EY Tax and Regulatory Alert

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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 December 2023

- **Instruction No. 04/2023 -GST Dated: 23.11.2023** was issued by the CBIC with respect to serving of the summary of notices in FORM GST DRC-01 and uploading summary of order in FORM GST DRC- 07 electronically on the GST portal by the Proper Officer.

- In this regard, CBIC had observed that there were instances where the notices and orders were being issued manually. The relevant officers were neglecting the electronic issuance of summaries in Form GST DRC-01 (for notices) and Form GST DRC-07 (for orders) on the GST portal as per relevant sections of the Central Goods and Services Tax Act, 2017 ('CGST Act') and the Central Goods and Services Tax Rules, 2017 ('CGST Rules'). This said practice would be a direct violation of the explicit provisions outlined in the CGST Rules.

- Further, CBIC emphasizes that this lapse of not providing summaries electronically on the portal not only contravenes CGST Rules but also has adverse effect on GST record-keeping. Furthermore, it can affect subsequent appeal proceedings and recovery processes.

- Accordingly, CBIC has directed officers to serve summary of notices and issue summary of orders [i.e., FORM GST DRC-01 and FORM GST DRC-07] electronically on the GST portal in the prescribed manner. Also, the Principal Chief Commissioners/ Chief Commissioners of the CGST Zones and the Principal Director General of DGGI have been instructed to supervise the officers and ensure strict compliance with Rule 142 of the CGST Rules with an aim to rectify the current non-compliances in the system.

- **Instruction No.05/2023 -GST Dated 13.12.2023** was issued by CBIC wherein the CBIC has clarified and instructed to the field officers that the ruling of Hon'ble Supreme Court ('SC') in the case of Northern Operating Systems Pvt Ltd ('NOS") on secondment can't be applied generally to all the cases of secondment.

- It was observed that the field officers have been applying the Hon'ble SC judgement without considering the facts of each case.

- Further, careful reading of the NOS judgment indicates that Hon'ble Supreme Court's emphasis is on a nuanced examination based on the unique characteristics of each specific arrangement, rather than relying on any singular test. Moreover, there may be multiple types of arrangements in relation to secondment of employees of overseas group company in the Indian entity. In each arrangement, the tax implications may be different, depending upon the specific nature of the contract and other terms and conditions attached to it.

- Therefore, CBIC had instructed that the decision of the Hon'ble Supreme Court in the NOS judgment should not be applied mechanically in all the cases. Investigation in each case requires a careful consideration of its distinct factors, including the terms of contract between overseas company and Indian entity, to determine taxability or its extent under GST and applicability of the principles laid down by the Hon'ble Supreme Court's judgment in NOS case.
- It was also clarified that section 74(1) can be invoked only in cases where the

- investigation indicates material evidence of fraud or wilful mis- statement or suppression of facts to evade tax on the part of the said taxpayer and such evidence should also be made part of notice.

- Section 74(1) cannot be invoked merely on account of non-payment of GST, without specific element of fraud or wilful misstatement or suppression of facts to evade tax

- **GSTN Advisory: Two-factor Authentication for Taxpayers:** In a bid to bolster the security measures of the Goods and Services Tax Network (GSTN) portal, the GSTN has introduced two-factor authentication (2FA) for the taxpayers.

- The taxpayers would need to provide One-time password post entering user id and password, the OTP will be delivered to their Primary Authorized Signatory's "Mobile Number" and "Email ID".

- Thereby, the tax-payers are requested to keep their mobile number and email of the authorized signatory updated on the GST portal for receiving the OTP communication.

Customs and Foreign Trade Policy (FTP)

This section summarizes the regulatory updates under Customs and FTP for the month of December 2023

- **Notification No. 87/2023 -Customs (NT) Dated 29.11.2023** was issued by the CBIC to exempt deposits under Section 51A of the Customs Act 1962 as per Notification No .18/2023-Customs (N.T.), Dated 30th March, 2023 for the period 1st April 2023 till 19th January 2024.

- **Notification No. 88/2023 -Customs(NT) Dated 29.11.2023:** was issued by CBIC to notify that the exemption from deposits under Section 51A of the Customs Act 1962 in line with Notification S.O. 1512(E). No. 19/2022-CUSTOMS (N.T.), F. No. 442/02/2017-Cus IV(Pt), Dated 30th March, 2022 shall come into force from 20th January 2024.

- **Trade Notice No 35/2023-24, dated 05th December, 2023** was issued by DGFT to clarify that the last date for submission of the application under the amnesty scheme for closure of cases involving default in Export Obligation under Advance Authorisation and EPCG Schemes shall be 31-12-2023.

- It is specified that the Policy Relaxation Committee (PRC) /EPCG Committees consider each application based on the individual facts and circumstances on a case to case basis.

- Further, it is stipulated that since policy relaxation is not a matter of right, all the authorization holders are advised to not wait till their requests are decided by the PRC/EPCG Committees and submit their applications for closure of default in EO under the Amnesty Scheme by the prescribed date of 31.12.2023.

- Moreover, it is strictly clarified that pendency of any application for relaxation/clarification would not form a ground for relief/extension of permissible time period for filing of applications under the Amnesty Scheme beyond the prescribed date, i.e 31-12-2023.

- **Trade Notice No 36/2023-24 dated 26 December 2023** was issued by DGFT to extend the mandatory electronic filing of Non-preferential Certificate of Origin through Common Digital Platform to 31st December 2024.

- Accordingly, the exporters and Non-preferential CoO Issuing Agencies as notified under Appendix 2F of the FTP would have the option to use the online

- system, the online application process shall not be mandatory till 31st December 2024.

- In the interim period, existing system of processing non-preferential CoO applications in manual/ paper mode is permitted.

Part B- Case Laws

Goods and Service Tax

1. Grapes Digital Pvt. Ltd. Vs. Principal Commissioner, Delhi High Court [W.P.(C) No. 2918/2021 dated 05th December 2023]

Subject Matter: Ruling wherein it was held that the GST Interest Liability on Reverse Charge Mechanism ('RCM') cannot be avoided on ground that it is revenue neutral.

Background and Facts of the case

- M/s Grapes Digital Private Limited (hereinafter referred to as the "petitioner") is engaged in the business of providing services of digital media management, online advertisement, management of advertisement projects, sale and procurement of space and slots for advertisement campaigns and other business support services and provides such services to clients located in India as well as abroad.

- The petitioner had opted to export the services without payment of IGST under LUT. Accordingly, the petitioner was entitled to avail a refund of the accumulated ITC on account of such exports. However, due to immense ambiguity of the refund mechanism and to avoid working capital blockage, the petitioner did not pay the IGST on imports.

- Subsequently, the petitioner amended the export invoices and opted to pay IGST on the above exports. They also paid the impending IGST on imports. Accordingly, the accumulated ITC on account of payment of RCM liability on imports was utilised for the payment of IGST on exports.

- The petitioner filed a refund application to obtain a refund of the IGST paid on exports, which was accepted by the adjudicating authority. However, the Adjudicating Authority adjusted the interest due on the delayed payment of IGST on imports and exports against the refund claim.

- The petitioner challenged the adjustment of interest before the appellate authority on the grounds that such an adjustment of interest cannot be made without issuing a Show Cause Notice (SCN).

- Thereafter, the Appellate authority had held that the petitioner having chosen to export goods under Letter of Undertaking (LOU) without payment of Central goods and Services Tax(CGST) was precluded from changing its option to pay IGST and claim refund on export of services (zero rated supply). The only recourse available was to seek refund of ITC on account of tax paid on RCM in respect of import of input supplies. Thereby, it was held that the said refund was untenable.

- Pursuant to the above order issued by the Appellate Authority, a writ petition was filed with the Hon'ble Delhi High Court.

Discussions and findings of the case

- The petitioner contended that the IGST payable on imports would be available as a refund of accumulated ITC on account of exports, making the entire transaction tax-neutral. Since the interest is compensatory in nature, interest liability should not arise.

- The Hon'ble Delhi High Court observed that the interest provisions pertinently prescribe automatic accrual of interest against any tax which is not paid before the due date. Accordingly, such unpaid interest shall be recoverable as per the recovery provisions.

- Further, it was noted by the Court that although the recovery of interest shall be pursuant to a notice, no specific demand

notice under Section 73 of the CGST Act 2017 is required to be issued.

- Furthermore, it was observed that the petitioner was given due opportunity to contest the adjustment of interest on the delayed payment; accordingly, there was no requirement for any further notice.

- The High Court also asserted that GST and interest are 'statutory exactions' and cannot be averted merely because the simultaneous transactions of import and export are tax neutral.

- Thereby, invoking the principle that 'equity is out of place in tax law,' Hon'ble High Court categorically affirmed that payment of interest cannot be avoided merely because at a subsequent stage, the petitioner would be entitled to refund of the ITC.

Ruling

- In light of the above, it was held that the refund must be sanctioned and should be disbursed to the petitioner along with applicable interest. Thereby, the contention of the petitioner that the adjustment of interest is illegal was rejected.

- Further, the impugned Order-In-Appeal to the extent it denied the petitioner's claim for refund in entirety was also set aside.

Customs and FTP

1. **Shri Sumit Arora & M/S Unistar Technoplast Pvt. Ltd Vs The Commissioner Of Customs, Ludhiana [60586-60588/2023 dated 07th November 2023]**

Subject Matter: Ruling wherein it was held that the Vehicle Immobiliser System namely "Smartra Immobilisers" (hereinafter referred to as "Impugned goods") are rightly classifiable under CTH 8701

Background and Facts of the case

- M/s Bosch Limited (hereinafter referred to as "the taxpayer" or "the respondent"), is engaged in the import of 'Smartra Immobilisers' classifying the said goods under CTH 8536 5090 as automatic regulating and controlling instrument and apparatus.

- However, the Department contended that was an antitheft device and accordingly, the item was classified under chapter heading 8708 9900 as accessories of vehicles.

- Moreover, on appeal, the Commissioner (Appeals) relied on the Australian Customs Authority's classification and classified the impugned goods under CTH 8536 5090. Consequently, the Department filed an appeal against the said order.

Discussions and findings of the case

- The Revenue contended that a Smartra unit acts as an electronic translator between the engine management system and the key with the transponder. It also highlighted that a Smartra unit is made up

of digital circuits with one connector interface and mounting bracket. Therefore, the impugned good does not work as a switch to start and stop the engine so it cannot be classified under chapter heading 8536 as 'other switches'.

- On the contrary, the taxpayer relied on the HIS Explanatory notes and stated that Note 2(f) excludes goods of Chapter 85 to be classified as parts or accessory of goods of Section XVII.

- The Hon'ble CESTAT observed the relevant Section Notes and headings and contended that the impugned goods are undoubtedly used only in the vehicles for antitheft purpose and is not excluded by the provisions of the Notes to Section XVII, thus, satisfying both the conditions of explanatory notes of heading 8708.

- Further, it was also observed that the impugned goods are nothing but an electronic security device fitted to a motor vehicle that prevents engine from being started unless the correct key is present, thereby, preventing the vehicles from being stolen.

- Furthermore, it was held that the sole and the principal use of the impugned good is only as an accessory to the vehicle and therefore should be classified as a part of motor vehicles unless excluded by the Section or Chapter Notes or if there is a specific entry in the Tariff as per the General Explanatory Notes.

- It was also observed that when the primary evidences and criteria for classification do not allow classification under CTH 8536, the question of following the Tariff Advice which is only a persuasive value does not arise. Further, since there is no specific entry elsewhere, it was therefore held that the impugned good is rightly classified under CTH 8708.

Ruling

- In light of the above, it was observed that the 'Smartra Immobilisers' were appropriately classified under CTH 8701 as 'part/accessory of a motor vehicle'.

Direct Tax

1. Jigar Jashwantlal Shah - Gujarat High Court (HC) rules that gift tax provisions are not applicable to right shares

Background and Facts of the case

- In case of Jigar Jashwantlal Shah (Taxpayer), the issue before Gujarat HC was applicability of erstwhile gift tax provisions [section 56(2)(vii)(c) of the Income Tax Act - ITA] on receipt of right shares by the Taxpayer based on his own original holding of shares and also of his wife and father who renounced their rights in Taxpayer's favor.

- Section 56(2)(vii)(c) of ITA (gift tax), inter alia, provided that when an individual or HUF receives shares from any person or persons without consideration or for a consideration which is less than fair market value (FMV) of shares, computed in a prescribed manner, the shortfall is taxable as "Income from other sources". However, it excludes receipts, inter alia, from relatives (as defined in the section).

- In the facts of the case, the Taxpayer, being a director and shareholder in a company, subscribed to rights shares not only in respect of his original holding but also in respect of rights renounced in his favor by (a) his wife and father (relatives) and (b) third party (non-relative). The subscription was at a substantial discount to FMV of the shares. Hence, the tax authority invoked the gift tax provision in respect of all rights shares allotted to the Taxpayer relatable to his own original holding as also renunciation by relatives and non-relatives.

- On appeal, the first appellate authority deleted the addition to the extent of right shares allotted proportionate to the Taxpayer's own original holding of shares, but sustained the addition in respect of right shares on account of renunciation by relatives and non-relatives. Both the Taxpayer and tax authority filed further appeal with the Ahmedabad Tribunal.

- The Tribunal gave further relief to the Taxpayer and held that gift tax provision did not apply even to rights shares allotted in respect of renunciation of rights by relatives but sustained the addition in respect of renunciation of rights by non-relatives. The Tribunal relied on various decisions to hold that the gift tax provisions are not applicable to the extent right shares allotted are proportionate to the Taxpayer's own original holding of shares and right share renounced in the favor of the Taxpayer by relative.

- The tax authority appealed further to the Gujarat HC in respect of relief allowed to the Taxpayer by lower appellate authorities in respect of rights shares allotted in respect of the Taxpayer's own original shareholding and renunciation of rights by relatives.

High Court's Ruling:

- The Gujarat HC upheld the Tribunal ruling and held that in order to apply gift tax provisions, there must be an existence of property before receiving it. The shares come into existence only when the allotment is made by the company and there is a vital difference between the issue of a share to a subscriber and purchase of a share from an existing shareholder. The first case of the issue of shares is that of creation, whereas the second case is that of "transfer". The HC relied on the Supreme Court rulings in case of Khoday Distilleries Ltd v. CIT and Shri Gopal Jalan & Co. v. Calcutta Stock Exchange Association Ltd. to hold that "allotment" means appropriation out of previously unappropriated capital of a company and till such allotment the shares do not exist as such. The legislative intent was never to tax "fresh issue" or "fresh allotment" of shares by a company."

- The rights shares obtained by renunciation of right shares by relatives of taxpayer will also not attract the provisions of gift taxation since the gifts from relatives are excluded from the scope of gift taxation.

2. Dr. Reddy's Laboratories Ltd. - Telangana High Court (HC) rules that withholding tax proceedings in case of payments to non-residents should be concluded within a reasonable period

Background and Facts of the case

- In case of Dr. Reddy's Laboratories Ltd. (Taxpayer), the issue before Telangana HC was whether any limitation period under Section 201 of the Income Tax Laws (ITL) applies for passing withholding tax order against a taxpayer in respect of payments to non-residents when the relevant provision expressly applies only in respect of payments to a person resident in India. This has been a controversial issue giving rise to conflict of views between different HCs of the country.

- The time limit in respect of payments to residents was introduced in ITL in 2009 initially for a period of four years and subsequently extended to seven years. However, no time limit exists in respect of payments to non-residents, for which reason cited in Explanatory Memorandum and Circular is the administrative difficulty in recovery of taxes from the non-residents

High Court's Ruling:

- The Telangana HC, in the present case, took note of the following earlier rulings on the issue of limitation period for passing withholding tax order in respect of payments to non-residents in absence of limitation period prescribed in the ITL:

- *Withholding orders passed prior to introduction of limitation period for payments to residents*

- Andhra Pradesh HC in the case of CIT v U.B. Electronic Instruments Ltd. which held that in absence of a specific limitation period, a reasonable period needs to be imputed.

- Punjab & Haryana HC in the case of CIT v. H.M.T. Ltd. and Calcutta HC in the case of Bhura Exports Ltd. v ITO which held that in absence of specific limitation period, no limitation period can be imputed.

- Mumbai Tribunal Special Bench in the case of DIT v. Mahindra & Mahindra Ltd. which held that even though no limitation period is prescribed, nevertheless the withholding tax order has to be passed within a reasonable period of time i.e., within the time limit available for making reassessment of income in the hands of the non-resident payee. This was upheld by Bombay HC which declined to follow Calcutta HC ruling in Bhura Exports Ltd (supra) but did not express an opinion on what should be reasonable time period.

- *Withholding order passed post introduction of limitation period for payment to residents*

- Delhi HC in the case of Bharti Airtel Ltd v. UOI which followed its earlier rulings in the cases of CIT v. NHK-Japan Broadcasting Ltd., CIT v. Hutchison Essar Telecom Ltd. and Vodafone Essar Mobile Services Ltd. v. UOI to hold that in absence of a specific limitation period in law, a reasonable period of four years needs to be imputed.

- The Telangana HC disagreed with the Delhi HC ruling in the case of Bharti Airtel Ltd. (supra) and held that since the statute has consciously not provided for any limitation period in case of payments to non-residents on the ground of

administrative difficulty of recovery of taxes from non-residents, it is incorrect to read period of limitation into the provision for passing of withholding tax order. At the same time, in absence of specific limitation period, such order has to be passed within a reasonable period.

- What is a reasonable period would depend upon facts and circumstances of each case. It cannot be less than seven years as applicable to payment to a resident since recovery of taxes from non-resident is more difficult.

3. Cairnhill CIPEF Ltd. – Delhi High Court holds proceedings on representative assessee invalid when principal taxpayer ceases to exist

Background

- The Indian Tax Laws (ITL) contain specific provisions regarding assessments and tax recovery in special cases involving minors, trusts, NRs, etc.

- In such cases, tax may be levied and recovered from a representative of such principal taxpayer (Representative Assessee) "in like manner and to the same extent" as it would be leviable on the principal so represented.

- In respect of a principal, being an NR, such Representative Assessee (RA) is defined to mean the agent of the NR and includes any person who is treated as an "agent" under the ITL.

- For this purpose, the ITL treats the following persons as agent and consequently an RA of the NR:
  - Any person in India employed by or on behalf of the NR;
  - Any person in India having a business connection with the NR;
  - Any person in India through or from whom NR receives income (directly or indirectly);
  - Any person in India who is trustee of the NR; or
  - Any person (whether resident or NR) who has acquired a capital asset in India.

- In this respect, the ITL requires the tax authority to give the person proposed to be treated as an RA of the NR, an opportunity of being heard prior to determination of status as RA.

Facts

- Taxpayer (BuyerCo), along with its Group Entities, acquired certain shares of an Indian listed company (I Co) from a Mauritius Company (SellerCo) during the tax year (TY) 2015-16.

- In the return of income (ROI) filed by SellerCo, the gains on sale of shares of I Co were disclosed as being exempt from tax in India by virtue of the beneficial provisions of the India-Mauritius Tax Treaty. Such claim of exemption was also accepted by the tax authority vide assessment order passed on 12 December 2018. Soon thereafter, SellerCo was liquidated and it ceased to exist on 19 December 2018.

- In March 2021 (viz. subsequent to SellerCo ceasing to exist), the CIT passed orders treating the BuyerCo as an RA of SellerCo and revising the original assessment order passed on SellerCo (dated 12 December 2018) and imposed liability on capital gains accruing on transfer of I Co shares upon BuyerCo.

- Being aggrieved, BuyerCo preferred an appeal before the Income Tax Appellate

- Tribunal (Tribunal), whereupon Tribunal ruled in favor of BuyerCo and held that proceedings cannot be undertaken in the status of RA as SellerCo itself had ceased to exist.

- Aggrieved, tax authority appealed before the HC and contended that a person can be regarded as an RA even in cases where the principal is not in existence. Thus, once such provisions are invoked, the original assessment carried out in the hands of SellerCo can be revised in the hands of BuyerCo.

HC Ruling:

- HC held in favour of the Taxpayer. The HC ruled that BuyerCo cannot be regarded as an RA as the SellerCo was not in existence on the date when revisionary proceedings were initiated. Further, in the usual and normal course, the expression “agent” suggests that there is a principal in existence, on whose behalf the agent acts. The ITL provisions are wedded to this principle. This requirement is not fulfilled in the present case.

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