EY Tax and Regulatory Alert

September 2023

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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 September 2023

- **Notification No. 38/2023–Central Tax dated: 04.08.2023** was issued by the CBIC in order to notify the following amendments to the CGST Rules, 2017 w.e.f. 04.08.2023:

- Amendment in Rule 9: The said rule is amended in order to notify that the personal presence of the registrant applicant is no longer required for physical verification of business premises.

- Amendment in Rule 10A: Rule 10A of the CGST Rules 2017 prescribes the deadline for submitting the bank account details. As per the amended Rule 10A, the bank account details now have to be submitted within a period of 30 days from the date of grant of registration or before filing a statement of outward supplies in Form GSTR-1/IFF, whichever is earlier.

- Amendment in Rule 21(2A): The Amended Rule 21(2A) provides for suspension of registration of taxpayers in the following cases:

  i. Where a comparison of GSTR-3B with GSTR-1 or GSTR-2A/2B or such other analysis shows that there are significant differences or anomalies indicating contravention of the provisions of the Act, leading to cancellation of registration of the said person, or

  ii. Where a registered person fails to comply with the provisions of Rule 10A.

- Amendment in Rule 23: Post amendment, the period permitted for filing an application for the revocation of the cancellation of registration has extended to 90 days from the date of service of order of cancellation of registration.

  The said amendment shall be effective from 1st October, 2023.

- Amendment in Rule 25: The amended Rule 25 provides that where the proper officer is satisfied that the physical verification of the place of business of a person is required after the grant of registration, he may get such verification of the place of business done and the verification report along with the other documents, including photographs, shall be uploaded in FORM GST REG-30 on the common portal within a period of fifteen working days following the date of such verification.

  Further, the timeline to upload the documents and Photographs in Form REG 30 on the common portal at least five working days prior to the completion of the time period specified in the proviso to sub-rule (1) of rule 9.

- Amendment in Rule 43: An explanation is inserted in Rule 43 in order to provide that value of supply of goods from Duty-Free Shops at arrival terminal in international airports to the incoming passengers shall be included in the value of exempt supplies for the purpose of ITC reversal.

- Amendment in Rule 59: Clauses (e) & (f) were inserted in Rule 59(6) in order to disallow a registered taxpayer from filing Form GSTR-1/IFF for subsequent tax periods who has been served an intimation under Rule 88D(1) in respect of tax period(s) or who has not supplied the bank account details in compliance with Rule 10A.

- Insertion of Rule 88D: Rule 88D was inserted in order to specify the manner of dealing with differences of GSTR-2B and 3B. As per the said Rule 88D, in case ITC has been excess availed, the registered taxpayer will be issued a notice in Form GST DRC-01C.

  Thereafter, the registered person can take action for the excess credit, either in full or partially with interest, through FORM GST DRC-03, detailing it in FORM GST DRC-01C within the stipulated timeframe.

- Amendment in Rule 89: The said rule has been amended to provide that the refund can be claimed by a registered person only after the last return required to be furnished by him has been so furnished.

- Amendment in Rule 94: A new sub-rule (2) has been inserted in Rule 94 w.e.f 1st October 2023 wherein the period to be excluded while calculating the period of delay for which interest on refund is payable is specified.

- Amendment in Rule 108: As per the amended rule, an appeal to Appellate Authority can only be filed electronically except for certain conditions where the Appeal can be filed manually.

- Insertion of Rule 142B: The said rule has been inserted to specify in case any amount of tax or interest has become recoverable under section 79 and the same has remained unpaid, the proper officer shall intimate, electronically on the common portal, the details of the said amount in FORM GST DRC-01D, directing the person in default to pay the said amount, along with applicable interest in such time and in such manner as stated in the Rule.
- Amendment in Rule 162: As per the amended rule, the compounding amount which shall be determined by the Commissioner is notified.

- Amendments have been introduced to instructions issued for filing the Annual return in GSTR 9 & reconciliation statement in GSTR 9C.

- **Notification No 45/2023- Central Tax dated 06.09.2023** was issued by CBIC to introduce new rules for valuation of supply in case of online gaming including online money gaming as well as in case of actionable claims in case of casino.

- In regard to determining the value of supply in case of online gaming, the value shall be the total amount payable by the players to the game provider, including virtual digital assets. Any amount refunded shall not be deductible from the value of supply.

- Further, with regard to value of supply of actionable claims in case of casinos, the value shall be the total amount payable by the players for purchase of tokens, chips, coins, etc. or participating in events. Any amount refunded shall not be deductible from the value of supply.

- **Notification S.O. 4073(E). Dated 14th September, 2023** was issued by CBIC in order to notify the number of State Benches of the Goods and Services Tax Appellate Tribunal in respect to the States specified in the notification.

- **GSTN Advisory on introducing Electronic Credit Reversal and Reclaimed statement:** In order to facilitate the taxpayers in correct and accurate reporting of ITC reversal and reclaim thereof and to avoid clerical mistakes, a new ledger namely Electronic Credit and Re-claimed Statement is being introduced on the GST portal.

- This statement will help the taxpayers in tracking of their ITC that has been reversed in Table 4B(2) and thereafter re-claimed in Table 4D(1) and 4A(5) for each return period, starting from August return period.

Customs and Foreign Trade Policy (FTP)

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

- **Notification No 55/2023 dated 14.09.2023** was issued by CBIC wherein Notification No. 12/2022 dated 01.02.2022 was further amended to substitute the entries with the chapter or tariff items "39, 40, 42, 73, 74, 85"

- **Circular No 22/2023 dated 19.09.2023** was issued by the CBIC wherein process was notified for exporting goods that were stored in a bonded warehouse.

- A format for an export shipping bill (SB) from bonded warehouses has been introduced. While filling out this SB, exporters need to declare the warehouse code, indicating where the goods are being exported from (which may not be the original warehouse where they were stored upon import).

- Each SB can cover goods from only one warehouse. For each item, details of the original import bill of entry (BE) are required. The system updates the quantity exported in the ledger and allows amendments.

- This format is for exporting warehoused goods, and not for other goods including the manufactured goods meant for exports. However, if the goods imported in a warehouse where permission has been granted under section 65, are exported as such then the abovementioned ex-bond SB can be filed.

- **Trade Notification No 28/2023 dated 28.08.2023** was issued by DGFT wherein The Steel Importing Monitoring System (SIMS) shall require importers to submit advance information in an online system for import of items and obtain an automatic Registration Number by paying registration fee of Rs. 500.

- The Importers can apply for registration not earlier than 60th day before the expected date of arrival of import consignment. The automatic Registration Number thus granted shall remain valid for a period of 75 days.

- **Trade Notification No 33/2023 dated 26.09.2023** was issued by DGFT wherein it was notified that the RoDTEP scheme for exports has extended from 01.10.2023 to provide certain benefits for exporters.

- The existing rates for this scheme shall continue to apply from 01.10.2023 to 30.06.2024. However, these benefits would be subject to the budgetary framework.

Direct Tax

This section summarizes the regulatory updates under DT for the month of September 2023

1. CBDT notifies new valuation rules for equity and compulsorily convertible preference shares for angel tax provisions.

Background

- Section 56(2)(viib) of the ITL (popularly known as the "angel tax" provision) is an anti-abuse provision which applies when a CHC issues shares (including preference shares) at a premium and receives consideration which is in excess of the FMV of the shares. The excess amount so received is deemed as income from other sources in the hands of the CHC in the year of issue of the shares.

- Rule 11UA of the Income Tax Rules prescribes the valuation methodology for determining the FMV of various types of assets (including unquoted equity shares), not only for the purposes of the angel tax provision, but also for other anti-abuse provisions involving transfer of assets without consideration or at a value less than the FMV.

- Prior to Notification, the FMV of unquoted equity shares for the purpose of the angel tax provision read with earlier Rule 11UA was the higher of the following:
  - Net asset value as reflected in the audited balance sheet of the CHC (NAV method); or
  - The Discounted Cash Flow (DCF) value as determined by a Category-I Merchant banker (DCF method); or
  - The value that the company is able to substantiate to the satisfaction of the tax authority, basis the holding of various intellectual property rights (IPRs) like goodwill, know-how, patents, copyrights etc.
- Prior to the Notification, Rule 11UA prescribed valuation of preference share at a price it would fetch if sold in the open market on the valuation date (Open market value) and the CHC may obtain a report from a merchant banker or an accountant in respect of such valuation.

- Prior to the amendment by the Finance Act 2023 (FA 2023), the angel tax applied only to shares issued to a resident. FA 2023 amended the angel tax provisions, with effect from tax year 2023-24, to extend it to issue of shares by a CHC to NR investor. FA 2023 also extended the exemption from angel tax to investments in CHC by VCFs set up in IFSC (specified funds).

- The expansion of angel tax provisions gave rise to concerns regarding trigger of angel tax and valuation disputes on investments made by genuine and regulated NR investors in Indian companies (including start-ups registered with Department for Promotion of Industry and Internal Trade -DPIIT).

- In response to such concerns, the CBDT issued a Press Release on 19 May 2023 announcing a slew of reliefs from "angel tax" viz, amendment to valuation rules, excluding certain entities from the scope of angel tax provision and non-applicability of the provision to start-ups. Accordingly, the CBDT prescribed as under:

  - Notification No. 29/2023 (effective from 24 May 2023) 7 enlists categories of persons whose investments in CHC shall not be subject to trigger of angel tax provisions like (i) Government and Government related investors, (ii) banks or regulated entities involved in insurance business and (iii) investors

resident in any of the 21 jurisdictions and regulated in the country where it

is established, incorporated or resident like category-I foreign portfolio investors, endowment funds, pension funds and broad-based pooled investment vehicles or funds.

- Notification No. 30/2023 (effective retrospectively from 1 April 2023) exempts start-up companies from the angel tax provision if the start-up company fulfils the conditions specified by DPIIT in para 4 of its Notification No. G.S.R 127(E) dated 19 February 2019 and files a self-declaration to that effect. The exemption is applicable where a start-up company issue shares for a consideration at a premium to any person (whether resident or NR).

- On 26 May 2023, the CBDT issued a public consultation document providing a draft of amended Rule 11UA. The proposed amended Rule 11UA was aimed to prevent valuation disputes on investment by resident and NR investors in CHC.

- On 25 September 2023, post public consultation, the CBDT notified final valuation rules amending Rule 11UA for computing FMV of unquoted equity shares and CCPS.

New valuation rules (amended Rule 11UA):

- **Effective date:** The amended Rule 11UA shall be effective from the date of publication in Official Gazette i.e., 25 September 2023.

- **Types of shares covered:**
  - The amended Rule 11UA prescribes valuation methods for unquoted equity shares and CCPS issued to resident and NR investors.
  - The change in valuation methods for CCPS is a variation as compared to the draft valuation rule issued earlier. The amended Rule 11UA also provides an option that FMV of CCPS can also be based on FMV of unquoted equity shares which is determined as per prescribed valuation methods

- **Valuation method for unquoted equity shares and CCPS:** The CHC has an option to select from any of the following valuation methods in relation to unquoted equity share or CCPS investment by residents and NRs:

Name of valuation method	Methodology	Applicable to which investor?	Applicable to type of share?	Change as compared to erstwhile Rule 11UA
Net assets value	Determined on normative basis using book value of assets and liabilities	Both resident and NR	Unquoted equity shares	No change
DCF	Determined by merchant banker	Both resident and NR	Unquoted equity shares and CCPS	Erstwhile Rule 11UA required valuation of CCPS as per Open Market Value
Five new valuation methods as per merchant banker report	• Comparable company multiple method • Probability weighted expected return method • Option pricing method • Milestone analysis method • Replacement cost methods	Only NR	Unquoted equity shares and CCPS	New valuation method introduced for NR investors

- The valuation of preference shares other than CCPS continues to be based on Open Market Value based on report from a merchant banker or an accountant.

- **Price matching facility for both resident and NR investment:**

  - The price at which unquoted equity shares and CCPS are issued by CHC to NR entities notified in Notification No. 29/2023 shall be adopted as the FMV for the purposes of benchmarking investments by both resident and NR investors, subject to compliance of following conditions:
    - The consideration received from other investors at such FMV does not exceed aggregate consideration received from notified NR entity; and
    - Consideration is received by CHC from notified NR entity within a period of 90 days before or after10 the date of issue of shares which are the subject matter of valuation.

  - Similar price matching facility shall also be available with respect to investment made by VCF/venture capital company and specified funds in venture capital undertakings. This is explained with the help of illustration in the amended Rule 11UA.

- **90 days window period for merchant banker valuation**

  - Erstwhile Rule 11UA required merchant banker valuation report as on the date of issue of shares.
  - The amended Rule 11UA provides flexibility by making the valuation report issued up to 90 days prior to the date of issue of equity shares and CCPS acceptable for computing FMV for investments by both resident and NR investors.
  - Consequently, the reference to date of valuation stands modified from date of receipt of consideration to date of merchant banker valuation report.

- **Safe harbor valuation tolerance limit of 10%**

  - Erstwhile angel tax provision and Rule 11UA did not provide for any safe harbor valuation tolerance limit.

- The amended Rule 11UA provides a tolerance limit of 10% for both resident and NR investors as follows:

    - In case of resident investor, if the issue price for unquoted equity shares is within 10% of price determined as per NAV or DCF method or if the issue price for CCPS is within 10% of price determined as per DCF method, then such issue price shall be deemed to be FMV of such shares.

    - In case of NR investor, if the issue price for equity shares is within 10% of price determined as per NAV or DCF or any of the five new methods or if the issue price for CCPS is within 10% of price determined as per DCF or any of the five new methods, then such issue price shall be deemed to be FMV of such shares.

    - For this purpose, “issue price” is defined to mean the consideration received by the CHC for one share.

Part B- Case Laws

Goods and Service Tax

1. M/s Sai Service Private Limited [A.R.Com/24/2022] [TSAAR Order No. 13/2023]

Subject Matter: Ruling wherein ITC on demo car will be available in case the demo-car is further supplied. However, in case the car is used as replacement vehicle in workshop, ITC will not be available.

Background and Facts of the case

- M/s Sai Service Private Limited (hereinafter referred to as "the applicant"), is an authorized car dealers for various manufacturers and engaged in the business of supplying automobiles, spares, and servicing vehicles.
- As a part of its day-to-day business, the Applicant requires certain demo vehicles for demonstration purpose in the showrooms. Every model is registered unlike normal vehicles further, this model of demo cars are used for demonstration for a period of two years or 40,000 KMs whichever is earlier.
- These demo vehicles are procured from Maruti Suzuki Industries Limited (MSIL) at discounted prices against a tax invoice. Further, these cars capitalized as fixed assets in their books of accounts.
- Presently, the company does not avail Input Tax Credit (ITC) of the said demonstration vehicles during the procurement from MSIL and avails the benefit under Notification 08/2018 - Central Tax (Rate) dated 25-January-2018 on sale of the demo cars.
- However, the Applicant intends to avail the ITC on the procurement of such vehicles used for demonstration purposes and does not wish to avail the benefit under the above-mentioned notification at the time of sale of such vehicles.
- Accordingly, the Applicant had approached Telangana Authority for Advance Ruling (AAR) to seek clarification on whether they can avail input tax credit (ITC) on the tax charged on inward supplies of motor vehicles used for demonstration purposes.

Discussions and findings of the case

- Upon perusal of the test vehicle policy of MSIL, the AAR observed that the test vehicles will be registered under the company/dealership's name and can only be retained as test vehicles for a maximum of two years.
- Further, the AAR also observed that after this period, the vehicle can either be used as a replacement vehicle in the workshop or sold, but such sale requires written approval from the vendor company.
- Moreover, the AAR relied on section 17(5)(a) of the CGST Act, 2017 which generally restricts the ITC claim on motor vehicles purchased by a taxpayer, even if they are used for business purposes. However, the said section is subject to 3 exceptions:
    a. further supply of such motor vehicles; or
    b. transportation of passengers; or
    c. imparting training on driving such motor vehicles;
- The AAR also observed that the term "supply" in the context includes sale, lease, rental, etc. Therefore, the exception stipulated under Section 17(5)(a) applies not only to the sale of

motor vehicles but also to the purpose of lease, rent, etc., where there is no immediate transfer of property in goods and such motor vehicle may be capitalized in the purchaser's books in case of intention to lease or rent it.

Ruling

- In light of the above, AAR held that in case the Applicant is making further supply of the motor vehicle, it is eligible to claim ITC.

  However, where the demo car is used in workshop as replacement vehicle as mentioned in the sales policy of MSIL, he shall not be eligible for ITC as there is no further supply at his hands. Therefore, the ITC claimed by him has to be repaid in cash in view of the amended section 16(4).

2. In re Orient Cement Limited (GST Karnataka- Advance Ruling No. KAR ADRG 27/2023)

Subject Matter: Ruling wherein it was held that goods issued to dealers subject to fulfilment of pre-agreed conditions and stipulations will be considered as supply and the ITC on the same will not be restricted under Section 17(5)(h) of the Central Goods and Services Tax Act, 2017 (CGST Act)

Background and Facts of the case

- The applicant is engaged in the business of manufacturing different kinds of cement and incurs various marketing and distribution expenses to promote its brand and enhance sales.
- Accordingly, it launched various target-based promotional schemes wherein it would distribute gold coins and other white goods to its dealers, free of cost, on achieving specified targets laid down in the schemes.
- Applicant approached Karnataka Authority for Advance Ruling (AAR) to seek ruling on whether the obligation to issue gold coins and white goods to dealer upon achieving the stipulated targets during the scheme period would be regarded as:
- "goods disposed of by way of gift" and thereby, input tax credit (ITC) on the same would be restricted under Section 17(5)(h) of the Central Goods and Services Tax Act, 2017 (CGST Act)?
- permanent transfer or disposal of business asset on which ITC has been availed and thereby, getting covered under Entry 1 of Schedule I to the CGST Act?
- supply under Section 7 of the CGST Act?

Discussions and findings of the case

- The Appellant's contentions in the instant matter is as follows:
  - The restriction laid down in section 17(5)(h) is applicable only in respect of goods disposed of by way of gifts. The gold coins and white goods distributed to the dealers cannot be regarded as gifts as the dealer is eligible for the aforesaid goods only on the satisfaction of the terms and condition laid down under the scheme.
  - Distribution of gold coins and white goods cannot be regarded as permanent transfer or disposal of business assets.
  - Entry 4(a) to Schedule II is applicable only in cases where goods which are part of balance sheet are permanently transferred.
  - A transaction can be said to be a "supply" only if the same has been made or agreed to be made for a consideration. Therefore, in the absence of consideration, supply cannot be said to have been made. In the instant case, there is no consideration received from the dealers for the goods distributed to them. Therefore, the gold coins and white goods issued as part of incentive schemes cannot be regarded as supply under Section 7 of the CGST Act.
  - The AAR observed that the applicant is issuing goods to dealers as per the agreement reached between them. It is only issued subject to the fulfilment of specified conditions and stipulations. Gift is something which is given without any conditions or stipulations and

hence, the above transaction cannot be covered under the scope of “gift” and accordingly, ITC is not restricted on the same.

- Further, it also observed that achievement of marketing targets set by the applicant is a non-monetary consideration paid by the dealers for the issuance of gold coins and white goods by the applicant. Since, such transfer is made for a consideration, the same is covered in the definition of supply.

- Even if the above transaction is not considered to involve consideration, transfer of goods to dealers on which ITC has been availed will get covered under Entry 1 of Schedule I. The term asset would include inventory and since the goods are procured in the course of business, it would be covered under the scope of business asset. Nowhere in the said Schedule it is stated that these business assets should be capitalized.

Ruling

- In light of the above, AAR held that Entry 1 of Schedule I will cover the activity of distribution of white goods or gold coins as incentives and hence, would be treated as supply of such goods as per Section 7(1)(c) of the CGST Act.

Hence, the ITC on such goods would not be restricted under Section 17(5).

Direct Tax

1. Shobha Harish Thawani v. JCIT - Mumbai Tribunal upholds penalty under black money law for non-disclosure of foreign assets in tax return

Background and Facts of the case

- The BMA was enacted for assessment of undisclosed foreign assets and income, as also disclosure of foreign assets held and/or foreign income earned by a taxpayer being resident in India as per the provisions of the income tax laws (ITL).
- The BMA, amongst other things, empowers the tax authority to levy penalty of INR 1m on a resident taxpayer who has furnished tax return under the ITL, but has failed to furnish any information or has furnished inaccurate particulars relating to: (a.) Any foreign asset held by the taxpayer; or (b.) Any income from foreign source in such tax return. There is no specific provision in BMA enabling taxpayers to defend penalty on the ground of reasonable cause.
- Further, as per the ITL, any resident taxpayer who: (a.) Holds foreign assets; or (b.) Has signing authority in any foreign account; or (c.) Has income from foreign source, at any time during the year, is required to file tax return for that particular year and provide details of foreign assets/income/ singing authority in Schedule FA of the respective tax return.
- The Taxpayer had jointly invested in Global Dynamic Opportunity Fund Ltd. (foreign asset) in tax year 2014-15. Such investment was sourced from transfer of funds from her regular Indian bank account to a foreign bank account under the liberalized remittance scheme under the Foreign Exchange Management Act, 1999 (FEMA).
- In the tax return filed for tax years 2015-16 to 2017-18, the Taxpayer omitted to disclose the details of the foreign asset in Schedule FA, but disclosed and offered the income received from such foreign asset.
- However, the tax authority levied penalty of INR 1m for each tax year on account of failure to furnish details of the foreign asset in the respective tax returns.
- Subsequently, the levy of penalty was upheld by the first appellate authority and, hence, the Taxpayer filed an appeal before the Tribunal.

Taxpayer's contention

- The source of funds for investment in the foreign asset was explainable. Furthermore, income earned over the years through such foreign asset was regularly offered to tax. Accordingly, it was submitted that it is not a case of "undisclosed foreign asset".
- Failure to disclose the foreign asset was due to an inadvertent error.
- Levy of penalty under BMA is not mandatory, but at the discretion of the tax authority and such discretion was not properly exercised by the tax authority.
- No penalty was levied on the Taxpayer's husband who also failed to disclose similar information in his tax returns and no penalty was levied on her husband after examining the evidence submitted. Then, the same stand should be adopted in the case of the Taxpayer.
- Reliance was also placed on the Tribunal's co-ordinate bench decision in the case of Additional CIT v. Leena Gandhi Tiwari, wherein the Tribunal had held that non-disclosure of foreign bank account in the tax return in which the taxpayer was a signatory could not be exposed to penalty under BMA where such non-disclosure was under a bona fide mistake of the taxpayer.

Tax authority's contentions:

- Penalty is leviable in two cases where: (a.) A taxpayer fails to furnish requisite information; or (b.) Furnishes inaccurate particulars of foreign assets/income in the tax return filed under the ITL. Thus, non-disclosure of investment held in the foreign asset in Schedule FA is tantamount to failure to furnish information by the Taxpayer.

- The fact that the Taxpayer explained the source of the foreign asset and income from such asset under the ITL, shall not discharge the Taxpayer from obligation to report the details in Schedule FA. The scope of penalty under BMA is not restricted to "undisclosed foreign asset", but can be levied on account of non-disclosure of foreign asset (though source thereof is explainable) in Schedule FA.

- The particulars under the tax return filed under the ITL enable the tax authorities to conduct proper investigation. Hence, non-disclosure of any particular would disentail the purpose even if it is not on account of contumacious conduct on part of the Taxpayer.

Tribunal's Ruling:

The Tribunal dismissed the Taxpayer's appeal and upheld levy of penalty of INR1m for each tax year on non-disclosure of the foreign asset in Schedule FA for the respective year, on the basis of the following grounds:

- Penalty under BMA can be levied on event of non-disclosure of the foreign asset in Schedule FA of the tax return by the Taxpayer and it may not necessarily pertain to "undisclosed foreign asset" but can be any foreign asset held by the Taxpayer.

- There is no condition under the relevant provisions of BMA such that penalty may not be imposed if the source of a foreign asset is explained by the taxpayer or income from such foreign asset is offered to tax.

- The Taxpayer's argument that non-disclosure was on account of a bona fide mistake is not supported by any evidence on record.

- Penalty under BMA is not mandatory, but at the discretion of the tax authority. The Taxpayer failed to substantiate that the tax authority had exercised discretion extravagantly. The tax authority, after considering all facts, had judiciously concluded that penalty is leviable.

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