EY Tax and Regulatory Alert

April 2020

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 April 2020

Following are the series of Notifications issued by CBIC wherein in the wake of COVID-19 outbreak, several statutory and regulatory due dates have been extended:

- **Notification No. 30/2020-Central Tax, dated 03.04.2020** has been issued to allow cumulative application of condition as specified in Rule 36(4) of CGST Rules, 2017 with respect to Input Tax Credit (ITC) reconciliation. Rule 36(4) restricts ITC availment to 110% (effective 01.01.2020) of the matched credit available in Form GSTR 2A. Now, it has been provided that the said condition shall apply cumulatively for the tax periods February 2020 to August 2020 and the return in Form GSTR-3B for the tax period September, 2020 shall be furnished with such cumulative adjustment of input tax credit for the said months in accordance with the said condition.

- **Notification No. 31/2020 and 32/2020-Central Tax, dated 03.04.2020** has been issued seeking to provide relief by lowering of interest rates and waiver of late fees for delay in filing of GSTR 3B in a following manner:
  - Taxpayers having an aggregate turnover of more than INR 5 crores in the preceding FY, rate of interest shall be nil for first fifteen days from the due date and 9% p.a., thereafter, on the condition that GSTR 3B is furnished on or before 24.06.2020 for the tax periods from February 2020 to April 2020. Further, no late fee shall be levied.
  - Taxpayers having an aggregate turnover of more than INR 1.5 crores up to INR 5 Crores in the preceding FY, rate of interest shall be nil, on the condition that GSTR 3B is furnished on or before 29.06.2020 for the months of February 2020 and March 2020 and for the month the April 2020, the return has been furnished on or before 30.06.2020. Further, no late fee shall be levied
  - Taxpayers having an aggregate turnover of up to INR 1.5 crores in the preceding FY, rate of interest shall be nil, on the condition that GSTR 3B for months of February 2020, March 2020 and April 2020 has been furnished on or before 30.06.2020, 03.07.2020 and 06.07.2020, respectively. Further, no late fee shall be levied
  - It is to be noted that there is only a waiver of late fee and rationalization of interest rates for belated filings during these periods as per details below and no extension as such in the due dates for compliance

- **Notification No. 33/2020-Central Tax, dated 03.04.2020** has been issued wherein the amount of late fee payable under section 47 of the CGST Act, 2017 for delay in filing Form GSTR-1 for the months of March, 2020 to May 2020 and for the quarter ending 31.03.2020 has been waived subject to the condition that the FORM GSTR-1 in respect of such tax periods is filed on or before the 30.06.2020.

- **Notification No. 35/2020-Central Tax, dated 03.04.2020** has been issued which provides extension of time limit for completion or compliance of various actions which falls during the period between 20.03.2020 to 29.06.2020. The time limit for completion of such action, has been extended up to June 30, 2020.The said notification also extends the validity of e-way bill generate under Rule 138 of CGST Rules, 2017, expiring between 20.03.2020 to 15.04.2020, till 30.04.2020.

- **<u>Notification No. 36/2020-Central Tax, dated 03.04.2020</u>** has been issued seeking to extend the due date for furnishing of Form GSTR-3B for the month of May, 2020 in the following manner:

  - Taxpayers having aggregate turnover of more than INR 5 crores in previous FY, may furnish the return on or before 27.06.2020

  - Taxpayers having aggregate turnover up to INR 5 crores in previous FY, having principal place of business in the States of Chhattisgarh, Madhya Pradesh, Gujarat, Maharashtra, Karnataka, Goa, Kerala, Tamil Nadu, Telangana, Andhra Pradesh, the Union territories of Daman and Diu and Dadra and Nagar Haveli, Puducherry, Andaman and Nicobar Islands or Lakshadweep, may furnish the return on or before 12.07.2020

  - Taxpayers having aggregate turnover up to INR 5 crores in previous FY, having principal place of business in the States of Himachal Pradesh, Punjab, Uttarakhand, Haryana, Rajasthan, Uttar Pradesh, Bihar, Sikkim, Arunachal Pradesh, Nagaland, Manipur, Mizoram, Tripura, Meghalaya, Assam, West Bengal, Jharkhand or Odisha, the Union territories of Jammu and Kashmir, Ladakh, Chandigarh or Delhi, may furnish the return on or before 14.07.2020

- **<u>Circular No.137/07/2020</u>** - GST dated 13 April 2020 issued by CBIC clarifying the following issues pertaining to refund:
  - The timeline for filing refund application falling between the period of 20.03.2020 to 29.06.2020, has been extended till 30.06.2020, vide Notification No. 35/2020 dated 03.04.2020

  - Vide Notification No. 35/2020 Central Tax dated 03 April 2020, time limits for furnishing any record or document which falls during the period 20.03.2020 to 29.06.2020 has been extended till 30.06.2020. Consequently, LUT for FY 2020-21 may be filed anytime up to 30.06.2020. Meanwhile, taxpayer can quote LUT pertaining to FY 2019-20 in relevant documents wherever required

  - Where GST is paid against an advance received for a service contract which got cancelled subsequently and if the supplier has issued a tax invoice against such proposed supply, he may simply issue a credit note and adjust his tax liability. In case his output tax liability is nil due to which liability cannot be adjusted, he may file a claim for refund of excess payment of tax by filing FORM GST RFD-01. In other cases, where the supplier has issued a receipt voucher initially, he may issue a refund voucher. Thereafter, he may file a claim for refund of excess payment of tax by filing FORM GST RFD-01

  - In case where the goods supplied under the cover of tax invoice are returned subsequently by the recipient, the supplier may issue a credit note and adjust the tax liability. Further, if the output tax liability is nil due to which liability cannot be adjusted, the supplier may file a refund application in respect to excess payment of tax.

- **<u>Press Release – dated 08.04.2020</u>**, issued by Ministry of Finance announces the issuance of all pending GST and Customs refunds which would provide benefit to around one lakh business entities, including MSME. Hence, refund amounting to INR 18,000 crore (approx.) will be granted.

- **<u>Circular No.135/05/2020</u>**– GST dated 31.03.2020 issued by CBIC clarifying following GST refund related issues:

  - Bunching of Refund Claims across Financial Years:

    - The restriction of clubbing of refund claims across financial years was inserted in the Master refund circular No. 125/44/2019-GST dated 18 November 2019.

    - However, the issue has been examined and it has been decided to remove the restriction on clubbing of tax periods across the Financial Years. Hence, restriction on bunching of refund claims across financial years shall not apply.

  - Refund of accumulated input tax credit (ITC) on account of reduction in GST rate:

    - It has been clarified that applicant who claims refund under Inverted duty structure cannot claim refund of accumulated input tax credit on account of mere change in the rate of GST for the same product (eg. tax rate of 18% being subsequently changed to 12% resulting into accumulation of ITC).

  - Change in the manner of refund of tax paid on supplies other than zero rated supplies

    - It may be noted that any refund of tax paid on supplies other than zero-rated supplies will now be admissible in the respective original mode of payment.

    - By way of an illustration, it may be explained, if tax to be refunded has been paid through debiting the electronic credit ledger then any refund on account of excess or wrong payment of taxes shall be credited to the electronic credit ledger in form GST PMT-03 and not through the mode of cash.

    - Similarly, if tax to be refunded has been paid by way of debiting the electronic cash ledger, then any refund on account of excess or wrong payment of taxes shall be paid by issuance of order in Form GST RFD-06 and not through the mode of credit.

    - Guidelines for refund of Input Tax Credit (ITC) under Section 54(3): It has been clarified that refund of accumulated ITC shall be restricted to the ITC as per those invoices, details of which are uploaded by the Supplier in GSTR-1 and reflected in the Form GSTR-2A of the applicant.

    - This change is owing to the insertion of Rule 36(4) of CGST rules which provides that ITC to be availed by a registered person in respect of invoices or debit notes, the details of which have not been uploaded by supplier in GSTR-1, shall not exceed 10% of the eligible credit available in respect of the invoices or debit notes the details of which have been uploaded by the supplier in GSTR-1.

  - Requirement to mention HSN/SAC Codes in Annexure-B:

    - Due to difficulty in distinguishing the details of goods and services, it has been decided to add a column containing HSN/SAC code in the statement of invoices relating to inward supply in Annexure-B of the refund application.

- **<u>Release of new Form GST PMT-09</u>** on GST portal in accordance with Rule 87(13) of CGST Rules, 2017 as amended vide Notification No. 31/2019 – Central Tax dated 28.06.2019 in relation to the transfer of any amount available in the electronic cash ledger. This form enables all taxpayers registered under GST to transfer any balances available under major/ minor heads of electronic cash ledger.

However, the Government is yet to notify the date from which the aforementioned sub-Rule 87(13) shall come into effect.

Customs and Foreign Trade Policy (FTP)

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

- **Notification No. 57/2015-2020, dated 31.03.2020**, issued by Ministry of Commerce and Industry provides that Foreign Trade Policy, 2015-2020 would remain in force up to 31.03.2021 unless otherwise specified.

- **Trade Notice No. 03/2020-2021, dated 15.04.2020,** issued by Ministry of Commerce wherein DGFT has provided the manner of continuation of Merchandise Exports from India Scheme (MEIS) for shipments on or after 01.04.2020 and Introduction of the Remission of Duties and Taxes on Exported Products (RoDTEP) Scheme. With approval of the scheme by Cabinet on 13.03.2020, to replace the ongoing MEIS scheme as publicized vide PIB Press Note dated 13.03.2020, the DGFT has been receiving queries from Trade regards availability of benefit under MEIS, given that the FTP 2015-20 has been extended till 31 March 2021. It is further clarified that:

    - Benefits under MEIS for any item / tariff line / HS Code currently listed in Appendix 3B, Table 2 (MEIS Schedule) will be available only upto 31.12.2020

    - In case any item/tariff line/ HS code is notified under RoDTEP scheme prior to 31.12.2020, the same would be removed from MEIS coverage

    - Detailed operational framework for the Scheme for RoDTEP will be notified separately in consultation with Department of Revenue, Ministry of Finance.

- **Trade Notice No. 60/2019-2020, dated 31.03.2020,** issued wherein DGFT has provided the Extension of validity of Registration cum Membership Certificate (RCMC) beyond 31.03.2020 whereby Regional Authorities (RAs) of DGFT will not insist on valid RCMC (in cases where the same has expired on or before 31.03.2020) from the applicants for any incentive/ authorizations till 30.09.2020.

- **Public Notice No. 67/2015-2020, dated 31.03.2020,** issued by Ministry of Commerce and Industry provides the following extensions:

    - Where in respect of those Advance Authorizations and EPCG Authorizations wherein the extended Export Obligation Period, import validity period or Block period to fulfill Block-wise export obligation have either expired or is expiring between 01.02.2020 to 31.07.2020, the Export Obligation Period, import validity period and Block period, all have been extended for further six months from the date of expiry.

    - The last date for filing annual claims under Service Exports from India Scheme (SEIS) is 12 months from the end of relevant financial year of the claim period, which is expiring for 2018-19 claims on 31.03.2020, has been extended to 31.12.2020.

- **Trade Notice No. 01/2020-2021, dated 07.04.2020,** issued by Ministry of Commerce in respect of the issuance of Certificate of Origin (COO) under various Free/ Preferential Trade Agreements executed by India, the designated agencies will now issue digitally signed electronic certificates of origin on the online platform https://coo.dgft.gov.in.

- **<u>Notification No. 20/2020-Customs, dated 09.04.2020</u>,** issued by Ministry of Finance, wherein exemption has been provided to certain medical equipments, ventilators, Face and surgical masks etc from whole of the Customs Duty and Health Cess applicable thereon upto 30.09.2020.

- To tackle the ongoing crisis of COVID-19, several public notices are issued by the various Custom Houses across the country to provide various reliefs such as:

  - 24*7 assessment, examination and clearance of Import and Export Cargo has been allowed;

  - Labs would also be functioning 24*7 and the test results would be made available at the earliest;

  - Working hours of assessment group has been extended and a dedicated helpdesk has been created;

  - Request for amendment/ waiver of late fees in Bill of Entry can be made by sending an email to specified email ID's provided.

- **<u>Public Notice No. 01/2015-20, dated 07.04.2020</u>,** issued by DGFT has provided extension facility of one time condonation of delay for the below provisions up to 31.03.2021:

  - Obtaining extension of the block wise fulfilment of Export Obligation period under the EPCG Scheme;

  - Obtaining extension of Export Obligation period under the EPCG Scheme;

  - Condonation of delay in the submission of installation certificate.

- **<u>Press release dated 30.03.2020</u>,** issued by the Ministry of Commerce & Industry to provide relaxation on the following compliances to be met by units / developers / co-developers of Special Economic Zones:

  - SOFTEX form to be filed by IT/ITES units;
  - Filing of Annual Performance Reports (APR) by SEZ units;
  - Extension of Letter of Approvals (LoA) which may expire, in the cases of:

  (a) developers/co-developers who are in the process of developing and operationalizing the SEZ;
  (b) Units which are likely to complete their 5 year block for NFE assessment;
  (c) Units which are yet to commence operations.

  In addition to above, no punitive action is taken in cases where any compliance is not met during this period impacted by the sudden outbreak of COVID-19.

  Further, all extensions of LoAs and other compliances may be facilitated through electronic mode in a time-bound manner. In the cases where it is not possible to grant extension through electronic mode or in cases where a physical meeting is required, Development Commissioners have been asked to ensure that the Developer / Co-developer / Units do not face any hardship due to such expiry of validity during this period of disruption.

Direct Tax

Part-A Key Direct Tax updates

COVID-19 impact - extension of applicability of certificate for lower or nil TDS and TCS

- The COVID-19 pandemic has caused disruptions across the world, including India. To alleviate some of the difficulties faced by taxpayer, CBDT vide order dated 31 March 2020 issued directions/clarifications in relation to extension of applicability of the existing certificates issued for lower or nil TDS and TCS as well as revised procedure for making an application for issue of fresh certificates. The details of the Order are as follows:

  a) Where a taxpayer has obtained a certificate for lower/nil TDS/TCS for tax year 2019-20 (2019-20 certificate) and has also made an application for obtaining such certificate for tax year 2020-21 (2020-21 certificate) on the TRACES portal of the tax department, then the 2019-20 certificate will continue to apply till 30 June 2020 or disposal of application for 2020-21 certificate, whichever is earlier.

  b) Where a Taxpayer has obtained a 2019-20 certificate but has not yet filed an application for 2020-21 certificate, then the 2019-20 certificate will continue to apply till 30 June 2020. However, such taxpayers are required to make an application by e-mail (instead of regular process through TRACES portal) by providing the requisite details before 30 June 2020 or as soon as normalcy is restored, whichever is earlier.

  c) A taxpayer, who has not filed an application for 2020-21 certificate and has also not obtained 2019-20 certificate, will be required to make an application for 2020-21 certificate by email by submitting the specified documents.

  d) In case of non-residents (including foreign companies) having a Permanent Establishment in India, not covered by (a) or (b) above, withholding will need to be made at 10% (inclusive of surcharge and cess) on payments till 30 June 2020 or disposal of the application made, whichever is earlier.

- In cases of (b) and (c) above, the filing of application by taxpayer as well as issue of certificate by the Tax Authority will be over email. The email certificate will be valid till 30 June 2020 or any other date (earlier than 30 June 2020) as specified by the Tax Authority.

- The CBDT vide order dated 3 April 2020 has also clarified that all the taxpayers whose application for lower tax deduction certificate ('LTDC') for tax year 2019-20 is pending as on 3 April 2020 are required to intimate the Tax Authority through e-mail procedure (as prescribed) and such applications will be disposed on or before 27 April 2020. Certificate issued over e-mail shall be applicable for the amount paid/credited during tax year 2019-20 after the date of making of application but remained unpaid till date of issuance of the certificate by the Tax Authority.

- Further, if certificate of tax year 2019-20 was applicable for a specific period (and not for entire year), the same will be effective for tax year 2020-21 i.e. 1 April 2020 to 30 June 2020, subject to the satisfaction of other conditions specified in the CBDT Order dated 31 March 2020.

- Though, the aforesaid CBDT orders provide substantial relaxations to taxpayers, the stakeholders sought clarifications from the CBDT on nuances of the reliefs provided. In this backdrop, the CBDT vide order dated 9 April 2020 has further clarified as under:

- Even if LDC of tax year 2019-20 was applicable for a specific period (and not for entire year), the same LDC will be effective for tax year 2020-21 i.e. 1 April 2020 to 30 June 2020, subject to the satisfaction of other conditions specified in the CBDT Order dated 31 March 2020. For instance, if LDC was issued for a period from 1 October 2019 to 15 December 2019, the same shall additionally apply for tax year 2020-21 for the period from 1 April 2020 to 30 June 2020, subject to conditions referred in the CBDT Order dated 31 March 2020.

- The threshold/transaction limit for tax year 2020-21 will be the same as specified in LDC for tax year 2019-20, but as a fresh limit for the period 1 April 2020 to 30 June 2020 subject to other conditions referred in the CBDT Order dated 31 March 2020.

- Extension of LDC of tax year 2019-20 till 30 June 2020 is only in relation to the same deductor with the same uction Account Number (TAN) for the same transactions. In case of new deductors or new TAN, the relaxation provided by way of extending the validity of LDC of tax year 2019-20 shall not apply and the taxpayer is required to follow the e-mail procedure as prescribed in the Annexure to CBDT Order dated 31 March 2020. Also, in cases where the taxpayer wants to apply for a rate lower than the rate permitted in LDC of tax year 2019-20, the taxpayer is required to follow said e-mail procedure.

- Official emails will be used by the Tax Authority for internal approvals for issuing LDC and for communicating the same.

COVID-19 Impact – Govt. extends various timelines up to 30 June 2020 and provides relaxations under various direct tax laws in India

- In view of the outbreak of COVID-19 pandemic across many countries of the world, including India, the Government felt it imperative to relax certain provisions, including extension of time limit in the taxation and other laws.

- Since Parliament is not in session, the President has promulgated the Taxation and Other Laws (Relaxation of Certain Provisions) Ordinance, 2020 ('the Ordinance') on 31 March 2020, which provides for extension of time limits of certain compliances and actions falling due between 20 March 2020 and 29 June 2020 (specified period).

- The Ordinance covers compliances under following direct tax laws which are collectively defined as "Specified Act"

  a) The Wealth-tax Act, 1957
  b) The Income-tax Act, 1961
  c) The Prohibition of Benami Property Transactions Act, 1988
  d) Chapter VII of Finance (No. 2) Act, 2004 (Securities Transaction Tax)
  e) Chapter VII of Finance Act, 2013 (Commodities Transaction Tax)
  f) The Black Money (Undisclosed Foreign Income and Assets) and imposition of Tax Act, 2015
  g) Chapter VIII of Finance Act, 2016 (Equalisation Levy)
  h) The Direct tax Vivad Se Vishwas Act, 2020

- As per the Ordinance, the specified period can be extended beyond 29 June 2020 by notification to be issued by the Central Government (CG). The compliances falling due within the specified period qualify for extension of time limit and other relaxations under the Ordinance.

- The Ordinance specifies 30 June 2020 as the extended date for compliances falling due with the specified period. But this date can be further extended by notification to be issued by the CG.

- The nature of compliances falling due within specified period which qualify for extended time limit are divided into four categories as follows:

  - **Tax Authority centric** - Completion of any proceedings or passing of any order or issuance of any notice/ intimation/ notification/ sanction/ approval or such other action by any authority or commission or tribunal under the Specified Act.

  - **Tax authority or taxpayer as appropriate to context-** Filing of any appeal, reply or application or furnishing of any report /document/return/statement or such other record under the Specified Act. As per Press Release issued by the CG, this, inter alia, covers original as well as revised return for tax year 2018-19 which stands extended from 31 March 2020 till 30 June 2020. It also covers taxpayer's compliance of linking Aadhar with PAN which stands extended till 30 June 2020.
  - **Taxpayer-centric -** Any action under the ITA like making investment, deposit, payment, acquisition, purchase or construction or such other action for the purposes of claiming any deduction, exemption or allowance in relation to:
    A. Capital Gains rollover exemption;
    B. Deductions specified in Chapter VIA of ITA under the heading "B-Deductions in respect of certain payments" ; or
    C. such other deduction provisions of ITA, subject to fulfilment of such conditions, as may be specified by the Government through Notification.

  - **SEZ Units –** Beginning activity of manufacture or production of article or thing or providing of services by newly established units in Special Economic Zone (SEZ) to claim profit linked tax holiday[3], in case letter of approval from SEZ authorities has been issued on or before 31 March 2020. The sunset date for such commencement was 31 March 2020 which stands extended to 30 June 2020.

  However, the CG may specify different dates for completion or compliance of different actions.

- **Relaxation on interest, penalty and prosecution on payment of any tax dues beyond due date -** The time limit to make payment of tax or levy which is due within the specified period is not extended. But if taxpayer pays such dues on or before 30 June 2020 (or any further date as may be specified by the Government), the rate of interest payable for the delay shall not exceed 0.75% for every month or part of the month (instead of 1% or 1.5%). The period of delay means the due date (falling within specified period) and the date on which the amount is paid. Further, no penalty or prosecution shall be levied or initiated for the delay. It is important to note that the relaxation applies only if the amount is paid on or before

30 June 2020 (or further notified date) failing which the normal provisions of the Specified Act shall apply.

- **Statutory recognition of Prime Minister's Citizen Assistance and Relief in Emergency Situations Fund (PM CARES Fund) -** Keeping in mind the need for having a dedicated national fund with the primary objective of dealing with any kind of emergency or distress situation, like posed by the COVID-19 pandemic, and to provide relief to the affected, a public charitable trust under the name of "Prime Minister's Citizen Assistance and Relief in Emergency Situations Fund" (PM CARES Fund) has been set up. Prime Minister is the Chairman of this trust and its Members include Defence Minister, Home Minister and Finance Minister. The Ordinance confers this Fund with same status as Prime Minister's National Relief Fund. Hence. Any income received by PM CARES Fund would be exempt from tax under the ITA. Further, any donation made to the PM CARES Fund will eligible for 100% deduction (without any cap of 10% of Gross Total Income) from taxable income of the payer under the ITA.

- **Extension of time limit for payment of tax arrears, penalty and interest under the VSVA -** Under VSVA, the date also stands extended from 31 March 2020 up to 30 June 2020. Hence, declaration and payment under the Scheme can be made by the taxpayer up to 30 June 2020 without additional payment.

Government of India directs to provide immediate refunds due under the Income-tax law for cases where refund is up to INR 5,00,000

- To ease liquidity constraints faced by taxpayers, the Government of India has, vide Press Release dated 8 April 2020 announced that that all pending refunds under the Income tax law amounting up to INR 0.5 million shall be issued immediately. This will benefit approximately 1.4 million taxpayers.

Government of India clarifies employer can make consolidated donations to PM CARES Fund on behalf of employees and issue receipts to them

- The GOI has issued a formal clarification dated 9 April 2020, through the CBDT, clarifying that the donations made to the PM CARES Fund are eligible for deduction under Section 80G of the ITA. In cases where donation is made to the PM CARES Fund by an employee through his/her employer, the PM CARES Fund may not be able to issue a separate certificate to every such employee in respect of the donation so made, as contributions made to the PM CARES Fund are in the form of a consolidated payment. It is clarified that the deduction in respect of such donations made through a consolidated payment will be admissible on the basis of salary withholding certificate (Form 16)/certificate issued by the employer in this regard

CBDT permits employers to consider new optional concessional tax regime (CTR) for salary withholding

Background

- The Finance Act, 2020 (FA 2020) introduced a new concessional tax rate (CTR) regime for individuals and Hindu Undivided Family (HUF) wherein such taxpayers can offer their total income at lower slab rate prescribed under the regime provided they forgo certain specified deductions, exemptions, brought forward losses and unabsorbed depreciation (new CTR regime).

- New CTR regime is optional for the taxpayers and the option can be exercised in every tax year where the taxpayer does not have business or professional income. Such taxpayers need to exercise the option along with filing of the return of income on or before the due date provided under the provisions of the ITA.

- In other cases, the option once exercised is irrevocable until business/profession ceases and if opted out in any year, such taxpayer cannot opt in again till the business/profession ceases. For such taxpayers, CBDT shall prescribe the form and manner of exercise of option under new CTR regime.

- While FA 2020 enabled taxpayers desiring to opt for new CTR regime to pay advance tax as per new CTR regime, there was ambiguity whether the employer can consider new CTR regime for salary withholding purposes if the employee desires to opt for CTR.

- However, CBDT noted that since the employees (not earning any income from business or profession) can exercise the option along with return of income, the employer, at the beginning or during the tax year is not aware whether the employees would opt for new CTR regime. In order to alleviate the hardship, the CBDT vide Circular No. C1 of 2020 dated 13 April 2020 has clarified the following manner of withholding taxes at source on total income of the employees opting for new CTR regime:

Scenario 1: Where the employee does not earn any income from business or profession and intends to opt for new CTR regime:

- The employee should furnish an intimation to his/her employer of his/her intent of availing new CTR regime. Once the intimation is filed, it cannot be modified subsequently.

- Such intimation shall be valid for the tax year for which it is filed.

- On receipt of the intimation, the employer shall withhold tax at the lower slab rates prescribed under new CTR regime.

- The CBDT has clarified that such intimation shall only be for the purposes of salary withholding during the relevant tax year. Since the option has to be exercised while filing the return of income, intimation to employer would not amount to exercising the option for the purposes of filing return of income and the option at the time of filing return can be different than the intimation made to the employer.

Scenario 2: Where the employee earns any income from business or profession and intends to opt for new CTR regime:

- The employee may furnish an intimation to his/her employer of his/her intent of availing new CTR regime. Once the intimation is filed, it cannot be modified subsequently.

- On receipt of the intimation, the employer shall withhold tax at the lower slab rates prescribed under new CTR regime.

- Since the option once exercised by employee having business/ professional income is irrevocable, the intimation to the employer for subsequent tax years must not deviate from the option in favor of CTR once exercised in a tax year.

Scenario 3: Where employee does not furnish any intimation to the employer

- If no intimation is filed by the employee, then the employer shall withhold tax on salary income without considering new CTR provisions.

CBDT issues Revised Frequently Asked Questions in relation to Vivad Se Vishwas Act, 2020

- The Direct Tax Vivad Se Vishwas Bill, 2020 (VSV Bill) was introduced in the lower house of Parliament (Lok Sabha) on 5 February 2020[. VSV, as introduced, resulted in various concerns among stakeholders. Some of these concerns were addressed by way of an amendment to VSV, which was passed by the Lok Sabha on 4 March 2020. VSV Scheme provides an opportunity to taxpayers to settle direct tax disputes by making an application in the prescribed form to the designated authority and by paying the prescribed amount before a specified date. Once litigation is settled under VSV scheme, taxpayer is entitled to waiver from interest levied and immunity from penalty and prosecution.

- However, there were also certain other concerns which required redressal by way of clarifications from the GOI. In this regard, pending enactment of Bill into Act, The CBDT issued Circular No. 7/2020 on 4 March 2020 (Circular) to clarify certain issues raised by stakeholders relating to the operation of the VSV Bill. Circular clarified that FAQs are subject to final approval and passing of the Bill and receiving presidential assent.

- The CBDT, through the said Circular, sought to clarify such concerns in the form of 55 questions and answers in relation to the scope of VSV. The clarifications dealt with the issues of the eligibility of a taxpayer to settle its case under VSV in different situations, the manner of computing the quantum of disputed tax payable, consequences under VSV and certain procedural aspects etc.

- Subsequently, the VSV Bill was passed by the parliament and received presidential assent and was enacted into The Direct Tax Vivad Se Vishwas Act, 2020 (VSV Act). CBDT also issued Notification No. 18 of 2020, notifying the Direct Tax Vivad Se Vishwas Rules, 2020 (VSV Rules) as well as Forms prescribed under such Rules.
- There could have been a scope to challenge validity of the Circular issued prior to enactment of law and its binding effect.

- In light of the subsequent enactment and notification of the Rules/forms, and with a view to give legal effect to clarifications issued earlier, the CBDT has now reissued the Circular No. 9/ 2020 dated 22 April 2020 (revised Circular) reiterating 55 FAQs with following modifications to old Circular.

- Reference to VSV Bill has been replaced with VSV Act and accordingly the reference to clauses of the VSV bill has been replaced with sections of the VSV Act.

- References to declaration form have been substituted by the relevant forms issued under VSV wherever relevant.

- In addition, the Revised Circular has modified question 22 of the old Circular. Question 22 of the old Circular suggested that cases where notice for initiation of prosecution has been issued with reference to tax arrears, such taxpayer has a choice to compound the offence under the Income Tax Act and opt for VSV. However, a case where prosecution has been instituted and is pending in court, is not eligible for being settled under VSV. The revised circular now clarifies that the disqualification from VSV applies only in case where prosecution has been instituted and not in case where mere notice of prosecution has been issued. In cases where prosecution has been instituted with respect to an assessment year, Taxpayer is not eligible to file declaration for such assessment year unless the prosecution is compounded before filing the declaration.

- The Revised circular however still refers to 31 March 2020 as the due date within which settlement of disputes can be made under VSV without payment of additional taxes. The time period for making declaration without payment of additional tax under VSV was extended from 31 March 2020 to 30 June 2020 by the Taxation and Other Laws (Relaxation of Certain Provisions) Ordinance, 2020.
- The Revised Circular has been issued under section 10 and section 11 of the VSV Act. Section 10 of the VSV Act authorizes the CBDT to issue such directions as it deems fit in relation to the operation of VSV. A circular issued under authority of law is binding on the tax authority though, does not bind the taxpayer.

- Section 11 of the VSV Act, authorizes the Central Government to remove any difficulties in the operation of the VSV by way of an order which is not inconsistent with the provisions of the VSV Act. Any such order is required to be laid before each house of the parliament as soon as may be possible. Revised Circular does not bring out any clarity as to which of the

FAQs are issued under section 10 and which are under section 11 of the VSV Act.

Regulatory

Part-A Key Regulatory amendments

Foreign Direct Investment (FDI) from neighboring countries brought under government approval route

Department for Promotion of Industry and Internal Trade ('DPIIT') has amended the FDI policy by prescribing a requirement for prior government approval for any investment from its neighbouring countries, i.e., China, Bangladesh, Bhutan, Afghanistan, Myanmar, Nepal and Pakistan ('Specified Investors'). The details of the amendment are provided as under :

- In terms of the extant FDI policy, FDI is permissible under two routes, i.e., automatic route and government approval route. Presently, majority of the sectors are under the automatic route implying that FDI can be received without any approval subject to complying with performance linked conditions (if any) prescribed with respect to that sector and the procedural requirements. Under the Government approval route, investment in the capital of an Indian entity can only be made by a non-resident, subject to obtaining a prior government approval.

- In terms of the extant FDI policy, foreign investments only by a citizen or entity incorporated in Bangladesh and Pakistan are under the government approval route. In addition to that, any foreign investments from Pakistan are prohibited in sectors such as defence, space, atomic energy and other sectors prohibited for foreign investment in India.

- Considering the challenging business environment for the Indian entities due to the outbreak of COVID19, the Government of India in order to curb any crisis driven takeover/acquisitions of any Indian entity has amended the extant FDI Policy by restricting foreign investments from the Specified Investors.

- Pursuant to the amendment, FDI from any of the Specified Investors shall be under the Government approval route.

- In addition, any FDI, wherein, beneficial ownership is vested with an entity or citizen of such countries, will also be covered under the government approval route.

- The requirement to obtain prior government approval will also be applicable on the transfer of ownership of existing or future FDI, directly or indirectly Indian entity, resulting in beneficial ownership in favour of the Specified Investors.

- The amendment has been made effective from 22 April 2020.

Source: Press note No. 3 (2020 Series) dated 17 April 2020 read with Foreign Exchange Management (Non-Debt Instruments) Amendment Rules, 2020 dated 22 April 2020.

RBI revises FPI investment limits in government securities for FY 2020-21

- The limits for FPI investment in Government securities (G-secs) and State Development Loans (SDLs) shall remain unchanged at 6% and 2%, respectively, of outstanding stocks of securities for FY 2020-21.

- Further, the revised limits (in absolute terms) for the different categories is provided as under:

Revised Investment Limits for FY 2020-21 (INR Crore)

	G-Sec General	G-Sec Long Term	SDL-General	SDL - Long Term	Corporate Bonds
Current Limit	2,46,100	1,15,100	61,200	7,100	3,17,000
Revised limit for HY Apr–Sept 2020	2,34,531	1,03,531	64,415	7,100	4,29,244
Revised limit for HY Oct-Mar, 2020	2,34,531	1,03,531	67,630	7,100	5,41,488

Source : A.P. (DIR Series) Circular No. 30 dated 15 April 2020 read with A.P.(DIR Series) Circular No.24 dated 30 March 2020

Reserve Bank of India ('RBI') extends the period of realization and repatriation of export proceeds

- In view of the pandemic COVID-19, the RBI in consultation with the Government of India has increased the present period of realization and repatriation to India of the amount representing the full export value of goods or software or services exported, from nine months to fifteen months from the date of export, for the exports made up to or on July 31, 2020.

- However, the provisions in regard to period of realization and repatriation to India of the full export value of goods exported to warehouses established outside India remain unchanged.

Source: A. P. (DIR Series) Circular No. 27 dated 01 April 2020 read with Foreign Exchange Management (Export of Goods and Services) (Amendment) Regulations, 2020 dated 31 March 2020

RBI introduces Fully Accessible Route ('FAR') for Investment by Non-Residents in Government Securities

- In line with announcement made in the Union Budget 2020-21 that certain specified categories of Central Government securities would be opened fully for non-resident investors without any restrictions, apart from being available to domestic investors, the RBI in consultation with the Government of India, has introduced a separate route, viz FAR for investment by non-residents in securities issued by the Government of India.

- The scheme is applicable for government securities as periodically notified by RBI for investment under the FAR route ('Specified securities'). This scheme shall operate along with the two existing routes, viz., the Medium Term Framework (MTF) and the Voluntary Retention Route (VRR). The details of the scheme are provided under ensuing paragraphs.

- **Investment Limits:** Under the FAR, there shall be no quantitative limit on investment by non-resident investors in the specified securities. Investments made under FAR shall also not be subject to applicable conditions related to minimum residual maturity, security-wise limit and concentration limits.

- **Treatment of existing investments:** Existing investments by non-resident investors in specified securities shall be reckoned under the FAR.

- **Process for investment and reporting:** FPI, Non-Resident Indians (NRIs), Overseas Citizens of India (OCIs) and other entities permitted to invest in Government Securities under the Debt Regulations can invest under this route as hitherto under existing arrangements. All other non-resident investors may invest through International Central Securities Depositories. The process for such investments will be notified in due course.

- **Transition for FPIs:** FPIs who currently hold investments in the Specified Securities shall, within one year from the date on which the FAR comes into effect, readjust their investments under the MTF to comply with the applicable requirements.

Source: A. P. (DIR Series) Circular No. 25 dated 30 March 2020 read with FMRD.FMSD.No.25/14.01.006/2019-20 dated 30 March 2020.

Part B – Case Laws

Goods and Services Tax

1. M/s Clay Craft India Pvt Ltd [RAJ/AAR/2019-20/33]

Subject Matter: Advance ruling is sought on the issue that whether the consideration paid to the Directors for providing services to the company is liable for GST under reverse charge mechanism vide Notification No. 13/2017- Central Tax (Rate) dated 28.06.2017.

Background and Facts of the case

- The Appellant is a manufacturing private limited company having 6 directors under its Board of Directors. These directors are also working as employees of the company at different levels of management in the company like procurement, production, accounting etc.

- The Appellant currently pays consideration in form of salary and commission to the directors of the company against the services provided by them to the company wherein the company is recipient of such service and Directors being the supplier.

- The Appellant is currently discharging GST under reverse charge on the commission paid to the directors treating the amount to be a consideration for the services provided by them in the capacity of a director.

- The Appellant vide its application has quoted various definitions of employee, Managing Director, employment, etc provided under the provisions of various Acts and has thus, emphasized that a director of the company is in the employment of the company and his services would be excluded from the provisions of GST Act by way of exclusion provided under Entry 1 of the Schedule III to the CGST Act, 2017.

Questions on which Advance ruling is sought

- Whether GST is payable under reverse charge on the salary paid to director of the company who is paid salary as per contract?

- Whether the situation would change from above point if the director is also a part time director in some other company?

Discussion and findings of the case

- It is observed that Section 2(31) of the CGST Act provides that consideration in relation to the supply of goods or services or both included any payment made or to be made, whether in money or otherwise, in respect of, in response to, or for the inducement of, the supply of goods or services or both, whether by the recipient or by any other person but shall not include any subsidy given by the Central Government or a State Government.

- It was also observed that consideration paid to the Director for the supply of services to the Company is specifically covered under Notification No. 13 /2017- Central Tax (Rate) dated 28.06.2017, which states that services supplied by a Director of a company or a body corporate to the said company or body corporate, shall be liable to tax under reverse charge and tax on such services would be discharged by the company or a body corporate located in taxable territory, being the recipient of service.

- Further, the consideration paid to the Directors is against the supply of services provided by them to the applicant company and are not covered under clause (1) of the Schedule III to the CGST Act, 2017 as the Directors are not the employee of the Company.

- Also, the services rendered by the Director to the company for which consideration is paid to them in any head is liable to pay GST under RCM as the liability to pay GST under RCM in this case is required to be decided on the basis of the existing provisions of CGST law quoted above.

Ruling

- Having regard to the above stated facts and provisions it was held that the consideration paid to the directors by the applicant company will attract GST under reverse charge as it is covered under Notification No. 13/2017 Central Tax (Rate) dated 28.6.2017 under the provisions of Section 9(3) of the CGST Act, 2017.

- Further, the situation will remain same as above and will attract GST under reverse charge mechanism even if such director is also a part time director in some other company.

2. Gokul Agro Resources Ltd. vs Union of India [TS-212-HC-2020(GUJ)-NT]

Submissions by the writ-applicant

- In the submissions, the applicant has given reference to the recent ruling of said court in the case of Mohit Minerals Pvt. Ltd. vs Union of India, wherein the court has struck down the Notification No.8/2017 – Integrated Tax (Rate) dated 28.06.2017 and the Entry 10 of the Notification No.10/2017 –Integrated Tax (Rate) dated 28.06.2017, which collectively levy IGST on ocean freight component under reverse charge mechanism, and thus, declared these notifications as ultra vires to the Integrated Goods and Services Tax Act, 2017, as they lacked legislative competency.

- In accordance with the above mentioned judgement, the writ-applicant seeks refund of the amount of IGST already paid by the petitioner pursuant to the impugned Entry No. 10 of Notification No. 10/2017 - IGST (Rate) dated 28.06.2017 along with appropriate interest on such refund.

Observations and Ruling of Court

- The court has observed that since the Notification has been struck down as ultra vires, as a consequence of the same, the writ applicant is entitled to the refund of the amount paid towards the IGST under reverse charge on Ocean Freight in case of purchases made on CIF basis.

- However, the court disposes off the writ directing the assessee to file an application to claim refund of IGST on Ocean freight component before Competent Authority in view of verdict in case of Mohit Minerals

- The court further held that, if any such application is preferred for the refund of the amount, the authority concerned shall immediately look into the same and pass an appropriate order in accordance with law keeping in mind the decision of Court that has been rendered in the case of Mohit Minerals (supra).

Part B – Case Laws

Customs, Foreign Trade Policy (FTP) and other laws

1. **Commissioner Of Customs, (Export) New Customs House, New Delhi Vs M/s Mahle Engine Components India Pvt Ltd [2020-VIL-164-CESTAT-DEL-CU]**

   Subject Matter: The appeals is filed regarding the levy of additional duty of customs at the time of import of some "automobile parts".

   Background and Facts of the case

- The Appellant has filed an appeal against the order-in-appeal in which proceedings, initiated against the Appellant for not having discharged additional duty of customs on import of certain goods, in accordance with proviso to section 3(2) of Customs Tariff Act, 1975, were concluded with confirmation of differential duty liability of INR. 20,05,573, confiscation of goods under section 111(m) of Customs Act, 1962 with option to redeem on payment of fine of INR 10,00,000 and imposition of penalty of INR 10,00,000 under section 112 of Customs Act, 1962 were upheld.

- The Appellant pointed out that the impugned goods are 'automobile parts' on which they, affix the 'retail selling price' in their warehouse and clear after discharging duty liability thereon under section 3 of Central Excise Act, 1944. Accordingly, there was no requirement of complying with the alternative provision for computation of additional duty of customs at the time of import.

- It was also pointed out that the General Notes in the Import Policy (at serial no. 5 intended for packaged goods) refers only to such as are to be sold or intended for retail customers without any further processing while, on their part, the goods undergo the final labelling before clearance to their various dealers.

- It was also considered that, Notification No. 44(RE-2000)/97-2002, dated 24.11.2000 of the DGFT that was amended to clarify that goods which would invariably undergo "further processing or assembling before they are sold to customers" do not attract prerequisite of labelling it was contended that, in the absence of such prescription, the goods were assessable to additional duties of customs only on the transaction value.

Discussion and findings of the case

- It was observed that, in the case of Mitashi Edutainment Private Limited v. Commissioner of Customs (Import), Mumbai, it was held that, there was no provision for assessment by recourse to 'retail selling price' except upon voluntary adoption at the time of import.

- Further, it was also observed that the expression that is variably deployed in connection with such assessment is 'intended for retail sale' and, implies the existence of such labelled price from the time of import or clearance from factory, as the case may be, till arrival at the point of retail sale as demonstrative of intention. And when routed through channels for industrial/institutional consumers are excluded from the statutory requirements under Legal Metrology Act, 2011.

- Therefore, the intention of the importer by affixing of 'retail selling price' is the sole decider for adopting the alternative mechanism for assessment of additional duties.

Ruling

- In accordance to the above, the assessment insisted upon in the impugned order is not in accordance with law and set aside.

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

2. **The High Court of Judicature at Madras Vs M/s. Hwashin Automotive India Pvt. Ltd. [TS-131-HC-2020(MAD)-EXC]**

Subject Matter: An appeal is filed against an impugned order rejecting the application of refund of duty paid by reversal of credit. Also, if the Appellant Tribunal, Chennai correct in holding that "contention of the appellant that the sale has not taken place does not find favour with them", when the rectified invoices were rejected by the job workers.

Background and Facts of the case

- The Appellant had sent the materials in question to the Job workers M/s Technical Stampings Automotive Limited and M/s. Neel Industries Limited. The Appellant changed the materials procurement policy from 'Job Work' to 'Outright Sale/Purchase' with their Vendors.

- The Sale Invoices were issued for the materials removed as such on Job Work basis by reversing the Cenvat Credit availed. However, the Vendors did not accept such Cenvat Invoices issued for the materials removed and did not avail any Cenvat credit in their books and therefore the Assessee claimed the refund of such amount by way of restoration of Cenvat credit, under Form R.

- Further, the application was rejected by the adjudicating authority and that order was upheld by the learned Tribunal on the ground of limitation of six months under Section 11B of the Act.

Discussion and findings of the case

- The Appellant contented that the limitation prescribed under Section 11B of the Act does not apply when instead of claiming the refund in cash, merely claims the restoration of the Cenvat credit.

- Whereas Revenue submitted that since the refund application was made in the prescribed Form - R under Rule 173 of Central Excise Rules, 1944, therefore, the limitation under Section 11B of the Act would apply and such a refund could not be allowed to the Assessee.

- Further, refence was given to three of the cases decided by three different Division Bench of High Court, wherein it was observed that the said refund of duty does not fall under Section 11B of the Act.

- It was also observed that merely because the Assessee laid its claim of refund by his moving an application in prescribed Form No.R under Rule 127, being a procedural requirement of the law, the substantive right of Assessee cannot be defeated by the Revenue authorities except at the peril of violating Article 265 of the Constitution of India.

- It was considered that, the contention raised by the Appellant that Rule 4(5)(a)(iii) of the Cenvat Credit Rules, 2004, the Appellant could itself credit the Cenvat account, if the goods were received back within the time frame of 180 days under the said Rule, but merely because he filed the refund application under Form R under Rule 127 his claim was refused.

Ruling

- Basis the above discussion, it was decided that the order passed by the Tribunal is not sustainable and the appeal filed by the Appellant deserves to be allowed.

- Accordingly, The Appellant is permitted to have consequential relief.

Part B – Case Laws

Direct Tax

1. **Texas Instruments (India) (P.) Ltd. Vs DCIT [IT(TP)A No.169/Bang/2014]**

Subject Matter: **Tribunal ruling on whether:**

- **Deduction u/s 80JJAA of the ITA will be available even if the additional employees satisfy the condition relating to days of employment in the succeeding year and not in the initial year; and**
- **Expenditure incurred on abandoned business expansion plan is allowable as a deduction or not.**

Facts

Relating to Section 80JJAA of ITA

- The taxpayer, an Indian company, is engaged in the business of software development.
- During FY 2006-07, 287 new regular workmen joined the company. Such workmen did not complete 300 days or more during FY 2006-07. Accordingly, taxpayer did not claim deduction u/s 80JJAA for FY 2006-07 in relation to such employees.
- However, such employees have continued to be employed in the company for more than 300 days in the subsequent FY i.e. 2007-08. Accordingly, the taxpayer claimed deduction u/s 80JJAA at the rate of 30% on the additional wages paid to such regular workmen for FY 2007-08.
- The Tax Authority rejected the claim of the taxpayer firstly on the ground that the employees engaged in software development work were not 'workmen' and secondly, since the employees were not employed for more than 300 days during the first year of their employment i.e. FY 2006-07, the additional wages paid to such employees will also not qualify for deduction u/s 80JJAA for remaining two subsequent FYs.

Relating to expenditure incurred for abandoned business expansion plans

- The taxpayer in FY 2006-07 was planning expansion of its business premises and in that regard employed consultants and contractors for planning, designing and constructing the new building. However, towards end of FY 2006-07, the taxpayer decided to abandon the expansion plan. Accordingly, the entire expenditure incurred towards the expansion of the building premises was written off in the profit and loss account for FY 2006-07.
- Subsequently, in FY 2007-08 relevant to the current appeal, certain additional claims were made against the taxpayer towards planning, designing, architecture fees. Further, the taxpayer paid damages to the contractor in-charge for putting up business premises. The taxpayer claimed a tax deduction for these expenses on the basis that the same was incidental to carrying on business of the taxpayer.
- The Assessing Officer disallowed the claim of the taxpayer on the basis that the expenditure was capital in nature and cannot be allowed as a deduction.
- On appeal by the Taxpayer, the CIT(A) upheld both the disallowances. Being aggrieved, the Taxpayer filed further appeal before the Tribunal.

Issue before the Tribunal

- Whether the employees employed in software industry can be regarded as 'workmen' for the purpose of this section.
- Whether the deduction u/s 80JJAA will be allowed in case of new workmen who did not complete 300 days in first year but completed 300 days in second year.
- Whether expenditure incurred for abandoned business expansion plans is allowable expenditure.

Tribunal's Ruling

On Section 80JJAA deduction

- Firstly, the Tribunal held that employees employed in software industry can be regarded as 'workmen' for the purpose of section. The Tribunal relied on its earlier rulings in case of same taxpayer for earlier years which had ruled in favour of the taxpayer.

- On the issue of new workmen who did not complete 300 days in first year but completed 300 days in second year, the Tribunal noted that the approach adopted by Tax Authority in the present case is contrary to the stand taken by him on similar claim for deduction u/s 80JJAA in FY 2006-07.

- For FY 2006-07, while disallowing the claim for deduction u/s 80JJAA in respect of new workmen who did not complete 300 days , the Tax Authority allowed deduction w.r.t employees employed for more than 300 days during the year who had joined in FY 2004-05 but did not complete 300 days in that year.

- Tribunal also relied on its coordinate bench ruling in the case of **Bosch Ltd vs ACIT (2016) 74 taxmann.com 161 (Bangalore ITAT),** wherein the Tribunal held that deduction u/s 80JJAA of the ITA is admissible for three years including the year in which the employment is exercised.

- Hence, for all three years it is relevant to test the threshold of 300 days. In case employees were employed for a period of less than 300 days in the relevant year then deduction u/s 80JJAA shall not be available in respect of additional wages paid to such employees during said year even though such employees were employed for more than 300 days during the preceding financial year.

- On similar lines, in the present case, it was held that though in the first year of employment, deduction was not allowed in relation to additional wages paid to new workmen u/s 80JJAA on account of non-satisfaction of minimum number of workdays, it will not preclude the taxpayer from claiming deduction in the subsequent two years if new regular workmen work for more than 300 days.

- Accordingly, the Tribunal allowed the claim of the taxpayer for the benefit of deduction u/s 80JJAA.

- Further, the Tribunal noted that such hardship caused to the taxpayer is now removed by insertion of second proviso to the definition of additional employee in Explanation (ii) to s. 80JJAA of the Act. The said Explanation provides that the employees who do not complete 240/150 days as the case may be, in Year 1 but complete 240/150 days in Year 2 are deemed to be employed in Year 2 and would be eligible for deduction. The Tribunal opined that even prior to such clarification, it is of the view that the claim for deduction u/s 80JJAA of the Act cannot be denied on the aforesaid ground.

On expenditure incurred for abandoned business expansion plans

- The Tribunal followed the Bangalore Tribunal judgement in the taxpayer's own case for the earlier year i.e. FY 2006-07 and held that the claim was in the nature of a capital expenditure.

- The earlier decision of the Bangalore Tribunal had held that the judicial precedents relied upon by the taxpayer, related to the expenditure which was in the nature of revenue incurred with the object of enhancing profitability and the efficiency of the existing business. It had held that expenditure incurred in the revenue field for expansion of an existing unit is allowable, whereas the expenditure on capital account cannot be allowed as a revenue expenditure. It mentioned that in the taxpayer's case, the expenditure was incurred to bring into existence a capital asset and hence, not allowable.

- With respect to claim for damages, the ITAT held that though it was in connection with not engaging contractor in future for other contracts, it could not be regarded as having no nexus with the capital work in progress written off. Hence, deduction could not be allowed and the expenditure was rightly held as capital expenditure.

2. **Shriram Capital Ltd Vs DIT [W.P.No.4965 of 2011 (Madras HC)]**

Subject Matter: Whether payment to foreign law firm in connection with acquisition of business abroad taxable as "Fees for Technical Services" (FTS).

Facts

- The Taxpayer, an Indian company, availed services of the Indonesian Firm for acquiring an insurance business in Indonesia. The Taxpayer did not have any existing business in Indonesia.

- The Indonesian Firm provided services from Indonesia in relation to all regulatory and legal compliances for the business acquisition, illustratively, obtaining all necessary regulatory approvals, services in relation to share purchase agreement, notarial share transfer deed, powers of attorney, public announcements in respect of the acquisition, form in respect of share transfers, amended articles of association of the insurance company, etc.

- The Taxpayer filed an application with the Indian tax authorities to exempt withholding provisions on payments made to the Indonesian Firm since such payment was not taxable in India. However, the said application was rejected.

- Aggrieved, the Taxpayer filed a writ petition before the HC.

Taxpayer's contentions

- The services rendered by the Indonesian Firm were neither technical nor consultancy in nature and, hence, not covered by the FTS provision of the India-Indonesia double taxation avoidance agreement (DTAA).

- Additionally, income had not been received in India by the Indonesian Firm. Furthermore, the income was not deemed to have accrued or arisen in India under the ITL, as the payment was made outside India and the services were provided and used outside India.

- The income gets covered by the source rule exclusion under the Indian Tax Laws (ITL), as the payments were made for the purpose of making or earning any income from a source outside India i.e., expenditure was incurred for services procured for a future business to be carried on by the Taxpayer outside India.

Tax Authority's Contention

- Services rendered by the Indonesian Firm were in the nature of consultancy services and payments made for such services would qualify as FTS under the ITL, as well as the DTAA.

- Neither the ITL nor the DTAA provides that services should only be rendered in India to be taxed in India. FTS can be taxable in India irrespective of the place of rendition of the services.

- Payment was not made to the Indonesian Firm for earning any income outside India. This is supported by the following:

  - Services of the Indonesian Firm were towards acquisition of a foreign business, which is a part of the investment of the Taxpayer. Hence, the payment does not have any nexus with the income earned abroad, but is towards investment which is a part of the business of the Taxpayer that it operated from India.

  - If the Taxpayer were to abandon the proposed acquisition of the insurance company in Indonesia after availing consultancy/advisory services, in such situation, the payments were not for the purpose of earning any income from outside India even on a future date.

- The Taxpayer does not have any business activity in Indonesia and, hence, the place of utilization of services is wholly in India where the Taxpayer is located.

High Court's ruling

The HC upheld the Tax Authority's position that payment made to the Indonesian Firm would qualify as FTS and the same would be taxable in India under the ITL. This is based on the following:

- The term "technical, managerial and consultancy services" as used in the FTS definition is of very wide import. Various meanings of the above term were noted, based on which, the services provided by the Indonesian Firm were "consultancy" in nature.

- Reference was made to the decision of the Supreme Court (SC) in the case of **GVK industries Ltd. v. ITO** where, in the context of the FTS source rule, it was observed that the income of the recipient is charged or chargeable in the country where the source of payment is located; to clarify, where the payer is located. Furthermore, it requires that the services should be utilized in India.

- If the services were utilized by the Taxpayer abroad for a pre-existing business outside India, the Taxpayer could have legitimately stated that the service provided was utilized for a business or profession carried out outside India or for the purpose of making or earning any income from any source from outside India. In the present case, there is no source existing in Indonesia.

- The present case is of a mere proposal for acquiring a business and the said firm provided consultancy services in this regard.

3. UOI Vs U.A.E. Exchange Centre [C.A. No. 9775 of 2011] [Supreme Court (SC)]

Subject Matter: Whether Indian Liaison Office's remittance related activities are 'preparatory/ auxiliary' in nature in terms of Article 5(3)(e) of India-UAE Double Tax Avoidance Agreement (DTAA) or not.

Facts

- The Taxpayer, one of the biggest names in the remittance space of the United Arab Emirates (UAE), is engaged in offering, among others, remittance services for transferring amounts from UAE to various places in India. It had applied for permission under Section 29(1)(a) of the Foreign Exchange Regulation Act, 1973, pursuant to which approval was granted by the Reserve Bank of India (RBI). The entire of the liaison offices in India are met exclusively out of funds received from the UAE through normal banking channels.

- It is undisputed fact that the Taxpayer through its Liaison Offices (LO) undertake no activity of trading, commercial or industrial, as the case may be. Even no fee/commission is charged or received in India by any of the LO for services rendered in India.

- In compliance with Section 139 of the ITA, the respondent had been filing its returns of income, showing NIL income, as according to the Taxpayer, no income had accrued or deemed to have accrued to it in India, both under the ITA, as well as DTAA.

- According to the Taxpayer, the remittance services are offered to Non-Resident Indians (for short, "NRIs") in UAE. The contract pursuant to which the funds are handed over by the NRI to the Taxpayer in UAE, is entered between the Taxpayer and the NRI remitter in UAE. The funds are collected from the NRI remitter by the Taxpayer in UAE by charging one-time fee of Dirhams 15. After collecting the funds from the NRI remitter, the Taxpayer makes an electronic remittance of the funds on behalf of its NRI customer in two ways:-

    (i). by telegraphic transfer through bank channels; or
    (ii). On the request of the NRI remitter, the Taxpayer sends instruments/cheques through its liaison offices to the beneficiaries in India, designated by the NRI remitter.

- As some doubt has comes up about the taxability in India, the Taxpayer filed an application before the Authority for Advance Rulings (AAR), which held that that the LO constitutes a PE of its head office in India since it was assisting the head office in its activities of servicing customers by downloading the information electronically and printing and dispatching cheques to the relatives in India of the NRI remitters and the activities carried out by the LO were an essential part of the business, without which the process of remittance of funds to India could not be concluded.

- Aggrieved by the aforesaid AAR ruling, the Taxpayer filed writ petition before High Court (HC), wherein HC quashed the ruling of AAR and held that activity carried on by the LO of in India did not in any manner contribute directly or indirectly to the earning of profits or gains by the Taxpayer in UAE and more so, every aspect of the transaction was concluded in UAE, whereas, the activity performed by the LO in India was only supportive of the transaction carried on in UAE. Thus, LO will fall under within the exclusionary clause Article 5 of DTAA and no PE will be constituted in India, accordingly, no income will be attributable to India.

- Aggrieved by the aforesaid HC's order the tax authorities filed a SLP before the SC.

Issue before the SC

- Whether the stated activities of the Taxpayer would qualify the expression "of preparatory or auxiliary character"?

SC's ruling

- The SC held that it is not dispute that the place from where the activities are carried on by the Taxpayer in India is a LO and would, therefore, be covered by the term PE in Article 5(2). However, Article 5(3) of the DTAA opens with a non-obstante clause and also contains a deeming provision. It predicates that notwithstanding the preceding provisions of the concerned Article, which would mean clauses 1 and 2 of Article 5, it would still not be a PE, if any of the clauses in Article 5(3) are applicable.

- In the instant case, the activities of LO are limited to permission given by the RBI i.e. as per the permission of RBI, LO can only (i) respond quickly and economically to enquiries from correspondent banks with regard to suspected fraudulent drafts; (ii) undertake reconciliation of bank accounts held in India; (iii) act as a communication centre receiving computer (via modem) advices of mail transfer T.T. stop payments messages, payment details etc., originating from taxpayer's several branches in UAE and transmitting to its Indian correspondent banks; (iv) printing Indian Rupee drafts with facsimile signature from the Head Office and counter signature by the authorised signatory of the Office at Cochin; and (v) following up with the Indian correspondent banks. Said permission does not even allow the LO to enter into any contract with anyone in India, but only to provide service of delivery of cheques/drafts drawn on the banks in India.

- On basis of above onerous stipulations specified by the RBI, the SC held that LO's activities are only in the nature of preparatory or auxiliary character.

- Further, the SC relied on judgement of **DIT (International Taxation), Mumbai vs. Morgan Stanley & Co. Inc.: 292 ITR 416**, and held that since nature of activities carried on by the Taxpayer through the LO in India, as permitted by the RBI, were in the nature of "preparatory or auxiliary character" and, therefore, covered by Article 5(3)(e) of DTAA. As a result, the fixed place used by the Taxpayer as LO in India, would not qualify the definition of PE in terms of Articles 5(1) and 5(2) of the DTAA on account of non-obstante and deeming clause in Article 5(3) of the DTAA.

Our offices

Ahmedabad
2nd floor, Shavlik Ishaan
Near. C.N Vidyalaya
Amba wadi
Ahmedabad – 380 015
Tel: +91 79 6608 3800
Fax: +91 79 6608 3900

Bengaluru
12th & 13th floor
"U B City" Canberra Block
No.24, Vital Malia Road
Bengaluru - 560 001
Tel: +91 80 4027 5000
+91 80 6727 5000
Fax: +91 80 2210 6000 (12th floor)
Fax: +91 80 2224 0695 (13th floor)

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

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

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

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

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

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

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

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

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

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

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

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

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

Ernst & Young LLP

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EY contacts for ACMA Knowledge Partnership:

- Rakesh Batra, National Automotive Sector Leader – rakesh.batra@in.ey.com / +91 124 464 4532