Legal Decisions[1]

GST

(2019-TIOL-132-AAR-GST) LD/67/155, Shri Nacvodit Agarwal, 26/03/2019

Value of diesel provided by recipient to the supplier for transportation of goods to recipient is includible in value of supply charged by the supplier for supply of transportation service and thus, chargeable to GST.

AAR noted that the diesel provided by the service recipient to applicant for use in the vehicles of applicant for transportation of cement forms an important and integral component of business process, without which the process of supply (transportation) of cement can never be materialised. AAR held that any amount which the supplier is liable to pay in relation to such supply but which has been incurred by the recipient of the supply and not included in the price actually paid or payable for the goods or services or both is includible in value. Thus, AAR held that applicant would be required to pay GST on total amount including cost of diesel i.e. on total freight inclusive of cost of diesel so provided by service recipient.

(2019-TIOL-132-AAR-GST) LD/67/156, Municipal Corporation Pratapgarh, 15/03/2019

In case the value of supply of goods involved in composite supply covered under purview of entry no. (3) of Notification No. 12/2017-CT (R) does not exceed 25% of total value of supply, such composite supply is exempted from GST and thereby, provision of GST TDS under section 51 would not apply.

AR noted that the applicant Municipal Corporattion is a local authority constituted under the provisions of Article 243W of Constitution of India. It provides various civic services directly or indirectly to citizens residing in territory governed by it viz. cleaning of roads, gardens, toilets and waste collection etc. AAR noted that various services received by applicant viz., cleaning of road, garden, toilets and waste collection are covered under various matters enlisted under twelfth schedule to Article 243W. AAR noted that as per said entry no.(3), in Composite supply of goods and services where supply of goods is not more than 25% of the total value of supply no GST will be applicable and consequently, question of deducting GST TDS under section 51 of CGST Act, 2017 would not arise. However, where the supply of goods is more that 25% of total value of supply, such composite supply would attract GST at the rate of 12% if the activity fall under purview of said entry no. (3) and otherwise, GST would be applicable at 18%. Accordingly, provisions of GST TDS will also apply.

(2019-TIOL-135-AAR-GST) LD/67/157, M/s Ujjwal Pune Ltd., 29-December-2018

The contract for installation, operation and maintenance of LED lights on electric poles erected by Municipal Corporation on roads, cannot be treated as 'works contract' and would be chargeable to GST at the rate applicable for supply of goods i.e. LED light, being principal supply in the contract of composite supply.

The applicant was awarded a contract by a Municipal Corporation for Installation and Operation of Energy efficient dimmable LED street lights for a period of 12 years. The Applicant sought present ruling as to whether said contract can be regarded as composite supply of works contract services? The AAR found that the contract involves more than two taxable supplies i.e. supply of LED lights and fixtures as well as installations, commissioning, operation and maintenance thereof. AAR held that since both the goods and services are supplied in conjunction with each other in the ordinary course of business, the contract would be regarded as composite supply under section 2(30) of CGST Act, 2017.

As regards next question as to whether such 'composite supply' can be regarded as 'works contract' under section 2(119) of CGST Act, 2017, AAR observed that though the electric poles, on which LED lights are installed, are attached to the earth, such LED's and fixtures can be removed without damaging the poles. Thus, AAR held that merely because the LEDs are fixed on poles/fixtures attached to earth, it does not mean that they would become immovable property. Further, as regards applicant's contention that such LEDs/ fixtures do not have any commercial value due to its non-usefulness and thus, become immovable property, AAR held that the definition of an immovable property does not envisage the usefulness or non-usefulness of the property in question. Consequently, AAR held that the composite supply made by applicant under contract with Municipal Corporation cannot be treated as 'works contract' and thus, liable to GST at the rate applicable to principal supply of goods i.e. LED lights.

(2019-TIOL-136-AAR-GST) LD/67/158,Siemens Ltd., 19/12/2018

In case of contract for composite supply, though contracts are further split into contract for supply of

[1] *Contributed by CA. Sahil Garud, CA. Mandar Telang, GST & Indirect Taxes Committee, Disciplinary Directorate and ICAI's Editorial Board Secretariat. For details please visit Editorial Board webpage at https://resource.cdn.icai.org/55324eboard44664.pdf*
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goods and contract for supply of services including transportation of goods, the freight charges recovered by contractor from the customers without issuance of consignment note would not be exempted from GST as per sr. no. 18 of notification no. 12/2017-CT(R) and chargeable to GST at the rate applicable to such composite supply.

The applicant sought present ruling as to whether the charges recovered by applicant from Customer towards transportation of goods would be chargeable to GST or exempt in terms of serial no. (18) of exemption notification no. 13/2017-Central Tax (Rate) namely "Services by way of transportation of goods except by GTA and Courier Agencies "?

The AAR observed that notwithstanding the award of work under separate contracts, the applicant would be required to undertake responsibility for execution of all contracts and operational acceptance thereof. AAR noted that the First Contract includes on shore ex works supply of all equipment's and materials. The second contract includes on shore services i.e. all other activities like transportation, insurance and all incidental services, installation, training required to be performed for complete execution of package. The scope of the work includes transportation, insurance and other incidental services. AAR also found that although awarded under two separate contract agreements, clauses under both the contracts make it abundantly clear that notwithstanding the breakup of the Contract Price, the contract shall, at all times, be construed as a single source responsibility and the Applicant shall remain responsible to ensure execution of both the contracts to achieve successful completion. Any breach in any part of the First Contract shall be treated as a breach of the Second Contract, and vice versa. The two contracts for supply of the goods and allied services are not separately enforceable. The recipient has not contracted for ex-factory supply of materials, but for the composite supply, namely Works Contract for Supply of Cable systems, which would be chargeable to GST at 18%. Accordingly, questions posed by applicant to AAR were answered in negative.

Service Tax

(2019-TIOL-808-HC-JHARKHAND-GST) LD/67/159, Sulabh International Social Service Organization Vs. The Union of India, 04/04/2019

Fresh Enquiry/audit envisaged in Rule 5A of Service Tax Rules, 1994, stayed by High Court; Power under Rule 5A of Service Tax Rules, 1994 are not protected by saving clause contained under section 174(2) of CGST

The assessee society questioned the initiation of service tax proceedings under Chapter V of Finance Act, 1994 which stood omitted w.e.f. July 01, 2017 upon introduction of CGST Act, 2017 As per assessee, the saving clause above does not protect Service Tax Rules and hence, any action taken in pursuance of the said Rules would be without the authority of law. Revenue contented that acts required to be protected by saving clause contained in sub clause (e) of Section 174(2) also includes the proceedings to be initiated subsequent to the omission of 1994 Act.

High Court opined that legality of the instruments challenged in this writ petition do not specify provisions under which such actions have been taken by the revenue authorities while the saving clause itself after omission of the statute does not refer to any particular provision of the Rules. Further the saving clause included the expression "may be instituted, continued or enforced". High Court observed that prima facie, the expression 'instituted' in sub clause (e) would imply the proceeding which stood already instituted at the time of repeal or omission of Finance Act. The High Court passed the stay order in favour of the Assessee.

(2019-TIOL-1135-CESTAT-AHM) LD/67/160, Modern Business Consulting Vs.CST Service Tax, 18/10/2018

The costs incurred by service provider, on his own account, in the course of providing services cannot be excluded from assessable value by merely converting such costs into 'reimbursements' under a contract.

In present appeal, appellant inter alia, contended that various reimbursements received by them towards expenses of rent, cost of salaries of personnel and other expenses, would not be includible in assessable value in light of decision of Hon'ble SC in *Intercontinental Consultant and Technocrats Pvt. Ltd. 2018(10)G.S.T.L. 401 (S.C.).*

Hon'ble Tribunal noted that merely because remuneration is arrived at by adding a percentage of margin over certain expense, this does not convert expenses into reimbursements. Tribunal noted that the rent and the cost of manpower are not reimbursable expenses but cost of service. Just by terms of contract, assessee cannot convert a cost into a reimbursable expense. It was observed that distinction between ' reimbursable expenses' and 'free supplies' become relevant in such cases. A free supply changes the nature of contract. For example a contract for 'painting of building' would became 'a labour contract' if paint and painting equipment is supplied free. However, a painting contract will remain a painting contract even if the agreement has clause where actual cost of paint and equipment is reimbursed. All expenses incurred by a service provider cannot be called reimbursable

expenses, only the expenses that qualify the test laid down in the decision of *Bhagawathy Traders* (supra) can be called reimbursable expenses. Thereby, tribunal upheld impugned demand by holding that the appellants are not entitled to exclude the rent and salaries from the assessable value.

Customs

LD/67/161, Asian CopiersVs.Commissioner of Customs, 09/04/2019

Order which has reached finality can only be reviewed, subject to satisfying the statutory provisions; Petition for modification is not a substitute for review; Revenue's modification petition against order directing release of goods rejected by the High Court.

Assessee had earlier filed a writ petition pleading to declare Para 2.31 of Foreign Trade Policy (2015-2020) as ultra vires, unconstitutional, excessive of authority and without jurisdiction; in so far it requires an authorisation for import clearance of second hand digital Multifunction Print & Copying Machine. This Court passed an order directing release of goods upon payment of applicable duty on the enhanced value, as determined by Chartered Engineer.

The Commissioner of Customs filed a modification petition of above order stating that since the constitutional validity of para 2.31 of the Foreign Trade Policy (FTP) 2015-2020 was ultimately upheld by the Supreme Court, the Customs Department would be put to undue hardship, since it is only an executing authority, whose powers are limited to the conditions and restrictions imposed by the DGFT and the Central Government under the Foreign Trade (Development and Regulation) Act, 1992.

Also the assessee had filed a contempt petition stating that Revenue had not implemented the above order directing release of goods, and thus Revenue had wilfully and contumaciously disobeyed the order passed by this Court., High Court stated that an order which has reached finality can only be reviewed, subject to satisfying the stated statutory provisions, and that a petition for modification is not a substitute for review. If the petition for modification has to be accepted then, it can be on any one of the grounds stated in Order of Code of Civil Procedure.High Court therefore held that modification petition cannot, at any stretch of imagination be a review petition, so that the merits of the case or order could be either reviewed or modified. High Court thus dismissed the modification petitions.High Court separately adjourned the matter of Contempt Petitions for further adjudication.

Income Tax

(ITA No. 1575/Bang/2018) LD/67/162, Hical Infra Private Limited Vs. The Income Tax Officer, Bangalore, 25/04/2019

Export commission paid to foreign agent, held as fees for technical services, since the agent was also engaged in quality check.

Assessee engaged in manufacturing and export of electronic components - No TDS was made on export commission of ₹ 6.42 lakhs paid to non-resident agents - As per the agreement, the foreign agent was to procure orders for it and to promote the products manufactured by the assessee, placing orders with the assessee on behalf of various customers, to coordinate and check the quality of goods ordered by the customers - AO treated export commission as FTS on the ground that the non-resident Agent has to check the quality of goods ordered by the customers with some expertise in international market - CIT(A) upheld the AO's order - ITAT rejected the assessee's contention that it has paid only commission and the works are in the nature of procurement of goods since the assessee could not substantiate with reasons that how the quality of goods can be checked by the non-residents when they do not have any expertise in the international market.

(ITA No. 392/JP/2019) LD/67/156, Satendra Koushik Vs. Income Tax Officer, 23/04/2019

Land purchased by Builder as stock-in-trade is not subjected to Section 56(2)(vii)(b) for inadequate consideration.

Assessee engaged in real estate business - AO observed that stamp value of the land was more than this consideration price and therefore made an addition of differential amount of ₹ 34.23 lakhs under section 56(2)(vii) - CIT(A) affirmed the order of AO - ITAT observed that the provisions of Section 56(2)(vii) were introduced as a counter evasion mechanism to prevent laundering of unaccounted income - The definition of property has been amended to provide that Section 56(2)(vii) will have application to the 'property' which is in the nature of a capital asset of the recipient and therefore would not apply to stock-in-trade, raw material and consumable stores of any business of such recipient - ITAT, however, restored the matter back to the AO for fresh adjudication.

(ITA No.103/017 & 207/2017) LD/67/15, Commissioner of Income Tax Vs. MSM Satellite (Singapore) Pte. Ltd, 23/04/ 2019

Payment received by the assessee, a Singapore

based company for granting distribution rights of the TV channels, was not taxable as royalty under the Act as well as India-Singapore DTAA.

The assessee, a Singapore based company and operates T.V. Channels for exhibition of various programmes, entertainment, educational or otherwise through layers of multi system operators and cable operators collects subscription charges to enable individual customers to view the channels and the programmes telecast on such channels - The revenue contended that these payments made to the assessee are in the nature of royalty for use of copyright - Assessee contended that the same is a business income and under no circumstances can be categorised as royalty payment - High Court observed that the ITAT in its ruling in the case of SET India Pvt Ltd had observed that non-resident company is not in use of any copyright and consequently cannot be characterised as Royalty - Further, it was also observed that Broadcasting Reproduction Right is not covered under the definition of Royalty under section 9(1)(vi) as well as Article 12 of the Treaty - Assessee was not parting with any of the copyrights for which payment can be considered as royalty payment - High Court rejected Revenue's argument.

(W.P.(C) 9996/2015) LD/67/158, Manipal Academy of Higher Education Vs. Union of India, 08/04/2019

Revenue's order rejecting approval under section 35(1)(ii) to the assessee-university set aside by High Court; Institution is entitled to the benefit if the sum paid is to be used for scientific research; Research activities having not materialised in a significant way is not relevant.

Assessee undertakes educational and research activities and had applied for approval under section 35(1)(ii) – Approval application got rejected on the ground that the assessee could not demonstrate that it had been doing any scientific research work in the schools - Revenue also stated that the claimed research activities of the applicant have not materialised in a significant way either in form of new theories/models, new hypothesis which has wide acceptance, copyrights, earnings from patents etc - High Court noted that Section 35(1)(ii) makes a distinction between the conditions which a research association must satisfy in order to avail of the benefit of the clause, and those applicable to a "university, college or other institution" - Assessee had submitted a significant amount of material showing the activities undertaken by it, including publication of research papers, patents granted, and grants and funds received from various national and international agencies which have been discarded by the AO - The question required to be considered while granting approval was whether the activities claimed by the assessee were genuine, and whether the funds being paid to the assessee were intended for the stated purpose, on which the impugned order was silent - High Court, therefore, set aside the rejection done by Revenue and directed Revenue to reconsider assessee's application in accordance with the procedure prescribed.

(TCA No. 365/2009 & 366/2009) LD/67/159, National Company Vs. Asst. Commissioner of Income Tax 08th April, 2019

Allotment of immovable property by assessee-firm to retiring partners towards their share in partnership is a not liable to capital gains under section 45(4).

Assessee is a partnership firm engaged in business of construction - During AY 2004-05, two partners retired from the firm and the firm continued with the remaining partners and admitted one more partner - Certain immoveable properties were transferred to the retiring partners as their share in the partnership - AO made addition of ₹ 8.53 crores alleging long term capital gains from transfer of immovable properties by the partnership firm to the retiring partners - CIT(A) ruled in favour of the assessee and held that re-constitution of the firm did not fall within purview of Section 45(4) - ITAT ruled in favour of the Revenue - High Court observed that for application of Section 45(4), there should be a transfer of capital assets; and there should be distribution of capital assets on the dissolution of a firm or otherwise - When a partner retires from a partnership and his share in the net partnership assets is determined and allotted to him, what he receives is his share in the partnership and not any consideration for transfer of his interest in the partnership to the continuing partners - There is no element of transfer of interest in the partnership assets by the retiring partner to the continuing partners and Section 45(4) did not apply as there was only a reconstitution of the partnership firm by retirement of two partners and admission of another partner.

(Tax Case Appeal No.302 of 2008) LD/67/160, West Asia Exports & Imports (P) Ltd Vs. Assistant Commissioner of Income Tax, Chennai, 11/03/2019

Unclaimed liabilities relating to creditors' in Financial Statements pertaining to erstwhile business of the assessee held to be taxable under section 41(1).

Assessee was earlier engaged in the business of Timber - From about 10 years back from relevant AY, the assessee had closed that business and had switched over to the business of Recruitment of Employees for sending to Gulf countries on behalf of certain foreign companies - There were around 16 sundry creditors amounting to ₹ 58.60 lakhs relating to timber business of the assessee and were still appearing in the Balance Sheet of the assessee - Pursuant to assessee's submission that those were old creditors of previous business of assessee and in absence of confirmations from creditors, AO held that liability of the assessee towards such sundry Creditors had ceased to exist and therefore, the same was liable to be added back as income of the assessee as per Section 41(1) - CIT(A) as well as ITAT ruled against the assessee - High Court analysed provisions of Section 41(1) and observed that the expression "cessation" means a cessation de facto and de jure - It observed that out of the impugned creditors of erstwhile business of the assessee, nobody claimed a single penny from the Assessee in the last ten years and assessee even failed to produce the written confirmations from such trade creditors - Entries in the books of accounts or balance being carried over in each year's books cannot postpone the applicability of Section 41(1).

(Income Tax Appeal No. 51/2016) LD/67/161, Principal Commissioner of Income Tax, Mumbai Vs. Sushil Gupta, 22/02/ 2019

Payments made to export house towards redemption fine on imports, held to be not allowable under section 37.

Assessee's case was subjected to reassessment proceedings based on information that the assessee had paid ₹ 75 lakhs towards penalty for import of almonds which import was not permissible - Assessee submitted it was using import license of M/s. Rajnikant Bros. which is an export house and had paid service charges equivalent to 25% of CIF value of the goods - As per assessee, it had merely made advances to Rajnikant Bros. and had not paid penalty of ₹ 75 lakhs, and that Rajnikant Bros. were the importer of goods and penalty was not paid by the assessee - AO held that the said expenditure was covered under section 69C - CIT(A) ruled against the assessee and also held that since impugned payment was in contravention of law, it was not allowable - ITAT ruled in favour of the assessee - High Court relying on Supreme Court ruling in *Hazi Aziz [41 ITR 350 (SC)]* held that the Supreme Court decision in case of *Hazi Aziz* was squarely applicable in instant case and held that the impugned penalty payment to be due to infraction of law, so not allowable as deduction under section 37.

Transfer Pricing

(Income Tax Appeal (IT) No. 266/2017) LD/67/164, Principal Commissioner of Income Tax – 3 Vs. India Debt Management Pvt. Ltd., 15/04/ 2019

Interest paid by the assessee at 11.30% on compulsory convertible debentures issued to Associated Enterprise in USA, held as being at Arm's Length.

Assessee, a Non-Banking Finance Company (NBFC) engaged in the business of identifying the investment opportunities in financially distressed companies, which otherwise had inherent viable business proposition - Assessee raised funds through debt instruments from Associated enterprises (AE) by issuing compulsory convertible debentures (CCDs) - Average interest rate of such CCDs came to 11.30% - The Transfer Pricing Officer (TPO) held that the interest paid by the assessee to the AEs was not at Arm's length and made an adjustment of ₹ 48.53 in AY 2010-11 - ITAT deleted the said adjustment stating that 'tested party' is the entity which has undertaken the transaction, and ITAT rejected treatment of AE as the 'tested party' - ITAT further rejected adoption of USD Corporate Bond Rates for determining ALP of interest on INR denominated CCD's issued by assessee to AE - Noting that assessee had filed 2 comparables for the year 2009 wherein for enterprises having credit rating of 'AA', the coupon rate of interest per annum was between 11% to 12% for a tenor of 60 months, ITAT had concluded that interest paid by the assessee to its AE at 11.30% was much within the arm's length rate - High Court thus upheld ITAT order deleting the TP adjustment.