EY Tax and Regulatory Alert

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Prepared for ACMA

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Part A - Key Tax updates

Goods and Services Tax

This section summarizes the regulatory updates under GST for the month of December 2019

- **Circular No. 126/45/2019** – CGST dated 22.11.2019, issued by CBIC clarifies the applicable rate of GST on job work services to registered persons viz-a-viz unregistered persons. 12% GST is levied only job work services which are provided by way of treatment or processing undertaken by a person on goods belonging to another registered person. On the other hand, 18% GST is levied only on such services which are carried out on physical inputs (goods) which are owned by persons other than those registered.

- Government has implemented the facility of generating Blocking/unblocking of EWB from 2 December, 2019. The advisory in relation to the same was issued earlier which come into force from 21 November 2019.

- In the 38th Meeting of the GST Council held on 18 December 2019, the below key recommendations were made :

  - Input tax credit in respect of invoices or debit notes that are not reflected in FORM GSTR-2A (i.e., unmatched invoices) shall be restricted to 10 per cent of the eligible credit available in respect of invoices or debit notes reflected in his FORM GSTR-2A. The earlier introduced provision of 20% limit with effect from 9 October 2019 has been reduced to 10%. It hence becomes imperative to execute a monthly reconciliation of GSTR-2A and purchase register.

  - Due date for filing of annual return in FORM GSTR-9 and reconciliation statement in FORM GSTR-9C for FY 2017-18 extended till 31 January 2020.

  - Blocking of E-Way bill in cases of non-filing of GSTR-1's for consecutive two tax periods.

  - Actions expected to be taken in cases of non-filing of FORM GSTR 3B returns.

  - The Council also approved various law amendments which will be introduced in Budget 2020.

Customs and Foreign Trade Policy (FTP)

This section summarizes the regulatory updates under Customs and FTP for the month of December 2019

- **Trade Notice No. 37/2019-20** – DGFT vide trade notice dated 22.10.2019 explains the importers who resort to mis-declaration of imported goods under 'Others' category of ITC (HS), 2017, Schedule - I (Import Policy). Any willful misdeclaration of HS Codes will be duly dealt with under Foreign Trade (Development & Regulation) Act, 1992.

- **Notification No. 28/2015-2020** - DGFT dated 31.10.2019 notifies amendment in Chapter 7 of the Foreign Trade Policy 2015-20 for conditions for refund of deemed export drawback. Refund of drawback on the inputs used in manufacture and supply under the said category can be claimed on 'All Industry Rate' of Duty Drawback Schedule notified by Department of Revenue from time to time provided no CENVAT credit has been availed by supplier of goods on excisable inputs or on 'Brand Rate Basis' upon submission of documents evidencing actual payment of basic custom duties.

- **Public Notice No. 40/2015.2020** -DGFT dated 31.10.2019 amends Chapter 7 of the Handbook of Procedures 2015-20. The existing provision regarding Fixation of Brand Rate has been amended to "rate of duty drawback".

Direct Tax

Government introduces Amendment Bill to replace Ordinance on new lower corporate tax regime

- On 20 September 2019 the President promulgated Taxation Laws (Amendment) Ordinance, 2019 [Ordinance] under Article 123(1) of Constitution of India to make certain amendments to the Income Tax Act, 1961 (ITA) and the Finance (No. 2) Act, 2019 (FA 2019). Since an ordinance is only a temporary executive measure, which cannot replace the power and function of the Parliamentary process, government had to be introduced as a bill (by presenting the same before both Houses of the Parliament) for its consideration.

- Accordingly, the Taxation Laws (Amendment) Bill, 2019 (Amendment Bill) introduced in Lok Sabha on 25 November 2019 to repeal and replace the Taxation Laws (Amendment) Ordinance, 2019 (Ordinance). On 3 December 2019, the Bill has been approved in the Lok Sabha with few changes and the Rajya Sabha has also passed the bill on 5 December 2019. Correspondingly, the President on 11 December 2019 has given its assent and the Taxation Laws (Amendment) Act, 2019 was enacted.

- To recollect, the Ordinance provided for a major reduction in corporate tax rates for existing (22%) and new domestic companies (15%), subject to certain conditions. The Ordinance also implemented the withdrawal of higher surcharge for non-corporates on certain capital market transactions, announced earlier on 24 August 2019, as also provided relief from buy-back distribution tax (BBT) for listed companies in respect of buybacks, which were announced prior to budget announcement on 5 July 2019.

- Below we have explained the additional clarification and conditions in the Taxation Laws (Amendment) Act, 2019:

Clarification with reference to taxpayers opting for 22% concessional tax rate (CTR) under section 115BAA

- It is clarified that if a domestic company fails to satisfy the conditions specified for 22% CTR in any tax year, the option shall become invalid for that tax year as also for all subsequent tax years.

- Further the lapse of carried forward loss on availing 22% CTR shall also apply to business loss and unabsorbed depreciation transferred from amalgamating company to amalgamated company in a qualifying amalgamation, to the extent it pertains to additional depreciation and specified incentives/deductions.

- As regards allowability of set off brought forward MAT credit, it may be noted that the Taxation Laws (Amendment) Act, 2019 codifies clarification provided in Central Board of Direct Taxes (CBDT) Circular 29/2019 and brought forward MAT shall not be allowed for set off against tax payable under 22% CTR.

- The unabsorbed depreciation allowance brought forward as on 1 April 2019 shall be adjusted to the tax written down value (WDV) of the block of assets as on 1 April 2019 in a manner to be prescribed by rules, if the taxpayer opts for 22% CTR in tax year 2019-20. Such recalibration of tax WDV shall apply to taxpayers opting in for 22% CTR in tax year 2019-20.

- A domestic company having a unit in International Financial Services Centre (IFSC) can claim 100% profit-linked tax holiday for a period up to 10 consecutive years, at the option of the taxpayer, out of first 15 years from the year in which regulatory permission is received. Currently, such companies claiming IFSC tax holiday need to pay MAT at lower rate of 9%. As per the Taxation Laws (Amendment) Act, 2019, such companies can continue to claim IFSC tax holiday despite opting for 22% CTR. There is no MAT on taxpayers opting for 22% CTR. Hence, such a unit can potentially enjoy complete tax holiday (including MAT) for a

period up to 10 years by opting for 22% CTR.

Clarification with reference to new domestic companies incorporated on or after 1 October 2019 and commencing manufacturing or production on or before 31 March 2023 and opting for 15% concessional tax rate (CTR) under section 115BAB

- It should commence manufacture or production of any article or thing on or before 31 March 2023. The reference to 'production' was missing in the Ordinance.

- The prohibition on use of building previously used as hotel or convention center is restricted to building on which profit-linked tax holiday in respect of profits and gains from business of hotels or convention center in specified areas was claimed and allowed under the ITA.

- CBDT in consultation with Central Government may issue guidelines to resolve difficulties that may arise in compliance of the qualifying conditions in relation to the use of secondhand plant and machinery, hotel/convention center as well as condition of not engaging in any other business other than manufacture or production. Every such guideline shall be laid before each House of Parliament and shall be binding on the person and the Tax Authority.

- The business of manufacture or production of any article or thing in following businesses shall not qualify for the benefit of 15% CTR:
  - (i). Development of computer software in any form or in any media;
  - (ii). Mining;
  - (iii). Conversion of marble blocks or similar items into slabs;
  - (iv). Bottling of gas into cylinder;
  - (v). Printing of books or production of cinematograph film; or
  - (vi). Any other business as may be notified by the Central Government in this behalf.

- The lapse of carried forward loss on availing 15% CTR shall also apply to business loss and unabsorbed depreciation transferred from amalgamating company to amalgamated company in a qualifying amalgamation.

- If a new domestic company fails to satisfy the conditions specified for 15% CTR in any tax year, the option shall become invalid for that tax year as also for all subsequent tax years. However, in such case, the taxpayer can opt to claim 22% CTR.

- Income which is neither derived from nor incidental to manufacturing or production will be chargeable to tax at the rate of 22% [Plus 10% surcharge and 4% cess] on gross basis without any allowance or deduction.

- Any profits which is deemed to be more than ordinary will be chargeable to tax at the rate of 30%.

- 15% CTR can be availed by an amalgamated company provided it continues to fulfil the prescribed conditions.

Uniform surcharge applicable to domestic companies availing 22% CTR or 15% CTR

- The Ordinance provided for 10% surcharge for domestic companies availing 22% CTR or 15% CTR but there was ambiguity on rate and computation of surcharge applicable on other incomes like capital gains. The Taxation Laws (Amendment) Act, 2019 provides for uniform rate of surcharge of 10% for domestic companies availing 22% CTR or 15% CTR on all types of incomes including capital gains.

Withdrawal of higher rate of surcharge on capital market transactions for FPIs and others

- The Ordinance partially withdrew higher rate of surcharge (25%/37%) imposed by FA 2019 on non-corporate taxpayers to the extent of capital markets transactions for non-corporates and FPIs. However, withdrawal of enhanced surcharge rates for FPIs applied only to association of persons (AOPs) and body of individuals (BOIs). The Taxation Laws (Amendment) Act, 2019 extended the withdrawal of higher surcharge to FPIs being

individuals and AJP also. This will provide clarity on applicable surcharge rates for FPIs structured as trusts and classified as individuals/AJPs.

Other changes by Ordinance ratified by the Taxation Laws (Amendment) Act, 2019

- **Reduction of MAT rates** - The Ordinance reduced MAT rate for companies from base rate of 18.5% to 15% (before application of surcharge and cess).
- **Transitional relief for buybacks by listed companies announced before 5 July 2019 -** The FA 2019 extended BBT to buyback of shares by listed companies on or after 5 July 2019. Pursuant to representations, the Taxation Laws (Amendment) Act, 2019 provided a transitional relief by a carve out in respect of buybacks which were announced prior to the budget announcement on 5 July 2019.

Regulatory

Amendment of Foreign Exchange Management (Non-debt Instruments) Rules, 2019 by Ministry of Finance

Ministry of Finance (Department of Economic Affairs), has issued amendment to Foreign Exchange Management (Non-debt Instruments) (Amendment) Rules, 2019 ('Non-debt Instruments Amendment Rules'). The highlights of the Non-debt Instruments Amendment Rules are as follows:

- Mutual funds (which invest more than fifty percent in equity governed by the SEBI (Mutual Funds) Regulations, 1996) have been omitted from the definition of "investment vehicle".
- Definition of the term "sectoral cap" has been amended by excluding the investment in debt instrument from the existing definition. The said term has been now defined as "the maximum investment including both foreign investment on a repatriation basis by persons resident outside India in equity instruments of a company or the capital of a LLP"
- It has been clarified that in case of convertible equity instruments, the price or conversion formula of the instrument should be determined upfront at the time of issue of the instrument and such price should not in any case be lower than the fair value worked out, at the time of issuance of such instruments, thereby, restoring the earlier position on issuance of convertible instruments.
- Further, E-commerce marketplace entity having Foreign Direct Investment (FDI) would be required to obtain and maintain a report of statutory auditor by 30th September every year for the preceding financial year confirming compliance of the conditionalities attached to FDI in e-commerce (Auditor Certificate requirement).
- The sectoral cap for entities having FDI and undertaking Single Brand Retail Trading (SBRT) has been restored to 100% under automatic route.
- The Non-debt Instruments Rules now specifically would include the changes as notified by the Department of Promotion of Industry and Internal Trade (DPIIT) (PN4 Amendments) vide Press Note No. 4 (2019 Series) dated 18 September 2019.
- The Non-debt Instruments Amendment Rules shall be deemed to have come into force on the 17 October, 2019, except PN4 Amendments and Auditor Certificate Requirement, which shall come into force on the date of their publication in the Official Gazette.

Source: Notification No. S.O. 4355 (E) dated 05 December 2019

Foreign Exchange Management (Export of Goods and Services) (Amendment) Regulations, 2019

The Reserve Bank of India (RBI) has amended the export regulations to include a specific clause under Regulation 4, i.e., "Exemptions" which covers scenarios wherein export of goods / software may be made without furnishing the declaration:

- Regulation 4(ea) will be added as follows: *"(ea) re-export of leased aircraft / helicopter and / or engines / auxiliary* power *units (APUs) re-possessed by overseas lessor and duly de-registered by the Directorate General of Civil Aviation (DGCA) on the request of Irrevocable Deregistration and Export Request Authorisation (IDERA) holder under 'Cape Town Convention' subject to permission by DGCA / Ministry of Civil Aviation for such export/s"*

Source: Notification No. FEMA 23 (R)/ (2)/2019-RB dated 03 December 2019

Part B – Case Laws

Goods and Services Tax

1. Sitaram Roadways Vs State of Gujarat [2019-VIL-510-GUJ]

Subject Matter: The appeal is filed by the petitioner where he has challenged the order dated 24.8.2019 passed by the second respondent in Form GST MOV-11 whereby he has ordered confiscation of the conveyance as well as the goods contained therein.

Background and Facts of the case

- The petitioner is a transporter. The conveyance in question was intercepted by the second respondent on 6.8.2019 at 6.45 p.m. at Vagharol, Taluka Dantiwada. It appears that the person in charge of the conveyance was not in a position to produce the mandatory documents in the nature of invoice and e-way bill.

- Vide an order dated 6.8.2019 issued in Form GST MOV-02, the person in charge of the conveyance was directed to station the conveyance carrying goods at Vagharol at his risk and responsibility. Thereafter, a notice dated 21.8.2019 came to be issued in Form GST MOV-10 for confiscation of the goods or conveyance and levy of penalty under section 130 of the CGST Act read with the relevant provisions of other related statutes. In terms of the said notice, the petitioner was directed to appear before the second respondent on 28.8.2019 at 11 a.m. Thereafter, without waiting for the petitioner to appear before him, the second respondent vide order dated 24.8.2019 passed an order of confiscation under section 130 of the CGST Act in Form GST MOV-11 computing the tax, penalty, fine in lieu of confiscation of goods and fine in lieu of confiscation of conveyance. Being aggrieved, the petitioner has filed the present petition.

Discussion and findings of the case

- It was observed that while making an order of confiscation under section 130 of the CGST Act, the officer adjudging has to state as to which clause of sub-section (1) of section 130 of the CGST Act is attracted in the facts of the said case, whereas in the present case, the impugned order is totally silent as regards which provision of the Act or the rules has been contravened; which clause of sub-section (1) of section 130 of the CGST Act is attracted; and as to why the officer adjudging it has come to the conclusion that there is contravention of the provisions of the Act and the rules made thereunder with the intent to evade payment of tax.

- The fine provided under the first proviso to sub-section (2) of section 130 of the CGST Act is the maximum fine leviable, however, it is not as if in every case the proper officer should levy the maximum fine.

- The order of confiscation should, therefore, reflect due application of mind on the part of the proper officer to the quantum of fine imposed by him.

- In the impugned order the proper officer has levied more than the maximum fine leviable in terms of the first proviso to sub-section (2) of section 130 of the CGST Act, inasmuch as, he has levied fine equal to the market value of the goods without deducting the tax chargeable thereon. Moreover, there is nothing in the order to reflect application of mind to the quantum of fine.

Ruling

- It was held that the impugned order is in breach of the principles of natural justice on two counts, therefore deserves to be set aside and the matter is required to be remitted to the proper officer to decide the matter afresh in accordance with law. Therefore the petition succeeds and is allowed

2. **M/s Vista Marine and Hydraulics [2019-VIL-417-AAR]**

Subject Matter: The applicant requested advance ruling on whether the supply of spare parts / accessories and repair service can be considered as composite supply wherein the principal supply is repair service and hence the rate of tax for all the supplies, consisting of spare parts / accessories and repair service, be taken as 18%.

Background and Facts of the case

- The applicant is engaged in the business of rendering repairing service of boats / vessels along with supply of spare pans and accessories. The applicant has entered into a Repair Rate Contract with customer, Naval Ship Repair Yard, Southern Naval Command, Indian Navy, Kochi, to provide service, viz., repairing of boats as per the rate mentioned in Repair Rate Contract. On the basis of such contract, necessary spare parts / accessories and repair service are provided by the applicant.

- The applicant requested advance ruling on whether the supply of spare parts / accessories and repair service can be considered as composite supply wherein the principal supply is repair service and hence the rate of tax for all the supplies, consisting of spare parts / accessories and repair service, be taken as 18%.

Discussion and Ruling

- The supply of spares parts / accessories and repair service are distinct and separately identifiable supplies for which the rates are quoted differently and work orders are issued separately specifying the spares / accessories to be supplied and the services to be supplied and the rates applicable thereon as per the rates quoted in the Repair Rate Contract can't be considered as a composite supply.

- Where a supply involves supply of both goods and services and the value of such goods and services supplied are shown separately, the goods and services would be liable to tax at the rates as applicable to such goods and services separately

3. **M/s Precision Rubber Industries Pvt Ltd Vs The Goods and Service tax Council [2019-VIL-527-MAD]**

Subject Matter: The writ petition is filed challenging the orders of rejecting the request of the petitioner for filing TRAN-1 to avail the Input Tax Credit by either by opening of GSTN portal or to allow it to be filed manually.

Background and Facts of the case

- The writ petitions are filed challenging the orders of the second respondent dated 22.03.2019 and 24.08.2018, rejecting the request of the petitioner for filing TRAN-1 to avail the Input Tax Credit and consequently, directing the respondents to allow filing of GST - Tran-1 by the petitioner, to carry

forward the credit on eligible duties of goods in electronic credit ledger in terms of Section 140(3) and 140(5) of the Central Goods and Services Tax Act, 2017, either by opening of GSTN portal or to allow it to be filed manually.

Discussion and findings of the case

- The impugned denial is only because of the reason that the time for filing TRAN-1 had lapsed and since that issue is sought to be resolved before GSTN - any of the orders of denial so far passed shall not stand in the way of GSTN to consider the claim of the petitioner and pass orders on merits and in accordance with law.

Ruling

- The Writ Petitions are disposed of, only with a direction to the Principal Nodal Officer to take appropriate action without loss of further time so as to get the issues resolved by GSTN at the earliest possible time.

4. Tata Motors Limited [2019-VIL-73-AAAR]

Subject Matter: The appellant has filed the application for advance ruling seeking clarification whether for the purpose of Cess under Sr. No. 52B of Notification No. 1/2017-Compensation Cess (Rate), whether the ground clearance of the vehicle is to be considered in laden condition or in unladen condition.

Background and Facts of the case

- The appellant is in the business of manufacturing and selling of vehicles, chassis for vehicles and parts thereof. The Appellant manufactures commercial as well as passenger vehicles.
- The appellant has filed the application for advance ruling seeking clarification whether for the purpose of Cess under Sr. No. 52B of Notification No. 1/2017-Compensation Cess (Rate), whether the ground clearance of the vehicle is to be considered in laden condition or in unladen condition.

Discussion and findings of the case

- The minimum ground clearance of any motor vehicles has to be measured only in fully laden state of that particular motor vehicle.
- There is no mention of unladen state anywhere in the said standard IS-9435 in so far as the measurement of ground clearance of a motor vehicle is concerned. Thus, it can decisively be inferred that as per the standards set out under IS 9435 : 2004 issued by Bureau of Indian Standard, which is followed by the ARAI, the authorized body for certifying the fitness of the motor vehicles, the ground clearance of the motor vehicles in their unladen state has no significance.
- Accordingly, it is observed that any vehicles whose ground clearance in laden state are below 170 mm. will not get covered under Sr. 52B of the Cess Rate Notification i.e. Notification No. 1/2017-Compensation Cess (Rate), dated 28.06.2017.
- For the purpose of Cess @ 22% under Sr. No. 523 of Cess Rate Notification, the ground clearance of the vehicle is to be considered in laden condition only.

Ruling

- Vehicle whose ground clearance in unladen condition is more than 170mm but below 170mm in laden condition, will not get covered under Sr. No. 52B of Cess Rate Notification, accordingly the ruling pronounced by the Advance Ruling Authority is set aside

Customs and FTP

1. M/S Birla Tyres Vs Commissioner of Central Excise, Customs & Service Tax, Bhubaneswar – I [2019-VIL-661-CESTAT-KOL-CE]

Subject Matter: The revenue seeks reversal of credit on input used in manufacture of Animal Driven Vehicle Tyres ("ADV tyres") tyres whereas the assessee contends that it is reversing credit on input used in manufacture of ADV tyres on the basis of CA certificate

Backgrounds and Facts of the case

- One of the types manufactured by the appellant during December 1999 to February 2003 in its factory was tyres used in animal drawn vehicles, known as ADV tyres, classifiable under Chapter Heading 4011.90 of the Central Excise Tariff Act (hereinafter referred to as "said goods"). During the material period, in terms of Notification Nos. 5/99-CE dated February 28, 1999, 6/2000-CE dated March 1, 2000 and 3/2001 dated March 1, 2001, the said goods were exempted from the whole of the duty of central excise leviable thereon.

- Central Excise - Revenue seeks reversal of credit on input used in manufacture of Animal Driven Vehicle Tyres ("ADV tyres") tyres.

- The assessee contends that it is reversing credit on input used in manufacture of ADV tyres on the basis of CA certificate.

- The appeal is filed seeking confirmation of duty demand, interest thereon and imposition of penalty.

Discussion and findings of the case

- It was observed that since the credit amount was already reversed, there was no issue left and, hence, the subject inputs finding a place in the Cost Auditor's report or the Chartered Accountant's Certificate is of no relevance.

- The finding that the stock register and stock statements maintained by appellant established that the input materials alleged in the show cause notice were used in or in relation to the manufacture of ADV tyres during the said period, either directly or indirectly is also not supported by any material on record.

- The entire stock records, which also contain stock of inputs of other varieties of tyres, including radial tyres, by itself cannot justify such a conclusion.

- No steps were taken to verify the production process and to satisfy as to the input materials used in the manufacture of ADV tyres.

- Further, the evidence establish that the subject materials were never used as input materials, either directly or indirectly, in or in relation to the manufacture of ADV tyres

Ruling

- It was held that the impugned order, to the extent it confirms the duty demand, interest thereon and the penalty imposed, is set aside. The appeal of the assessee is allowed and the Department's appeal is rejected.

2. Jtekt Sona Automotive India Limited Vs Commissioner of Customs [2019-VIL-693-CESTAT-DEL-CU]

Subject Matter: The appeal relates to classification of "gear reduction blank" under Chapter 8343 or 8408 of Customs Tariff Act

Backgrounds and Facts of the case

- The appellant has imported a consignment of "gear reduction blank" (hereinafter referred to as "impugned goods") from overseas supplier from China vide Bill of Entry No. 76447685 dated 30/11/2016 at ICD, Tuglakabad.

- The Appellant classified the impugned goods under tariff item 8483 40 00 as Gears and gearing, other than toothed wheel, chain sprockets and other transmission elements presented separately.

- This classification of the impugned goods was not accepted by the appraising group and the query was raised as to why the impugned goods should not be re-classified under tariff item 8708 94 00 of the Customs Tariff Act, 1975 (hereinafter referred to as „CTH)

- The appellant replied to the above query on EDI system stating that they have already submitted required documents for claim of the classification of the impugned goods under tariff item 8340 00 of CTH, however, agreed to pay the differential duty under protest. Thereafter, the Deputy Commissioner, ICD, TKD, New Delhi passed an assessment order wherein the classification claimed by the appellant was rejected and the impugned goods were re-classified under tariff item 87 0 89 400 of Customs Tariff Act.

- The appellant preferred appeal against this order on 08/03/2017 before the learned Commissioner (Appeal). However, the learned Commissioner (Appeal) upheld the order passed by the Adjudicating Authority in the assessment order which is the subject matter of present appeal.

Discussion and findings of the case

- It was observed that the imported item are parts of steering column which are classifiable under heading 848300 and cannot be said to be the article of Section XVII which are not excluded by Section Note 1(k) to Section XVI.

- No reason was found to classify the goods under heading 8708 as the part of motor vehicles as held in the impugned order.

- The parts which has been imported is part of column type electric powers steering system (CEPS) and not part of motor vehicle so as to classify under chapter 8708 of Customs Tariff.

Ruling

- The impugned order is set aside and appeals are allowed.

Direct Tax

1. Dalmia Power Ltd. v. ACIT [2019] 112 taxmann.com 252 (SC)

Subject Matter: Validity of belated revised returns filed by amalgamated companies

Background and Facts of the case

- In the case of Dalmia Power Ltd. and Dalmia Cement (Bharat) Ltd. ("amalgamated companies" or "taxpayers") with a view to restructure, consolidate and enable better realization of their business potential, entered into separate schemes of arrangement for amalgamation of some of their group companies (amalgamating companies) with themselves.

- The schemes of amalgamation of both the taxpayers carried an appointed date (AD) of 1 January 2015.

- One of the clauses of the scheme provided that the amalgamated companies shall be entitled to file revised return of income (ROI) for respective tax years even if the prescribed time limit for filing such ROI had lapsed, without incurrence of any liability on account of interest, penalty or any other sum.

- The Tax Authority did not raise any objection before the NCLT against the scheme when the opportunity was provided to it, as required by the Indian Corporate Laws (ICL) provisions.

- The last of the orders of the NCLT, duly sanctioning the aforesaid schemes, were received on 22 April 2018 and 1 May 2018, respectively, without any change in the AD of the scheme. By that time, the due date for filing revised ROI for tax year 2015-16 (viz., 31 March 2018) had elapsed.

- Consequently, upon sanction of the scheme, the taxpayer amalgamated companies manually filed revised ROI for tax year 2015-16 on 27 November 2018, by including the incomes/losses of the amalgamating companies post the AD, pursuant to the scheme of merger.

- Aggrieved by the rejection, the taxpayers filed a writ before the Madras HC. The Single Judge Bench of the Madras HC ruled in favor of the taxpayer amalgamated companies and directed the Tax Authority to carry out the assessment on the basis of the revised ROI filed.

- Aggrieved by the order passed by the Single Judge Bench, the Tax Authority filed an appeal before the division bench (DB) of the Madras HC , which reversed the judgement of the Single Judge Bench on the following grounds:

  - The clause of the scheme providing for belated filing of revised ROI by the taxpayers, is only an enabling clause;
  - Merely because no objections were raised by the Tax Authority at the time of sanction of the scheme, it cannot be inferred that it had agreed to consider revised ROI filed by the taxpayers in contravention of the provisions of the ITL;
  - The Tax Authority did not consent on waiving the procedural and statutory requirements prescribed for filing of revised ROI and obtaining the condonation of delay as per the ITL.

- Aggrieved by the decision of the Madras HC DB, the taxpayers filed an appeal before the SC.

Issue before the SC

- Whether the revised ROIs filed by the taxpayer amalgamated companies beyond the statutory due date, without seeking condonation of delay from the CBDT, were valid.

Ruling

The SC ruled in favor of the taxpayer amalgamated companies by setting aside the Madras HC DB ruling and restoring the Single Judge Bench ruling of the Madras HC. It directed the Tax Authority to accept the revised ROIs filed by the taxpayer amalgamated companies for carrying out assessment for tax year 2015-16, after taking into account the NCLT-approved scheme of arrangement. The SC adopted the following reasoning:

- The sanctioned scheme contained a specific clause which entitled the taxpayer amalgamated companies to file revised ROI even beyond the statutory due date, without incurrence of any liability towards interest, penalty or other sum.

- The Tax Authority did not raise any objections against the scheme before the NCLT when it was provided such opportunity, as required by the ICL procedures.

- Once the schemes were approved by the NCLT, they attained statutory force, not only amongst amalgamating and amalgamated companies, but also "in rem", as no objections were raised by the requisite stakeholders i.e., they were binding on all parties, including the Tax Authority.

- In an earlier ruling, in the case of Marshall Sons & Co. (India) Ltd. v. ITO: [(1997) 223 ITR 809 (SC)], the SC had held that the AD is the date on which all the assets and liabilities of the amalgamating company vests in and stands transferred to the amalgamated company. Where the Court does not prescribe any specific date, but merely sanctions the scheme presented, it would follow that the date of amalgamation/transfer is the date specified in the scheme as the AD. The SC held that pursuant to sanction of the amalgamation scheme, the assessment of the amalgamated company must take into account the income of both the amalgamating and the amalgamated company. While there may be some practical difficulties faced in such exercise, it cannot preclude the Tax Authority from giving effect to the scheme.

- In the facts of the present case, as the AD was fixed as 1 January 2015, on such date, the business of the transferor companies stood vested in the taxpayers. The transferor companies lost their identity and ceased to exist. Accordingly, the assets, profits and losses of the transferor companies stood transferred to the taxpayers from the AD. The revised ROIs filed by the taxpayers beyond the prescribed time limit was to give effect to the scheme, which required re-computation of their taxable incomes, including losses, unabsorbed depreciation etc.

- The ITL provision dealing with filing of revised ROI within the prescribed time limit was inapplicable to the present case, as the revised ROI was not filed due to any omission or wrong statement contained in the original ROI, but was filed to give effect to the sanctioned scheme.

- Furthermore, as the NCLT approved the scheme only in April 2018 and May 2018, it was impossible for the taxpayer amalgamating companies to adhere to the statutory time limit for filing of revised ROI for tax year 2015-16, which was 31 March 2018.

- The ITL provision dealing with approaching the CBDT for condonation of delay was also not applicable to the present case where the revised ROI was filed pursuant to the scheme sanctioned by the NCLT, without any objection being raised by the Tax Authority.

- In case of succession of business, the ITL provisions mandate the Tax Authority to assess the successor in respect of total income in respect of a tax year after the date of succession. As the taxpayers, in the present case, had succeeded to the business of the predecessor amalgamating companies from the AD, the Tax Authority is required to assess the income of the taxpayers after taking into account the revised ROI filed after amalgamation of the companies.

2. **ACIT v. M/s Dorma India Pvt. Ltd. [ITA Nos.1664 to 1666/Chny/2019]**

Subject Matter: Payment over and above net assets acquired is towards goodwill under slump sale transaction and depreciation is allowed on the same

Background and Facts of the case

- The taxpayer is engaged in the manufacturing and wholesale trading of automatic door operators, door controls and accessories. During the financial year (FY) 2008-09, they had entered into a Business Transfer Agreement ('BTA') with two of its business partners to acquire their distribution segment on a going concern basis for a net consideration of INR 213 million, consideration paid over and the above towards net worth of tangible asset was treated as goodwill and depreciation was claimed thereon.

- The assessing officer (AO) during the assessment proceedings observed that the taxpayer has allocated lesser value out of the business consideration towards tangible assets and if proportionate allocations in value were done towards tangible assets based on book value, then there would not be any allocation remaining towards goodwill. Further, the AO observed that fair market value (FMV) of each of the asset is not considered by the taxpayer. If the taxpayer had considered FMV of each of the assets and also fair market value of liabilities, then there was a case for claiming that the taxpayer has incurred certain amounts towards goodwill. The AO was of the view that in the absence of such an exercise, it could not be said that the taxpayer incurred certain amounts for goodwill. Thus, in the absence of such exercise to identify FMV of assets and liabilities acquired by taxpayer, the AO observed that it could not be said that the taxpayer had paid for purchase of goodwill in the nature of commercial rights. Thus, the AO observed that the taxpayer could not prove that it had purchased goodwill and hence consequentially no depreciation can be allowed on goodwill.

- Furthermore, the AO relied on the decision of Toyo Engineering India Ltd., (2013) (33 Taxman.com 560) (Mumbai Trib.) and observed that slump sale agreements entered into by taxpayer there is a condition of non-compete clause, therefore, any consideration paid over and above the net worth of the business assets taken over by taxpayer, the same should be considered

towards non-compete fee and not towards goodwill.

- The CIT(A) has held the decision in favour of the taxpayer. Aggrieved, the tax department filed an appeal before ITAT.

Ruling

- The Hon'ble ITAT noted that the as per slump sale agreements, the taxpayer had only acquired running businesses on going concern basis. The said slump sale agreements were composite agreements to acquire running business of two entities. The tangible assets which are acquired under these two agreements are mainly computer hardware, printers , fax machines, and other office equipments / appliances, inventories, accounts receivables, loans and advances etc. which were existing in the books of accounts of the two entities on effective date which were incorporated by taxpayers in its books of accounts at their book value.

- The taxpayer has also acquired customers, business contracts, customer orders, business information etc. which are intangibles assets associated with these businesses. The perusal of said slump sale agreements clearly and undisputedly specify the intention of the taxpayer to acquire these businesses erstwhile run by said two entities which is related to trading in taxpayers products and related installation services, on a going concern basis with an intent to run these businesses thereafter by taxpayer under its own name for its own sole benefit uninterruptedly on a going concern basis. Thus, acquisition of these businesses as going concern basis with an intention to run thereafter directly by taxpayer in its own name for its own sole benefit.

- The decision relied by AO in the case of Toyo *(supra)* not applicable in present case since the taxpayer primarily acquired movable assets such as computer, laptops, fax machine, etc and it cannot be said that incorporating these assets in books of accounts of the taxpayer at book value existing on the date of acquisition has led to distortion in presentation of books of accounts of the acquirer. However, in the Toyo, the valuation of land and building done at book value in the books of acquirer which has distort the books of accounts as the fair market value of land and building is significantly higher, as no such land and buildings are acquired by taxpayer under these two slump sale agreements.

- The tribunal has held that the book value of the tangible movable assets acquired by taxpayer was indeed their FMV. The excess paid by the taxpayer over and above book value of tangible assets was towards intangible assets acquired under the form of business contract, customer orders, etc. Thus, consolidated payments made by taxpayer over and above net assets acquired by it under a composite contract in the present case towards goodwill and non-compete agreement were eligible for depreciation under section 32 of ITA.

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