EY Tax and Regulatory Alert

May 2019

Prepared for ACMA

Contents

Building a better working world

Indirect Tax

This Section of Tax alert summarizes the Indirect tax updates for the month of May 2019

Judicial Precedents

1. M/s. Megha Engineering & Infrastructures Ltd.

v/s

The Commissioner of Central Tax, Hyderabad
The Assistant Commissioner of Central Tax, Hyderabad
The Superintendent of Central Tax, Hyderabad

[Writ Petition No. 44517 of 2018]

Backgrounds and Facts of the case

- The petitioner, M/s Megha Engineering & Infrastructures Limited ('the Assessee') was issued notice by the department demanding interest @ 18% for delay in payment of tax in terms of section 50 of CGST Act, 2017 on account of delay in filing of return

- The case of the Assessee is that the GST Portal is designed in such a manner that unless the entire tax liability is charged by the assessee, the system will not accept the return in GSTR - 3B Form. As a result, even if an assessee was entitled to set off, to the extent of 95% by utilizing the ITC, the return cannot be filed unless the remaining 5% is also paid.

- There was a delay on the part of the Assessee in filing the returns in GSTR - 3B Forms for the period from October 2017 to May 2018. This was due to the shortage of ITC, available to off-set the entire tax liability. The total tax liability of the Assessee for the period from July 2017 to May 2018 was Rs. 1014,02,89,385/- and the ITC available to the credit of the Assessee during this period was Rs. 968,58,86,133/-. Thus, there was a short fall to the extent of Rs. 45,44,03,252/-, which the petitioner was obliged to pay by way of cash.

- According to the petitioner, they could not make payment and file the return within time due to certain constraints. However, the petitioner discharged the entire tax liability in May 2018.

- In response to the notice issued by department regarding payment of interest on the total tax liability, the petitioner pointed out that interest is to be calculated only on the net tax liability after deducting ITC from the total tax liability and hence made the payment of Rs. 30,92,522/- towards interest calculated on the net tax liability. The learned counsel of the Assessee relied on the approval made in principle by the GST Council for the amendment of Section 50 of the CGST Act, 2017 which provides that interest should be charged only on the net tax liability of the taxpayer, after taking into account the admissible input tax credit, i.e., interest would be leviable only on the amount payable through the electronic cash ledger

- However, the Department demanded interest on the total tax liability as it contended that Section 50(1) of the CGST Act, 2017 is not confined only to the cash component of the tax payable. That the claim of the Assessee is based upon the wrong presumption as

though ITC amount was lying with the Government Treasury. Further, Section 50 imposes a burden in the form of interest, upon every person who is liable to pay tax, but failed to pay the same. The liability to pay interest under Section 50(1) is a statutory obligation which the registered persons are obliged to comply on their own accord, and that since the liability under Section 50 is not penal in nature, the Assessee cannot escape liability

Discussions and Findings of the case

- The Hon'ble Telangana High Court analysed the detailed procedure from availment of credit till utilization thereof and pointed the chronology of the procedure involved as follows-
  (i) The entitlement of a person to take credit of eligible input tax, as assessed in his return
  (ii) The credit of such eligible input tax in his electronic credit ledger on a provisional basis under Section 41(1) and on a regular basis under Section 49(2)
  (iii) The utilization of credit so available in the electronic credit ledger for making payment of tax, interest and penalty etc., under Section 49(3)

- It was observed that until a return is filed, no entitlement to credit and no actual entry of credit in the electronic credit ledger takes place. As a consequence, no payment can be made from out of such a credit entry. It is only after a claim is made in the return that the same gets credited in the electronic credit ledger, post which the payment could be made, even though the payment is only by way of paper entries.

- The Assessee filed returns belatedly, for whatever reasons. As a consequence, the payment of the tax liability, partly in cash and partly in the form of claim for ITC was made beyond the period prescribed. Therefore, the liability to pay interest under Section 50(1) arose automatically. The petitioner cannot, therefore, escape from this liability

- The liability to pay interest under Section 50(1) is self-imposed and also automatic, without any determination by anyone. Hence, the stand taken by the department that the liability is compensatory in nature, appears to be correct.

Ruling

- It was held that the claim made by the department for interest on the ITC portion of the tax is upheld and accordingly interest is required to be paid on the total tax liability.

2. M/s Tata Motors Ltd

v/s

Deputy Commissioner CGST & Central Excise, Division - II, (Pimpri), Pune I

[2019-VIL-131-AAR]

Backgrounds and Facts of the case

- The Applicant is in the business of manufacture and sale of motor vehicles, chassis and parts thereof., is launching new passenger vehicle Tata Harrier with these specifications:

Particulars	Details
Seating capacity	5 persons
Engine capacity	1956 cc
Fuel	Diesel
Market segment	Utility vehicle
Length	4598 mm
Ground clearance(unladen)	205 mm
Ground clearance (laden)	160 mm

- The present application has been filed under Section 97 of the CGST Act, 2017 and the Maharashtra GST Act, 2017 seeking an advance ruling in respect of the following questions

  - Whether Tata Harrier vehicle, which has following specifications, is classifiable under Tariff Item 8703 32 91 or 8703 32 99 of the First Schedule to the Customs Tariff Act, 1975 (51 of 1975)?

  - For a motor vehicle to get covered under Sr. 52B of Notification No. 1/2017-Compensation Cess (Rate) dated 28.06.2017 as SUV/ UV, whether it has to satisfy only the conditions mentioned in main clause i.e. engine capacity above 1500 cc and popularly known as SUV/ UV or in addition, it has to also satisfy the conditions mentioned in Explanation i.e. length exceeding 4000 mm and having ground clearance of 170 mm and above

  - For the purpose of Cess @ 22% under Sr. No: 52B of Notification No. 1/2017 Compensation Cess (Rate) dated 28.06.2017 as amended, whether the ground clearance of the vehicle is to be considered in laden condition or in unladen condition?

  - Whether Tata Harrier vehicle whose ground clearance in unladen condition is 205 mm and in laden condition is 160 mm, would fall under Sr. No. 52B of the Notification No. 1/2017- Compensation Cess. (Rate) dated 28.06.2017 as amended?

  - Whether GST Compensation Cess @ 22% under Sr. No. 52B of Notification No. 1/2017- Compensation Cess (Rate) dated 28.06.2017 as amended, will be applicable to Tata Harrier vehicle?

  - Vehicle whose ground clearance in unladen condition is more than 170 mm but below 170mm in laden condition, whether will get covered under Sr. No. 52B of Notification No. 1/2017-Compensation Cess (Rate) dated 28.06.2017?

Discussions and Findings of the case

- The jurisdictional office has made submissions in reply to the application. They have with reasonings concluded as under:

(I) In view of the technical specifications provided by the applicant, i.e., the "engine cylinder capacity" and the type of engine makes it clear that the vehicle falls under Chapter 8703 32 91 (Motor Cars) of the Customs Tariff Act, 1975

(II) There is a difference between the two entries, i.e., 52A & 52B given in the amendment Notification and the applicant's product matches the description given at Sl. No. 52B, thereby attracting the Compensation Cess of 22%

(III) The ground clearance given in under Sr. No. 52B of Notification No. 1/2017 Compensation Cess (Rate) dated 28.06.2017 as amended, has to be arrived in unladen state. The ground clearance in laden condition cannot be considered as the weight of passengers can vary. Hence no standardization of laden weight can be arrived at

(IV) The Tata Harrier vehicle whose ground clearance in unladen condition is 205 mm and in laden condition is 160 mm, would fall under Sr. No. 52B of the Notification No. 1/2017- Compensation Cess (Rate) dated 28.06.2017, as amended and the GST Compensation Cess @ 22% under the same will be applicable

(V) Vehicle whose ground clearance in unladen condition is more than 170 mm but below 170mm in laden condition, will get covered under Sr. No. 52B of Notification No. 1/2017-Compensation.Cess (Rate) dated 28.06.2017

Ruling

- In view of the above discussions Tata Harrier vehicle, is classifiable under Tariff Item 8703 32 91 of the First Schedule to the Customs Tariff Act, 1975 (51 of 1975)

- To be covered under Sr. No. 52B of Notification No. 1/2017-Compensation Cess (Rate) dated 28.06.2017, the vehicle must satisfy the conditions mentioned in main clause as well as the conditions mentioned in the Explanation

- The ground clearance given in the Notification must be arrived in unladen condition

- Tata Harrier vehicle whose ground clearance in unladen condition is 205 mm and in laden condition is 160 mm, would fall under Sr. No. 52B of the Notification No. 1/2017-Compensation Cess (Rate) dated 28.06.2017 as amended

- GST Compensation Cess @ 22% under Sr. No. 52B of Notification No. 1/2017-Compensation Cess (Rate) dated 28.06.2017 as amended, will be applicable to Tata Harrier vehicle

- To get covered under Sr. No. 52B of Notification No. 1/2017-Compensation Cess (Rate) dated 28.06.2017, the ground clearance should be 170 mm or above in unladen condition

3. M/s BHARAT VIJAY TRANSPORT CO.

v/s

STATE OF GUJARAT

[2019-VIL-210-GUJ]

Backgrounds and Facts of the case

- The petitioner is engaged in transportation services
- The goods were being transported under an invoice and e-way bill bearing a valid GSTN when the confiscation is made on the ground that the owner of the goods is untraceable
- When the conveyance in question was apprehended it was carrying goods under 31 bills and lorry receipts, out of which in case of 22 bill and lorry receipts the goods were released immediately; in case of nine defective bills and lorry receipts, seven of the concerned tax payers had paid the tax and penalty, pursuant to which the goods were released
- It is in case of only two lorry receipts viz. No. 155609 and 155616 issued to M/s Standard Sales Corporation that the owner of the goods has not turned up for getting the goods released

Findings of the case

- Upon inquiry, it is found that the GSTN stated in the e-way bill etc. have been obtained on the basis of the Aadhar card, PAN and mobile number of one Mahendrabhai Venilal Solanki who had permitted one Vipulbhai to use such documents for obtaining GST registration upon payment of some amount to him
- However, though the statement of Mahendrabhai has been recorded in January 2019 no criminal proceedings have been instituted against him nor has any complaint been filed before the police in respect of such offence. No steps have been taken against the said Mahendrabhai under section 122(xxii) of the Central Goods and Services Tax Act, 2017/Gujarat Goods and Services Tax Act, 2017
- Admittedly the goods were being transported under an invoice and e-way bill bearing a valid GSTN. It appears that such GSTN has been given without proper inquiry as contemplated under the Act and the rules, which is on account of default on the part of the concerned authorities
- On a perusal of the order of confiscation made under Section 130 of the Goods and Services Tax Act, 2017 read with the relevant provisions of the State Goods and Services Tax Act/ integrated Goods and Services Tax Act, it is evident that the authority concerned has not applied its mind to the objections raised by the petitioner and has perfunctorily passed the impugned order confiscating the conveyance of the petitioner
- In the aforesaid premises the petitioner has made out a strong prima facie case for grant of interim relief. Under the circumstances, Issue Rule returnable on 19th June 2019

Ruling

- By way of interim relief, the respondents are directed to forthwith release the conveyance being Truck No.GJ-01-BY-5326 of the petitioner, subject to a responsible partner of the petitioner firm filing an undertaking before this court, within a period of two days from aforementioned date, that in the event the

petitioner fails in the petition or is otherwise found to be liable under the CGST/GGST Act, the petitioner shall forthwith discharge such liability without prejudice to its rights to challenging such order before the appropriate forum.

Key Indirect Tax updates

This section summarizes the regulatory updates for the month of May 2019

- **Change in the mechanism of usage of credit from cross pool, brought in post the applicability of GST Amendment Act 2018 w.e.f. 1 February 2019**

A new section namely Section 49A has been inserted in CGST Act, 2017, with respect to utilization of input tax credit:

"Section 49A. Notwithstanding anything contained in section 49, the input tax credit on account of central tax, State tax or Union territory tax shall be utilised towards payment of integrated tax, central tax, State tax or Union territory tax, as the case may be, only after the input tax credit available on account of integrated tax has first been utilised fully towards such payment"

"Section 49B. Notwithstanding anything contained in this Chapter and subject to the provisions of clause (e) and clause (f) of sub-section (5) of section 49, the Government may, on the recommendations of the Council, prescribe the order and manner of utilization of the input tax credit on account of integrated tax, central tax, State tax or Union territory tax, as the case may be, towards payment of any such tax."

- **Following enhancements have been made in the e-Way bill generation system**

(i) Auto calculation of distance based on PIN Codes for generation of e-Way Bill;

(ii) Knowing the distance between two PIN codes;

(iii) Blocking the generation of multiple e-Way Bills on one Invoice/Document;

(iv) Extension of e-Way Bill in case the consignment is in Transit/Movement; and

(v) Report on list of e-Way Bills about to expire

Direct Tax

This section of tax alert summarizes the Direct tax updates for the month of May 2019.

Key Direct Tax Developments

1. **Procedure, format and standards for issuance of certificate for TDS in Part B of Form 16 notified**

- All deductors are required to issue TDS certificate in Part B of Form 16 by generation and download through TRACES Portal in respect of all sums deducted after 1st April, 2018.
- The deductor shall before issuing Form 16 Part B authenticate the correctness of content mentioned therein and verify the same using manual/ digital signature.
- Certain items in Part B of Form 16 are required to be filled-in by deductor manually and shall be made available at the bottom of the TRACES generated Form 16 Part B.

Source: Notification No. 9/2019 dated 06 May 2019 (Notification) issued by the Central Board of Direct Taxes (CBDT).

2. **Reporting under clause 30C and clause 44 of the Tax Audit Report which was earlier kept in abeyance till 31st March, 2019 shall now be kept in abeyance till March 31st, 2020**

- Clause 30C dealing with reporting of GAAR & clause 44 dealing with GST was earlier deferred till March 31, 2019 by Circular No. 6/2018.
- CBDT has issued circular to further defer the such reporting till March 31st, 2020.

Source: Circular 9/2019 dated May 14, 2019 issued by CBDT

3. **Supreme Court rules that an element of human intervention is required for taxing a payment as 'fees for technical services'**

Background and Facts

- The Taxpayer, engaged in the business of providing cellular/telephone facilities, obtained licenses for operating in its specified circles.
- In case of calls made by subscribers of one network to another network i.e., subscribers which fall outside the specified circle of the Taxpayer, these are necessarily to be routed through national long distance telecommunication carriers viz., MTNL and BSNL, which provide interconnection between the two networks.
- Therefore, as per the prevailing guidelines, the Taxpayer is required to connect its network with that of BSNL and a similar concomitant agreement is entered into under which BSNL is required to interconnect its network with that of the Taxpayer. For such interconnection/port access, payments are made by the Taxpayer.
- Under the provisions of the ITL, the term FTS is defined to mean any consideration for the rendering of any managerial, technical or consultancy services. Where a payment qualifies as FTS, it is subject to withholding tax even when the recipient is a resident of India, under the ITL.
- The issue under consideration was whether payments made by the Taxpayer to BSNL/MTNL for availing the interconnection/port access services should be subject to withholding tax as FTS.
- The HC (supra) had decided the issue in favour of the Taxpayer on the basis that these services do not involve any human interface. The HC agreed with the Taxpayer that the term 'technical' needs to be interpreted in light of the words 'managerial' and 'consultancy', between which it is sandwiched in the definition of 'FTS' under the ITL. An element of human intervention is essential for providing managerial and consultancy services and, consequently, by applying a similar analogy,

the term 'technical' would also have to be construed as involving a human element.

The SC Ruling

- The expression 'technical services' comes in between the words 'managerial' and 'consultancy' services in the ITL. Various decisions of the High Courts and Tribunals have taken a view that the expression 'technical services' has to be read in the narrower sense by following the rule of Noscitur a sociis i.e., questionable meaning of a word can be derived from its association with other words.

- There is, however, no expert evidence from the Tax Authority's side to show how human intervention takes place in the present fact pattern. Expert evidence is required to decide whether there is any manual intervention involved during the traffic of such calls. In a situation where the taxpayer is allotted a fixed capacity and in case this capacity is exhausted, it is unclear whether any human involvement is required in allocating additional capacity on an urgent basis. Thus, whether at any stage, any human intervention is involved needs to be examined based on the technical evidence from technical experts. This would enable appellate authorities to decide the legal issue based on factual foundation.

- Therefore, keeping in mind the larger interest and the ramification of the issue, the matter was remitted to the Tax Authority to decide the issue after examining technical experts within a period of four months. Such experts would be cross-examined. The taxpayers are also at liberty to examine the experts and adduce any other evidence. Till such time, the tax administrative authority was asked to issue directions to all its officers that in such cases, the Tax Authority would not proceed against other taxpayers only on the basis of agreements placed before them. Once the issue is settled, the Tax Authority would be able to levy both interest and penalty on such transactions based on the outcome of the issue.

- However, interest or penalty cannot be levied on the Taxpayer and other parties to this case for the following reasons:

  - There is no loss of revenue to the Tax Authority for not withholding taxes on such payments as taxes have already been paid by the recipient.

  - The question of taxability of the payments as FTS is still not determined. Therefore, there would be no levy of penal interest prior to the date of fresh adjudication order.

Source: Supreme Court (SC) [193 Taxman 97]

4. Madras High Court allows filing of revised return beyond timeline under Section 139(5) pursuant to the NCLT Approved amalgamation scheme

Background and facts

- This case involves writ petition filed by two taxpayers for filing revised return of income after the time barring date.

- The taxpayers have entered into the scheme of arrangement and amalgamation which has been duly approved by NCLT through an order dated after the time barring date for filing the revised return under Section 139(5).

- The taxpayers had taken a conscious call to file the revised return u/s.139(5) of the amalgamated company, (that is the above two companies) at the same time, so that proper effect was given to income and expenditure, credit of prepaid taxes etc for A.Y's 2015-16 & A.Y. 2016-17.

- On observing this, Revenue held that since the revised returns of income had been filed beyond the prescribed period as stipulated under Section 139(5) of the Income Tax Act, and condonation of delay was not obtained from the Board in accordance with Section 119(2)(b) of the Income Tax Act read with CBDT Circular No.9 of 2015 , as also the petitioner had not complied with Rule 12(3) of

the Income Tax Rules by filing the revised returns electronically, the revised returns of income were invalid.

Issue before HC

- Whether the scheme of amalgamation approved by the NCLT under Section 391 of the Companies Act permitting the respective petitioners to file a revised return of income, even beyond the prescribed period is binding on income tax authorities if the revised return is filed beyond the prescribed period as stipulated under Section 139(5) of the ITA.

- Whether the Circular no. 9/2015 issued under Section 119(2)(b) of the ITA overrides the scheme of amalgamation approved by NCLT.

- Whether filing of revised return of income electronically is mandatory and whether there can be exceptions to this rule.

Madras HC Ruling

- Paragraph 64 (c) of the scheme of arrangement and amalgamation approved by the National Company Law Tribunal permitted the respective petitioners to file revised returns of income beyond the prescribed period without incurring any liability on account of interest, penalty or any other sum.

- The respective petitioners cannot be made remediless on the basis of Section 139(5) of the ITA. The said provision is not applicable for the facts of the instant case as the revised return of income has been filed pursuant to the scheme of arrangement and amalgamation approved by the NCLT and not a case where there was discovery of any omission or any wrong statement under the original return of income filed for the assessment years 2015-2016 and 2016-2017.

- Section 119(2)(b) of the ITA has no relevance to the facts of the instant case as the circular No.9 of 2015 issued by the CBDT under Section 119(2)(b) of the Income Tax Act, 1961 has been issued only to avoid genuine hardship in any case or class of cases. But, in the instant case, the revised returns of income have been filed by the respective petitioners pursuant to the orders passed by the NCLT approving the scheme of arrangement and amalgamation which permits the respective petitioners to file the revised returns of income beyond the prescribed period.

- Insofar as Rule 12(3) of the IT Rules, 1962, which requires filing of returns electronically is concerned, the petitioner cannot be rendered remediless just because the income tax website did not allow a window to the respective petitioners for filing returns of income electronically as the revised returns of income were filed beyond the prescribed period as stipulated under Section 139(5) of the ITA.

- When there is no such express bar under the ITA or its Rules, the Revenue cannot override the approved scheme of arrangement and amalgamation which has a statutory force by rejecting the revised returns of income filed by the respective petitioners as invalid.

Source: TS-253-HC-2019(MAD)

5. Uttarakhand High Court holds that service tax reimbursement shall not form part of the gross revenue for computing presumptive income

Background

- Under the ITL, taxes are levied, as per the charging provisions, on the "total income" of a taxpayer. In the case of NRs, India follows a territorial system of taxation, whereby "total income" refers to income which is received or deemed to be received in India or income which accrues or arises or is deemed to accrue or arise in India. Furthermore, there are source rules in the ITL, which set out the circumstances in which different types of income will be regarded as deemed to accrue or arise in India. In the context of business income, the source rule provides that income which is attributable to operations carried out in India shall be deemed to accrue or arise in India.

- Business income is generally computed on net basis by deducting specified expenses and

allowances from gross receipts. However, with a view to simplify computation of taxable income in the case of NRs, the ITL provides for an alternative scheme of presumptive taxation of business income of NR taxpayers in certain cases. Under the scheme of presumptive taxation, a certain percentage of total turnover or gross receipts of the taxpayer is considered as deemed income and tax is levied on such income.

- One such presumptive taxation provision provides an option for NRs/foreign companies engaged in the business of provision of specified services to be used in prospecting, extraction or production of mineral oil, to compute their income at 10% of gross revenues.

- The gross revenue, as specified under the presumptive taxation provisions, includes: (a.) The amount paid or payable (whether in or out of India). (b.) The amounts received or deemed to be received in India, "on account of" provision of specified services in connection with the business of prospecting, extraction or production of mineral oil. A flat rate of 10% of the gross revenue is deemed as presumptive income from such business, which is subject to tax at 40%.

- Where, however, NR taxpayers claim income lower than the deemed income, computation of its income will be made as per the normal provisions specified under the head "Profits and gains from business or profession" in the ITL, subject to maintenance of the accounts and getting these accounts tax audited under the Income Tax Act (ITA).

Facts

- The Taxpayers, being NR foreign companies, entered into contracts with ONGC for supply of rigs/plant and machinery on hire and for carrying out oil exploration activities in India. Along with its service fees, the Taxpayers collected service tax from ONGC and deposited the same with GoI.

- The Taxpayers opted for the presumptive taxation provisions under the ITL and declared their gross revenue without including the amount of service tax received from ONGC. However, the Tax Authority included the said amount in the gross receipts and subjected it to tax under the presumptive taxation provisions.

- The Tax Authority contended that the phrase "on account of" used in the presumptive taxation provisions has a much wider connotation, as it includes within its ambit any amount received by a taxpayer by reason of, or as a consequence of, the services rendered by them. If the intention of the Legislature was to confine its meaning purely to the consideration received for the services part only, the word "for", or any such word, would have been used instead of "on account of".

- As against that, the Taxpayers contended that the service tax recovered from ONGC should not be considered as part of the gross revenue, since the same is not beneficially payable "on account of" the provision of service to ONGC. The service tax amount received from ONGC is "pure reimbursement" without having any "income" element, both under the normal provisions for computing "profits and gains from business or profession" and the presumptive taxation provisions. Thus, such amount would not be liable to income tax in India.

- The Taxpayers further contended that, so far, the Tax Authority had not challenged the law laid down by the Division Bench of the Delhi High Court (HC), wherein the HC happened to rule in favor of the Taxpayer. The Tax Authority, having accepted the Delhi HC ruling on this issue, is not open to challenge the correctness of this decision before another HC.

- The First Appellate Authority and the Tribunal upheld the Tax Authority's order. The Division Bench dealing with the present case of the Taxpayer, however, not being able to accept the earlier decision by the Division Bench of the Uttarakhand HC[5] on the issue, referred the matter to the Larger Bench.

Issue before HC

Whether the amount reimbursed to the Taxpayers towards service tax should be included in computing the gross revenue under the presumptive taxation provisions of the ITL.

Large Bench Ruling

On exclusion of service tax for computing gross revenue of the Taxpayers

The Larger Bench upheld the decisions of the earlier Division Bench and held that reimbursement of service tax is not an amount paid to the Taxpayers "on account of" providing services and facilities in connection with the prospecting for, or extraction or production of mineral oils in India. Thus, such amount cannot be included in computing gross revenue as per the presumptive taxation provisions.

In arriving at the conclusion, the Larger Bench considered the following principles:

- The charging provisions under the ITL should not be side tracked merely because the presumptive taxation provisions are special provisions. Rather, the aid of the presumptive taxation provisions should be taken to determine whether a particular amount results in "income" within the ambit of the charging provisions under the ITL.

- The expression "amount paid or payable" and the expression "amount received or deemed to be received" used in the presumptive taxation provisions, are qualified by the words "on account of provision of services or facilities". On literal construction, the presumptive taxation provisions would trigger in respect of the amount paid by ONGC to the Taxpayers on account of: (i.) Provision of services in connection with; or (ii.) Supply of plant and machinery on hire used in prospecting, extraction and production of mineral oils. The amount of reimbursement of service tax is not the amount paid to the Taxpayers towards the aforesaid services.

- Various dictionaries define the term "on account of" to mean "by reason of" or "because of" or "in consideration of". These meanings also support the aforesaid proposition.

- It is not every amount paid on account of provision of services and facilities which must be deemed to be the presumptive income of the Taxpayers. Only such amounts which are paid to the Taxpayers on account of the services and facilities provided by them, must be deemed to be the income of the Taxpayers. Service tax is a tax levied on services and cannot be treated as the service fees itself.

- Service tax, being an indirect tax, can be passed on by a service provider to the service recipient. Reimbursement, thereof, by the service recipient to the service provider cannot be treated as presumptive income of the service provider. Furthermore, service tax is a tax on service and does not form a part of the consideration paid for services rendered.

- The presumptive taxation provisions start with a non-obstante clause and prevail notwithstanding anything to the contrary laid down in the normal provisions prescribed under the ITL for computing profits and gains of business or profession. While interpreting a provision containing a non-obstante clause, it should first be ascertained what the enacting part of the provision provides, on a fair construction of the words according to their natural and ordinary meaning. A plain and literal reading of the provision provides that reimbursement of service tax is not paid to the taxpayer on account of provision of specified services and, thus, such an amount cannot be included in computing the deemed income of the taxpayer.

- While dealing with a taxing provision, the principle of "strict interpretation" should be applied. The Court shall not interpret the statutory provision in such a manner which would create an additional fiscal burden on a person. When two interpretations are possible, the Court would interpret the provisions in favor of a taxpayer and against the Tax Authority. In case of doubt or dispute, the construction should be made in favor of the taxpayer and against the Tax Authority.

- The Central Board of Direct Taxes (CBDT) issued circulars[9] in the context of tax withholding provisions, which have clarified that no tax is to be withheld on the service tax component reflected in invoices raised for services rendered. These circulars reflect its understanding that service tax paid by the Taxpayers is not "income". These circulars also support the proposition that service tax would not

form part of gross receipts for presumptive taxation.

Impact of non-preferring of appeal by Tax Authority against the judgment of the Delhi HC

- The issue was whether the Tax Authority is entitled to challenge the correctness of the decision of one HC before another when the Tax Authority itself had not preferred appeal against the HC ruling in the first place.

- The Division Bench of the Delhi HC, relying on the Supreme Court (SC) decision in the case of Lakshmi Machines Works, had held that the service tax collected by the taxpayer did not have any element of income and, therefore, could not form part of the gross receipts for the purposes of computing the presumptive income of the taxpayer under the ITA. The Tax Authority did not prefer appeal to the SC against the ruling of the Division Bench of the Delhi HC. It is a settled legal position that where the Tax Authority has not challenged the correctness of law laid down by the HC and has accepted it in the case of one taxpayer, it is not open to the Tax Authority to challenge the correctness of said HC ruling in the case of other taxpayers, without just cause.

- Having regard to the aforesaid principles, the Larger Bench held that, in the absence of any just cause being shown by the Tax Authority, the Larger Bench did not find any basis to differ with the judgment of the Division Bench of the Delhi HC.

Source: Uttarakhand High Court (Larger Bench) [TS-201-HC-2019(UTT)]

Key Regulatory amendments

This section summarizes the regulatory updates for the month of May 2019.

Notifications/ circulars issued by RBI

1. RBI permits foreign portfolio investors (FPIs) to invest in municipal bonds

- The definition of 'Municipal Bonds' has been included under the extant control exchange framework to mean debt instruments issued by municipalities constituted under Article 243Q of the Constitution of India.

- Further, in order to broaden the access of FPIs to debt instruments in India, Municipal Bonds have been added to the list of permissible instruments (other than capital instruments), that can be issued to FPIs.

- Accordingly, FPI are now permitted to invest in municipal bonds and such investments shall be reckoned within the limits set for FPI investment in State Development Loans.

Source : FEMA Notification No. FEMA 20 (R) (4) /2019-RB dated 18 April 2019 read with A.P. (DIR Series) Circular No. 33 dated 25 April 2019

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