EY Tax and Regulatory Alert

February 2022

Prepared for ACMA

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INDIRECT TAX

Part A - Key Indirect Tax updates

Goods and Services Tax

This section summarizes the regulatory updates under GST for the month of February 2022

- **Budget Update 2022 Indirect Tax Key Highlights:-**

- Time limit has been relaxed extended by two months i.e., till 30th November, in regards to Claim of Input Tax Credit (ITC), Issuance of credit note and rectification of errors in the statement of outward supply and returns.

- GSTR-3B cannot be filed without filing GSTR-1. The government may notify exceptions.

- Manner and conditions for communication of details of inward supplies and ITC in auto-generated statement Form 2B has been prescribed. Two-way communication process in return filing has been removed.

- Claim of provisional credit has been replaced with self-assessed credit

- For non-payment of tax by the supplier, ITC will need to be reversed along with interest by the recipient. Such ITC can be reclaimed on subsequent tax payment by the supplier

- Balance in cash ledger of CGST can be transferred to other ledgers within same GSTIN or to CGST/ IGST cash ledger of a distinct person.

- Interest on ITC wrongly availed and utilized shall be leviable @ 18% (amendment retrospective from 1 July 2017)

- Registration can be cancelled if returns are not furnished for a period as may be prescribed.

- **Press Release No. 523 dated 17.02.2022** states that the office of Pr.CCA, CBIC has setup a 'GST Refund Help Desk' for addressing payment related problems faced by the taxpayers. Contact details of the Help Desk is as follows:- Name of Nodal Officer – Ms. Anita Rawat, Accounts Officer, Toll Free Helpline Number – 1800-11-1424 and Mail ID – gstrefunds-helpdesk@gov.in.

- For payment/disbursement-related issues in their refund application, the taxpayers are informed to contact this GST Refund helpdesk.

- **Deployment of Interest Calculator in GSTR 3B.**

- The new functionality of interest calculator in GSTR-3B is now live on the GST portal.

- This functionality will facilitate & assist the taxpayers in doing self-assessment. This functionality will arrive at the system computed interest on the basis of the tax liability values declared by the taxpayers, along with the details about the period to which it pertains. The interest appliable, if any, will be computed after the filing of the said GSTR-3B and will be auto-populated in Table-5.1 of the GSTR-3B of the next tax period. The facility would be similar to the collection of Late fees for GSTR-3B, filed after the Due date, posted in the next period's GSTR-3B. This functionality will inform the taxpayers about the manner of system computed interest for each tax head and hence will assist the taxpayers in doing the correct computation of interest for the tax liability of any past period declared in the GSTR-3B for the current tax period.

- This functionality will further improve ease of filing return under GST and is, therefore, in the direction of further reducing the compliance burden for taxpayers.

- **Notification No. 1/2022 – Central Tax dated 24th February 2022** whereby the aggregate turnover in a financial year for applicability of E-invoicing has been reduced from Rs. 50 crores to Rs. 20 crores. w.e.f. 01-04-2022.

Customs and Foreign Trade Policy (FTP)

This section summarizes the regulatory updates under Customs and FTP for the month of February 2022

Budget Update 2022 Customs Key Highlights:-

- Power provided to the Board or the Principal Commissioner of Customs or Commissioner of Customs to assign function to the officer of Customs.

- Officers of DRI, Audit and Preventive formation are included in the definition of proper officer to validate actions taken by such officers to nullify the impact of Supreme court judgment in case of Canon India.

- In order to check undervaluation in imports, Section 14 is being amended to enable board to specify additional obligations of the importer for imported goods whose value is not being declared correctly basis the trends of declared value of such goods or any other relevant criteria.

- Provisions for advance ruling amended as below:

  a) Flexibility given to the applicant to withdraw the advance ruling application from current 30 days period to anytime before ruling is pronounced
  b) Advance ruling shall be valid for period of 3 years from the date of pronouncement or till change in law or facts basis which such advance ruling has been pronounced, whichever is earlier
  c) Definition of non-resident, Indian company and foreign company have been removed.
  d) A welcome change has been made under the Customs law by way of insertion of new Section 110AA to ensure that any inquiry, investigation or audit once concluded by any officer, could not directly be taken up by any other officer of Customs. In such cases, where any other officer of Customs has reasons to believe that there is a loss of revenue would transfer relevant documents along with report to the officer who originally exercised such jurisdiction and such officer shall have sole authority for any further action like re-assessment, adjudication etc.

- Section 135AA is being inserted to provide protection to the import and export data submitted to Customs, and publication of such data (unless provided by law) has been included in the list of offence under Customs Act.

- As a part of custom duty rate rationalization, around 350 exemptions have been withdrawn.

- More than 40 exemptions relating to capital goods and project imports to be gradually phased out.

- Customs tariff structure is simplified by moving unconditional concessional rates from existing exemption notifications to First Schedule of Customs Tariff Act.

- Import of Goods Concessional Rate of Duty (IGCR) Rules have been revised to make entire process digital and transparent.

- **Trade Notification No. 53/2015-20 dated 01.02.2022** was issued by DGFT to extend the last date of submitting applications under MEIS, SEIS, ROSTCL, ROCL and 2% additional ad-hoc incentive which was earlier notified to be 31.01.2022 has been extended to 28.02.2022.

- **Notification No. 10/2022 – Customs (N.T.) dated 17.02.2022** was issued by CBIC to notify the EXIM exchange rates w.e.f. February 18,2022. USD valued at Rs.76.05 for imports whereas Rs. 74.35 for exports. The same supersedes Notification No. 08/2022 – Customs (N.T.) dated 08/2022 – Customs (N.T.) dated 03.02.2022.

Direct Tax

Part-A Key Direct Tax updates

This section summarizes the Direct Tax updates under for the month of February 2022

1. **Central Board of Direct Taxes (CBDT) Circular No. 3/2022 dated 3 February 2022 (Circular), clarifying the applicability of MFN clause of Indian Double Taxation Avoidance Agreements (DTAAs or treaties) with OECD member states (or countries). The CBDT has issued the Circular in light of several representations received, seeking clarity on the applicability of the MFN clause.**

Background

- India's DTAAs with certain OECD countries have an MFN clause which provides that if after signature/ entry into force of the tax treaty with first State (original treaty), India enters into a DTAA on a later date with a third country, which is an OECD member, providing a beneficial rate of tax or restrictive scope for taxation of dividend, interest, royalty, etc. a similar benefit should be accorded to first State.

- The application of MFN clause is explained with the help of an illustration. The dividend article of India-Netherlands (NL) DTAA provides that dividend paid by Indian entities to residents of Netherlands, who are beneficial owners of such dividend, are liable to tax at a rate not exceeding 15%. However, DTAAs signed subsequently by India with countries like Slovenia, Colombia, Lithuania (third countries) provides for lower rate of 5% tax for dividend taxation, subject to certain conditions. Accordingly, if MFN clause were to be applicable, the rate under India-NL DTAA may be claimed to be reduced to 5%. However, in the present context, these third countries were not OECD members when their respective DTAAs were entered into with India. Instead, these countries became OECD members only at a later date. Accordingly, issue arose whether the beneficial tax rate agreed under DTAAs with third countries could be applied to original tax treaties, say NL in our example, with the MFN clause.

- This issue has been a matter of litigation in India. The Delhi High Court (HC) in case of Concentrix extended the benefit of lower withholding rate of 5% on dividend provided in the DTAAs with third countries by invoking MFN Clause under India-NL DTAA. Some of the key observations made by Delhi HC are:

  - Use of the word "is" in the sentence "which is a member of the OECD" in MFN clause requires countries to be OECD members when source taxation is triggered in India and not at the time when the original DTAA (India-NL DTAA) was executed.

  - Clarification issued by Netherlands provides benefit of 5% rate pursuant to India-Slovenia DTAA.

  - For efficient and fair application of India-NL DTAA, a common interpretation should be applied to ensure consistency and equal allocation of tax claims between the contracting states as DTAAs are negotiated by diplomats and not necessarily by men instructed in the law.

- This decision was subsequently followed by various courts in cases like Nestle, Deccan Holdings, Cotecna Inspection where courts allowed benefit of lower withholding rate pursuant to MFN clause to taxpayers. Further, countries like Netherlands, France, Switzerland have issued unilateral clarifications for application of MFN clause:
  - Netherlands and France published a decree/ a notification wherein it has been categorically provided that the treaty benefit of 5% rate as available in Slovenia treaty shall be made applicable to Netherlands/France DTAA as well due to Slovenia becoming an OECD member, even though at a later date. It has been further stated in the decree/notification that the lower rate will be applicable retrospectively from the date Slovenia became member of the OECD.
  - The Swiss competent authorities also released a similar statement on 13 August 2021 wherein applicability of MFN clause was made conditional upon India's acceptance.
- Due to lack of guidance in the Indian context, representations were filed before Indian tax authorities seeking clarification on India's stand on application of MFN clause. In light of the same, the CBDT issued the Circular clarifying its position.

Clarification provided in the Circular

- On 3 February 2022, CBDT issued the Circular, clarifying India's position on interpretation of MFN clause present in the Protocol to India's DTAAs with certain OECD member countries. Briefly, the Circular states as below:

1. Plain reading of MFN clause clearly provides that the third State has to be a member of OECD both at the time of conclusion of the DTAA with India as well as at the time of applicability of MFN clause.

2. Unilateral decree/notifications/clarifications given by other treaty partner does not represent shared understanding on applicability of the MFN clause.

- The unilateral instruments issued by Netherlands and France have no binding effect as the same has been issued without any consultation with India. These instruments represent only the views of the respective governments and does not have any effect on curtailing the tax liability that is payable to the Government of India (GoI).
- Extending MFN benefit based on Slovenia being OECD member state at the time of applicability of the MFN clause defeats the object and purpose of the MFN clause when Slovenia was not an OECD member when India entered into DTAA.
- As it appears from the Circular, India's position on interpretation of MFN clause has been communicated to Netherlands/France and no reply has been received from these countries.
- Further, India has also communicated its position to Switzerland that the benefit cannot be imported as third State was not a member of OECD at the time of signing the DTAA.

3. Concessional rate or restricted scope to apply from the date of entry into force of the DTAA with the third State and not from the date on which such third State becomes an OECD member.

- Where wording of the MFN clause mandates the application of lower rate from the date of entry into force of the Indian DTAA with the third State, its application from the date of third State becoming OECD member by the unilateral instruments of Netherlands, France and Switzerland is not in accordance with the provision of MFN clause.

- One should not ignore the clear wording of the MFN clause which mandates application of lower rate from the date of entry into force of the Indian DTAA with third State.

4. Requirement of notification for implementation of tax treaty provisions under the ITL:

- As per the Supreme Court ruling in the case of Azadi Bachao Andolan, a notification under the provisions of the ITL is required to implement the provisions of a DTAA.

- India has not issued any notification importing the beneficial provisions from DTAAs with Slovenia, Lithuania and Colombia to the DTAAs with France, Netherlands or Switzerland.

5. Selective invocation and application of MFN clause as reflected in unilateral instruments of NL/France/Switzerland is not permitted as per the rules of interpretation of international treaties.

- India-Lithuania DTAA provides for the beneficial rate of 5% on dividend income only if the company, receiving the dividends, hold directly at least 10% of the capital of the dividend paying company. However, in all other cases, the rate prescribed is 15%.

- Import of only concessional rate of 5% and not the 15% for other cases by invoking MFN clause is not justified.

6. Further, it is provided that benefit of lower rate and restricted scope under MFN clause will be provided only when all the below conditions are satisfied cumulatively:

- Treaty with third State is entered into after the signature/entry into force (depending on language of MFN clause) of India's DTAA.

- Third State has to be an OECD member at the time of signing its treaty with India.

- India limits its taxing rights in relation to rate or scope of taxation in its treaty with the third State.

- India issues a separate notification under the ITL for importing the favorable benefits of third State treaty into the original treaty.

7. It is also clarified that the Circular will not be applicable to those taxpayers in whose case there is a favorable decision by any court on this issue.

Foreign Exchange Management Act (FEMA)

Part-A Key FEMA updates

This section summarizes the FEMA updates under for the month of February 2022

1. Reserve Bank of India ('RBI') increases the investment limit under Voluntary Retention Route for Foreign Portfolio Investors

- On 01 March 2019, RBI had introduced Voluntary Retention Route (VRR) for investment in government and corporate debt securities by Foreign Portfolio Investors (FPIs) with a view to facilitating stable investments in debt instruments issued in India.

- RBI has decided to increase the investment limit under VRR from the current ₹1,50,000 crore to ₹2,50,000 crore with effect from 01 April 2022.

Source: A.P. (DIR Series) Circular No. 12 dated 10 February 2022.

Part B- Case Laws

Goods and Service Tax

1. M/s LANDIS GYR LTD vs CG & ST, CHANDIGARH (Hon'ble CESTAT Appeal No. ST/60477/2021)

Subject Matter: Ruling wherein it was held that refund claim of CENVAT credit lying unutilised in the Cenvat credit account on closure of operation will be allowed.

Background and Facts of the case

- The appellant is in appeal against the impugned order wherein the refund claim of credit remained unutilized on closure operation has been rejected.
- The appellant is manufacturer of electricity meters and registered with the Central Excise department.
- On 6.3.2018, the appellant filed refund claim under Rule 5 of Cenvat credit Rules, 2004 for the credit remained unutilized in their Cenvat credit account on closure of operation from 1.7.2017.
- The said claim was rejected by both the authorities. Subsequently, the appellant filed an appeal against the said order before the Hon'ble Tribunal.

Discussions and findings of the case

- Accordingly, it is submitted by the Appellant that the issue has been examined by the Hon'ble Tribunal at Chandigarh as well Jurisdictional High Court in the case of Rama Industries Ltd vs. CCE, Chandigarh-2009-TIOL-100-HC-PH-CX.
- The Appellant also made reference to a plethora of judicial pronouncements such as Shri Guru Hargobind plethora of judicial pronouncements such as Shri Guru Hargobind Steel Industries vs. CST, 2021-VIL-01-CESTAT-CHDCE, M/s. Shree Krishna Paper Mills Ltd. vs. CCE & ST, 2018-VIL-884-CESTATCHD-CE, Welcure Drugs & Pharmaceuticals Ltd. vs. CCE, 2018-VIL-592-RAJ-CE, Slovak India Trading Co.Pvt.Ltd.-2006 (2001) ELT 559 (Kar) - 2006-VIL-53-KAR-CE, etc.
- It opposition, the Revenue submitted that no cash refund of unutilized credit on closure of factory can be given in absence of statutory provisions. It also held that Rule 5 of Cenvat Credit Rules, 2004 has been amended on 1.4.2012 and there is no such provision for cash refund.
- Further, the Revenue also referred to the judicial pronouncements held in the cases of Saera Electric Auto Pvt. Ltd. vs. CCE & C, ST, Gurugram-I, Phonix Industries Pvt. Ltd. vs. CCE, Raigad-2015 (330) ELT 303 (Tri.-Mum) - 2014-VIL-497-CESTAT-MUM-CE, Purvi Fabrics & Texturise Pvt. Ltd. vs. CCE, Jaipur-II-2015 (319) ELT 551 (SC) - 2015-VIL-210-SC-CE, CCE vs. Apex Drugs & Intermediaries Limited-2015 (332) ELT 834 (A.P.)- 2011-VIL-91-AP-CE, etc.
- Subsequent to hearing both the parties, the Hon'ble CESTAT found that the case law relied upon by the Appellant in the case of Shri Guru Hargobind Steel Industries (supra) and in the case of M/s. Shree Krishna Paper Mills Ltd (supra) was passed by the said Tribunal.
- Further, in the case of JU Pesticides vs. CCE (supra), the issue came up before this Tribunal and this Tribunal after examining the legal position has allowed the refund vide order dated 3.9.2021.

- Further, the issue was also examined by this Tribunal in the case of Nichiplast India Pvt. Ltd. vs. Principal Commissioner of CGST & Central Excise, Delhi, wherein it has been observed that the cash refund will be allowed.

Ruling

- In light of the above, based on judicial pronouncements, the Hon'ble Tribunal held that the appellant is entitled to cash refund under Rule 5 of Cenvat Credit Rules, 2004 of the credit lying unutilized in their Cenvat credit account on closure of operation.

- Accordingly, the impugned order was set aside and the appeal was allowed.

Customs and Foreign Trade Policy (FTP)

1. BARODA RAYON CORPORATION LTD vs C.C.-AHMEDABAD (Hon'ble Ahmedabad CESTAT Appeal no 10752 of 2019)

Subject Matter: Ruling wherein it was held that the Appellant will be allowed to re-export the imported goods without payment of duty even if the Appellant was not able to clear imported goods from their bonded warehouse after expiry of extended warehousing period, thereby allowing consequent extension of the warehousing period.

Background and Facts of the case

- The appellant M/s Baroda Rayon Corporation Limited is a public limited company which started its commercial production of Viscose Filament Yarn i.e. Rayon Yarn in 1962.

- The company diversified its activities by installing a Nylon Plant in 1974 and in a couple of years, it established Polyester Plant. Thereafter, the Company established Nylon Tyre Cord Plant in 1981.

- In the year 1995-1996 the company had imported Plant and Machineries/equipments under OGL from Japan, Germany and Korea after executing 21 Bonds amounting to Rs 18,01,31,442/-.

- The goods were initially stored at Bombay Location to the safety and security of goods. On the request of the appellant the imported goods were allowed to be shifted from Bombay to appellant's private bonded warehouse at Surat.

- After the expiry of Initial warehousing period, the company had applied for first extension of warehousing period and the department had granted first extension up to 30.06.1996 for six months. As the appellant was not able to clear the imported plants & Machineries/ equipment due to financial crunch, the company had applied for the second, third, forth and fifth extension of the warehousing period

- However, all the extensions were rejected. Thereafter all the extensions applied by the company did not receive any response from the department.

- As the company was not able to clear the imported Plant & Machineries/ equipment from their bonded warehouse after the expiry of permitted extended warehousing, therefore, the department issued 16 Show Cause Notices. The Assistant Commissioner of Central Excise Surat-I vide 16 OIO's all dated 30.03.2001 had confirmed the total custom duty amount of Rs. 5,30,36,179/- and imposed penalty of Rs 10,000/- on each bond.

- In respect of 16 SCN and also order to recover the interest on appropriate rate against these 16 OIO's appeals were filed by the appellant before Commissioner (Appeals) Surat, who vide Single OIA dated 15.01.2001 rejected all these appeals.

- On 26.10.2006 the appellant requested the Department for transferring the bonded plants & Machineries/equipment lying in their private bonded warehouse outside the factory premises to inside the factory premises at Surat. The department in its reply dated 19.01.2007 stated that since request for extension of warehousing period has been rejected beyond the year 1998 and since the SCN for all the consignments were already given to the appellant has been confirmed duty demand of Rs 6,85,96,547/- and penalty of Rs. 2,10,000/- along with interest is still pending for recovery. Therefore, permission was not granted to shift the goods inside the factory at Surat.

- However, when the appellant vide its letter dated 09.02.2007 gave a detailed justification for safety and security of bonded plants & Machineries/equipment if the same are not shifted inside the factory premises, the permission was granted by the department.

- The plant and Machineries/equipment imported in the year 1995-96 has not been installed as yet and still lying in bonded warehouse.

- Subsequently, the company became a Sick Industrial Unit and got registered under BIFR. Thus, the said capital goods became technically and economically unfeasible for the company.

- Accordingly, the appellant requested the department to accord permission for re-export of the consignments in terms of Board's Circular No.03/2003-CUS dated 14.01.2003.

- During the period of 16 years from year 2000- 2016 the appellant case was pending before BIFR/AAIFR, the department neither took any action for recovery of the Custom Duty on account of expiry of extended warehousing period nor decided the appellant request for re-export of warehoused goods.

- In this background the appellant had requested the Chief Commission of Customs, Gujarat Zone, Ahmedabad for extending the warehouse period as the appellant was going to re-export the imported plant, Machineries/equipments.

- The said request for re-export of warehoused plants, machineries/equipment and consequent extension of warehousing period till the limited time within which the goods will be re-exported was rejected by the Chief Commissioner of Customs, Gujarat Zone, Ahmedabad against which the present appeal was filed.

Discussions and findings of the case

- The appellant contended that Chief Commissioner of Customs has wrongly rejected the request for re- export of warehoused plants & machineries/equipment along with consequent extension of warehousing period as the same is against the Board Circular 03/2003-Cus dated 14.01.2003 and various statutory provisions. He submits that the ground of rejection is that once the SCN has been issued and demand has been confirmed upto the

level of Tribunal i.e. the matter has already attained finality, the representation does not merit any consideration is not correct and proper for the reason that since the goods are remained in warehouse the re-export cannot attract any duty.

- Further, he referred to proviso to Section 61(b) ibdi as amended with effect from 13.05.1994 which provides that warehoused goods other than capital goods for use in 100% EOU may be left in the warehouse which they are deposited till the expiry of the period of one year and in case of goods which are not likely to deteriorate, the prescribed period of warehousing of one year on sufficient cause being shown, be extended by the Commissioner of Customs for a period not exceeding 6 months and by the Chief Commissioner of Customs for such period as deem fit.

- Basis above, the Appellant concluded that the order rejecting the appellants request for re-exporting by extending the warehousing period requires to be set aside as the same was not correct in law.

- The Appellant further held that even after clearing the warehoused goods on payment of duty for home consumption , the appellant will continue to have the right to export the imported plant, machineries/equipment, which have not been put to use at all as yet to claim drawback of 98% of duty paid on the imported goods in terms of Section 74ibid.

- In contrary to the above, the Revenue contended that since the demand has been confirmed and the same is upheld up to the Tribunal the request of the appellant for re-export and extension of Warehousing period cannot be granted.

- The Hon'ble Tribunal relied upon the provisions of Section 69 of the Customs act & the Board circular no 03/2003-Cus dated 14.01.2003.

- The Tribunal further contended that the provisions of Section 72(1)(d) would be applicable when the department wish to sell the goods by auction. It further held that the provision will not be applicable only in case when the appellant failed to clear the goods for home consumption. Therefore, there is no conflict between the board circular 03/2003- Cus dated 14.01.2003 and Section 72(1)(d) of the Customs Act, 1962 as the said section is applicable only in case when the goods are cleared for home consumption or in case the appellant do not intend to clear the goods and department proceed to sell the goods by auction.

Ruling

- In light of the above, it was held that appellant is allowed to re-export the warehoused goods without payment of duty/fine/penalty, if any.
- It was also held that the warehousing period of the imported goods shall also be extended for 6 Months or further period within which the goods are re-exported.

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