EY Tax and Regulatory Alert

April 2021

Prepared for ACMA

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INDIRECT TAX

Part A - Key Indirect Tax updates

Goods and Services Tax

This section summarizes the regulatory updates under GST for the month of April 2021

- **Notification No. 06/2021, dated 30.03.2021** issued by CBIC, for taxpayers, having aggregate turnover of more than INR 500 crores, are required to provide dynamic QR code on invoices issued to unregistered customers (B2C invoices) w.e.f. 1 December 2020.

  - However, CBIC vide Notification no. 89/2020-CT dated 29 November 2020, waived the amount of penalty leviable for not providing dynamic QR code on B2C invoices during the period December 2020 to March 2021, subject to the condition that the taxpayer complies with the QR code requirement from 1 April 2021 onwards.

  - Vide the recent notification, CBIC has extended the waiver of penalty by three months till 30 June 2021 subject to the condition that the taxpayer complies with the provisions from 1 July 2021.

- **CBEC-20/16/05/2021-GST/359,dated 23.02.2021** issued by CBIC, to release guidelines for provisional attachment of property under section 83 of the CGST Act, 2017 in view of issues pertaining to provisional attachment of property as well as observations of various HC's on the modalities of implementation of provisions of section 83 of the CGST Act by the tax officers;

- Outlines grounds, procedure, cases fit for provisional attachment of property along-with types of property that can be attached and property which is exempt from attachment as per Civil Procedure Code, 1908;

  - Specifies that every provisional attachment order in FORM GST DRC-23 shall cease to have effect after the expiry of a period of one year from the date of the provisional attachment order; Explains that as provisional attachment is resorted to protect interest of revenue and may affect working capital of taxable person, endeavour should be to complete investigation and adjudication at earliest well within period of attachment;

  - Clarifies that guidelines shall stand modified according to amended provisions of Section 83 once amendment as proposed in Finance Bill 2021 comes into effect.

- **GSTN issues clarification on reporting 4/6 digit HSNs to address taxpayer's concerns** issued by CBIC, on clarification of reporting 4-digit/6-digit HSNs pursuant to receipt of some tickets at GST helpdesk apprising about non-availability of 6-digit HSN codes in HSN Master/not accepted on e-invoice/e-Way bill portals;

  - GSTN clarifies that based on the harmonious interpretation of Notification Nos. 12/2017 -Central Tax & 78/2020 - Central Tax r/w Customs Tariff Act, 1975, the number of digits of HSN as specified in the notifications are minimum number of digits of HSN to be mentioned on invoice.

  - It explains that declaration of HSN at 4/6 Digits has to be out of valid HSN codes only, whereas some taxpayers are trying to report truncated first 6-digits out of an otherwise valid 8-digit HSN, resulting in invalid codes or codes not being allowed by system;

- Further, it states that taxpayers shall raise a ticket on GST Self-Service Portal, if the HSN of any Goods/Services is otherwise valid but not accepted on GST Portal/e-invoice Portal / e-way Bill portal

- **CBIC clarification restricting refund under inverted duty-structure on same input-output challenged in Rajasthan HC, i**ssued by CBIC, where Rajasthan HC (Jodhpur) issues notice in writ petition challenging rejection of refund under section 54(3)(ii) [inverted duty structure] of CGST Act and clarificatory Circular issued on refund related issues;

  - Revenue relies upon Circular no. 135/05/2020-GST dated March 31, 2020 which restricts the refund of accumulated ITC in cases where input and output supplies is same and lists matter on May 13, 2021.

- **GSTN rolls-out new features of Form GSTR-2B & GSTR-3B under QRMP scheme & updates the Forms** issued by CBIC, where Govt. introduces new features of Form GSTR-2B & GSTR-3B which is made available to taxpayers under QRMP Scheme for quarter Jan-March 2021;

  - It Introduced updates in Forms GSTR-1, GSTR-3B and Matching Offline Tool for taxpayers in QRMP Scheme while listing out salient points related to filing of Form GSTR-1 statement & auto-population of liability in Form GSTR-3B for taxpayers under QRMP Scheme for the quarter Jan-March 2021;

  - These new features are: (i) Provision of Auto Generation of Form GSTR-2B for the QRMP taxpayers, and (ii) Provision of Auto-population of ITC in Form GSTR-3B for the QRMP taxpayers.

Customs and Foreign Trade Policy (FTP)

This section summarizes the regulatory updates under Customs and FTP for the month of April 2021

- **Instruction No. 05/2021-CX dated 24th March, 2021** issued by CBIC to issue instructions regarding urgent matters to sensitise trade in the light of proposed changes to Section 46 of Customs Act, 1962

  - The Board would shortly issue a detailed clarificatory circular on the subject, once the Finance Bill, 2021 is enacted;

  - Deems it of utmost importance that Trade/Customs Brokers etc. are alerted to be ready for the change, which would come into force shortly with enactment of Finance Bill, 2021;

  - Highlights that such amendment makes it imperative that Bill of Entry (BoE) is filed before vessel/aircraft/vehicle arrival, which is a distinct departure from present legal provision that allows filing of BoE even after the arrival;

  - Directs all the field formations to issue suitable Public Notices/Trade Notices urgently to sensitize the trade so as to avoid inconvenience and disruptions; As regards relaxation sought from Trade so as to prescribe a different time line for filing of BoE in respect of imports at Land Customs Stations and airports, imports consigned from neighbouring countries, which arrive by short-haul vessels, apprises that "any relaxation, that is found merited can be notified only after the proposed amendment to Section 46 comes into effect

- **Notification No.19/2021 dated 30th March 2021** issued by CBIC, extends exemption benefit of IGST and compensation cess to Export Oriented Units (EOU) on imports till April 01, 2022 by amending notification no. 52/2003-Customs dated March 31, 2003.

- **Trade Notice No.48/2015-20 dated 31st March 2021** issued by DGFT, extends the validity of existing Handbook of Procedures 2015-20 upto September 30,2021 with immediate effect.

- **Notification No.60/2015-20 dated 31st March 2021** issued by DGFT, extends the validity of existing Foreign Trade Policy 2015-20 which is valid upto 31.03.2021 to September 30,2021 with immediate effect.

- **Notification No.23/2021 dated 31st March 2021** issued by DGFT, extends the exemption from Integrated tax and Compensation Cess on goods imported against Advance Authorization (AA) / Export Promotion Capital Goods (EPCG) authorizations upto March 31, 2022.

- **Notification No.41/2021 dated 05th March 2021** issued by CBC, introduces Customs (Verification of Identity and Compliance) Regulations, 2021, which shall be applicable to Importer, Exporter and Customs Broker but not to Central Government, State Governments and Public Sector Undertakings;

  - It explains that these regulations shall apply to specified persons newly engaging in import or export activity after commencement of these regulation, however, these may apply to any person selected by Commissioner of Customs, engaged in import or export activity or who availed or claimed certain benefits u/s 99B of the Act or engaged as a Customs Broker prior to commencement of these regulations;

- Clarifies that verification of identity shall be considered to have failed when identity cannot be established basis documents provided or physical verification;

- States that failure to comply with verification requirements and submission of incorrect documents shall lead to suspension of benefits mentioned in Section 99B of Customs Act, 1962 and that benefits suspended shall be restored when person concerned does necessary compliance regarding identity verification/furnishing of correct document or information sought;

- Regulations mandate furnishing of documents or information on Common Portal by person selected for verification of his identity, also provides that where verification of identity is completed by means other than authentication of Aadhaar, physical verification shall not be waived;

- It has been said that the regulation shall come into force with effect from the date to be notified.

- **Notification Nos. 33-36/2021-Customs (N.T.) dated 29 March 2021 and Circular No.08/2021-Customs dated 29 March 2021**,issued by CBIC in view of the recent amendments made vide the Finance Act, 2021. The key updates in this regard are highlighted below:

  - ICEGATE (https://www.icegate.gov.in/) has been notified as the Common Customs Electronic Portal (Common Portal) for facilitating various services such as registration, filing of Bill of Entry (BoE), shipping bills, other prescribed documents and forms, payment of duty and for data exchange with other systems within or outside India.

  - Time limit for filing BoE has been relaxed in case of goods consigned from specified countries i.e. Bangladesh, Maldives, Myanmar, Pakistan and Sri Lanka, arriving at sea port and for all goods arriving at a customs airport or land customs station.

  - Master Bill of Lading (MBL)/ Master Airway Bill (MAB)are not required at the time of filing BoE in advance and a reference to House Bill of Lading (HBL)/ House Airway Bill (HAWB) would be sufficient.

  - The importers are allowed update MBL and MAB later.

Direct Tax

Part-A Key Direct Tax updates

1) CBDT issues instructions regarding issue of notices without DIN for reassessment of non-PAN cases prior to 1 April 2021

- In this regard, the CBDT had previously issued instructions on 4 March 2021 specifying the limited category of cases that are to be considered for reopening by the jurisdictional tax officers including, inter alia:

  (i) Cases where there are reports of the Directorate of Income Tax (Investigation) or Directorate of Intelligence & Criminal Investigation; and

  (ii) Cases from Non-filer Management System and other cases as flagged by the Directorate of Income-Tax (Systems) as per risk profiling.

- The CBDT has now clarified that the above categories would also include reassessment in cases where a taxpayer does not have a Permanent Account Number (PAN). These cases are allocated to jurisdictional tax officers based on name and address of the taxpayer.

- In this regard, it is instructed that, in such cases, considering the time involved in allotting PAN as also the technical issues in generating notices through the computerized system of the tax authority, a notice for reopening of assessment may be sent manually without a Document Identification Number (DIN).

- However, immediately subsequent to such notice, the jurisdictional tax officer is required to collect the necessary information and take up the matter with Directorate of Income-Tax (Systems) for allotment of PAN. Further, it is also instructed that such manually issued communication shall also be uploaded on the computerized system of the tax authority (with DIN, as far as possible) at the earliest.

2) CBDT permits reassessment based on information received from Central Charges prior to 1 April 2021

- Subsequently, in this regard, vide instructions on 12 March 2021, it was clarified that the above specified category would include information from the jurisdictional tax authority themselves, but exclude information received from:
  (i) Tax authority in Central Charges.
  (ii) Directorate of Income Tax (Investigation) or Directorate of Intelligence & Criminal Investigation.

- Further, such cases were permitted to be reopened only after careful scrutiny of the list of potential cases, along with details and evidences thereof, by a senior tax officer.

- Instructions in line with the above were also issued on 15 March 2021 for reopening of cases by the international tax charge.

- Against this backdrop, the CBDT, vide the present instructions, seeks to modify the above instructions dated 4 March 2021, 12 March 2021 and 15 March 2021 to the extent that information received from Central Charges after 1 April 2019 may also be considered for reopening of cases pertaining to TYs 2012-13 to 2016-17.

3) CBDT grants further extension for linking Aadhaar with PAN by taxpayers and issuance of reopening notices, passing of final assessment orders etc. by tax authority

Background

- In order to provide relief in compliance of requirements to taxpayers and the tax authority, the Central Government has promulgated The Taxation and Other Laws (Relaxation of Certain Provisions) Act, 2020(Ordinance). In substance, amongst other things, the Ordinance provided that any compliance due on the part of taxpayers or the tax authority under the ITL which was falling due between 20 March 2020 to 31 December 2020 (hereinafter referred as disruption period) can be complied on or before 31 March 2021.

- Subsequently, the disruption period for tax authority was extended till 30 March 2021 (i.e. 20 March 2020 to 30 March 2021) vide Notification No. 93/20204 dated 31 December 2020 but the compliance date was kept unchanged at 31 March 2021.

- In a partial modification of Notification No. 93/20205 dated 31 December 2020, the CBDT, vide Notification No. 10/20216 dated 27 February 2021, granted extension to the tax authority. The extension was limited to passing of assessment or reassessment order (which were due between 20 March 2020 to 30 March 2021) to 30 April 2021, penalty orders (which were falling due between 20 March 2020 to 29 June 2021) to 30 June 2021 etc. However, no such extension was granted for cases where final assessment order is to be passed pursuant to directions issued by DRP.

- Further, the CBDT, at the end of the limitation period in March 2021, has issued various circulars to the tax authority for reopening of the past assessments based on certain specified criterions. The time limit for issuing reassessment notices was to get time barred as on 31 March 2021.

- Also, prior to the present CBDT Notification, in relation to Equalisation Levy, the last date to process the statements filed by taxpayers and sending intimation to taxpayers by tax authority which was due between 20 March 2020 to 30 March 2021 was kept at 31 March 2021.

- Additionally, prior to the present CBDT Notification, in relation to compliance on the part of taxpayers for Aadhaar-PAN linking was extended till 31 March 2021 vide Ordinance.

- In the wake of this background, the CBDT has issued the present CBDT Notification and further clarified vide Press Release dated 31 March 2021 to grant extension to taxpayers and tax authority for the aforesaid compliances.

Present CBDT Notification:

- The disruption period for passing of final assessment order pursuant to directions issued by DRP as also for issuance of notice for reopening of assessment is extended from 20 March 2020 to 31 March 2021 and such compliance by tax authority can be done on or before 30 April 2021.

- In relation to the issuance of notice for reopening of the assessment for past years, it is clarified that though the provisions for conducting reassessment proceedings are revamped vide FA 2021 with effect from 1 April 2021, for the purposes of the present extension, reopening provisions of the pre-amended law will apply as applicable otherwise.

- The disruption period for processing of statement filed under Equalisation Levy by tax authority is extended from 20 March 2020 to 31 March 2021 and the compliance date is extended from 31 March 2021 to 30 April 2021.

- The sunset date for linking of Aadhaar with PAN by taxpayers is extended from 31 March 2021 to 30 June 2021.

- Therefore, the aforesaid compliances which were due within the revised disruption period can be now complied within the extended period.

- The present CBDT Notification is effective from 31 March 2021.

4) CBDT notifies tax return forms for tax year 2020-21

Background

- The CBDT, vide the Notification, has amended Rule 12, as also notified the ITR forms, for all categories of taxpayers for tax year 2020-21 [assessment year (AY) 2021-22]. However, the instructions for filing the ITR forms are awaited.

- This Tax Alert summarizes the key changes in the ITR forms as compared to the immediately preceding tax year 2019-20.

Common amendment made in different ITR Forms

- **Additional reporting requirement for taxpayers liable to transfer pricing (TP) provisions of the ITL (ITR 3, 5, 6):**
  Erstwhile ITR forms only required taxpayers to state whether they were liable to carry out audit of account under the TP provisions of the ITL and furnish the date of such audit report. However, ITR forms of tax year 2020-21 have been amended to provide for additional reporting requirement – If liable to audit, then whether the accounts of the taxpayer have been audited or not. Thus, requiring information of actual compliance by the taxpayer if liable to audit under the TP provisions of ITL.

- **Additional reporting requirement for long-term capital gains computed on transfer of specific securities (ITR 2, 3, 5, 6):**
  Under the ITL, long-term capital gains arising from transfer of equity shares, units of equity-oriented mutual funds or units of business trust is taxable at 10% in excess of INR0.1m, provided such transfer is chargeable to Securities Transaction Tax (STT). The provision has been made applicable to income arising to Foreign Portfolio Investors (FPIs) also. Pursuant to the same, taxpayers are required to provide details of such long-term capital gains in Schedule 112A and Schedule 115AD of the ITR forms. For tax year 2020-21, these schedules have been amended to specifically include a column wherein the taxpayer is required to mention the nature of security acquired i.e., whether a share or a unit. This is in addition to providing other information such as International Securities Identification Number (ISIN) code of share/unit, name of the share/unit etc.

- **Deletion of the "Schedule DI – Details of Investment" (ITR 1, 2, 3, 4, 5, 6):** Due to explosion of the COVID-19 pandemic, the President had promulgated Taxation and Other Laws (Relaxation of Certain Provisions) Ordinance, 20204 on 31 March 2020 to grant various procedural relaxation for compliance under various laws. It included extension of last date of carrying out requisite investments/deposits/payments to claim various benefits under the ITL for tax year 2019-20 from 31 March 2020 to 30 June 2020.

- Pursuant to the said relief, a separate schedule was introduced for ITR forms applicable to tax year 2019-20 to furnish details of investments/deposits/payments made on or after 1 April 2020 to 30 June 2020 with respect to which deductions are to be claimed under Chapter VI-A of the ITL and/or amount utilized from the Capital Gains Account Scheme for various capital gains exemption provision compliances. The deadline related to certain capital gains compliances was further extended to 30 September 2020 and to Chapter VI-A deductions to 31 July 2020 by Notification No. 35/2020 dated 24 June 2020.

- Considering that the extension of time limit for claiming deduction under Chapter VI-A of the ITL or investments for claiming exemption from capital gains was only for tax year 2019-20, the following amendments have been notified in the ITR forms of tax year of 2020-21:

  - (i) Schedule DI capturing the relevant information of the above relaxation is deleted. Consequently, the references of Schedule DI in other schedules, being CG Schedule and Schedule VI-A also stand deleted.

  - (ii) Schedule VI-A is appended with a note stating that where deduction in respect of investments/deposits/payments for the period 1 April 2020 to 31 July 2020 has been claimed in returns of tax year 2019-20 (i.e., AY 2020-21), the same cannot be claimed again in the returns of subsequent tax year 2020-21 (i.e., AY 2021-22).

- **Additional reporting requirement for certain donations made towards scientific research or rural development (ITR 2, 5, 6):** Schedule 80GGA of the ITR forms dealing with reporting requirements related to donations made towards scientific research or rural development, as provided under Section 80GGA of the ITL, is amended to provide for an additional disclosure requirement of “date of donation in cash”, besides the taxpayer providing information about the amount of cash donation made.

- **Elimination of bifurcation of carried forward losses into pass through losses and others (ITR 2, 3, 5, 6):** Erstwhile provisions of the ITL provided that where the net computation of income of an investment fund was a loss, such loss had to be captured at the level of the investment fund only and the same could not be passed on to the unitholders of the investment fund. However, Finance (No. 2) Act, 2019 changed such treatment and provided that losses arising from tax year 2019-20, with respect to losses other than arising under the head of income from business and profession, shall be passed on to the unitholders meeting stipulated conditions.

- Schedule CFL of ITR forms, notified for previous tax year 2019-20, provided for details of losses to be carried forward to future years, with separate bifurcation with respect to house property loss, short-term capital loss and long-term capital loss into normal losses and losses made available due to pass through from investment fund. This requirement has been deleted from the ITR forms notified for tax year 2020-21 and, consequently, no bifurcation is now required to be made.

- **Deletion of reference of distribution of accumulated loss by Investment fund to its unitholders (ITR 5,6):** As stated at Para above, earlier losses were captured at the investment fund level only and not subjected to pass through in hands of the unitholders. However, Finance (No. 2) Act, 2019 provided that for losses accumulated with the investment fund as on 31 March 2019, with respect to income other than income from business and profession, shall be considered as loss of the unitholders and shall be allowed to be carried forward by such unitholders. Pursuant to the same, ITR forms of previous tax year 2019-20 were amended to provide a separate line item in Schedule CFL (details of losses to be carried forward to future years) to provide for losses distributed by investment fund amongst its unitholders.

- Considering that such adjustment of accumulated losses was allowed to be made only in tax year 2019-20, the above line item has been deleted from ITR forms of current tax year 2020-21.

- **Reference to Form 16D inserted in Schedule of "Tax Payments" (ITR 3, 4, 5, 6, 7):** As per the provisions of the ITL, every individual and Hindu Undivided Family (HUF) responsible for paying to a resident a sum for carrying out any work (including supply of labor for carrying out any work) in pursuance of a contract, by way of commission or brokerage or by way of fees for professional services during the tax year, shall be required to deduct tax from such payment or at the time of credit of such sum to the account of the resident (whichever is earlier) at 5%, if the aggregate of the sums paid/credited to account of a resident exceeds INR5m during a tax year. The tax deductor is required to furnish information of the same in certification of tax deducted - Form 16D.

- Schedule "Tax Payments" is amended to include reference to Form 16D in the context of reporting requirement of Tax Deducted at Source (TDS) deducted on behalf of the taxpayer under such provision of the ITL and reflected in such form.

- **Additional instruction provided in respect of claim of TDS credit (ITR 2, 3, 4, 5, 6, 7):** Schedule Part B- TTI (computation of tax liability on total income), inter alia, included information in relation to "tax payments" made by the taxpayer in the form of advance tax, self-assessment tax, TDS etc. In case of disclosure requirement related to TDS credit claimed by the taxpayer, the ITR form provided that TDS credit can be claimed in a particular tax year only if the corresponding income on which the tax is deducted has been offered to tax in the same tax year. This instruction has been amended by the Notification to provide that it is not applicable if tax has been deducted @ 2% on cash withdrawals made in excess of INR10m (reduced to INR2m in certain cases5) under the provisions of the ITL.

- **Amendments pursuant to revert to classical system of dividend taxation and abolishment of DDT**

  (i) The classical dividend taxation regime was reinstated by FA 2020 by abolishing DDT. Under the erstwhile dividend taxation regime, DDT was levied on the payer company or mutual fund, while the dividend income remained exempt from tax in the hands of the shareholder or unitholder. FA 2020 abolished DDT and shifted the incidence of tax on the dividend from the payer company to the hands of the shareholders or unitholders.

(ii) Section 115BBDA of the ITL provided for taxation of dividends in the hands of shareholders, where dividend was received from domestic companies (subjected to DDT) and was in excess of INR1m in a tax year. Considering that under the classical dividend taxation regime, the entire income is taxable in the hands of shareholders, this section was deleted by FA 2020.

(iii) FA 2020 also provided that only interest expense shall be allowed as a deduction against the dividend income of the taxpayer. Further, a separate provision was introduced under the ITL, being Section 80M, to provide that a taxpayer domestic company shall be entitled to claim deduction of dividend income received by it from other domestic companies, foreign companies or business trust, to the extent that such income does not exceed the amount of dividend distributed by the taxpayer domestic company on or before the due date.

(iv) These amendments were applicable for dividends distributed for and from 1 April 2020.

(v) Pursuant to the above amendments, the following changes have been effected in the ITR forms for tax year 2020-21:

- Reference to exemption provisions of Section 10(34) and Section 10(35), which granted exemption from tax on dividend income to shareholders and unitholders, stands deleted from Schedule OS which deals with other income. Earlier, only dividend income which was not exempt under the aforesaid section was to be reported in the Schedule. However, now, all of the dividend income is to be reported (ITR 2, 3, 5, 6).

- Reference to Section 115BBDA stands deleted from Schedule OS, Schedule SI, wherein information in relation to income chargeable to tax at special rates under the ITL is required to be provided by the taxpayer. Schedule EI, wherein information in relation to exempt incomes is to be provided by the taxpayer (dividend income from domestic company not exceeding INR0.1m). (ITR 2, 3, 5, 6, 7).

- Separate line item introduced in the Schedule OS for dividend income distributed by a business trust to its unitholders. (ITR 2,3,5,6,7)

- Separate line item introduced in the deductions available against Other Sources Income in Schedule OS towards interest expenditure claimed as a deduction against dividend income. (ITR 2,3,5,6,7)

- Schedule DDT, wherein the Taxpayer, being dividend distributing domestic company was required to furnish details of tax on distributed profits and payment thereof stands deleted. The Schedule required Taxpayer to furnish various information, such as date of dividend declaration/ distribution, amount of dividend declared/ distributed/paid, provisions of ITL under which dividend is declared, tax payable on such dividend, etc. (ITR 6)

- Reference to section 80M of ITL which provides for deduction of certain inter-corporate dividends, as explained above, included in Schedule VI-A wherein deduction claims are to be recorded by Taxpayers (ITR 6)

- Reference to dividend income, which was subject to DDT tax has been deleted from Schedule PTI wherein details of pass through income received/ accrued from business trust and investment fund are required to be reported (ITR 2,3,5,6,7)

- In ITR Forms 1 and 4, a specific instruction has been included in the line item wherein Taxpayer is required to report “Income from Other Sources” to provide that in case of dividend income, quarterly break up is required to be mentioned for allowing applicable relief from interest on deferral of payment of advance tax instalment. However, the notified ITR Form does not reflect any space for filing in such information and hence, there may be certain changes in the electronic file for allowing Taxpayers to furnish such information.

- **Increase in threshold limit from INR50M to INR100M for tax audit cases for person carrying on business for receipt and payments in cash not exceeding in aggregate 5% (ITR 3,5,6):** The ITL currently provide relief from tax audit to taxpayer carrying on business an having total sales, turnover or gross receipts up to INR50M subject to cash receipts and payments not exceeding 5% of total receipts and payments respectively. Finance Act, 2021 increased the threshold limit of INR50M to INR100M for and from AY 2021-22 (i.e tax year 2020-21). Consequently, the ITR Form in Part-A of General Schedule replaces the limit of INR50M to INR100M in tax audit details.

Key changes in ITR 6 – applicable to corporate taxpayers:

- **Adjustment to business losses carried forward and unabsorbed depreciation carried forward pursuant to opting in for concessional corporate tax regime:** The Taxation Laws (Amendment) Act 2019 provided for concessional tax regime for specified domestic companies, wherein the corporate tax rate (CTR) stood reduced to 22% subject to meeting stipulated conditions and surrendering of benefit of certain allowances. One of allowances to be surrendered by taxpayer is with respect to additional depreciation.

- The ITL also provides that unabsorbed depreciation allowance related to such additional depreciation shall be deemed to be given full effect to and no further deduction shall be allowed with respect to the same, for taxpayers opting in for 22% CTR. A one-time window was provided for taxpayers opting for 22% CTR in the previous tax year 2019-20, wherein such unabsorbed depreciation brought forward as on 1 April 2019 was allowed to be adjusted to the tax WDV of the block of assets as on 1 April 2019 in the manner prescribed.

- The ITR Forms of previous tax year 2019-20 provided for a separate line item for such adjustment to WDV of block of assets in the Schedule DPM (Depreciation on plant and machinery). As the same is redundant for tax year 2020-21, since the adjustment was entitled to taxpayers opting for 22% CTR in previous tax year 2019-20 only, the ITR Forms notified for tax year 2020-21, delete the said line item in Schedule DPM.

5) CBDT further extends timeline for completion of proceedings under Income Tax Laws and payment of amount determined under DTVSV, 2020

Background

- The central government had promulgated The Taxation and Other Laws (Relaxation of Certain Provisions) Act, 2020 (Ordinance) which provided that any compliance due on the part of taxpayers or the tax authority under the Income Tax Laws (ITL), which was falling due between 20 March 2020 to 31 December 2020 (hereinafter referred to as Disruption Period), can be complied with on or before 31 March 2021. The Disruption Period was extended till 30 March 2021 vide Notification No. 93/2020 dated 31 December 2020.

- Acknowledging the hardship being faced by taxpayers because of the ongoing COVID-19 pandemic, the CBDT had issued Notification No. 10/2021 dated 27 February 2021 (February Notification) and Notification No. 20/2021 and Press Release dated 31 March 2021 (March Notification) providing for extension in various time limits under the ITL.

- DTVSV was introduced as a part of Union Budget 2020 to provide an opportunity for taxpayers to settle their direct tax disputes pending as on 31 January 2020 by filing a declaration in the prescribed form with the Designated Authority (DA) and by paying the prescribed amount before the due date. The sunset date for payment of 100% of disputed tax (without an additional amount) was extended from 31 March 2021 to 30 April 2021, vide Notification No. 9/2021 dated 26 February 2021.

- In the wake of the continuing pandemic, the CBDT has issued the Press Release providing for extension in time limit till 30 June 2021 for passing assessment/reassessment orders, orders to be passed in consequence of directions of the DRP etc., as well as the time limit for payment of the amount payable under DTVSV.

- The CBDT has granted further extension to the tax authority in relation to specific compliances under the ITL as follows:

Compliance pertaining to	Erstwhile disruption period	Erstwhile compliance date	Extended disruption period	Extended compliance date	Further extended compliance date as per Press Release
Passing of assessment/ reassessment orders under ITL	20 March 2020 to 30 March 2021	31 March 2021	No change	30 April 2021	30 June 2021
Passing of final assessment order pursuant to directions issued by DRP	20 March 2020 to 30 March 2021	31 March 2021	20 March 2020 to 31 March 2021	30 April 2021	30 June 2021
Issuance of notice for reopening of assessment	20 March 2020 to 30 March 2021	31 March 2021	20 March 2020 to 31 March 2021	30 April 2021	30 June 2021
Sending intimation of processing of statements filed by taxpayers under equalisation levy	20 March 2020 to 30 March 2021	31 March 2021	20 March 2020 to 31 March 2021	30 April 2021	30 June 2021

- In addition to the above, the other timeline for completion of proceedings under the ITL which were already extended earlier by the February and March Notifications, will remain unaffected by the present Press Release.

- The Press Release has granted further extension till 30 June 2021 for payment of the amount determined under DTVSV (without any additional amount).

6) Update on Provident Fund Taxation by Finance Act 2020 and Finance Act 2021

Background

- Prior to amendments by Finance Acts of 2020 and 2021, employer's contributions to retirement funds like EPF, ASF and NPS were taxable in limited circumstances. In most cases, EPF enjoyed an Exempt-Exempt-Exempt (EEE) status, while ASF and NPS enjoyed partial EEE status and partial Exempt-Exempt- Tax (EET) status.

Key Provisions of the Finance Act, 2020 and Finance Act, 2021 w.r.t Provident Fund taxation

- The Finance Act, 2020 has introduced provisions to tax employer's contribution towards various retirement funds. One of the provisions brings to tax employer's contribution towards EPF, ASF and NPS in excess of INR 7.5 lacs. Additionally, annual accretion by way of interest, dividend or any other amount of similar nature to the credit of such funds to the extent it relates to such excess contribution (to be computed in a manner to be prescribed by rules) shall be treated as income in the hands of the employee.

- The said amounts are treated as salary income of the employee in the year of excess contribution/accretion and the employer has corresponding withholding obligation on such amounts. Although the provisions came into effect from the tax year 2020-21 (01 April 2020 to 31 March 2021), the methodology to calculate accretion on the excess contribution was only notified vide Rule 3B of the Income Tax Rules, 1962 on 05 March 2021, which is effective from 01 April 2021 (i.e., assessment year 2021-22 relating to tax year 2020-21).

- The Finance Act 2021 also amended provisions of Section 10(12) of the Income Tax Act, 1961('Act') to tax the interest accrued on the employee contribution to the EPF above INR 2.5 lacs (increased limit of INR 5 lacs applies where there is no employer contribution involved in such funds). The interest on such excess employee's contribution is treated as Income from other sources.

Both the above amendments have their own set of practical difficulties and ambiguities posed for the employer and employee, which are illustrated below:

For employer:

- Rule 3B is effective from 01 April 2021. Being a rule relating to computation of income, it appears to apply from the tax year 2020-21 (the assessment year 2021-22). This would essentially mean that employers have to consider the above income for withholding compliance for the tax year 2020-21.

- The sourcing of relevant data for the employer may also become difficult as the data is available only to the employee. The practical challenges for employer will be higher in the case of employees who have newly joined or left during the year.

- When calculating the accretion under Rule 3B, it is not feasible to calculate the value of accretions for NAV based funds like NPS, which are market linked. In such cases, criteria for calculation needs to be specifically addressed by the tax department.

- Rule 3B does not address which fund should be picked for excess contribution (whether the formula is to be applied to each fund on an individual basis or all the funds on an aggregate basis).

There is difficulty in determining the actual PF interest as the interest for the tax year gets credited after the close of the relevant tax year.

For employees:

- As the tax return requires accurate reporting of income, the employee needs to know the basis adopted by the employer for computing perquisite and assess if any additional disclosure is required.

Key Regulatory amendments

This section summarizes the regulatory updates for the month of April 2021

Reserve Bank of India ("RBI") grants relaxation in the period of parking of unutilized External Commercial Borrowings ("ECB") proceeds in term deposits

- In line with its Statement on Developmental and Regulatory Policies, dated 07 April 2021, RBI, to provide relief to the ECB borrowers affected by the Covid-19 pandemic, has as a one-time measure, relaxed the current cumulative period of maximum 12 months granted to ECB borrowers to park of unutilized ECB proceeds in term deposits with AD Category-I banks in India ("AD Banks").

- As per the revised guidelines, unutilised ECB proceeds drawn down on or before 01 March 2020 can be parked in term deposits with AD Banks in India prospectively for an additional period up to 01 March 2022.,

Source: A.P. (DIR Series) Circular No. 01 dated 07 April 2021

Part B- Case Laws

Goods and Service Tax

1. M/s . I-Tech Plast India Ltd [GUJ/GAAR/R/10/2021]

Subject Matter: Ruling wherein Debit note is held to be always correlated with the original invoice & the financial year to which the debit note pertains, will always be considered to be the year in which the original invoice was issued

Background and Facts of the case

- The Applicant is engaged in the business of manufacturing & supply toys made up of plastic and/or rubber or both wherein essentially plastic is the main component.
- The Applicant intends to classify plastic toys under HSN 95030030 which pertain to toys like tricycles, scooters, pedal cars etc. (including parts and accessories thereof) [other than electronic toys]
- Separately, one of the suppliers of the Applicant is intending to issue debit notes for price variation in relation to invoices issued during FY 2018-19.
- In this regard, the Applicant made reference to the recent amendment in Section 16(4) and stated that the amendment was made to enable the taxpayer to claim Input Tax Credit (ITC) of the past periods where the error occurred in the past periods is noticed in the subsequent period.
- Accordingly, It sought Advance Ruling on the following questions:
  - What is the appropriate classification and rate of GST applicable on supply of the Plastic Toys under the GST?
  - Can the applicant claim ITC in relation to GST separately charged on debit notes issued by their supplier in current FY in respect of transaction pertaining to previous FY?

Discussion and findings of the case

- Basis review of pictures of some of the plastic toys & inspecting some samples of the same, the Authority concluded that the toys are made of plastic meant for children and are not electronic toys, hence, classifiable under Heading 95030030.
- Consequently, they would fall under Sr.No.228 of Schedule-II of Notification No.01/2017-Central Tax(Rate) dated 28.06.2017 and the GST applicable on the said product would be 12% (6% SGST + 6% CGST).
- For the succeeding issue, the Authority observed that the amendment did not appear to have been made till 30.09.2020 and would come into effect from 01.01.2021. It also held that no drastic change was proposed by the Finance Act, 2020 & therefore the debit note would always be connected to the invoice.
- Therefore, it was concluded that even if the debit note is issued in a different financial year than that of the financial year in which the original invoice was issued, the debit note will always be considered to have been issued in the year in which the original invoice was issued.
- In this regard, it observed that the very purpose of the said requirement is to enable the recipient of the supply to correlate the said debit note with the original invoice.

Ruling

- In light of the above, it was ruled that the debit note issued after the expiry of specified time period will not be treated as an independent document and the ITC cannot be claimed in respect of the same.

2. M/s Dwarikesh Sugar Industries Limited [Order No 52- UPAAR- dated 22.01.2020]

Subject Matter: Ruling that ITC will be eligible on goods & services procured for undertaking the activities of corporate social responsibility (CSR) mandated under the Companies Act, 2013.

Background and Facts of the case

- The applicant is a company incorporated under the Companies Act, 2013. It is engaged in the business of manufacture and sale of sugar and allied products.

- In order to comply with Corporate Social Responsibility (CSR) in terms of Section 135 of the Companies Act, it undertakes certain activities. It procures various goods and services on which GST is charged by the supplier.

- It sought an advance ruling on the following questions:

  - Whether expenses incurred to comply with CSR requirements under Companies Act qualify as being incurred in the course of business and eligible for input tax credit (ITC)?
  - Whether ITC on free supply of goods as a part of CSR is restricted under Section 17(5)(h) of the Central Goods and Services Tax Act, 2017 (CGST Act)?
  - Whether ITC on goods and services used for construction of school building which is not capitalized in the books of accounts is restricted under Section 17(5)(c) or (d) of CGST Act?

Discussions and findings of the case

- AAR referred to Sections 16(1) and 2(17) of the CGST Act. Section 16(1) defines the eligibility for taking ITC as per which a registered person can take ITC on goods and services used or intended to be used in the course or furtherance of business. Section 2(17) defines the term "business".

- Section 135(1) of the Companies Act provides for the criteria for constitution of a CSR Committee. Further, the amount to be spent for CSR has been specified in Section 135(5). Section 135(7) provides for penalty in case of non-compliance of section 135(5). Hence, any company which meets the criterial under section 135(1) has to compulsorily undertaken CSR activities, otherwise, it may lead to business disruptions. Thus, they are an essential part of the business process as a whole. Hence, they have to be treated as incurred "in the course of business".

- Reference was made to the decision of the Mumbai CESTAT in the case of Essel Propack Ltd2 , wherein it was observed that:

  - *"CSR is not a charity anymore. It augments credit rating of the company and its standing in the corporate world. Sustainability of a company depends on CSR.*
  - *CSR has also been made obligatory for the private sector and unless the same is treated as input service in respect of activities relating to business, the production and sustainability of the company itself would be at stake".*

- Section 17(5)(h) of CGST Act restricts credit on goods disposed of by way of gifts. In common parlance, gift is voluntarily provided to someone occasionally without consideration.

- CSR cannot be considered as a gift as it is obligatory & regular as opposed to the voluntary & occasional nature of a gift. Hence, ITC is not restricted under section 17(5) of the CGST Act.

- With respect to ITC on goods and services used for construction of a school building, AAR observed that the Section 17(5) restrict ITC on construction/works contract services to the extent of capitalisation.

Ruling

- Basis the above, it was held that the CSR Activities qualify as being incurred in the course of business & eligible for Input Tax Credit in terms of Section 16 of the CGST Act, 2017. The free supply of goods as a part of CSR Activities would not be restricted under section 17(5)(h) of CGST Act,2017.

- It was also held that ITC would not be available to the extent of capitalization of the goods & services used for construction of school building under section 17(5)(d).

Customs and Foreign Trade Policy (FTP)

1. **M/s DHL Express India Pvt Ltd vs Commissioner of Service Tax Bengaluru [2021(4) TMI 598- Karnataka High Court]**

   Subject Matter: Ruling wherein it was held that if the customs duty was paid in excess, the department would be liable to refund the same & limitation provided under Section 27 of the said Act 1962 would not be applicable.

   Background and Facts of the case

- The Applicant is a private limited company registered under Companies Act,1956. It is engaged in providing door to door international express courier service.

- The Applicant during the course of its business, carried out a shipment consigned to M/s. Bharat Earth Movers Limited (hereinafter referred to as 'M/s. BEML' for short) & based upon the authorization of M/s. BEML, arranged for the customs clearance of imported consignment through its customs house agent by submitting a bill of entry for paying the duty of customs.

- The Applicant's contention is that the current duty of customs payable on the value of cost specified in the bill of entry was at ₹ 4,743/, as against which, the appellant-Company discharged duty of customs to the tune of ₹ 42,31,718/- resulting in excess payment of ₹ 42,26,975/- on account of arithmetical error while computing the liability. It wrongly applied the exchange rate while determining the assessable value in the bill of entry.

- M/s. BEML, being the importer, filed a refund claim on 16.4.2009 and also furnished a copy of confirmation of exchange rate issued by Shinhan Bank, New Delhi Branch.

- The Superintendent (Refunds) of the respondent-department requested M/s. BEML to produce reassessed copy of the bill of entry vide letter dated 23.4.2009 and M/s. BEML, as importer, approached the Customs Authorities for rectification of error in the original bill of entry and for issue of reassessment bill of entry vide requisition dated 13.5.2009. The Customs Authorities directed the importer to file an appeal before the Commissioner of Customs (Appeals) against the order of assessment of bill of entry and to get necessary directions.

- The Appellate Commissioner set aside the order of assessment of bill of entry and for reassessment of bill of entry under Section 154 of the Customs Act, 1962. Hence, M/s BEML could not file an application for refund (as required under section 27 of Customs Act, 1962) within six months for want of reassessed bill of entry which was not issued by the Assistant Commissioner. The Assistant Commissioner reassessed the bill of entry on 30.12.2009 correcting the assessable value at ₹ 19,376/-

- The Assistant Commissioner issued a show cause notice in respect of the refund application dated 16.4.2009 filed by M/s. BEML alleging that M/s. BEML, as the importer, had not borne the incidence of customs duty and therefore, M/s. BEML is not eligible to claim the said refund. It was stated that the customs duty & the extra duty was paid by the Applicant & BEML was therefore not eligible for reimbursement.

- BEML filed a detailed reply objecting to the show cause notice and requesting for issuance of refund in favour of the Applicant. & also submitted that the excess duty which was paid by the Applicant was on behalf of BEML & hence, it has no objection with respect to the Applicant claiming the excess duty.

- The Adjudicating Authority rejected the application on the account that the doctrine of unjust enrichment is not fulfilled & has neither paid the duty nor borne the same

- Thereafter, the Applicant filed another refund application. This application was rejected on the ground that the duty of customs was paid on 7.3.2009, whereas the application for refund was received on 6.6.2012. It is therefore barred by limitation under Section 27 of the said Act of 1962.

- The Applicant being aggrieved by the order passed by the Adjudicating Authority, preferred an appeal before the Commissioner of Customs (Appeals) in Appeal No.163/2013 and contended that non filing of the refund application in time will not disentitle the appellant-Company for refund.

- The Commissioner of Customs (Appeals) had dismissed the appeal and thereafter second appeal was preferred before the Appellate Tribunal. The Appellate Tribunal had also dismissed the appeal. Thereafter, the case was presented before the Karnataka High Court.

Discussions and findings of the case

- The Applicant that the Tribunal had not referred to the judgment of the Hon'ble Supreme Court in case of **MAFATLAL INDUSTRIES LTD. Vs. UNION OF INDIA reported in 1997 (89) ELT 247** wherein it has been categorically held that for refund of the amounts/duty paid without authority of law, the relevant provisions applicable are of the Limitation Act and not the one specified under Section 27 of the said Act of 1962.

- They had also held that the refund was rejected on account of technical glitches which is not justified. It also contended that the duty of the customs payable on the transaction in question under the statute is only ₹ 4,743/-and therefore, the payment of duty over and above the aforesaid amount paid by the appellant is also beyond the statute and thus, retention of the same excess amount

- On the other hand, the respondent-Revenue argued that the Authorities are justified in rejecting the claim of the applicant keeping in view Section 27 of Customs Act,1962 & thus, the question of refund will not arise in the present case.

- The Court referred to Section 27 of Customs Act,1962. It stated that on account of erroneous calculation, the duty had been paid in excess to the tune of ₹ 42,26,975/-. It also stated that claim of the appellant could have been corrected and the Tribunal had erred in observing that the payment of excess duty requires to be rectified under Section 154 of the Customs Act,1962. The Authorities ought to have refunded the said excess amount to the Applicant either upon their application or on an application made by the importer.

- The court had also relied on its judgment on the case of ***KVR Construction (supra)*** **which was on the basis of the judgment in case of** Mafatlal Industries Ltd. (supra). It also relied on the judgment of Kerala High Court in the case of **Geojit BNP Paribhas Financial Services Ltd (supra)** which held that excess payment of service tax on account of mistake cannot be taken as payment made relatable to Section 11B of Central Excise Act.

Ruling

- Basis above, it was held that when the customs duty is paid in excess, the department is liable to refund the same and the limitation provided under Section 27 of the said Act of 1962 will not be applicable. Thus, the Tribunal had erred in law while dismissing the application. The mistake can be rectified under Section 154 of Customs Act,1962.

Part B – Case Laws

Direct Tax

1. Ozone India Ltd TS-260-ITAT-2021(Ahd Tribunal)]

Subject matter: Ahmedabad Tribunal rules that angel tax provisions are not applicable when shares are issued pursuant to a scheme of amalgamation, especially when the same are issued at par value

Background

- Under the ITL, income of a taxpayer is chargeable to tax under different heads of income; such as income from salary, income from house property, capital gains etc. Income which is taxable but not covered under any of the specific heads of income is taxable under the residual head of "Income from other sources" (IFOS).
- As per the provisions of the ITL, when a CHC issues shares (including preference shares) to a resident at a premium and receives consideration, which is in excess of the FMV of such shares, then the amount received in excess of the FMV of the shares is deemed as "income" in the hands of the share issuing CHC and such income is chargeable to tax under the head IFOS, in the year of issue of such shares. The above provisions of the ITL are popularly referred to as "angel tax provisions". The said provisions were incorporated under the ITL vide Finance Act, 2012 w.e.f. 1 April 2013.
- The angel tax provisions are not applicable when the consideration for issue of shares is received, inter alia, by a venture capital undertaking (VCU) from a venture capital company/fund (VCC/VCF).

Facts of the case

- During the tax year 2012-13, Kalavir Estate Pvt. Ltd. (KEPL) was amalgamated with the Taxpayer and the said amalgamation was approved by the Hon'ble Gujarat High Court.
- Pursuant to the scheme of amalgamation, all the assets and liabilities of KEPL were vested with the Taxpayer against issue of shares by the Taxpayer as the consideration, the shares being issued at par value.
- In the books of the Taxpayer, the above amalgamation was accounted for basis the "purchase" method of accounting as laid down under accounting standard 143 dealing with accounting for amalgamation. Consequent to this accounting method followed the excess of net assets received by the Taxpayer from KEPL over the value of shares issued by the Taxpayer as the consideration under the scheme of amalgamation, was credited as "Capital Reserve" in the books of the Taxpayer.

All the assets of KEPL were transferred at book value to the Taxpayer, except land, which was transferred at a revalued amount. The land asset was taken in as stock-in-trade by the Taxpayer at the revalued amount.

Tax authority's contentions:

- During the course of assessment proceedings of the Taxpayer for the tax year 2012-13, the tax authority held that the excess value of assets received by the Taxpayer over the share consideration issue, i.e. the amount credited to "Capital Reserve" account, is liable for taxation in the hands of the Taxpayer under the angel tax provisions of the ITL.
- Accordingly, the tax authority taxed the difference between net assets received on amalgamation from KEPL and FMV of shares issued by the Taxpayer under the head of IFOS.

Aggrieved, the Taxpayer filed an appeal with the first appellate authority.

First appellate authority's ruling:

- The first appellate authority (FAA) adjudicated the matter in favor of the Taxpayer and held that angel tax provisions are not applicable in the facts of the case.

- The FAA held that the legislative intent behind introduction of angel tax provision was to cover cases of CHC which received disproportionate amount on share issue over and above the face value of such shares by way of share premium. In the present case, the Taxpayer had issued shares at par and no premium was charged/received by the Taxpayer. Thus, angel tax provisions were not applicable.

- Further, the FAA noted that under the scheme of amalgamation, the consideration is discharged by the amalgamated company (the Taxpayer) by issue of shares rather than consideration being received by the amalgamated company (the Taxpayer) for issue of shares. The persons to whom shares have been allotted have not paid anything for allotment of such shares and the shares have been allotted in consideration of their existing shareholding in the amalgamating company (KEPL).

- The above proposition is supported by the ITL provisions dealing with the definition of "amalgamation" and the applicable accounting standard.

- "Capital Reserve" account which is credited with a balancing figure and which is notional in nature cannot be called as "share premium" or "consideration for issue of shares". The amount in "Capital Reserve" account reflected the differential arising primarily due to revaluation of land. It was this differential which caused the tax authority to observe the trigger of the angel tax provisions in the hands of the Taxpayer.

- Judicial precedents support that valuing the stock at market value does not and cannot bring in any real profit, which is necessary for taxing income. It is real income which is taxable under the ITL and not notional income, such as the notional gain arising on asset revaluation. When stock is revalued and then acquired under amalgamation, in absence of any specific provision, such notional gain is not taxable under ITL.

- Aggrieved by the order of the FAA, the tax authority filed an appeal before the Tribunal.

Tribunal's ruling:

- The issue under consideration is whether the shares received by KEPL in consideration of vesting of its assets and liabilities in the Taxpayer, pursuant to the scheme of amalgamation, is covered under angel tax provisions of the ITL. The Tribunal rejected the appeal filed by the tax authority on the following grounds and held that there was no income accruing/arising to the Taxpayer under the angel tax provisions.

- **Intent and interpretation of angel tax provisions suggest that taxability is triggered only when shares are issued at premium and not otherwise:**

  - Upon perusal of the angel tax provisions under the ITL, the two constituents emerge thereof are:
    (a) Consideration received by the share issuing company is in excess of the face value (par value) of shares issued; and
    (b) The consideration received is to be compared with the FMV of the shares issued and the excess of consideration received over FMV is deemed as income of share issuing company.

- When the angel tax provisions under the ITL are read in tandem with the text from various documents which highlight the intent of introduction of such provisions, being Explanatory Memorandum to Finance Bill, 2012, the Budget 2012 speech by the Finance Minister and the Explanatory Circular to Finance Act, 2012 bearing No. 3/2012 dated 12 June 2012 released by Central Board of Direct Taxes (CBDT)'s, it transpires as under:

  (a) The provisions intend to bring into the tax net, the excessive share premium received unjustifiably by a CHC on issue of shares without carrying underlying value to support such uncalled for premium and thereby enriching the CHC without payment of legitimate taxes by the CHC;

  (b) Attempt is to tax such excessive receipts received in the garb of share premium by a CHC;

  (c) The subscription to the shares issued by a CHC at a substantial premium (not necessarily backed by a valuation justifying the premium) was supposedly resorted to convert the unaccounted money and, hence, angel tax provisions were introduced to curb the same.

- In the present case, considering that the Taxpayer has not received or charged any premium on the issue of its shares and the shares have been issued at par value, the case is not covered under the angel tax provisions of the ITL, in light of object and purpose of such provisions.

- **Deeming fiction is to be strictly construed and cannot be stretched beyond the limited purpose for which it is created:** Angel tax provisions are deeming provisions, which deem a capital receipt as revenue income. The tax authority's attempt to notionally term the excess value of assets received by the Taxpayer from KEPL as "premium over face value" for application to such deeming provisions, results in stretching the fiction beyond its purpose and importing another fiction in it. Judicial precedents hold that deeming fiction cannot be stretched beyond its purpose and import another fiction in it.

- **Angel tax provisions cannot apply to shares issued under a scheme of amalgamation:**

  - While on a plain reading of the angel tax provisions, it can be possibly argued that the issue of shares pursuant to a scheme of amalgamation is covered thereof as there is (a) issue of shares by amalgamated company and (b) receipt of consideration from a resident person (amalgamating company).

  - In contrast to the above, the following propositions support that the angel tax provisions do not cover a share issue made pursuant to a scheme of amalgamation:

    (a) **The share issue by amalgamated company is towards discharge of its consideration under a scheme of amalgamation:**

    - The issue of shares in an amalgamation is to give effect to the scheme of amalgamation, as per mutual agreement and court order.

    - It may be argued that the issue of shares does not trigger any consideration, but it is the obligation to discharge consideration for the transfer of undertaking under an amalgamation, which triggers the issue of shares.

- The provision contemplates issue of shares by CHC on its own and not towards discharge of any consideration/ obligated pursuant to amalgamation.

(b) **A tripartite agreement is not covered under angel tax provisions:**

- The provisions contemplate a transaction between a resident person (from whom consideration is received by CHC) and the CHC issuing shares.
- In amalgamation, the consideration i.e. undertaking is vesting undertaken by the amalgamating company, but shares are issued to shareholders of amalgamating company by the amalgamated company. The shares are not issued to the amalgamating company.
- Thus, in effect, it is a tripartite arrangement between amalgamated company (the Taxpayer), amalgamating company (KEPL) and shareholders of amalgamating company (KEPL).
- Such arrangements in amalgamation cases are not contemplated in angel tax provision.

(c) Exception to angel tax provision support that the provision requires a bilateral arrangement to trigger: The angel tax provisions are not applicable when consideration is received by VCU from issue of shares to a VCC/VCF. This implies that shares should be issued by CHC directly to the subscribers, for consideration i.e. a bilateral transaction.

(d) Exemption granted to shareholders of amalgamating company under the provisions of the ITL supports non-applicability of angel tax provision:

- The provisions of the ITL contemplate that there is a “transfer” of shares by shareholders of amalgamating company in consideration of allotment of shares by the amalgamated company.
- In order to neutralize the above tax effect, which may lead to capital gains taxation in the hands of shareholders of amalgamating company, the provisions of the ITL exempt such a transaction from taxation by excluding it from the ambit of “transfer”.
- Thus, under the ITL, from the perspective of shareholders, the consideration for issue of shares by amalgamated company (the Taxpayer) is shares held in amalgamating company (KEPL).
- Accordingly, a bare issue of shares as contemplated in angel tax provisions cannot be equated with an instance of “transfer” as explained above.

2. Miele India Pvt. Ltd. [TS-235-HC-2021(DEL)]

Subject matter: Delhi HC rules that setting up of business sufficient, commencement not essential, for claiming business expenditure

Background

- The assessee had filed its return on 27.09.2010, wherein it had declared a loss of Rs.7,83,71,011/-. The return filed by the assessee was processed under Section 143(1) of the Income Tax Act, 1961 (in short 'the Act') and notice under Section 143(2) of the Act was issued.

- While framing the assessment under Section 143(3) of the Act, the assessing officer made additions concerning the following:

  (i) Pre-operative expenses amounting to Rs.3,50,51,978/-.

  (ii) Advertising expenses amounting to Rs.60,39,950/-.

- Being aggrieved by the order dated 19.03.2014 passed under Section 143(3) of the Act, preferred an appeal with the Commissioner of Income Tax (Appeals) [in short 'CIT(A)]. The CIT(A) allowed the assessee's appeal. Further, revenue appealed before Tribunal which was also dismissed in the favour of assessee.

Tax Authorities Contention

- The assessee is in the business of trading and therefore, expenses incurred prior to the commencement of business were rightly added back by the AO. In support of this plea, it was pointed out that the AO has indicated that the assessee in his written note had stated that its business commenced on 29.10.2009.

- It was submitted that the 'experience centre' was launched only on 29.10.2009 and therefore, that had to be taken as the actual date when the assessee had set-up its business.

- The mere fact that the assessee obtained stock of the goods, that it intended to trade in, was not enough. Since the assessee is a trading entity, it needed an outlet such as an experience centre for conducting its business; which, as indicated above, was set-up only on 29.10.2009.

- The assessee could not have sold the goods, otherwise, than via a physical outlet, as it had no online presence. In support of these submissions, reliance was on the following judgments:
  (a) Commissioner of Wealth Tax v. Ramaraju Surgical Cotton Mills Ltd., (1967) 63 ITR 478 (SC).
  (b) Marvel Polymers Pvt. Ltd. v. Commissioner of Income Tax-II, (2007) 165 Taxman 618 (Delhi).
  (c) Akzo Nobel Car Refinishes India (P.) Ltd. v. Deputy Commissioner of Income Tax, Circle 1(2), New Delhi, (2008) 25 SOT 226 (Delhi).

- For the other issue, the only argument which was advanced was that the Tribunal had erred in deleting the addition made qua advertising expenses by ignoring the fact that the said expenses had been incurred to build goodwill. In other words, the argument was that if the expenses were capital in nature, it could not have been treated as revenue expenses.

Assessee's Contention

- There is a difference between the setting-up of business and commencement of business; as long as the assessee is ready to carry on business and there are facts and circumstances obtaining in a case, which point in this direction, then, it can be safely concluded that the business has been set-up and, therefore, any expenses incurred would have to be allowed as a deduction.

- Reliance was placed on the remand report filed by the AO before the CIT(A). Based on the contents of this report, it was sought to be demonstrated that several steps have been taken by the assessee to set-up the business in the previous AYs, which included placing orders in the domestic market. The emphasis was laid on the fact that there was no prohibition in the assessee carrying on its trading activity in the domestic market and therefore, the argument advanced on behalf of the revenue that the goods in which the assessee dealt in were also obtained from its holding company albeit on or after 29.10.2009 had no relevance in the given circumstances.

- Reliance was on the following judgments:

(i) Carefour WC & C India (P.) Ltd. v. Deputy Commissioner of Income Tax, (2015) 53 taxmann.com 289 (Delhi).
(ii) Commissioner of Income Tax v. L.G. Electronics (India) Ltd., (2005) 149 Taxman 166 (Delhi).

- For advertisement expenses, it was submitted that the view taken by the CIT(A) and the Tribunal should be sustained. The advertising expenses were incurred wholly and exclusively for the business of the assessee and therefore, ought to be allowed as a deductible expense under Section 37 of the Act.

- In support of this submission, reliance was placed on the judgment rendered in Commissioner of Income Tax v. Citi Financial Consumer Fin. Ltd., (2012) 20 taxmann.com 452 (Delhi).

High Court's Ruling

- The assessee had obtained the Importer Exporter Code [in short 'IEC'] on 07.11.2008; the assessee had executed a lease deed with Regus Business Centre on 16.06.2008; a lease deed qua a commercial plot located at Jasola, Delhi was executed by the assessee on 16.12.2008; the assessee had entered into an agreement for outsourced employees (which included drivers, advisors positioned at the dealer's site and chef) on 22.09.2008; the assessee had hired six senior employees between the financial year [in short 'FY'] 2008-2009; the first local purchase was made on 27.11.2008; local sales were made by the assessee on 04.12.2008 and 26.03.2009; orders were received from Dawar International Electronics Pvt. Ltd. on 02.01.2009 and 22.01.2009; and purchase orders were raised on the assessee's holding company on 18.03.2009.

- There is a reference to certain steps which the assessee had taken in AY 2008-2009 such as getting itself incorporated and having a PAN number and TAN number allotted to it.

- Considering the above, in our view, that the assessee had set-up its business and was ready to carry on the same in the previous AY, i.e., AY 2009-2010.

- It is correctly argued by the assessee that there is a difference between setting-up of business and commencement of business. The fact that the assessee had executed lease deeds for its premises, engaged senior employees, carried out local purchase, and sales could not have been possible had it not set-up its business.

- The fact that the assessee had set-up an experience centre in the FY 2009-2010, which was another mode or platform for selling its goods, cannot have us hold that the assessee had not set-up its business in the previous AY. Therefore, the stated absence of the assessee on an online platform, in our view, is non-sequitur in the fact situation obtaining in the instant case.

- In relation to second issue of advertisement expenses, there is nothing on record to show that the expenditure incurred by the assessee, towards advertising, was not laid out or expended, wholly and exclusively, for the purposes of business. The expenditure incurred, in our view, being a business expenditure, which was incurred wholly and exclusively for the purposes of business and did not lead to the creation of a capital asset in the assessment year in issue, ought to have been allowed by the AO.

- Goodwill, which is built, based on the reputation acquired by the business over the years, is an intangible asset, which is monetized, ordinarily, when the business is sold. Therefore, for the A.O. to disallow advertising expenditure on this basis was completely erroneous. In sum, it fulfilled the criteria for allowability of such expenditure, as provided, in Section 37 of the Act.

- The expenditure was incurred for the subject AY and, therefore, the addition made by the A.O. was rightly deleted by the CIT(A); a decision which was sustained by the Tribunal.

3. Concentrix Services Netherlands B.V. and Optum Global Solutions International B.V.

Subject Matter: Delhi HC applies 5% withholding tax under India-Netherlands DTAA on dividend income pursuant to Most-Favored-Nation clause

Background

- I-NL DTAA was entered in 1989 and was subsequently amended by way of Notification dated 30 August 1999.

- As per I-NL DTAA, dividend paid by Indian entities to residents of Netherlands, who are beneficial owners of such dividend, is liable to withholding tax at a rate not exceeding 10%.

- Further, protocol to I-NL DTAA has an MFN clause which states that if India enters into a DTAA on a later date with a third country, which "is" an OECD member, providing a beneficial rate of tax or restrictive scope for taxation of dividend, interest, royalty, etc. a similar benefit should be accorded to I-NL DTAA as well. The relevant extract of the MFN clause is as below:

  "If after the signature of this convention under any Convention or Agreement between India and a third State which is a member of the OECD, India should limit its taxation at source on dividends, interests, …. to a rate lower or a scope more restricted than the rate or scope provided for in this Convention on the said items of income, then as from the date on which the relevant Indian Convention or Agreement enters into force the same rate or scope as provided for in that Convention or Agreement on the said items of income shall also apply under this Convention."

- It may be noted that some of Indian DTAAs with countries like Slovenia, Lithuania and Columbia (which are OECD member countries) provide for a lower withholding rate of 5% for dividend taxation subject to conditions. These countries were not OECD members when DTAA was entered into by India, but became OECD members only at a later date, post 2010.

Facts

- The Taxpayers, being resident of Netherlands, were contemplating to receive dividend income from its wholly-owned Indian subsidiaries.

- The Taxpayers made an application with the tax authority to grant a lower rate withholding certificate under the ITL, wherein the request was to permit remittance of dividend by Indian companies after withholding taxes at lower rate of 5% as per I-NL DTAA read with MFN clause and India's DTAAs with Slovenia/ Lithuania/ Columbia.

- The tax authority issued a withholding tax certificate stating that the taxes will be required to be withheld at the rate of 10% as per I-NL DTAA when dividend income is remitted.

- The Taxpayers contended that the benefit of MFN clause was automatic and triggered the moment India entered into a beneficial DTAA with a member of OECD and there was no requirement to issue any specific notification to accord the beneficial rate of 5%. Aggrieved by the same, the Taxpayers filed writ petitions before the Delhi HC.

Tax authority's contention:

- Slovenia, Lithuania, and Columbia were not OECD members on the date when India executed DTAAs with these countries. Accordingly, the MFN benefit given to these countries is in their own right and was not due to the fact that they were OECD members.

- Further, the benefit of MFN clause would be available only if the country with which India enters into a DTAA was an OECD member at the time of execution of the subject DTAA (i.e. I-NL in the present case). However, Slovenia, Lithuania and Columbia were not OECD members on the date of execution of I-NL DTAA and became members only on a later date. Thus, MFN clause of I-NL DTAA have no applicability.

- Further, no notification has been issued in order to give effect to the MFN clause of I-NL DTAA.

HC ruling:

The HC granted the benefit of 5% withholding tax rate on dividend income by virtue of MFN clause of I-NL DTAA and based on the below reasonings ruled that the 10% withholding certificates should be quashed and a fresh certificate indicating lower rate of 5% should be issued by the tax authority:

- The protocol of a DTAA forms an integral part of the DTAA and there is no requirement of issuing a separate notification in order to apply the provisions of the protocol. Reliance was placed on the Delhi HC decision in the case of Steria (India) Ltd. v. CIT [[2016] 386 ITR 390].

- The MFN clause, which forms part of the protocol, incorporates the principle of parity between I-NL DTAA and the DTAAs executed with the third states thereafter by India qua the rate of withholding tax or the scope of the DTAA in respect of items of income concerning dividends, interest, royalties, etc.

- As per the MFN clause, the principle of parity is applicable if the following conditions are satisfied:

  - The third state with whom India enters into a DTAA should be a member of the OECD.

- The DTAA executed with the third state limits the rate of withholding tax imposed by India at a rate lower or a scope more restricted, than the rate or scope provided in the subject DTAA, i.e., I-NL in the present case.

- On satisfaction of the above conditions, the benefit of lower withholding tax or the restricted scope of DTAA with the third state should be applicable to I-NL DTAA from the date when the DTAA with the third country comes into force.

- Further, the contention of the tax authority that the benefit of MFN clause would be available only if the country with which India enters into a DTAA was an OECD member at the time of execution of the subject DTAA (i.e. I-NL in the present case) is misconceived and contrary to the plain language of I-NL DTAA. Rather, there could be a hiatus between the dates on which the DTAA is executed between India and the third state and the date when such third state becomes a member of OECD. The MFN clause can only apply when the third state fulfils the attribute of being a member of the OECD.

- On the contention of the tax authority that MFN clause of I-NL DTAA can be made applicable only in cases where the third state "is" a member of OECD on the date when the DTAA has been entered into with India, whereas the DTAAs with Slovenia/Lithuania/ Columbia were entered into with India when these countries were not OECD members and became OECD members only on a later date, the HC has observed as below:

    - The word "is" describes a state of affairs that should exist not necessarily at the time when I-NL DTAA was executed but when a request is made by the payer or deductee for issuance of a lower rate withholding tax certificate under the ITL.

- Assuming the DTAA language is susceptible to two readings, to glean the intent of the India and Netherlands in framing MFN clause reliance can be placed on the decree issued by Netherlands, wherein Netherlands has provided the benefit of 5% withholding tax with reference to participation dividend paid by companies resident in Netherlands to a body resident in India from the date when Slovenia became a member of OECD.

- As per "common interpretation" rule, in order to allocate tax claims equally between the two contracting states, the courts of the contracting states are required to ensure that DTAAs are applied efficiently and fairly so that there is consistency in the interpretation of the provisions by the tax authority and courts of the concerned states. However, the common interpretation rule should be applied with care and caution having regard to the fact that the view expressed could be unique and/or personal to the tax authority or a court. Hence, an attempt should be made to choose a view that finds general acceptance with courts and authorities.

- In the present case, Netherlands has interpreted the MFN clause in a particular way and, therefore, the principle of common interpretation should apply on all fours to ensure consistency and equal allocation of tax claims between the contracting states.

- While interpreting international treaties including DTAAs the rules of interpretation that apply to domestic or municipal law need not be applied, as international treaties, conventions and DTAAs are negotiated by diplomats and not necessarily by men instructed in the law.

- Therefore, interpretation of DTAAs is liberated from the technical rules which govern the interpretation of domestic/municipal law. The core function of a DTAA should be seen to aid commercial relations and equitable distribution of tax revenues in respect of income which falls for taxation in both the contracting States.

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