existence.
- ♦ Respondent claimed that when the term "immovable property" is not defined under the CGST Act, 2017, meaning of the said term should be understood in context of the provisions of the GST Act and not in terms of the definition of the said expression under other legislations.
- ♦ Under the provisions of GST Act dealing with works contract services, blocked credit etc., the term "immovable property" is used in the sense that it has to be in a tangible form i.e. in physical form. Thus, "interest" in immovable property, being an intangible estate cannot be dubbed as immovable property itself.
- ♦ Respondent argued that GIDC being the owner of the land has, *inter alia*, right to possess and occupy the land. When such right to occupy the land is transferred by GIDC in favour of the lessee, it is treated as supply of service under the GST Act and same is susceptible to GST. In such case, further transfer of right to occupy/possess by lessee to a third party, should also continue to remain as supply of service.
- ♦ Respondent further submitted that agreeing to transfer the leasehold rights is nothing but agreeing to do an act which would also be considered as supply of services.

Observations & Decision of the Gujarat High Court

- ♦ Hon'ble High Court observed that GIDC retains the ownership of the plot of land allotted by it and only the right to occupy/possess is transferred by way of leasehold rights in favour of lessee. Such leasehold rights are clearly classified as supply of services under the GST Act.
- ♦ High court noted that the Respondent has drawn distinction between "immovable property" and "interest in immovable property" so as to submit that immovable property as such is not liable to levy of GST whereas "interest" in immovable property like leasehold rights which is transferred by way of sale is liable to levy of GST.

- ◆ However, one must note that there are two transactions, one is the GIDC allotting plot of land along with right to occupy/ construct / possess on long term lease basis and other one is the sale and transfer of leasehold rights by the assignor in favour of assignee.
- ◆ In the former one, the right of ownership of plot remains with the GIDC which will revert back on expiry of lease period. Hence, it is nothing but supply of service. Whereas, in the latter transaction, the absolute right in the property is relinquished by the assignor.
- ◆ The assignor/lessee has transferred leasehold rights which is over and above the actual physical plot of land and building. Such rights encompass incorporeal ownership rights in such land and building like right to possess, right to enjoy income from, right to alienate, etc.
- ◆ Therefore, interest in the immovable property in form of leasehold rights are nothing but benefits arising from immovable property, which is immovable property itself.
- ◆ On perusal of the definition of the term 'service' under the erstwhile Service tax law, there was a specific exclusion for transfer of title in immovable property. Thus, the legislature did not intend to levy Service tax on transfer of immovable property under the pre-GST regime. Further, development rights being benefits arising from land were not leviable to Service tax.
- ◆ Thus, it was held that assignment by sale and transfer of leasehold rights of plot of land allotted by GIDC to assignor/lessee in favour of Assignee shall be assignment / sale / transfer of benefits arising out of "immovable property" and consequently, such transfer of assignment rights would not be leviable to GST. Considering the above, the question of eligibility to claim ITC of GST paid by Assignee does not arise.

NASA Comments

- ◆ The decision of Hon'ble High Court gives much needed relief to the taxpayers. It also gives clarity around the term "benefits arising out of immovable property".
- ◆ Although ruling of High Court has significant weightage, Taxpayers who have paid taxes on such transactions may explore the possibility of seeking refund.
- ◆ One needs to wait and watch whether the Department will challenge the ruling before the Apex Court.

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