Decoding SC Ruling of NDTV

Background/Summary

The tax payer is an Indian company engaged in the business of television channels of various kind. It has a subsidiary in UK named NDTV Network Plc.('NNPLC'). The tax payer submitted its ITR for the FY 2007-08 in September 2008 declaring losses. It was taken up for scrutiny and order was passed in August 2012. The issue was w.r.t Step up Coupon bonds amounting to USD100Mn issued in July 2007 through the bank of New York with 5 years redemption @ premium of 7.5%. However, the bonds were redeemed in advance at a discounted value of USD74.2Mn in November 2009.

AO held that UK subsidiary virtually had no financial standing with capital of Rs.40lacs, then how come it can get convertible bonds of USD100Mn unless repayment of interest and payment was assured in the form of corporate guarantee and therefore AO didn't doubt the transaction but imposed a fee of 4.68% equivalent to Rs.18.72Cr.

On 31 March 2015, AO issues reassessment notice for AY2008-09. The main reason for reopen was that AO proposed a substantial addition of Rs.642Cr on account of monies raised by NDTV through its subsidiaries (NDTV Netherland). DRP holding that UK subsidiary didn't have any business activity but postal address.

Chronological order of Events

1. July 2007-NNPLC issued step-up coupon bonds of $100Mn to be redeemed at 7.5% premium by 5 years;

2. August 2008- NDTV filed return of income for FY 2007-08 declaring loss;

3. Nov-2009- NNPLC redeemed step-up coupon bonds in advance at a discount at $74.2 Mn

4. August 2012-Scrutiny proceedings for NDTV concluded – addition of Rs. 18.72 Cr on account of guarantee fees for issue of step-up bonds by NNPLC;

5. March 2015-Notice u/s 148 issued to NDTV for FY 2007-08

6. August-2015-“Reasons to believe” given by AO – sought to tax Rs. 405.9 Cr introduced in NNPLC by NDTV in the form of step-up coupon bonds

7. November 2015-NDTV’s objections rejected – mentioned 2nd proviso to Sec 147 for the first time, notice valid

Scope of Reassessment

- **Empowers the AO** to **reopen the assessment** for any AY if:
  - He has reason to believe that
  - Any income which is chargeable to tax has escaped assessment
- "if the AO has reasons to believe" stronger than "if the AO is satisfied"
- Reopening on mere suspicion or rumour – Not justified
- He can assess / reassess any income which has escaped assessment, or re-compute loss or depreciation allowance. Further, can assess / reassess any other income (not subject matter of appeal / revision) which has escaped assessment

However, if True disclosure of Material Facts is done then..

- **No action beyond 4 years** from the end of the relevant AY
- If assessment / reassessment has already been made u/s 143(3) / 147
- **Unless income has escaped assessment due to failure** to file return of income
- **To disclose fully and truly all material facts** necessary for his assessment

Trigger for Reassessment

- **Reliance on following subsequent facts** to reopen assessment
  - **Subsequent scrutiny proceedings** for AY 2009-10 including DRP order – **raising doubts** regarding **NDTV's corporate structure**
  - **Tax evasion petitions** by minority shareholders alleging **round tripping** of **undisclosed income**

Legal Principle Involved

- Reasons to believe" should indicate the proviso of Sec 147 being relied upon. Reasons are to be read as a whole and not mere incantation of words that may render it meaningless
- Once notice is quashed, AO is free to issue fresh reassessment notice provided other conditions are satisfied

Key Takeaways

Following are the suggested Steps to be taken upon receiving a reassessment notice:

1. Ascertain if the re-opening notice is within time limit prescribed in law
2. If within extended time, examine if any material fact has been suppressed
3. Analyze if alleged suppression is of primary facts / inference from primary facts
4. Ask for copy of “reasons to believe” and file detailed objections
5. Any error in phrasing of notice / “reasons to believe” – can it be fatal for reassessments?

Thank You

Gujrat HC Ruling - Consideration of input services under Net ITC for refund under inverted duty structure in the- VKC Footsteps India (P) Ltd

Background/Summary

Facts:
The petitioner is engaged in the business of manufacture and supply of footwear, which attracts goods and service tax (GST) at the rate of 5%.

It procured input services such as job work service, and inputs such as synthetic leather, polyurethane polyol, etc. on payment of the applicable GST, availed ITC.

Majority of the inputs and input services attract GST at the rate of 12% or 18% thus leading to higher rate of inputs/ input services than the applicable tax rate on its outward supply of footwear. It resulted in accumulation of un-utilised credit in the petitioner's electronic credit ledger.

- Existing concern in the provision of section 54(3) of the CGST Act read with Rule 89(5) of CGST Rules resulting in disallowing refund of input service

- The petitioner filed a special civil application before the Gujarat High Court.

Issue Involved

The issue involves whether the provision of amended Rule 89(5) of the CGST Rules, to the extent that the Rule denies refund of un-utilised ITC relatable to input services, are constitutionally valid

Petitioner's contentions

- The petitioner has relied upon the provisions of the GST law and object of introducing the GST legislation, pre-GST materials as released by the government. It was argued that section 54 of the CGST Act, 2017 (CGST Act), allows the refund of any accumulated ITC.

- This was subsequently narrowed down by the introduction of an explanation to Rule 89(5) of the CGST Rules. Thus, the same shall be treated as ultra vires to the provision of section 54 of the CGST Act.

- It was argued that it was a settled principal that a rule made by the executive cannot curtail or whittle down the provisions of the substantive law i.e.CGST Act. Therefore, it was submitted that explanation (a) to Rule 89(5) of the CGST Rules, which confines the refund to "input credit" and excludes "input service credit," actually narrows down the effect of the word "any" in the phrase "any unutilised input tax credit" employed in section 54(3) of the CGST Act. This is because "any" mean "all" ITC, including input services.

Tax Department contentions

- While rejecting the arguments extended by the petitioner, it was stated that Rule 89(5) of the CGST Rules only provides the mode of calculation of refund available to the taxpayer on account of inverted duty structure. The same is not contrary to the provisions of sub-section 3 of section 54 of the CGST Act in any manner

- In addition, Rule 164(2) ofthe CGST Rules has empowered the government to make rules for all or any matter(s) for which the CGST Act could not make a provision.

High Court decision

a) In this regard, the Hon'ble High Court examined the various provisions of the CGST Act; CGST Rules;

b) Integrated Goods and Services Tax Act, 2017;

c) First discussion paper on GST in India by the Empowered Committee of the State Finance Minister dated 10 November 2009;

d) International VAT/ GST Guidelines published on February 2006 and

e) The existing provisions of the GST legislation for granting refunds thereunder;

f) intent, objectives, concepts and features of the GST legislation as elaborated under various discussion papers

g) Judicial analysis , which has held that the CGST Rule that goes beyond the statutes is ultra vires and liable to be struck down by referring to various decisions of the Supreme Court.

High Court decision

Based on its analysis, the High Court decided in favour the taxpayer for the following reasons –

1. From the conjoint reading of the provisions of the CGST Act and its Rules thereunder, it was held that prescribing the formula in Rule 89(5) of the CGST Rules, to exclude the refund of tax paid on “input service” as part of the refund of un-utilised ITC, is contrary to the GST Act.

2. The provisions of section 54(3) of the CGST Act, the legislature has provided that a registered person may claim refund of “any un-utilised input tax.” Therefore, by way of Rule 89(5) of the CGST Rules, such claim of the refund cannot be restricted only to “input” excluding the “input services” from the definition of ITC.

3. Intent of the government by framing the rule restricting the statutory provision cannot be the intent of law as interpreted in circular number 79/53/2018-GST dated 31 December 2018 i.e. to deny refund of tax paid on “input services” as part of the refund of un-utilised ITC.

Key Takeaways

This decision is a most awaited and welcome decision by the Gujarat High Court in the case of an inverted duty structure refund application.

While treating explanation (a) of the Rule 89(5) of the CGST Rules, as contrary to section 54(3) of the CGST Act, the Gujarat High Court has placed substantial reliance on the object, intent and basic principal of the GST legislation. Thus, it has effectively held that the term “net ITC” shall include ITC pertaining to inputs and input services as well.

1. This judgement will put to rest many petitions that are presently pending before the High Courts of various other states on the same issue.

2. Further, allowing the refund of the accumulated ITC availed under the input service category would result in lesser accumulation of ITC for various taxpayers.

Thank You