EY Tax and Regulatory Alert

August 2020

Prepared for ACMA

Contents

S. No.	Particulars	Description
Part A	**Key Tax Updates**	
1.	**Goods and Services Tax (GST)**	Key Circulars and Notifications • Notifications issued in relation to e-invoicing
2.	**Customs and Foreign Trade Policy**	Key Circulars and Notifications • Circular issued for 2nd phase of All India roll-out of Faceless Assessment • Notification notifying the Manufacture and Other Operations in Special Warehouse Regulations, 2020 (MOOSWR) • Notification amending the Manufacture and Other Operations in Warehouse Regulations, 2019.
3.	**Direct Tax**	Key circulars and notifications • COVID-19 impact – Government of India provides further extension in due date for filing returns for tax year 2018-19 • CBDT exempts dividend payment to non-residents from higher withholding in the absence of PAN on furnishing alternative documents • Prime Minister of India unveils "Transparent Taxation - Honouring the Honest" platform • CBDT issued guidelines for Tax Authority for effective implementation of Faceless Assessment Scheme 2019
4.	**Regulatory**	• Reserve Bank of India ('RBI') amends Foreign Exchange Management (Export and Import of Currency) Regulations, 2015 ('FEMA 6R') • RBI empowered to administer Foreign Exchange Management (Non-Debt Instruments) Rules, 2019 ('NDI Rules')
Part B	**Judicial Precedents**	
	Goods and Services Tax (GST)	
1.	**M/s Material Recycling Association of India [2020-VIL-341-GUJ]**	Ruling wherein the petitioner challenged the constitutional validity of Section 13(8)(b) of the IGST Act, 2017 as the same as ultra vires under Articles 14, 19, 265 and 286 of the Constitution of India.
2.	**M/s. Bharat Oman Refineries Ltd. [2020-VIL-397-GUJ]**	Gujarat High Court judgement on Refund of IGST paid under reverse charge on Ocean Freight
3.	**M/s VKC Footsteps India Private Limited Versus Union of India & 2 other(s) [C/SCA/2792/2019]**	Judgement pronounced by the Hon'ble High Court of Gujarat involving the matter for refund of ITC pertaining to input services under the inverted duty structure.
4.	**M/s Volvo-Eicher Commercial Vehicles Ltd [Order no. KAR/AAAR-14-B/2019-20**	Whether the activities performed by the Appellant with regard to repair and servicing of Volvo vehicles for Indian customers during the warranty period, for which the reimbursements are made by M/s Volvo Sweden pursuant to the arrangement between M/s Volvo Sweden and the Appellant, is an activity amounting to a supply of service for Volvo Sweden and consequently whether the same is a zero-rated supply.

	Direct Tax	
1.	**Shree Choudhary Transport Company (SC)**	Supreme court upholds disallowance of expenditure on non- withholding of taxes, without accepting retrospective application of amendment granting benefit of 30% disallowance.
2.	**Tax Authority concedes before High Court that no payment of Equalisation Levy in the presence of a Permanent Establishment**	Excludes applicability of ESS EL where the NR has a PE in India and the E-commerce supply or services are effectively connected with such PE.

INDIRECT TAX

Part A - Key Indirect Tax updates

Goods and Services Tax

This section summarizes the regulatory updates under GST for the month of August 2020

- **Notification No. 60/2020-Central Tax and 61/2020-Central Tax, dated 30.07.2020** has been issued by CBIC in relation to e-invoicing to provide following changes:

- A revised format/schema for Form GST INV – 1 (e-invoice) has been issued. The revised e-invoice schema i.e. Version 1.1 has provided 131 fields (mandatory, conditional mandatory and optional fields) in comparison to 132 fields provided earlier under Notification no. 02/2020

- Notification no. 13/2020-Central Tax dated 21.03.2020 specifying the class of registered persons who are required to prepare e-invoice, has been amended as follows:

  - Special Economic Zone units have been exempted from the requirement to prepare e-invoice

  - Taxpayers whose aggregate turnover in a financial year exceeds INR 500 Cr. are required to prepare e-invoice (earlier the threshold was INR 100 Cr.)

Customs and Foreign Trade Policy (FTP)

This section summarizes the regulatory updates under Customs and FTP for the month of August 2020

- **Circular No. 34/2020, dated 30.07.2020**, issued by DGFT on the 2nd phase of all India roll-out of Faceless Assessment.

- On review of 1st phase of Faceless Assessment at Bengaluru and Chennai and resolving few technical and administrative issues that arose the Board noted that on expected lines the Faceless Assessment ushered in a smooth and faster clearance process with uniformity in assessment.

- Accordingly, Board has decided to begin the 2nd phase of All India roll-out of Faceless Assessment w.e.f. 03.08.2020 by including Delhi and Mumbai Customs Zones and extending the scope of Faceless Assessment at Chennai and Bangalore Customs Zones.

- It is clarified that the Customs Zones and the imports already covered under the 1st Phase would continue and be treated as subsumed under the 2nd phase.

- Thus, Customs Zones to be covered in the 2nd phase of Faceless Assessment along with the imports primarily under the specified Chapters of the Customs Tariff Act, 1975 have been specified.

- For monitoring and ensuring speedy and uniform assessments in the specified Customs Zones, in regard to Bills of Entry assigned by the Customs Automated System to the officers of the Faceless Assessment Groups, Board hereby nominates certain officers as Nodal Commissioners.

- Further, Notification No.63/2020-Customs (N.T.) dated 30.07.2020 is issued for the purpose of empowering the jurisdictional Commissioners of Customs (Appeals) at Bengaluru, Chennai, Delhi and Mumbai to take up appeals filed in respect of Faceless Assessments pertaining to imports

made in their jurisdictions even though the assessing officer may be located at the other Customs station.

- **Notification Number 75 /2020-Customs (N.T.) dated 17.08.2020** has been issued to notifying the Manufacture and Other Operations in Special Warehouse Regulations, 2020 (MOOSWR). The said regulation would apply to the units that operate under section 65 of the Customs Act, or units which apply for permission to operate under section 65 of the Customs Act.

- It would be relevant to note that these warehouses would be special warehouses licensed under section 58A of the Customs Act (i.e. Special Warehouse).

- **Notification No. 76/2020-Customs (N.T.) dated 17.08.2020** amends the Manufacture and Other Operations in Warehouse Regulations, 2019.

- Amendment is brought in to apply the said regulation to the units that operate under section 65 of the Customs Act, or units which apply for permission to operate under section 65 of the Customs Act in a warehouse licensed under section 58 of the Customs Act (i.e. Private Warehouse).

- **Notification Number 77/2020-Customs (N.T.) dated 17.08.2020** the said notification amends the Special Warehouse (Custody and Handling of Goods) Regulations, 2016 to the extent that these regulations shall not apply to a warehouse licensed under Section 58A of the Act and operating under section 65 of the Customs Act.

- **Circular No. 36 /2020-Customs dated 17.08.2020** issued by Board covers the procedures and documentation for a section 58A warehouse (special warehouse), operating under Section 65 of the Act, in a comprehensive manner including application for seeking permission under section 65, provision of execution of the bond and security by the licensee, receipt, storage and removal of goods, maintenance of accounts, conduct of audit etc.

- The form of application is to be filed by an applicant before the jurisdictional Principal Commissioner / Commissioner of Customs as per the format in Annexure A to the circular.

- The declaration to be made to satisfy regulation 5 of Special Warehouse Licensing Regulations, 2016, and the undertaking to be made by the applicant as per regulation 4 of MOOSWR, 2020, is included in the application format (Part II).

- The warehouse in which section 65 permission is granted shall also be declared by the licensee as the principal/additional place of business for the purposes of GST.

- The licensees manufacturing or carrying out other operations in a bonded warehouse shall be required to maintain records as per form prescribed under this circular as Annexure B to the circular

- The licensees would be required to furnish a bond prescribed as per Annexure C of the circular. Additionally, the licensee will furnish security by way of a bank guarantee equivalent to the duty involved on the warehoused goods.

- To the extent that the resultant product manufactured or worked upon in a bonded warehouse is exported, the licensee shall have to file a shipping bill and pay any amounts due. GST invoice shall also be issued for such removal. In such a case, no duty is required to be paid in respect of the imported goods contained in the resultant product as per the provisions of section 69 of the Customs Act.

- To the extent that the resultant product (whether emerging out of manufacturing or other operations in the warehouse) is cleared for domestic consumption, such a transaction squarely falls within the ambit of supply under the CGST Act and therefore would be taxable and GST would be discharged depending upon the supply is intra-state or inter-state.

- The resultant product will thus be supplied from the warehouse to the domestic tariff area under the cover of GST invoice on the payment of appropriate GST and compensation cess, if any.

- Import duties payable on the imported goods contained in so much of the resultant products are concerned, the same shall be paid at the time of supply of the resultant product from the warehouse for which the licensee shall have to file an ex-bond Bill of Entry and such transactions shall be duly reflected in the accounts prescribed under form as per Annexure B of the Circular.

- The applicant shall also inform the input-output norms for raw materials and final products and shall also inform the revised input-output norms in case of change therein.

- The waste generated during the course of manufacture or other operations of the resultant product may be cleared for home consumption as per section 65 of the Customs Act on payment of applicable duties of customs and GST.

- The licensee to provide such facilities, equipment and personnel as are sufficient to control access to the warehouse, provide secure storage of the goods and ensure compliance to the regulations.

- Considering the nature of goods to be warehoused in a special warehouse, the Principal Commissioner or Commissioner has to ensure that the structure is fully closed from all sides, gate(s) with access control and personnel to safeguard the premises. It is also to be ensured that there is/are CCTV cameras at the gate(s) and there is a provision of accessing the same by customs officers.

- The Principal Commissioner/Commissioners should take into consideration the facilities, equipment and personnel put in place for secure storage of goods, while considering grant of license.

- Further, office space for bond officer and sufficient space for customs officer for carrying out examination at the time of arrival or removal of goods have to be provided.

- Services of customs officer for supervising various activities shall be chargeable on cost recovery or overtime basis as specified in the regulations.

- The licensee shall have to indicate the frequency with which the warehouse has to be operated per day / per week and the expected business hours of such operation, requiring supervision/presence of the bond officer.

Direct Tax

Part-A Key Direct Tax updates

COVID-19 impact – Government of India provides further extension in due date for filing returns for tax year 2018-19

Background

- In the past few months, with the advent of COVID-19 pandemic and constraints placed by it, the GoI undertook various significant measures to provide relaxation to the taxpayers to ease compliance and regulatory requirements under the Income-tax Act, 1961 (ITA). The GoI has, inter alia, undertaken the following measures in this behalf:
  - Introduction of Taxation and Other Laws (Relaxation of Certain Provisions) Ordinance 2020 (Ordinance) on 31 March 2020 to extend the timelines for various compliances, reduce rate of interest and waive penalties and prosecution during COVID-19 disruption period. The Ordinance extended the due date for filing belated and revised returns for tax year 2018-19 from 31 March 2020 to 30 June 2020.
  - In partial modification to the timelines provided under the above Ordinance, vide CBDT notification dated 24 June 2020, the GoI further extended various compliance timelines and requirements as previously covered by the Ordinance. The notification, inter alia, provided further relief as follows:
    - Further extension of time limit for filing belated and revised returns for tax year 2018-19 from 30 June 2020 to 31 July 2020;
    - Relief provided to taxpayers in respect of interest payable on Self-Assessment tax on belated filing of returns for tax year 2019-20 where the SA tax (i.e. after reducing tax deducted/collected at source, advance tax, etc.) does not exceed INR 0.1 million.

By way of further relief, vide CBDT Notification dated 29 July 2020 (Notification), the GoI has further extended the time limit for filing belated and revised returns for tax year 2018-19.

Extension of due date for filing returns for tax year 2018-19

- The Notification further extends the due date for filing belated and revised returns for tax year 2018-19 (Assessment Year 2019-20) from 31 July 2020 to 30 September 2020.
- However, there is no change in the timelines for other compliances including filing of returns for tax year 2019-20 (Assessment Year 2020-2021).
- The CBDT started an e-campaign on 20 July 2020 to voluntary induce filing of belated or revised returns for tax year 2018-19 by informing the taxpayers over SMS/ e-mail about the financial information collected from various sources.
- Perhaps, the CBDT felt that taxpayers will require further time amidst COVID-19 disruption to reconcile the financial information and take appropriate remedial action. Hence, it further extended the time limit to 30 September 2020.

CBDT exempts dividend payment to non-residents from higher withholding in the absence of PAN on furnishing alternative documents

Higher withholding of tax in absence of PAN

- Presently, as per the provisions of the Indian Tax Laws (ITL), any person, who is entitled to receive any income which is subject to tax withholding, is required to furnish PAN to the payer. In case the payee fails to furnish PAN, the payer is liable to

withhold tax on such sum at a rate which is higher of:

- The rate specified in the ITL;
- The rate or rates in force; or
- 20%.

- The above provision applies to NR payees also, which imposed a burden on them to obtain PAN in India to avoid the trigger of higher withholding tax.

- Although the above provision does not exempt NRs who are eligible for lower tax rate as per Double Taxation Avoidance Agreement (DTAA), as per current tax jurisprudence, an NR who is entitled to DTAA benefit will not be subject to higher withholding rate of 20% in absence of PAN. But the controversy is not yet fully settled pending decision of Supreme Court on the issue.

- To improve the ease of doing business in India and to remove undue hardships faced by NRs, certain payments to NRs were subsequently exempted from this provision. Those payments are as follows:
  - Interest on long-term bonds which qualify for concessional tax rate of 5% under a special provision in the ITL. No documents or information is required to be furnished by NR payee for this purpose.

  - Payments specified in the Rule 37BC (Rule) subject to conditions specified therein. The Rule prescribes following payments to which higher withholding will not apply but subject to payee furnishing TRC, Tax identification number (TIN) and other relevant information as prescribed therein:
    - Interest
    - Royalty
    - FTS
    - Payments on transfer of any capital asset.

- Dividend payment was not covered in the above Rule for the reason that till 31 March 2020, the ITL provided for dividend distribution tax (DDT) regime where tax on dividends paid to shareholders was payable by the company and dividend income was exempt in the hands of shareholders. Hence, no tax was deductible on dividend payment by domestic companies.

Amendments by Finance Act 2020 to dividend taxation and return filing compliance for NR taxpayers

- The Finance Act (FA) 2020 changed the dividend taxation system and reintroduced classical system of dividend taxation in the hands of shareholder with effect from 1 April 2020. Consequently, dividend income in the hands of NR shareholders is taxable at general rate of 20% on gross basis under section 115A of the ITL. Consequently, the domestic company is required to deduct tax at "rates in force" on dividend payment which, as per definition, is the rate specified in the annual Finance Act or the DTAA, whichever is more beneficial. But final tax rates (and corresponding withholding tax rates) to certain classes of NR shareholders like Foreign Portfolio investors (FPIs) are provided separately. For instance, final tax rate and withholding rate at 20% applies for FPIs under a separate provision.

- Significantly, FA 2020 also amended section 115A of the ITL which provides for gross basis of taxation for certain incomes like interest, royalty, FTS and also dividend (post amendment by FA 2020). Prior to amendment, section 115A provided for exemption from furnishing of return of income for those NR taxpayers whose total income included interest income and/or dividend and tax deductible at source as per the ITL has been deducted from such income. There was no such similar exemption for NR taxpayers whose total income included only royalty or FTS income. Hence, such taxpayers were required to furnish return of income even if tax payable on such income was already paid in the form of withholding tax by the payer. Non-furnishing of return triggered adverse consequences in the form of fees up to INR 10,000 and prosecution.

- The FA 2020 amended section 115A, inter alia, to extend the exemption from return filing compliance to royalty and FTS as well. However, the condition for exemption was modified to provide that exemption shall be applicable only in cases where the tax deductible at source under the provisions of the ITL has been deducted from such income and the rate of deduction is not less than the rates of tax specified in section 115A. This implies that if the withholding rate is as per lower rate provided in DTAA, the exemption from return filing compliance will not apply.

- PAN is a prerequisite for return filing compliance. Hence, even if higher withholding tax in absence of PAN is avoided by NR payee by furnishing TRC and other information to the payer, the NR payee is still required to obtain PAN for the purposes of filing return.

Notification extending exemption from higher withholding in absence of PAN to dividend payment

- The Notification has added dividend payment to the list of payments prescribed in the Rule on which higher withholding at 20% will not apply in absence of PAN on furnishing of TRC and other specified information.

- The impact of the addition is that if an NR shareholder does not hold PAN but furnishes TRC and other specified information to the company, the company can withhold tax at the "rates in force" (which includes lower DTAA rate, if applicable).

- If the withholding is at 20% as provided in section 115A and the NR shareholder does not have any other taxable income in India, then NR shareholder is not required to furnish return of income.

- However, if the withholding on dividend is at lower DTAA rate, then NR shareholder will be required to furnish return of income.

Effective date of Notification

- The Notification, in so far as it amends the Rule (to include dividend payment) provides that it shall come into effect from the date of publication of the Notification in the Official Gazette i.e. 24 July 2020. Thus, the inclusion of dividend in the Rule is effective from 24 July 2020.

- Incidentally, the text of the Rule as appearing on the website of the Income Tax Department reflects that the amendment is effective from 1 October 2020 which appears to be an inadvertent error and may be eventually rectified to reflect the correct date of 24 July 2020.

Prime Minister of India unveils "Transparent Taxation - Honouring the Honest" platform

Background

- The Indian tax administration has evolved over a period by embracing latest technology to simplify various tax compliances and improve internal administration.

- The CBDT made the filing of various returns and forms by taxpayers in electronic mode over a period starting from 2006 and processing of returns through centralized processing centers from 2011. As a next step, the CBDT started experimenting with electronic compliance verification process from 2015 starting with e-mail interaction with jurisdictional tax authority and thereafter through an electronic platform known as 'Income-tax Business Application Module' in 2017. While correspondence was through electronic means, the interaction was still with jurisdictional tax authority without any anonymity.

- The Finance Act 2018 introduced statutory provisions in the ITL empowering the Central Government to notify scheme for electronic assessment so as to impart

greater efficiency, transparency and accountability by:

a) Eliminating the interface between the Tax Authority and the taxpayer to the extent technologically feasible.
b) Optimizing utilization of the resources through economies of scale and functional specialization.
c) Introducing a team-based assessment with dynamic jurisdiction.

- Accordingly, an electronic assessment scheme was launched in 2019 for automation of various proceedings of assessment under the ITL. Further, Finance Act 2020 also introduced provision for enabling the Central Government for framing a scheme of conducting faceless appeal proceedings before the First Appellate Authority so as to impart greater efficiency, transparency and accountability.

- As per Finance Ministry's Press Release dated 4 August 2020, 58,319 cases across 8 cities were selected for faceless assessment in the first cycle out of which 8,700 cases were disposed.

- Finance Act 2020 introduced another provision empowering the CBDT to adopt and declare a Taxpayer's Charter (TC). The intent of introducing TC as expressed by the Finance Minister in her Budget Speech was to bring in fairness and efficiency in the tax administration and also to free the citizens from harassment of any kind.

- It may be noted that on the income tax website, a "Citizen's Charter" was published on 29 April 2014 which briefly provides the mission and vision of tax department and what it expects from the taxpayers, including their rights. This Charter was issued as a good governance practice although without formal statutory basis.

- With the statutory basis for faceless assessment and TC in place and a successful trial run of faceless assessment, the Prime Minister formally launched "Transparent Taxation – Honouring the Honest" platform on 13 August 2020, which will incorporate below:

  - Faceless assessment;
  - Faceless appeal; and
  - Taxpayers' Charter

Faceless Assessment: Pursuant to formal dedication of the new platform to the nation, the CBDT has issued certain directions and amendments to e-assessment scheme.

Faceless appeals: Faceless Appeals will be launched on 25 September 2020 and hence the details of the same are awaited.

Taxpayers' Charter: The TC unveiled by the PM on 13 August 2020, provides for various rights and obligations of taxpayers.

- As part of taxpayer's rights, the obligations of Tax Authority, inter alia, include the following:

  - Providing fair, courteous and reasonable treatment while dealing with the income tax matters.
  - Treating the taxpayer to be an honest taxpayer.
  - Provision of complete and accurate information to the taxpayer and also complete the income tax proceedings within the time frame prescribed.
  - Only the correct dues to be collected as per law.
  - Protect and respect the privacy of taxpayer and maintain confidentiality of information provided, unless authorized by the law.
  - Hold the tax authorities accountable for their actions.
  - Enable to choose a representative of taxpayer's choice and ease for lodging complaints and resolution in a time-bound manner.
  - Efficient management of tax issues by publishing standards for service delivery periodically.

- On the other hand, taxpayers' duties inter-alia include:
  - Taxpayer to be honest, compliant, and be informed.
  - Taxpayer should maintain accurate records required under law and be aware about the information given by the representative on his/her behalf.
  - Taxpayer should adhere to timely submission of information required under the law and also pay all his/her dues in a time-bound manner.
- Taxpayers can approach the TC Cell under Principal Chief Commissioner of Income tax in each Zone for compliance to this Charter.

CBDT issued guidelines for Tax Authority for effective implementation of Faceless Assessment Scheme 2019

Extending faceless assessment proceedings to ongoing proceedings except for two types of proceedings

- CBDT has made certain modifications in scope and procedure of the Scheme. Amongst other modifications, the Scheme will now include best judgement assessments and ongoing regular/ reassessment proceedings under its purview.
- CBDT has also issued an order, with effect from 13 August 2020, directing that all assessment orders are to be mandatorily passed only under the Scheme except in:
  a) Cases assigned to Central Charges; or
  b) Cases assigned to International Tax Charges.
- Any assessment order passed on or after 13 August 2020 outside the Scheme (except for two exceptions as stated above) is to be treated as non-est and deemed to have never been passed.

Centralization of powers for conducting survey proceedings

- The ITL authorizes the jurisdictional Tax Authority to conduct survey proceedings at the business premises of the taxpayer or its other place of business to inspect books of accounts, verify cash, stock and other valuable articles or for such other purposes as required under the ITL.
- The CBDT recognizes that these powers, being very wide and intrusive in nature, should be invoked with utmost responsibility and accountability.
- In a significant move, the CBDT, vide order dated 13 August 2020, withdraws the power to conduct survey proceedings from the jurisdictional Tax Authority and confers 'only and exclusive authority' to conduct survey by the specified Tax Authority.

Functions of Tax Authority under the Scheme:

- National e-assessment Centre (NeAC) and various Regional e-assessment Centres (ReAC) are responsible for smooth functioning of proceedings under the Scheme.
- All functions performed under the Scheme are necessarily through electronic means. NeAC will be the sole gateway for all such functions and flow of information with taxpayer and also within different units under the Scheme.
- All communications from Tax Department and taxpayer/third party will be in the name of NeAC only. No ReAC or its units will have any direct communication with the taxpayer/third party in any manner.
- The functions of each unit established under the Scheme will be detailed out separately by NeAC with consultation of CBDT. However, broadly the following functions are enlisted for different units:

- **Assessment Unit (AU):** To carry on regular assessment/best judgement assessment/reassessment functions
- **Verification Unit (VU):** To undertake verification related functions in relation to above assessments as also verification related to centralised dissemination of information
- **Review Unit (RU):** To review of draft assessment orders prepared by AU
- **Technical Unit (TU):** To provide technical support to AU

Key Regulatory amendments

This section summarizes the regulatory updates for the month of August 2020

Reserve Bank of India ('RBI') amends Foreign Exchange Management (Export and Import of Currency) Regulations, 2015 ('FEMA 6R')

- In terms of the extant provisions of FEMA 6R, a person is allowed to send out of India to any country and bring into India from any country the currency notes of Government of India and /or of RBI subject to prescribed thresholds and in compliance with certain conditions.

- As per the amended FEMA 6R, RBI is empowered to permit (upon an application being made by any person resident in India and/or person resident outside India) to send out of India and bring into India the currency notes of Government of India and /or of RBI in cases wherein the prescribed thresholds and conditions stipulated under FEMA 6R are not met.

  Source: Foreign Exchange Management (Export and Import of Currency) (Amendment) Regulations dated 11 August 2020

RBI empowered to administer Foreign Exchange Management (Non-Debt Instruments) Rules, 2019 ('NDI Rules')

- The Ministry of Finance ('MoF'), Department of Economic Affairs ('DEA') has amended the NDI Rules and the key highlights of the amendment are as follows: In terms of the erstwhile NDI Rules, the Central Government was the authority for administering the NDI Rules.

  As per the amended rules, RBI has been empowered to administer the NDI Rules and interpret and issue such directions, circulars, instructions, clarifications, as it may deem necessary, for effective implementation of the NDI Rules.

- Further, in terms of the erstwhile NDI Rules, the RBI was required to consult the Central Government for approving investments in India by persons resident outside India which are not specifically permitted under Foreign Exchange Management Act, 1999 (FEMA) or rules and regulations made thereunder. The amended NDI Rules have done away the requirement of consulting the Central Government and the RBI is solely empowered to approve such investments in India

Source: Foreign Exchange Management (Non-Debt Instruments) (Third Amendment) Rules, 2020 dated 27 July 2020

Part B – Case Laws

Goods and Services Tax

1. M/s Material Recycling Association of India [2020-VIL-341-GUJ]

Subject Matter: Ruling wherein the petitioner challenged the constitutional validity of Section 13(8)(b) of the IGST Act, 2017 as the same as ultra vires under Articles 14, 19, 265 and 286 of the Constitution of India.

Background and Facts of the case

- The petitioner is an association comprising of recycling industry engaged in manufacture of metals and casting etc., for various upstream industries in India. The members of the petitioner also act as:

  - agents, for scrape, recycling companies based outside India engaged in providing business promotion and marketing services for principals located outside India;

  - facilitator, for sale of recycled scrap goods for their foreign principals in India and other countries

- The members of the petitioner association not only deal with goods sold by foreign principals to customers in India but also facilitate sale of goods by foreign principals in non- taxable territory to their customers, who are also located in non-taxable territories and receives commission upon receipt of sale proceeds by its foreign client in convertible foreign exchange.

- Basis the above facts, the petitioner has in the present case framed a question before the Hon'ble High Court that whether the service rendered by the members of the petitioner association is an intermediary service or export of service.

- Further, the petitioner specifically challenged the vires of the Section 13(8)(b) read with Section 8(1) of the Integrated Goods and Services Tax Act, 2017, on the following accounts:

  - Section 13(8)(b) of the IGST, 2017 is violative of Article 14 of the Constitution of India as it renders differential treatment when services supplied within territory of India and when supplied outside the territory of India.

  - Parliament has been authorized to formulate the principles for determining when a supply is deemed to have been undertaken outside the territory of the State or when it has been undertaken in the course of import/export of such goods for services and has not been empowered to determine the "place of supply". That the power vested with the parliament is confined by the scope of clause 1 of Article 286 and the parliament is not authorized to legislate and artificially assign the place of supply to be within India when clearly the services are being exported out of India.

  - Transaction of providing intermediary services would be subject to tax in the country where the recipient is located as it would be an import of service for such recipient. That the transaction would suffer GST in India and tax in the country outside India where the recipient of service is located which would result in transaction being subjected to double taxation.

Discussion and findings of the case

- The Hon'ble High Court has while reviewing the vires of the Section 13(8)(b) of the IGST Act, specifically noted that the person who is intermediary cannot be considered as

exporter of services because he is only a broker who arranges and facilitate the supply of goods or services or both.

- The basic logic or inception of section 13(8)(b) of the IGST Act,2017 considering the place of supply in case of intermediary to be the location of supplier of service is in order to levy CGST and SGST and such intermediary service therefore, would be out of the purview of IGST.

- There is no distinction between the intermediary services provided by a person in India or outside India. Only because, the invoices are raised on the person outside India with regard to the commission and foreign exchange is received in India, it would not qualify to be export of services, more particularly when the legislature has thought it fit to consider the place of supply of services as place of person who provides such service in India.

- There is no deeming provision as canvassed by the petitioner, there is stipulation by the Act legislated by the parliament to consider the location of the service provider of intermediary to be place of supply.

- The contention of the petitioner that it would amount to double taxation is also not tenable in eyes of law because the services provided by the petitioner as intermediary would not be taxable in the hands of the recipient of such service, but on the contrary a commission paid by the recipient of service outside India would be entitled to get deduction of such payment of commission by way of expenses and therefore, it would not be a case of double taxation.

Ruling

- Basis the above, the High Court rejected the contentions of the petitioner and specifically ruled that the provision of Section 13(8)(b) read with Section 2(13) of the IGST Act, 2017 are not ultra vires or unconstitutional in any manner, thus service provided by intermediary in India cannot be treated as "export of services" under the IGST Act, 2017.

2. M/s. Bharat Oman Refineries Ltd. [2020-VIL-397-GUJ]

Subject Matter: Gujarat High Court judgement on Refund of IGST paid under reverse charge on Ocean Freight

Background and Facts of the case

- A Writ petition was filed by Mohit Minerals Pvt. Ltd. with respect to levy of IGST under reverse charge on Ocean Freight in case of purchases made on CIF basis.

- Writ Applicant referred the Entry no. 9 of Notification No.8 of 2017 – Integrated Tax (Rate) dated 28th June 2017, specifies the levy of IGST at the rate of 5% on the service of transport of goods in a vessel including the services provided or agreed to be provided by a person located in a non-taxable territory to a person located in a non-taxable territory by way of transportation of goods by a vessel from a place outside India up to the customs stations of clearance in India.

- Further, as Per Entry no. 10 of Notification No.10 of 2017 – Integrated Tax (Rate) dated 28th June 2017, the importer as defined in clause 2(26) of the Customs Act located in the taxable territory shall be the person liable to pay tax under reverse charge on above service.

- Section 14 of the Customs Act, 1962 read with the Customs Valuation Rules provides

that the custom duty is payable on the CIF value of imported goods and hence, the levy of integrated tax again on the Ocean Freight under the impugned Notifications amounts to double taxation

- In view thereof, the writ-applicant challenges the legality and validity of the impugned Notification No.8/2017-Integrated Tax (Rate), dated 28.06.2017 and Entry 10 of the Notification No.10/2017-Integrated Tax (Rate), dated 28.06.2017 as the same are lacking legislative competency, ultra vires to the Integrated Goods and Services Tax Act, 2017.

Discussions and findings of the case

- In case of purchases made on CIF basis, the freight invoice is issued by the foreign shipping line to the foreign exporter, the writ-applicant neither has any invoice of such freight and nor has any idea of payments and the amount of such freight.

- In a case of CIF contract, the contract for transportation is entered into by the seller, i.e. the foreign exporter, and not the buyer, i.e. the importer, and the importer is not the recipient of the service of transportation of the goods.

- The writ-applicant cannot be made liable to pay tax on some supposed theory that the importer is directly or indirectly recipient of the service. The term 'recipient' has to be read in the sense in which it has been defined under the Act.

- Thus, the impugned Notification No.8/2017 – Integrated Tax (Rate) dated 28.06.2017 and the Entry 10 of the Notification No.10/2017 – Integrated Tax (Rate) dated 28.06.2017 are declared as ultra vires the Integrated Goods and Services Tax Act, 2017, as they lack legislative competency.

Ruling

- The effect of this judgement is that no IGST should be levied on ocean freight on reverse charge basis, if the imports are made under CIF contract, as the overseas supplier of goods is the receiver of the transportation service.

- In reference to the decision in the case of M/s. Mohit Minerals Pvt. Ltd. in the trailing mail, a similar decision pronounced by the Hon'ble Gujarat High Court in the case of M/s. Bharat Oman Refineries Ltd. ("applicant").

- The issue raised in the writ application by the applicant was squarely covered by the decision in the case of M/s. Mohit Minerals Pvt. Ltd. whereby the Hon'ble Gujarat High court declared Notification No.8/2017-Integrated Tax (Rate) and the Entry No.10 of the Notification No.10/2017-Integrated Tax as ultra vires the Integrated Goods and Services Tax Act, 2017 on the ground that the same lacked legislative competency. Both the Notifications referred above were declared to be unconstitutional. Therefore, by virtue of the said judgment, imposition of IGST under reverse chare in case of ocean freight was held unconstitutional.

- In view of the above, the writ application was allowed and issue was decided in favour of the applicant. Additionally, the Court also directed the respondents to sanction the refund and pay the requisite amount of IGST already paid by the writ applicant pursuant to the Entry No.10 of Notification No.10/2017-IGST which was declared to be ultra vires.

- Further, specific directions have been given to the respondents to undertake the process of refunding the requisite amount of IGST at the earliest and ensure that the same is paid to the writ applicant within a period of six weeks from the date of receipt of the writ of this order.

- The above decision supplements the decision in the case of M/s. Mohit Minerals and clearly provides that since the relevant provisions above have been declared as unconstitutional, the tax was wrongly collected and therefore, refund of such tax should be paid to the applicant.

3. M/s VKC Footsteps India Private Limited Versus Union of India & 2 other(s) [C/SCA/2792/2019]

Subject Matter: Judgement pronounced by the Hon'ble High Court of Gujarat involving the matter for refund of ITC pertaining to input services under the inverted duty structure.

Background and Facts of the case

- Petitioner is engaged in the business of manufacture and supply of footwear which attracts GST at the rate of 5%. Whereas, the Petitioner procures input services and inputs which attracts GST at the rate of 12% or 18%. Accordingly, the GST rate paid by the Petitioner on procurement of inputs is higher than the rate of tax payable on their outward supply of footwear.

- As a result, there is accumulation of unutilized ITC in the electronic credit ledger of the Petitioner.

- Petitioner intends to claim the refund of entire unutilized ITC accumulated under inverted duty structure. However, in terms of explanation (a) to Rule 89(5) of the CGST Rules, the respondent is allowed the refund of ITC only to the extent of inputs and not the input services.

- In view of the above, the Petitioner filed the writ petition before the Hon'ble High Court of Gujarat to quash the said explanation contained in Rule 89(5) of the CGST Rules, 2017 and allow the refund of entire unutilized ITC (i.e. on inputs and input services) under the inverted duty structure.

Key submissions by the Petitioner

- GST law provides for refund of unutilised input tax credit ("ITC") under the provisions of Section 54(3) of the CGST Act, 2017. Sub clause (ii) of the proviso to Section 54(3) negates the claim of refund of unutilised ITC other than where the credit has accumulated on account of rate of tax on inputs being higher than the rate of the tax on the output supplies (i.e., "inverted duty structure"), except the supplies of the goods or services or both as may be notified by the Government on the recommendations of the GST council.

- The main Section 54(3) categorically provides that a person may claim refund of 'any unutilised input tax credit'. Further, the expression 'input tax credit' as defined under Section 2(63) means credit of input tax. Where, the expression 'input tax' as specifically defined under Section 2(62) means the tax charged on any supply of "goods or services or both" made to a registered person. Therefore, it is evident that Section 54(3), allows the refund of unutilised ITC pertaining to both inputs and input services, and does not limit the refund of tax paid on inputs only.

- Rule 89(5) of the CGST Rules, 2017 provides the formula for determining the refund of the unutilised input tax credit on account of inverted duty structure. Further, explanation (a) to the said Rule 89(5) has restricted the refund to input tax credit on inputs by defining “NET ITC” to mean input tax credit availed on inputs. Relevant extract of the Rule 89(5) has been reproduced in the judgement.

- The Explanation (a) to Rule 89(5) has narrowed down Section 54(3) by employing the expression “input tax credit availed on inputs” in Rule 89(5). Thus, Rule 89(5) has the effect of granting refund only on inputs and not on input services. Hence, Explanation (a) to Rule 89(5) to the extent it confines refund of input tax credit only to 'inputs’ and ignores the ‘input services’, is ultra vires Section 54(3).

- It is well settled that when an expression employed in the body of the Act is defined in the Act, that definition will apply whenever the expression is employed in the body of the Act, therefore, the expression ‘input tax credit’ appearing in main Section 54(3) would include both i.e., credit on inputs and input services as well.

- There is no reference/or provision in entire Section 54(3) enabling the Central Government/ Executive to frame / enact Rule in this regard. It was submitted that this is unlike numerous other sections in the CGST Act, which expressly employ the word "prescribed”. In other words, in the context of Section 54(3), any exercise of any power by Rule making authority to frame Rule in this regard is entirely unnecessary and unwarranted. Hence, Rule 89(5) of the CGST Rules,2017 and explanation (a) thereto, is ultra vires to that extent.

- The need and the rationale for the formula contained in Rule 89(5) in considering turnover of inverted duty structure goods vis-a-vis total turnover is understandable and reasonable, however, Rule 89(5) in the garb of fixing formula for determining pro-rata amount of credit relatable to inverted duty structure turnover vis-a-vis total turnover, has restricted the refund to input tax credit on inputs and by denying input tax credit on input services by defining ‘Net ITC’ to mean input tax credit availed on inputs only which consequently ignores/overlooks input tax credit relatable to input services.

- It is well settled law that Rule made by executive cannot curtail or whittle down the provisions of the Act. It was further submitted that explanation (a) to Rule 89(5) which confines refund to ‘input credit’ to the exclusion of ‘input service credit’ also whittles down the effect of the word “any" in the phrase ‘any unutilised input tax credit' employed in Section 54(3) as the word ‘any’ in the phrase 'any unutilised input tax credit’ employed in Section 54(3) would obviously mean "all" input tax credit including input services. The word “any” was further discussed in detail in the case of Shri Balaganeshan Metals Vs. M.N. Shanmugham Chetty [(1987) 2 SCC 707].

- Section 164(1) of the CGST Act confers a general rule making power on the government. Thus, the government can make rules only for the purpose of carrying out the provisions of the Act. However, Rule 89(5) restricts the refund to input tax credit on inputs alone and denies in respect of input services. Therefore, such a rule is not for the purpose of carrying out the provisions of the Act but for the purpose of restricting the provision of the Act namely Section 54(3) which provides credit of any unutilised input tax credit and as such explanation (a) to the Rule 89(5) cannot

be sustained even under general rule making power conferred by Section 164(1).

- It is well settled that if a provision is ultra vires, the court in an appropriate case can strike down the offending portion keeping intact the valid portions of the provision. Therefore, if the expression "on inputs" used in the definition of "Net ITC" employed in Explanation (a) to Rule 8(5) is struck down, it will be entirely in line with the main provision viz. Section 54(3). Hence, the offending words in the Explanation i.e. "on inputs" are easily severable and liable to be stuck down to bring the Explanation (a) in accordance with main section 54(3) read with proviso (ii) thereto.

- Granting refund of input tax credit on inputs and denying refund in respect of input services is also violative of Article 14 of the Constitution of India since it is manifestly arbitrary and irrational.

- By referring to the statement of objects and reasons of the CGST Bill, 2017, the Petitioner submitted that the basic object of the GST Act was to streamline indirect tax structure earlier prevailing in India so as to levy tax on intra-state supply of goods and interstate supply of goods and other objectives, therefore, it was submitted that Rule 89(5) prescribing the formula for calculation of refund on account of inverted duty structure is contrary to sub-section 3 of Section 54 of the GST Act rendering in contradictory to the basic scheme and object of the GST Act. Reliance was placed on the case of Printers Mysore Limited and Anr. Vs. Asst. CTO and Ors. [(1994) 2 SCC 434] wherein it was held that the object of the GST Act is not to create burden, which was not there but to remove burden, if any already existing in the prevailing tax structure.

Key submissions by the Revenue

- Proceedings are not maintainable as Rule 89(5) of the CGST Rules only provides the mode of calculation of refund and the same is not contrary to Section 54(3) of the CGST Act.

- The Rule making power conferred under Section 164 upon the government is in the widest possible manner to make rules for carrying out the provisions of the CGST Act.

- Section 164(2) empowers the Government without prejudice to the generality of the provision of sub-section (1) to make rules for all or any of the matters which by CGST Act,2017 are required to be, or may be, prescribed or in respect of which provisions are to be or may be made by the Rules and Section 164(3) empowers the Government to have retrospective effect of such rules. It was therefore, submitted that the Government has framed the CGST Rules, 2017 in exercise of this rule making power conferred under Section 164 of the CGST Act. In such circumstances, it was submitted that the Rule 89(5) cannot be held to be ultra vires as it only provides the method of calculating the refund on account of inverted duty structure.

- Reliance was placed on the case of Willowwood Chemicals Pvt. Ltd. Vs. UOI [SCA No. 4252 of 2018] wherein the rule making powers of the Government was deliberated and discussed.

Discussions and findings of the case

- While deciding the matter of the petitioner, the Hon'ble High Court gave due adherence to the first discussion paper on GST, the International VAT / GST guidelines (specifically Chapter 19), the relevant provisions of CGST Act/ Rules, the Circular no. 79/53/2018 – GST, the FAQ's on GST

issued by the Board and the relevant precedents pronounced from time to time. Basis such information, the Hon'ble High Court observed as in the following paragraphs.

- The Rule 89(5) of CGST Rules and more particularly explanation (a) to Rule 89(5), provides that Net ITC shall mean ITC availed on inputs during the relevant period other than the ITC availed for which refund is claimed under sub-rule (4A) or (4B) or both. Whereas, vide Section 54(3) of the CGST Act, the legislature has provided that the registered person may claim refund of "any" unutilised ITC. Further, as per Section 2 of CGST Act, "Input" and "Input services" (i.e. "goods" and "services") both are part of the definition of "input tax credit" and "input tax". Therefore, the provisions of Rule 89(5) are in violation to the provisions of Section 54(3).

- Further, the framing of Rule 89(5) to restrict the statutory provision of Section 54(3) cannot be the intention of government as interpreted in the Circular No. 79/ 53/2018-GST, so as to deny the registered person refund of tax paid on "input services' as part of refund of unutilised ITC.

- Therefore, the said explanation (a) to Rule 89(5) which denies the refund of ITC of "input services" accumulated on account of inverted duty structure is ultra vires the Section 54(3) and thus liable to be struck down. Reliance was placed on the case of Intercontinental Consultants & Technocrafts Pvt. Ltd. Vs. Union Bank of India [(2013) 29 STR (Del.)] wherein it was held that Rule which goes beyond the structure is ultra-vires and thus liable to be struck down. Further, the Supreme Court in the case of Lohara Steel Industries Ltd. Vs. State of A.P. [(1997) 2 SCC 37] held that the offending portion which is severable can be struck down.

Ruling

- Given the above, the explanation (a) to the Rule 89(5) is read down to the extent that explanation (a) would define Net ITC as "input tax credit" only, such that Net ITC would cover the ITC availed on both "inputs" and "input services" and would become in line with the provisions of Section 54(3)

- It was held that Net ITC should mean "input tax credit" availed on "inputs" and "input services" as defined under the Act.

4. M/s Volvo-Eicher Commercial Vehicles Ltd [Order no. KAR/AAAR-14-B/2019-20]

Subject Matter: Whether the activities performed by the Appellant with regard to repair and servicing of Volvo vehicles for Indian customers during the warranty period, for which the reimbursements are made by M/s Volvo Sweden pursuant to the arrangement between M/s Volvo Sweden and the Appellant, is an activity amounting to a supply of service for Volvo Sweden and consequently whether the same is a zero-rated supply.

Background and Facts of the case

- The Appellant is in the business of selling Volvo branded trucks and thereafter providing after sales support services, including warranty services for Volvo branded trucks and buses in India.

- The Appellant sells its products with a standard warranty of 1 to 2 years, the cost of which is included in the cost of sale of products. The Appellant is responsible for the

servicing of warranty claims of its customers and the onus to reimburse such expenses incurred for discharging the warranty obligation lies with M/s Volvo Sweden.

- The Appellant invoices Volvo Sweden for claiming the amount spent on discharging such warranty obligations. The reimbursement sought includes the cost of replaced product and the services provided including fixing of the parts, for the purposes of replacing the goods.

Discussions and findings of the case

- In this regard, the lower Authority (i.e. Karnataka AAR) has held that there is a supply of parts and services to the customers for a consideration which amounts to a supply transaction with the Appellant being the supplier and the customer being the recipient of services and that the applicant is providing composite supply of goods and services to the customers wherein the principal supply is that of goods or services depending on the nature of individual case.

- In order to counter the above view of Karnataka AAR, the appellant made the following necessary submissions before AAAR:

- Per Para 8.3 of the ruling – *"If during the warranty period, any part is found to be defective and is to be replaced, the responsibility of replacement is on the manufacturer. Thus, the activities undertaken by the dealer during the warranty period is for meeting the obligations of the manufacturer and is therefore a supply made to the manufacturer, even though beneficiary may be the customer / buyer of the vehicles."*

- Per Para 8.4 of the ruling – *"… the transaction relates to supply of services of warranty from the Appellant to M/s Volvo Sweden with the customers located in India who are the beneficiaries; that the recipient of the supply in the present transaction is Volvo Sweden and not the customer. The Appellant either provides warranty services and/or also provides to replace defective parts if it is found to be provided for under the warranty obligation. However, in no case is there a mere transfer of goods without any service being provided under the warranty obligation. Hence, they submitted that the transaction is primarily a supply of service."*

Ruling

- The order of lower authority is set aside by Karnataka AAAR in view of its findings as per Para 20 of the ruling, reproduced below:

"20. A reading of the definitions given in Section 2(93) and 2(31) of the CGST Act, indicates that the person who is required to make a payment for getting a job done is the recipient of service. To illustrate, if a manufacturer A is under obligation to provide free repair service during a specified warranty period to his customers in respect of some goods sold to them and he engages B to provide the services of free repairs during warranty period to his customers C1, C2, C3 ……..., and for this he pays to B, the recipients of the service provided by B would be A, not the customers C1, C2, C3 ……

- *Accordingly, the recipients of the service supplied by the Appellant during the warranty period, will be the manufacturer Volvo Sweden as it is at their behest that the Appellant has undertaken the activity of repair and/or replacement of parts to the customer during the warranty period.*

- *The reimbursement received from Volvo Sweden is in the nature of consideration paid by the manufacturer to the Distributor-Appellant for carrying out the service during the warranty period, which activity was part of the obligations of Volvo Sweden*

Part B – Case Laws

Direct Tax

1. Shree Choudhary Transport Co.

Subject matter: Supreme court upholds disallowance of expenditure on non-withholding of taxes, without accepting retrospective application of amendment granting benefit of 30% disallowance.

Background

- The ITL imposes a statutory WHT obligation on a person making payments for any specified work carried out pursuant to a "contract", provided the specified threshold is exceeded.

- In order to augment the compliance of the WHT provisions, Finance (No. 2) Act, 2004 introduced a provision (w.e.f. 1 April 2005) into the ITL providing for disallowance of expenses "payable", on which tax is deductible at source but such tax has not been deducted or, after deduction, has not been paid within the tax year [Disallowance Provision]. However, deduction of such expenses is permitted in the subsequent year in which a taxpayer complies with the WHT provisions and pays tax to the Government of India.

- Use of the expression "payable" in the Disallowance Provision gave rise to an issue of whether the disallowance applies only in respect of expenses remaining "payable" as on the last day of the tax year or whether it is also applicable in respect of expenses "paid" during the tax year without withholding taxes thereon.

- In this respect, in order to mitigate hardship caused by the above disallowance, the Disallowance Provision was retrospectively amended vide Finance Act (FA) 2008 to permit the claim of deduction of expenses in case where the tax withheld was remitted prior to the due date of filing the return of income (ROI), as long as the payment pertained to tax to be withheld in the month of March of the respective tax year [2008 Amendment]. Subsequently, the provision was further amended vide FA 2010 to extend the above benefit even with respect to tax to be withheld in all months of the tax year [2010 Amendment].

- Further, vide Finance (No. 2) Act, 2014, the amount to be disallowed on account of non-withholding of taxes was reduced to 30% of the actual sum on which tax was to be withheld [2014 Amendment].

Facts

- The Taxpayer, a partnership firm, had entered into a contract (say with A Co) for transportation of cement for tax year 2004-05. A Co withheld appropriate taxes while making payment to the Taxpayer.

- As per the terms of the agreement between the Taxpayer and A Co, in case the Taxpayer failed to provide trucks for transportation, A Co. was free to hire trucks from market at prevailing prices and the amount of expenses incurred, if any, was to be debited to the Taxpayer's account terming the Taxpayer to be the transporter.

- The Taxpayer did not own any trucks of its own and engaged the services of various truck operators for such transportation and paid to the truck operators the consideration received from A Co, after deducting freight and commission charges.

- The Tax Authority observed that in respect of certain payments to truck operators, while the individual invoice exceeded the threshold limit of INR 20,000, cash book consecutive entries showed that the payments were split into more than one payment of an amount around INR 10,000

per entry though, aggregating above INR 20,000 per day. However, no taxes were withheld by the Taxpayer on the ground that no single payment exceeded the threshold limit of INR 20,000.

- The Tax Authority rejected the contentions of the Taxpayer and held that merely splitting payments does not absolve the Taxpayer from complying with the WHT requirements of the ITL. Further, it was observed that the Goods Receipt for transportation amounted to a contract and since payments to different truck operators/owners were made directly by the Taxpayer, who had privity, WHT provisions were applicable. Consequently, the expenses were disallowed by the Tax Authority, which was confirmed by the First Appellate Authority, the Tribunal as well as the Rajasthan High Court.

- Aggrieved, the Taxpayer filed an appeal with the SC.

Issues before the SC

- Whether a written contract is necessary to trigger withholding for work carried out pursuant to a contract?

- Whether disallowance of expenses for failure to withhold taxes under the ITL is applicable only in respect of expenses which remain "payable" or it also covers expenses actually "paid" during the year without withholding of taxes?

- Whether the amendment to the disallowance provision vide Finance (No. 2) Act, 2014 restricting the amount of disallowance to 30% of the amount on which tax is to be withheld is retrospective in nature?

Taxpayer's contentions

The Taxpayer contended that there was no liability to withhold taxes on payment made to truck owners on the following grounds:

- There was no oral or written contract with the truck owners who were hired on a need basis. Further, the Taxpayer was a mere facilitator or intermediary in the process of transportation of goods and, thus, had no liability to withhold taxes.

- As per the provisions of the ITL, disallowance for non-withholding of taxes would be applicable only to expenses that are "payable" and not applicable to expenses that are already "paid".

- The SC decision in the case of Palam Gas Service, which held that the word "payable" also includes amount actually paid, needs reconsideration as:

  (a) The Disallowance Provision has to be strictly construed as per the language used and there is no scope for adopting the so-called purposive construction;

  (b) The change of words used in the Finance Bill "credited or paid" to the word "payable" at the time of its enactment has been ignored;

  (c) The fact that the Disallowance Provision, in permitting claim of expenditure in subsequent years on compliance with the WHT requirement, uses the term "paid" makes it clear that the intent of the main provision in using the term "payable" is only to disallow the outstanding or payable amounts;

- The Disallowance Provision which was introduced w.e.f. 1 April 2005 and had received Presidential assent on 10 September 2004 cannot be applied retrospectively in the present case. Reliance was placed on the Calcutta High

Court decision in the case of PIU Gosh which had held that giving the Disallowance Provision a retrospective effect (from tax year 2004-05) would tantamount to punishing an assessee for no fault of his/her since the provision was introduced in the middle of the tax year (i.e. on receiving Presidential assent on 10 September 2004) and the Taxpayer could not have foreseen prior to such date that non-withholding would trigger disallowance of claim of expenditure. Further, the HC held that the legislature, being conscious of such consequence had intentionally introduced the provision w.e.f. 1 April 2005.

- Alternatively, the 2014 Amendment, restricting and limiting the extent of disallowance to 30% was retrospective and, hence, disallowance in the instant case should be restricted to such extent.

- Reliance in this regard was placed on the SC ruling in the case of Calcutta Export Company which observed that the 2010 Amendment, similar to the 2008 Amendment which was given retrospective application by the legislature, was inserted to remedy unintended consequences and to make the provision workable. Accordingly, the SC affirmed that the 2010 Amendment, being curative in nature should be applicable retrospectively.

SC's Ruling

<u>On applicability of withholding provisions</u>

- The responsibility to transport cement was on the Taxpayer and there was no privity of contract between the truck owners and A Co. Further, hiring the services of truck operators/owners for the said purpose could have only been under a contract and whether such the contract was in writing or not held no relevance.

- The fact that the truck operators/owners were not bound to supply the trucks or that the freight payable was not pre-determined is of no importance. Where a particular truck was not engaged, there existed no contract but, when any truck was engaged for the purpose of execution of the work undertaken by the Taxpayer and freight charges were paid, all the essentials of making of a contract existed.

- In the instant case, the privity was between the Taxpayer and the truck owner and not with the consignor, i.e. A Co. Further, it is immaterial whether the Taxpayer had specific and identified trucks or had been picking them up on freelance basis since the legal effect on the status of parties will remain the same.

<u>On disallowance of expenses</u>

- The main objective behind the introduction of the Disallowance Provision was to ensure strict and punctual compliance with tax withholding requirements under the ITL.

- The SC placed reliance on various High Court rulings as approved by the SC in Palam Gas Services (supra) which held as below:

    - The liability to withhold tax under the ITL is mandatory and any person who does not adhere to this statutory obligation has to suffer the consequences which are stipulated under the ITL;

    - On a holistic analysis of the entire scheme of tax withholding provisions, it cannot be held that the word "payable" occurring in the Disallowance Provision refers to only those cases where the amount is yet to be paid and does not cover the cases where the amount is actually paid;

- The term "payable" is descriptive of the payments which attract the liability for deducting tax at source and has not been used to specify any particular class of default on the basis of whether payment has been made or not;

- Accordingly, the decision of Palam Gas Services (supra) is squarely applicable in the present case and, hence, the contention that the expression “payable” be read in contradistinction to the expression “paid” is without merit.

- Further, in the absence of any decision of a larger bench of the SC or statutory provision espousing the contrary view, the SC ruling in Palam Gas Services (supra) does not necessitate reconsideration.

Date of applicability of Disallowance Provision

- It is a settled law that for income tax matters the law to be applied is the law in force on the first day of relevant assessment year (AY) unless otherwise stated or implied. Thus, when the legislature consciously stated that the provision is to be effective from 1 April 2005, it means AY 2005-06 (i.e. tax year 2004-05). If the view that the Disallowance Provision is applicable only from tax year 2005-06 is upheld, it would result in the provision being applicable only AY 2006-07. Such a result is neither envisaged nor could be countenanced.

- While the presidential assent was received on 10 September 2004, the WHT provisions were part of the statute even prior to the introduction of the Disallowance Provision. It is not right to suggest that only when one is made aware of such drastic consequences of disallowance, he/she would have honoured withholding requirements.

- Separately, the Calcutta HC decision in the case of PIU Gosh failed to observe that even though the provision first formed part of the statute on 10 September 2004, the disallowance with respect to tax withholding defaults prior to such date could be rectified by depositing the amount of tax prior to the ROI filing due date as held by the SC in the case of Calcutta Export Company (supra).

- In contrast, the approach of the Taxpayer avoiding its obligation and suggesting that it had no WHT liability, when standing at conflict with law, would inevitably trigger the consequence of disallowance.

- There is no prejudice to the Taxpayer since what has been disallowed is that amount on which the Taxpayer had failed to withhold taxes and not the entire amount received from the company (A Co) or paid to the truck operators/owners.

On retrospectivity of 2014 Amendment restricting disallowance to 30% of amount on which tax was to be withheld

- The 2014 Amendment was specifically made applicable w.e.f. 1 April 2015 and clearly represented the will of the legislature as to what is to be deducted or what percentage of deduction is not to be allowed for a particular eventuality, from AY 2015-16. Such amendment could not be stretched anterior to the date of its introduction so as to reach the AY 2005-06.

- The SC ruling in the case of Calcutta Export Company (supra) was distinguishable since it was with respect to the 2010 Amendment, which was introduced to provide relief to a bonafide assessee faced with the procedural hardship of being unable to deposit tax withheld within prescribed time.

- As against the above, the Taxpayer, in the instant case, was either under the mistaken impression that no WHT was required or under the mistaken belief that the methodology of splitting a single payment into parts below the threshold of INR 20,000 would provide him escape from the rigor of the Disallowance Provision. The Taxpayer was, hence, not a bonafide assessee who would have made the deduction and deposited it subsequently.

- Accordingly, entire amount on which taxes were not withheld are subject to disallowance.

2. Tax Authority concedes before High Court that no payment of Equalisation Levy in the presence of a Permanent Establishment

Background

- The Finance Act (FA) 2020 amended the scope of Equalisation Levy with effect from 1 April 2020 to cover consideration received by non-resident (NR) e-commerce operators for E-Commerce Supply or Services provided to specified persons subject to certain conditions and exclusions.

- One such exclusion provided in S. 165A (2) of the Finance Act 2016 pertains to a case where a NR has a PE in India and the E-commerce supply or services are effectively connected with such PE. In other words, if an NR has a PE in India and consideration received for e-commerce supply and services is effectively connected to such PE then ESS EL shall not be applicable.

- ESS EL, where applicable, is to be paid at the rate of 2% on the amount of consideration received.

Facts

- Taxpayer, a Singapore company, engaged in providing transaction processing services in India to financial institutions and banks, was held to have diverse presence in India in the form of fixed place permanent establishment (PE), service PE as well as agency PE in an AAR ruling pronounced in 2018. Further, the AAR also held certain payments received by the Taxpayer to be in the nature of royalty income.

- However, the Taxpayer had filed a writ petition before the High Court against the AAR ruling on the basis that the Taxpayer neither has a PE in India nor is the consideration received in the nature of royalty. The subject appeal is still pending with the HC.

- In the course of pendency of such appeal, while the Taxpayer has been remitting the entire income tax liability in India in the form of Advance Tax and Tax Deducted at Source (TDS) on the basis of presence of PE, the same is claimed as refund by way of filing a NIL return of income.

- Subsequently, on enactment of ESS EL provisions, the Taxpayer apprehended that, were it to succeed in its appeal before the High Court on the subject of absence of a PE in India, the Tax Authority would contend applicability of ESS EL provisions w.r.t. transactions taking place on or after 1 April 2020 and accordingly levy tax which would result in double taxation (given the advance tax and TDS paid previously).

- The Taxpayer also apprehended the possibility of Tax Authority levying penalty for non- compliance with ESS EL provisions at such stage.

- Accordingly, the Taxpayer pro-actively approached the High Court with a writ petition to foreclose the possibility of such double taxation and levy of penalty.

Proceedings before the HC

In reply to a notice issued by the HC, the Tax Authority filed an affidavit stating as under:

- The taxation under the Income Tax Act, 1961 (ITA) on the grounds of presence of PE as concluded by the AAR is binding on the Tax Authority.

- Accordingly, in consonance with the same, Tax Authority, at this point, does not seek to collect ESS EL. Incidentally, ESS EL is not applicable to NR if the NR has a PE in India and consideration received for e-commerce supply and services is effectively connected to such PE. Therefore, the question of imposition of penalty on non-compliance of ESS EL provisions is pre-mature and academic.

- Moreover, in case the contention of the Taxpayer that there exists no PE is upheld, the Taxpayer would be eligible to receive a refund of income tax along with statutory interest.

- At the same time, the Taxpayer would be liable to pay ESS EL along with statutory interest for the period of delay in payment of ESS EL.

- Considering the above submission by the Tax Authority, the Taxpayer did not present its application any further and pleaded that the Tax Authority be held to be bound by the above affidavit. In line thereof, the HC, accepting the plea of the Taxpayer, approved that Tax Authority should be bound by the above affidavit.

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Bengaluru - 560 001
Tel: +91 80 4027 5000
+91 80 6727 5000
Fax: +91 80 2210 6000 (12th floor)
Fax: +91 80 2224 0695 (13th floor)

Ground Floor, 'A' wing
Devisee Chambers
11, O'Shaughnessy Road
Langford Gardens
Bengaluru – 560 025
Tel: +91 80 6727 5000
Fax: +91 80 2222 9914

Chandigarh
1st Floor
SCO: 166-167
Sector 9-C, Madhya Marg
Chandigarh - 160 009
Tel: +91 172 671 7800
Fax: +91 172 671 7888

Chennai
Tidal Park
6th & 7th Floor
A Block, No.4, Rajiv Gandhi Salami
Tar Amani, Chennai – 600 113
Tel: +91 44 6654 8100
Fax: +91 44 2254 0120

Delhi NCR
Golf View Corporate
Tower – B
Sector 42, Sector Road
Gurgaon – 122 002
Tel: +91 124 464 4000
Fax: +91 124 464 4050

3rd & 6th Floor, Worldmark-1
IGI Airport Hospitality District
Atrocity New Delhi – 110 037
Tel: +91 11 6671 8000
Fax +91 11 6671 9999

4th & 5th Floor, Plot No 2B
Tower 2, Sector 126
NOIDA - 201 304
Gautam Bodh Nagar, U.P.
Tel: +91 120 671 7000
Fax: +91 120 671 7171

Hyderabad
Oval Office
18, labs Centre
Hitech City, Madhapur
Hyderabad – 500 081
Tel: +91 40 6736 2000
Fax: +91 40 6736 2200

Jamshedpur
1st Floor,
Shanti Niketan Building
Holding No. 1, SB Shop Area
Bistoury, Jamshedpur – 831 001
Tel: + 91 657 663 1000

Kochi
9th Floor "ABAD Nucleus"
NH-49, Maraud PO
Kochi - 682 304
Tel: +91 484 304 4000
Fax: +91 484 270 5393

Kolkata
22, Camaca Street
3rd Floor, Block C"
Kolkata - 700 016
Tel: +91 33 6615 3400
Fax: +91 33 6615 3750

Mumbai
14th Floor, The Ruby
29 Senapati Bapat Marg
Dadar (west)
Mumbai - 400 028
Tel: +91 22 6192 0000
Fax: +91 22 6192 1000

5th Floor Block B-2
Nylon Knowledge Park
Off. Western Express Highway
Goregaon (E)
Mumbai - 400 063
Tel: +91 22 6192 0000
Fax: +91 22 6192 3000

Pune
C—401, 4th floor
Pinch-hit Tech Park
Yeravda (Near Don Bosco School)
Pune - 411 006
Tel: +91 20 6603 6000
Fax: +91 20 6601 5900

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