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INDIRECT TAX

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Judgments

Deposits made to Electronic Credit Ledger in nature of 'Advance Tax', thus, no interest on delayed debit

Arya Cotton Industries & Anr. versus Union of India & Anr. (R/Special Civil Application No. 8871 of 2022)

The Gujarat High Court holds that an amount deposited in the Electronic Cash Ledger ('ECL') is in nature of advance tax. Accordingly, interest under Section 50 of the Central Goods and Services Tax, 2017 ('CGST Act') is payable, in case of default in filing of FORM GSTR- 3B and consequent payment of tax, only till the deposit of tax amount in the ECL and not till the date of filing of return in Form GSTR-3B.

The Petitioner had converted itself from a limited liability partnership to limited company, but, owing to technical issues, was unable to transfer the unutilized Input Tax Credit ('ITC'). This, in turn, led to non-filing of Goods and Services Tax ('GST') returns on time. The Petitioner, nevertheless, had deposited GST for the said period in its ECL. When the ITC was finally transferred, the Petitioner filed its GST returns and paid interest from due date of filing of return till date of deposit in the ECL. However, the GST Department contended that interest was payable till the date of filing of return and not up to date of deposit of tax in the ECL.

The High Court, upon analyzing the relevant provisions, observed that when the return is filed by an assessee in FORM GSTR-3B and if there is sufficient balance available in the ECL, then the liability as per the return is simply offset against such balance by debit in ECL. Therefore, the amount in the ECL is nothing but in nature of advance tax lying in the account of the assessee which cannot be withdrawn or utilised in any manner by the assessee except for payment of tax liability as per the return filed.

The Court further observed that the provisions of Section 50(1) (*which applies for calculating levy of interest on delayed payment of tax*) cannot be literally interpreted to the effect that interest is payable on the amount which is already deposited in the ECL and thereafter, adjusted for payment of tax. Such interpretation would be contrary to the fundamental principle for charging interest, which is compensatory in nature and would convert the interest into the nature of penalty.

The Court held that it is only for accounting purposes that the debit in ECL is made at the time of filing of the return i.e., FORM GSTR- 3B, otherwise the amount gets credited to the account of the Government immediately upon the deposit. Therefore, the GST liability of the registered person is discharged to the extent of the deposit made to the Government and consequently, the Petitioner cannot be made liable to pay the interest from the date of deposit in ECL till the date of filing of the return.

Recently, the Madras High Court had held against the interest liability where GST amount was routinely deposited in the ECL within due date, but the assessee defaulted in filing monthly GST return in FORM GSTR- 3B. However, the Patna High Court had taken a divergent view insofar as it had held that the levy of interest is automatic on delayed filing of returns, regardless of whether the payment is made by debiting the ECL or Electronic Credit Ledger ('ECrL'). The present judgment of the Gujarat High Court is in consonance with the view taken by the Madras High Court. Interestingly, the GST Council in its 53rd Council Meeting had also recommended amending the relevant GST provisions to provide that the amount available in the ECL on the due date of filing of return in FORM GSTR-3B and is debited while filing the said return, shall not be included while calculating interest in respect of delayed filing of the said return.

No Service Tax on University Affiliation Fees

Principal Additional Director General of GST Intelligence and Ors. versus Rajiv Gandhi University of Health Sciences [Writ Appeal No. 856 of 2022 (T-Res)]

The Karnataka High Court holds against the levy of service tax on affiliation services provided by the Universities. However, income from non-educational activities such as rental from buildings leased/licensed for banking facilities has been held to be chargeable to service tax.

The Appellant-Service Tax Department had issued a Show Cause Notice alleging that the Respondent University had not paid Service Tax on the amount received by way of fees, charges & penalties, for granting affiliation/renewal, and on certain other amounts such as rental income from its buildings, etc. The Show Cause Notice was challenged by way of a writ petition, which was allowed by a single judge and against which the Department filed an appeal.

The High Court, after a threadbare examination of the relevant provisions of the Service Tax Laws as well as exemptions available to educational institutions and the nature and functions of the Respondent University, held as under:

On taxability of income from affiliation and allied functions: The Court observed that the Respondent University, being a statutory body, accords affiliation to the health and science colleges on the recommendation of the State Government. The act of granting, renewing, or withdrawing affiliation is done in the discharge of public duties enjoined by law. Consequently, such activities do not fit into the expression 'activities carried on for consideration', more particularly, when they do not have commercial elements. Thus, no service tax is leviable on income accrued to the University on account of granting/renewing affiliation.

Taxability of income from non-educational activities: The High Court held that while no service tax is leviable on dealing in textbooks and/or providing hostel facilities to pupil since such activities are incidental to imparting education, however, leasing/ licensing of building for providing banking facilities cannot be said to be incidental to education. Consequently, the income from the rentals of buildings leased/licensed for banking facilities is not exempted from service tax. The Court, however, held that income accruing to the University because of renting of

property for providing canteen facilities is entitled to be exempted from service tax since the relevant notification specifically exempted catering services provided by an educational institution to its students, faculty & staff.

The present judgment reaffirms the earlier judgment of the Karnataka High Court wherein it was held that affiliation services rendered by the University are not chargeable to service tax. However, in the context of GST, the Delhi, Telangana, and Madras High Courts have held that affiliation services are chargeable to GST on account of not being covered by the relevant exemption notification. With the relevant entry under the service tax exemption notification being similarly worded to the relevant exemption notification under the GST laws, it would be interesting to see how the issue unfolds under the GST laws.

FORM ASMT-10 not mandatory for adjudication but crucial for valid scrutiny

Mandarina Apartment Owners Welfare Association (MAOWA) Vs Commercial Tax Officer/State Tax Officer [W.P.Nos.15307 & 15330 of 2024 & WMP Nos.16631, 16633, 16656 & 16657 of 2024]

The Madras High Court has held that issuance of FORM ASMT- 10, which is issued to a taxpayer for intimating discrepancies in a return after the scrutiny thereof, is not a mandatory requirement for adjudication under Section 73 or 74 of the CGST Act. However, as a consequence of not issuing the FORM ASMT-10, any conclusions drawn in course of scrutiny stands vitiated and cannot form basis for the adjudication.

The Petitioners, by way of writ petitions, had challenged the assessment orders primarily on the ground of non-issuance of notice in FORM ASMT -10 at the stage of scrutiny of the returns.

The High Court observed that Section 61 provides that the obligation to issue notice to the registered person is not triggered merely by the selection of the returns of such person for scrutiny, but by the discovery of discrepancies in such returns on scrutiny. Thus, upon fulfilment of two conditions, namely, selection of returns for scrutiny and the discovery of discrepancies on such scrutiny, there is an obligation to issue notice in FORM ASMT- 10.

The Court further held that if FORM ASMT-10 is not issued to the taxpayer, in spite of noticing discrepancies, it would impair the entire scrutiny process. Accordingly, such scrutiny cannot be relied upon for adjudication. The Court, at the same time, observed that the issuance of notice in FORM ASMT-10 does not constitute a mandatory requirement as such for adjudication, even where returns had been scrutinized.

The judgment emphasizes that if tax authorities identify discrepancies during the scrutiny process but fail to issue FORM ASMT-10, the entire scrutiny process is vitiated. This could potentially lead to the invalidation of any tax demands or penalties imposed based on such flawed scrutiny, providing significant relief to taxpayers.

Kerala High Court upholds prospective levy of GST on supply between clubs and members

Indian Medical Association vs. Union of India [WP(C) No. 23853 OF 2023]

The Kerala High Court turns down the challenge to Section 7(1)(aa) and explanation thereto read with Section 2(17)(e) of the CGST Act vide which a person, other than an individual, and its members or constituents are deemed to be two separate persons and consequently, GST is chargeable on supply of activities or transactions inter se between such persons.

The Petitioner was a registered association to which the members were admitted on payment of a one-time admission fee. The Petitioner contended that admission of a member in the petitioner association does not involve rendering of any service to attract GST on the contribution/ admission fee and that the well-recognized principles of mutuality could not have been erased by insertion of Section 7(1)(aa) to the CGST Act retrospectively.

The High Court observed that Article 246A or 366(12A) of the Constitution of India does not have any reference to the term person and that the levy of GST is on 'activities', i.e., 'the supply of goods and services or both'. Thus, the Parliament as well as the State Legislature, in exercise of their power under Article 246A r/w Article 366(12A), are empowered to legislate for imposing tax on the supply of goods and services, irrespective of the person/ individual involved. The Constitution does not put any restriction or limitation from defining a person for the purpose of levy of GST. Therefore, the principle of mutuality will not come in the way of the Parliament or the State legislature to enact law for tax on supply of goods and services by club/association to its members. Consequently, the amendment brought by inserting Section 7(aa) is well within the legislative competence and not *ultra-vires*.

On retrospective application of Section 7(1)(aa), the Court observed that before such amendment was brought, the law of mutuality was a well-established principle of taxation. When the law of mutuality, as was held by the Supreme Court in *State of West Bengal Vs. Calcutta Club [2019 (29) GSTL 545]*, was understood by the authorities as well as the petitioner, the petitioner could not have collected tax. Consequently, the High Court held that Section 7(aa) should not be given retrospective operation w.e.f. 01.07.2017 but should be given effect from the date when it was notified i.e., 01.01.2022.

The amendment by way of insertion of Section 7(1)(aa) to the CGST Act was specifically introduced to override the Supreme Court's judgment in the Calcutta Club Ltd. wherein the principle of mutuality had been upheld. In light of the statutory amendment of the CGST Act, the present judgment of the Kerala High Court brings relief to clubs and associations to the extent that it rules that such amendment should not be applied retrospectively but rather prospectively, thereby limiting their GST liability to transactions occurring after the amendment was notified.

No recovery by way of adjustment of refund amount after expiry of statutory refund period

Commissioner of Trade and Taxes v. FEMC Pratibha Joint Venture [Civil Appeal No. 3940 of 2024]

The Supreme Court has ruled against the adjustment of refund from dues under default notices, which are issued subsequent to the prescribed period for refund.

The Respondent claimed a refund of excess tax credit along with applicable interest under the provisions of the Delhi Value Added Tax Act, 2004 ('DVAT Act'). However, after the expiry of the period within which the refund ought to have been processed under the relevant provisions of the DVAT Act, the VAT Department issued default notices to the Respondent and subsequently, passed an order for adjustment of the Respondent's claims for refund against dues under default notices. Thereafter, the Delhi High Court quashed the adjustment order and directed refund along with interest. The Department challenged the decision of the Delhi High Court before the Apex Court.

The Supreme Court noted that the Department must adhere to the refund timelines stipulated under the relevant provisions to fulfil the object of the provision, i.e., to ensure that refunds are processed and issued in a timely manner. The relevant refund provisions under the DVAT only permit adjusting amounts towards recovery that are "due under the Act". The Supreme Court held that the default notices had not crystallized within the statutory period for grant of refund, and the Respondent-assessee was not liable to pay any dues during such period. Consequently, the Appellant- Department could not have adjusted the refund amount against the amounts due under default notices that were issued subsequent to the refund period.

This ruling sets an important legal precedent for cases involving refund claims under various tax laws, including GST. It reinforces the principle that once a refund is due, tax authorities cannot delay or adjust it based on subsequent developments, unless such adjustments are explicitly permitted by the relevant statutory provisions.

Customs duty and interest payable even after confiscated goods are redeemed after payment of redemption fine

M/s Navayuga Engineering Co. Ltd. versus Union of India & Anr. [Civil Appeal No. 1024 of 2014]

The Supreme Court holds that customs duty is leviable when confiscated goods are redeemed upon payment of fine. Additionally, the Apex Court holds that the liability to pay such duty will also include the liability to pay interest on delayed payment.

The Appellant had availed benefit of exemption from payment of customs duty on imported goods. Subsequently, the Customs Department alleged violation of import conditions and issued a show cause notice proposing confiscation of the imported goods along with interest and penalties. The Appellant thereafter approached the Settlement Commission, which, while upholding the duty liability, held against the interest liability. Against the order of the Settlement Commission, the Customs Department filed writ petitions which were allowed by the Bombay High Court.

The Supreme Court, after examining the provisions of Section 28 (*which pertains to recovery of duties not levied or not paid or short-levied or short-paid or erroneously refunded*) and Section 125 of the Customs Act, 1961 ('Customs Act') (*which empowers the owner of the goods to exercise an option of legitimizing the importation by paying fine, duty and other charges*), decided on the following questions of law:

Whether there is a liability to pay customs duty when the confiscated goods are redeemed after payment of fine: The Supreme Court held that once the option to pay the fine is exercised and the goods are redeemed, it is natural for the goods to be subjected to customs duty. Thus, the duty obligation is inextricably connected to the option to redeem the confiscated goods. In other words, it is a precondition for redemption. Accordingly, in 1985, the Parliament introduced Section 125(2) to clarify and declare that the owner of goods, in addition to payment of fine, will also be liable to pay duty and other charges upon exercising the option to pay fine to redeem goods.

The Supreme Court accordingly concluded that the owner of the goods has a liability to pay customs duty, even after confiscated goods are redeemed upon payment of fine under Section 125. Further, the obligation to pay duty and other charges under Section 125(2) arise only when the owner of goods exercises the option to pay fine for redemption of goods and the Department accepts the same.

Whether the liability to pay such duty will include the liability to pay interest on delayed payment: The Court held that the customs duty obligation in confiscation proceedings arises because of the option available and exercised under Section 125 of the Customs Act and not Section 12 or 28 of the Customs Act, which prescribes the method and procedure by which the customs duty is assessed and determined. The Court observed that Section 28 comes into operation for assessing and determining the duty and other charges payable with respect to goods redeemed under Section 125(2). Accordingly, once Section 28 of the Customs Act applies for determination of duty obligation arising under Section 125(2), the interest on delayed payment of duty arises under Section 28AB.

The present judgment of the Supreme Court has brought much clarity on customs duty and interest liability on goods redeemed on payment of fine. Referring to its earlier ruling in Commissioner of Customs (Import) v. Jagdish Cancer and Research Centre (Appeal (civil) 2680 of 2000), the Supreme Court explains that Section 28 of the Customs Act will be applicable for calculation and assessment of duty in cases where liability arises due to confiscatory proceedings.

Substituted rules apply to pending proceedings

Pernod Ricard India (P) Ltd. v. The State of Madhya Pradesh & Ors. [Civil Appeal Nos. 5062-5099 of 2024]

The Supreme Court holds that the substituted rule under the Madhya Pradesh Excise Act, 1951 ('M.P Excise Act') prescribing imposition of lesser penalty shall operate and apply to pending proceedings pertaining to imposition of penalty.

Under the M.P. Excise Act, sub-licensees importing foreign liquor were liable for penalty in case where the loss of liquor during transit was beyond the permissible limits prescribed under the relevant rule. During the Financial Year 2019- 20, a penalty equivalent to four times the maximum duty payable on foreign liquor was prescribed under the relevant rules. Subsequently, the quantum of penalty was reduced to an amount not exceeding the duty payable on foreign liquor by way of amendment to the Rule.

In this factual matrix, eight months after the aforesaid amendment, the Excise Department proposed and confirmed penalty on Appellant (sub-licensee under M.P Excise Act) equivalent to four times the duty payable on foreign liquor for exceeding the permissible limits during the year 2009- 2010. The said order, which was initially set- aside by a single judge, was subsequently upheld by the division bench of the Delhi High Court.

The Supreme Court observed that the principle that a repealed provision will cease to operate from the date of repeal and the substituted provision will commence to operate from the date of its substitution is subject to specific statutory prescription. A statute can enable the repealed provision to continue to apply to transactions that have commenced before the repeal. Similarly, subject to statutory prescriptions, a substituted provision that operates prospectively, if it affects vested rights, can also operate retrospectively. However, the principle governing subordinate legislation is slightly different inasmuch as the operation of subordinate legislation is determined by the empowerment of the Parent Act. Without statutory empowerment, subordinate legislation will always commence to operate only from the date of its issuance and at the same time, cease to exist from the date of its deletion or withdrawal.

The Supreme Court, after examining the provisions of the M.P. Excise Act, held that the said Act did not provide for continuation of a repealed provision to rights and liabilities accrued during its subsistence. Further, the amendment was intended to reduce the quantum of penalty for better administration and regulation of foreign liquor. Accordingly, the Court held that there is no justification in ignoring the subject and context of the amendment and permit the State to recover the penalty as per the unamended Rule. The relevant rule reducing the quantum of penalty operated retroactively and thus, saves it from arbitrarily classifying the offenders into two categories with no purpose to subserve.

This judgment sets an important precedent on retroactive application of laws, particularly those involving penalties. Additionally, the ruling also provides guidance on the application of subordinate legislation.

Purchaser cannot be punished if seller fails to deposit the tax in case of bona fide purchase transactions

National Plasto Moulding versus The State of Assam and 3 Ors. (WP(C)/2863/2022)

The Petitioners inter alia challenged the constitutional validity of Sections 16(2)(c) (*which provides that a recipient is entitled to ITC only if the GST charged in respect of the supply has been paid to the Government*) and 16(2)(d) (*which provides filing of return in Form GSTR- 3B by the recipient as a condition for availment of ITC*) of the CGST Act along the corresponding provisions of the Assam GST Act.

The High Court, following the judgment of the Delhi High Court in *On Quest Merchandising India Private Limited versus the Government of NCT of Delhi & Ors., [W.P.(C) 6093/2017 & CM No.25293/2017]*, held that a purchasing dealer, who have entered into a bona fide transaction with a selling dealer, cannot be punished in case the selling dealer fails to deposit the tax collected by it to the Government. Accordingly, while the High Court set- aside the show cause notices and orders impugned before it, the Court noted that the Department is free to act in those cases where the purchase transactions were not *bona fide*.

The present judgment of the Gauhati High Court is in consonance with the earlier press release issued by the Department subsequent to the 27th GST Council meeting wherein it was provided that there will not be any automatic reversal of ITC from buyer on non-payment of tax by the seller. Furthermore, various other High Courts have also taken a similar view against recovery of ITC from bona-fide taxpayers.

KEY PEOPLE

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Shashank Shekhar is a Partner in the Indirect Tax Practice at DMD Advocates, bringing over two decades of experience to the role. He has extensive court-room experience while representing clients at various fora including Supreme Court of India, High Courts and Tribunals and has obtained favourable judgments and orders for the clients from Courts and Tribunals.

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