EY Tax and Regulatory Alert

July 2021

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 July 2021

- **Notification No 28/2021 dated 30.06.2021** issued by CBIC waives off the penalty payable by any registered person under Section 125 of the CGST Act for non-compliance of the provisions for Dynamic QR Code for the period 1.12.2020 till 20.09.2021.

- **Circular No 157/13/2021- GST CBEC-20006/10/2021- GST dated 20.07.2021 was issued to provide clarification regarding extension of limitation under GST Law in terms of the Hon'ble Supreme Court's order dated 27.04.2021. Various legal opinions from the purview of the Supreme Court were observed. On such basis,** various clarifications were issued which are enumerated as below:-

  - **Proceedings that need to be initiated or compliances that need to be done by the tax payers:-** These actions would continue to be governed only by the statutory mechanism and time limit provided/ extensions granted under the statute itself. Various Orders of the Hon'ble Supreme Court would not apply to the said proceedings/ compliances on part of the taxpayers.

  - Quasi-Judicial proceedings by tax authorities:-The tax authorities can continue to hear and dispose off proceedings where they are performing the functions as quasi-judicial authority. This may interalia include disposal of application for refund, application for revocation of cancellation of registration, adjudication proceedings of demand notices, etc. Similarly, appeals which are filed and are pending, can continue to be heard and disposed off and the same will be governed by those extensions of time granted by the statutes or notifications, if any.

  - Appeals by taxpayers/ tax authorities against any quasi- judicial order: Wherever any appeal is required to filed before Joint/ Additional Commissioner (Appeals), Commissioner (Appeals), Appellate Authority for Advance Ruling, Tribunal and various courts against any quasi-judicial order or where a proceeding for revision or rectification of any order is required to be undertaken, the time line for the same would stand extended as per the Hon'ble Supreme Court's order.

- Hence, the extension of the timelines granted by Hon'ble Supreme Court vide its Order dated 27.04.2021 is applicable in respect of any appeal which is required to be filed before Joint/ Additional Commissioner (Appeals), Commissioner (Appeals), Appellate Authority for Advance Ruling, Tribunal and various courts against any quasi-judicial order or where proceeding for revision or rectification of any order is required to be undertaken, and is not applicable to any other proceedings under GST Laws.

- **Functionality introduced on GST Portal to check misuse of PAN:** In order to address the complaint related to misuse of PAN for obtaining GST registration, a functionality to register such complaints on GST Portal has been introduced. It will check the misuses, control the frauds and help officers in enquiry and cancellation of such registration.

- A search functionality is given to find out whether any GSTIN is issued on a particular PAN or not, under ***Search taxpayer > Search by PAN.***

- Any person aggrieved of having his PAN misused, may directly or through an authorized representative, register a complaint at GST Portal. He may search the GSTIN based on

- PAN and the registration(s) which are not taken by him, may be selected and reported to the jurisdictional officer. Further, the status of the complaint can also be tracked on the GST portal.

- **Functionalities to be deployed on GST Portal for the month of July 2021:**

- Registration: The extended timelines for filing of application and revocation of cancellation of Registration in Form GST REG-21 has ceased to be effective from 1st July, 2021 and timelines for filing of application for revocation of cancellation is changed to 90 days (as was earlier) on the GST portal, from the date of Order of Cancellation of Registration in Form GST REG-19.

- Late fee for Last Return under Form 10: Taxpayers whose registration is cancelled, at the time of filing the last return in Form GSTR-10 will now be provided with details of late fee payable by them, for the delayed filing of any of the previous returns/statements in a table, for their assistance in filing of the said return by them.

Customs and Foreign Trade Policy (FTP)

This section summarizes the regulatory updates under Customs and FTP for the month of July 2021

- **Notification no 36/2021- Customs and Notification no 37/2021- Customs** issued by CBIC suggests the following changes to the Notification no 45/2017- Customs and Notification no 45/2017- Customs respectively. Notification Nos. 45/2017-Customs and 46/2017-Customs, both dated 30th June, 2017, issued at the time of implementation of GST, prescribe certain concession from duty/taxes on reimport of goods exported for repair outside India:

- In the Table, against serial numbers 2 and 3, in column (3), for the words 'Duty of customs", the words "Said duty, tax or cess" shall be substituted. Hence, For the Goods, other than those falling under Sl. No. 1 exported for repairs abroad, the duty, tax or cess in excess of leviable under column 3 would be exempt.

- Further an explanation was also added after explanation clause c in notification 45/2017 and notification 46/2017, which states that "*on recommendation of the GST Council, for removal of doubt, it is clarified that the goods mentioned at serial numbers 2 and 3 of the Table, are leviable to integrated tax and cess as leviable under the said Customs Tariff Act, besides the customs duty as specified in the said First Schedule, calculated on the value as specified in column (3), and the exemption, under said serial numbers, is only from the amount of said tax, cess and duty over and above the amount so calculated.*"

- **Circular No. 16/2021-Customs, Dated 19.07.2021** was issued for providing clarification regarding applicability of IGST on repair cost, insurance and freight, on goods re-imported after being exported for repairs, on the recommendations of the GST Council made in its 43rd meeting.

- This circular was issued in succession of the clarificatory amendment made in the notifications 45/2017-customs and Notification 16/2017-customs, vide notification Nos. 36/2021-Customs and 37/2021- Customs, both dated 19th July, 2021

- Hence, this circular clarifies that the re-import of goods sent abroad for repair attracts IGST and cess (as applicable) on a value equal to the repair value, insurance and freight.

- **Circular No. 15/2021-Customs, Dated 15.07.2021** was issued for implementation of Risk Management System (RMS) for processing of the Duty Drawback claims.

- RMS is proposed to be implemented in 2 phases. In the first phase of implementation, RMS processed the data and provided information to ICES upto goods examination stage.

- In the second phase, RMS will process the shipping bills data after the Export General Manifest (EGM) is filed electronically and will provide the required output to ICES for selection of the shipping bills for risk based processing of duty drawback claims.

- The above measure is expected to reduce the processing time taken for the drawback claims, enable quick disbursal to exporters and rationalize the Customs Workload.

- **Circular No 14/2021- Customs, Dated 07.07.2021** was issued for introducing improvements in the faceless assessments for expediting the Customs clearance process. The Board has decided to implement the following measures in the Customs Faceless Assessment and clearance processes:

- Enhancement of facilitation levels: Board has decided that w.e.f. 15.07.2021 the facilitation level across all Customs stations would be increased to 90% relating to RMD. It is clarified that the element of randomness in interdiction of any Bill of Entry would be retained by RMS. This measure is expected to enable faster clearance of non-risky imports with enhanced focus on risky imports, so that revenue remains safeguarded.

- Expediting assessment process: With a view to facilitate faster decisions and, in turn, faster verification of self-assessments as well as to promote specialisation and enhance uniformity in assessment, Board has decided to streamline the assessment procedure and working hours of all the FAGS.

- To promote specialisation in assessment, it is also decided to create separate FAGs for certain commodities, which also contribute appreciably to revenue.

- Enhancing Direct Port Delivery (DPD):Further, the Board has decided that all the advance Bills of Entry which are fully facilitated (do not require assessment &/or examination) would be granted the facility of DPD. It is clarified that, this facility is over and above the present system of entity based DPD extended to AEO clients.

- Automated generation of examination orders: In order to enhance uniformity and streamline the examination orders, Board has decided to introduce RMS generated uniform examination orders at all Customs stations across the country. Further, the imports of items which ordinarily warrant First Check as per para 2.3 of Circular No.45/2020-Customs dated 12.10.2020 would now be directly routed to the shed for First Check examination.

- Anonymized escalation: To better address the grievances of trade relating largely to delays in assessment, DG Systems shall soon shortly operationalize an Anonymized Escalation

Mechanism (AEM) on ICEGATE which would empower importers/Customs Brokers to directly register his/her requirement of expeditious clearance of a delayed Bill of Entry, which may be pending for assessment or examination.

- **Circular No. 13/2021- Customs, Dated 01.07.2021** was issued in order to introduce online filing of AEO T2 and AEO T3 applications vide launch of version 2.0 of web-application for filing, real-time monitoring and digital certification. The updated version of the web-based application <URL www.aeoindia.gov.in> will be made accessible for both the applicants and the customs officials from 07.07.2021.

- The AEO T2 and AEO T3 applicants on submission of their physical documents in the jurisdictional Principal Chief Commissioner/ Chief Commissioner's Office (AEO Cell) shall register on the AEO web application.

- On successful registration, the applicant shall upload the duly filled relevant annexures for their AEO T2 and AEO T3 applications.

- Once the relevant annexures are uploaded by the applicant, the applicant will be able to monitor the processing of their application at each stage in real time on the dashboard.

- **Circular No. 12/2021- Customs, Dated 30.06.2021** was issued in order to implement Sea Cargo Manifest and Transshipment Regulations (SCMTR), 2018.

- These regulations were notified wide Notification No 38/2018- Customs (NT)) dated 11.05.2018 and seek to bring about transparency, predictability of movement, advance collection of information for expeditious clearance and supersedes the earlier regulations viz. Import Manifest (Vessels) Regulations, 1971 and Export Manifest (Vessels) Regulation, 1976.

- Directorate General of Systems has issued various detailed guidelines and FAQs for different categories of stakeholders are available on ICEGATE (https://www.icegate.gov.in/SeaManifestRegulation.html)

- **Trade Notification No 11/2015-2020 dated 01.07.2021** was issued to extend the period for modification of IEC till 31.07.2021. In case there is no change in IEC, the same needs to be confirmed online.

- Further, the fee to be charged for modification of IEC done during the month of July,2021 will remain 'Nil'.

- **Trade Notice No 08/2021-22 dated 08.07.2021** was issued in order to inform the members of the Trade and Industry that the issuance of benefits/ scrips under MEIS. SEIS, ROSL and ROSCL Schemes would be kept on hold for a temporary period due to changes in the allocation procedure.

- During this period, no fresh applications would be allowed to be submitted at the online IT module of DGST for these schemes and all the submitted applications pending for issuance of scrips would be also on hold.

- **Trade Notice No 10/2021-22 dated 19.07.2021** was issued to extend the date for mandatory electronic filing of Non-Preferential Certificate of Origin (CoO) through the Common Digital Platform to 01st Oct 2021.

- The option of submission and issuance of CoO (Non-Preferential) by the issuing agencies through their paper-based systems may continue latest up to 30th September 2021.

- **Public Notice No 12/2015-2020 dated 12.07.2021** was introduced in order to reduce the compliance burden on the exporters by amending Para 2.96 (b) of Handbook of Procedures ,2015-2020**.**

- Post issuance of this notice, the requirement on the exporters to furnish quarterly return/ details of his exports of different commodities to the concerned registering authority is withdrawn. The requirement for status holders to send

quarterly returns to FIEO in the format specified by FIEO is also withdrawn.

- Further, S. no 9(d) of ANF-2C of Foreign Trade policy mandating submission of monthly returns of exports including 'NIL' returns to the Registering authority by 15th day of the month following the quarter is deleted, and the revised format for ANF-2C is notified.

- **Public Notice No 16/2015-2020 dated 22.07.2021** was issued to amend para 4.41, 4.51 and 4.57 in the Handbook of Procedures (HBP) , 2015-20.

- Under Para 4.41 of HBP, a new sub-para (e) is added which states that for the Advance Authorizations issued on or after 15.08.2020 and not covered under para 4.41 (b), only 1 revalidation for 12 months from the expiry date would be allowed and no further revalidation would be allowed for such authorizations.

- Paras 4.51 and 4.57 are replaced with the new paragraphs as mentioned in the notice.

Direct Tax

Part-A Key Direct Tax updates

Background

1) CBDT issues guidelines for withholding tax on purchase of goods from resident sellers

- In response to representations made by stakeholders about difficulties envisaged in implementation of S.194Q, the CBDT has issued guidelines vide the Circular for removal of difficulties on TDS on purchases. These guidelines also explain the interplay and resolve certain issues related to the operation of TDS on EOPs and TCS on sale of goods.

Clarifications provided in the Circular

Relief to transactions carried out on recognized exchanges and clearing corporations:

- Recognizing the difficulty for application of TDS on transactions carried out through certain exchanges and clearing corporations where there is no one-to-one contact between the buyer and seller, the CBDT has clarified that TDS on purchase of goods shall not apply to:
  - Transaction in securities and commodities which are traded through recognized stock exchanges, including a recognized stock exchange located in International Financial Service Centre (IFSC).
  - Transactions cleared and settled by recognized clearing corporations, including recognized clearing corporations located in IFSC.
  - Transactions in electricity, renewable energy certificates and energy saving certificates traded through power exchanges in accordance with Regulation 21 of the Central Electricity Regulatory Commission.

Computation of threshold for tax year 2021-22 for TDS on purchases:

- Since the threshold of INR 5m is in respect of purchases during a tax year, calculation of the value of purchase of goods qua seller for tax year 2021-22 shall be computed from 1 April 2021. Hence, if the buyer has already purchased goods amounting to INR 5m or more up to 30 June 2021 from a seller, TDS shall apply on all sums paid/credited with respect to purchases on or after 1 July 2021 during tax year 2021-22.

- Since TDS on purchases applies on credit to the account of seller or payment, whichever is earlier, the Circular clarifies that it shall not apply on any sum credited or paid before 1 July 2021. If either of the two events has happened before 1 July 2021, TDS on purchases shall not apply to such transaction.

Adjustments towards purchase return, discounts and indirect taxes (GST)

- In the context of TDS on purchases, the Circular clarifies that TDS on purchase of goods is made at the time of credit of amount in the account of seller. If the agreement or contract between the buyer and the seller indicates the component of GST comprised in the amount payable to the seller separately, then TDS on purchase of goods shall be made on the amount credited without including such GST.

- However, if TDS on purchases is made on payment basis because the payment is earlier than the credit, TDS on purchases should be made on the whole amount, as it is not possible to identity payment with GST component of the amount to be invoiced in future.

- With respect to purchase returns, the Circular clarifies that TDS on purchases is required to be made on payment or credit, whichever is earlier. Thus, before purchase return happens, TDS on purchases would already have been made on that purchase. If that is the case and against this purchase, money is refunded by the seller, then the TDS so deducted may be adjusted against subsequent purchases from the same seller. No adjustment is required if the purchase return is replaced by the goods by the seller as, in that case, purchase on which TDS on purchase of goods has been made is completed with goods replaced.

Relief to NR buyers not having PE in India

- Stakeholders sought clarification whether TDS on purchases applies to buyer being an NR. This is because the definition of "buyer" does not specify that NRs are excluded.

- To remove difficulties, the Circular clarifies TDS on purchases shall not apply to an NR whose purchase of goods from a seller resident in India, is not effectively connected with the PE of such NR in India.

- For this purpose, "PE" shall mean to include a fixed place of business through which the business of the enterprise is wholly or partly carried on.

Relief for buyers/sellers whose income is exempt

- To remove difficulty, the Circular clarifies that TDS on purchases shall not apply on purchase of goods from a person, being a seller who, as a person, is exempt from income tax either under the ITL or other acts passed by the Indian Parliament , such as Reserve Bank of India Act, 1934 (RBI Act), The Asian Development Bank Act, 1996 (ADB Act) Act etc.

- Similarly, TCS on sales also shall not apply to sale of goods to a person , being a buyer ,who as a person, is exempt from income tax either under the ITL or under any other act passed by the Indian Parliament, such as RBI Act, ADB Act etc.

- However, the Circular clarifies that the above referred relaxation is not applicable if only part of the income of the person (being a seller or being a buyer, as the case may be, is exempt.

Applicability of TDS on advance payment made to seller

- TDS on purchases shall apply on advance payments made by the buyer to the seller since TDS on purchases applies on payment or credit, whichever is earlier.

Non-applicability of TDS in the year of incorporation

- Every buyer whose total sales or turnover or gross receipts from the business carried on by him exceeds INR100m in the tax year immediately preceding the tax year in which purchase of goods is carried out, is required to do TDS on purchases.

- Since the above referred condition would not be satisfied in the year of incorporation, the Circular clarifies that TDS on purchases shall not apply in the year of incorporation.

Computation of turnover from business

- Stakeholders sought clarification whether TDS on purchases shall apply to the buyer who has turnover or gross receipt exceeding INR100m but total sales or gross receipts or turnover from the business is INR100m or less.

- In this regard, the Circular clarifies that TDS on purchases is applicable only when the total sales or turnover or gross receipts from business carried on by the buyer exceeds INR100m in the tax year immediately preceding the tax year in which purchase of goods is carried out.

- Hence, the sales or gross receipts or turnover from the business carried on by the buyer should exceed INR100m. Turnover or receipts from non-business activity is not to be counted for this purpose.

Interplay between TDS on purchases, TDS on e-commerce transactions and TCS on sales

- A seller is relieved from TCS on sale of goods if the buyer is liable to deduct tax under any provisions of the ITL on the goods purchased by him from the seller and has deducted such amount.

- A buyer is relieved from TDS on purchase of goods if:

  - Tax is deductible on the transaction under any provisions of the ITL; or

  - Tax is collectible under any provisions of the ITL, except for TCS on sales.

- In context of TDS on e-commerce transactions, a transaction on which tax is deducted by EOP under TDS on e-commerce transactions or which is not liable for TDS on e-commerce transactions for not meeting the threshold of INR0.5m in case of EP being individual or HUF who furnishes his PAN or Aadhar number to EOP, is not liable to withholding under any other withholding provisions of the ITL.

Scenario	TDS on e-commerce transactions @1% on gross amount of sale or services	TDS on purchases @ 0.1% on purchase consideration	TCS on sales @ 0.1% on sales consideration
If EOP has deducted TDS on e-commerce transactions (or is exempted for not meeting INR0.5m threshold for individual/HUF furnishing PAN/Aadhar)	Applicable	Not applicable	To remove difficulty, the Circular clarifies that TCS on sales shall not apply where EOP has deducted TDS on e-commerce transactions (although buyer does not deduct tax)
If transaction is within purview of both TDS on e-commerce transactions and TCS on sales	Applicable even if seller has collected TCS on sales since rate of TDS on e-commerce transactions (1%) is higher than rate of TCS on sales (0.1%)	Not applicable (although the Circular is silent on this aspect)	Not applicable once EOP has deducted TDS on e-commerce transactions
If transaction is within purview of both TDS on purchases and TCS on sales	Not applicable since it is not facilitated by EOP	Applicable However, if, for any reason, TCS on sales has been made by seller before buyer could deduct TDS on purchases, TDS on purchases shall not apply. This concession is provided to remove difficulty since rate of TDS on purchases is same as TCS on sales (0.1%) (see note below)	Not applicable if buyer has deducted TDS on purchases

Note: This circumstance is possible as one illustration where seller complies with TCS on sales ahead of time on raising of invoices on the buyer, without waiting for the receipt of sale consideration from the buyer and informs the buyer accordingly.

2) CBDT issues rule prescribing methodology for determining short term capital gains and written down value for block of intangible asset comprising goodwill

Background

- FA 2021 amended the definition of intangible asset to exclude goodwill of business or profession thereby making goodwill ineligible for depreciation from TY 2020-21 onwards – both for existing goodwill forming part of block of intangible asset as on 31 March 2020 and new goodwill acquired on or after 1 April 2020.

- To give effect to amendment of disqualifying goodwill as depreciable asset, the FA 2021 also amended the definition of "written down value" to provide for reduction of WDV of goodwill from the WDV of intangible block of asset as on 31 March 2020.

- Further, in respect of goodwill on which depreciation has been claimed in past years up to 31 March 2020, FA 2021 amended the capital gains provisions under the ITL to authorize CBDT to prescribe manner of computation of capital gain and WDV of block of intangible asset comprising of goodwill.

- In exercise of powers granted under the amended provisions, vide Notification No. Notification No. 77/2021/ F. No. 370142/23/2021-TPL dated 7 July 2021, the CBDT has now prescribed new Rule 8AC. This Rule provides for the methodology to reduce the WDV of goodwill from WDV of block of intangible asset as also mechanism to compute short term capital gains.

- The new Rule 8AC shall be applicable for determination of WDV and short-term capital gains for block of intangible assets comprising goodwill on which depreciation has been claimed up to 31 March 2020.

Methodology prescribed by new Rule 8AC:

- The Rule provides that where goodwill is the only asset in block of intangible asset on which depreciation is claimed up to 31 March 2020, then WDV of such block of intangible will need to be reduced by the quantum of actual cost of goodwill less depreciation allowable on such goodwill which will resulting in WDV of such block of intangible asset being reduced to NIL.

- Where block of intangible asset comprises goodwill as also various other intangible assets then the WDV of intangible block of asset as on 1 April 2020 needs to be reduced by standalone WDV of goodwill computed as difference between actual cost of goodwill and depreciation allowable on such goodwill up to 31 March 2020.

- Where the standalone WDV of goodwill is higher than aggregate of opening WDV of entire intangible block of asset and actual cost of any intangible asset acquired in TY 2020-21 then the excess shall be deemed to be capital gain of TY 2020-21 arising from the transfer of short-term capital asset.

- The above situation may arise where there was transfer of intangible assets in past years but the moneys payable in respect of such transferred assets credited to the block did not exceed the WDV. Hence, there was no trigger of capital gains in the past years. Rule 8AC now requires the taxpayer to discharge such capital gains in the TY 2020-21 on the block turning negative on reduction of standalone WDV of goodwill.

- This will be a contentious issue considering that the gain merely arises from reduction of WDV of goodwill from block of intangible assets and not on account of transfer of intangible asset from the block during TY 2020-21.

- However, the Rule 8AC clarifies that there will not be any capital gains or loss where the goodwill was the only asset forming part of intangible block of asset as on 31 March 2020 and such block of asset ceases to exist due to reduction of WDV of goodwill.

- Since goodwill would cease to be part of block of intangible assets from TY 2020-21 and no depreciation would be allowable, the capital gains or loss on transfer of such goodwill shall be determined in the manner as if the transfer is of non-depreciable capital asset. However, depreciation obtained by the taxpayer before TY 2020-21 on such goodwill will be reduced from cost of acquisition while computing such capital gains. Furthermore, the cost of acquisition of goodwill in case of self-generated goodwill of a taxpayer or self-generated goodwill acquired by taxpayer through a tax neutral event (like amalgamation, demerger, etc) shall be taken at NIL.

Part B- Case Laws

Goods and Service Tax

1. M/s Airbus Group India Private Limited [Karnataka AAR- KAR ADRG 31/2021]

Subject Matter: Ruling wherein the AAR held that the technical advisory support services so as to improve the supply chain facility of the supplier by way of continuous onsite assessment, technical advisory/ guidance to the supplier; identifying the list of suppliers, etc would be classified as intermediary services.

Background and Facts of the case

- The Applicant is a subsidiary of Airbus Invest SAS ,France and its ultimate holding company is Airbus SE, Netherlands. The Airbus Group is involved in designing, assembling and delivering aerospace products, services and solutions to its customers on a global scale.

- Airbus Group procures the parts or components or services required for its manufacturing operations from both domestic and international markets including the Indian markets. The entire procurement/ sourcing strategy for the group is monitored by Airbus SAS France.

- Airbus SAS France has entered into an 'Intra-Group Service Level Agreement' with the applicant under which the applicant would primarily assist Airbus SAS by carrying out certain support functions/activities in relation to its global procurement strategy.

- The applicant has agreed to render various technical advisory support so as to improve the supply chain facility of the supplier by way of continuous onsite assessment, technical advisory/ guidance to the supplier; identifying the list of suppliers, etc but it does not include the decisions to be taken regarding the supplier from whom the merchandize will be sourced, communication with the supplier about his selection, etc.

- The Applicant is of the view that the aforesaid services provided to Airbus SAS France would fall under Heading 9983 under 'Other professional, technical and business services'. It was also of the contention that the services would not be classified under intermediary services since they were provided on principal-to-principal basis and were provided by the applicant on his own account and not on behalf of the principal.

- To consolidate the above position, it also stated that the an intermediary is a person who actually facilitates or arranges a main service whereas the services provided by the applicant were in the nature of auxiliary service. Further, the consideration for the said services was in the form of Cost plus Mark-up.

- The Applicant further asserted that since all the conditions necessary to qualify as export of services, viz supplier of the services is in India, the recipient is outside India, place of supply is outside India, consideration is received in convertible foreign exchange and supplier and recipient are not establishments of distinct persons are satisfied, as a result these services must be treated as export.

- Thus, the Applicant had sought Advance Ruling on the following questions:

  - Whether the activities carried out in India by the Applicant would constitute a supply of "Other support services" falling under HSN code 9985 or as "Intermediary service" classifiable under HSN code

- 9961/ 9962 or any other classification of services as specified under various Tariff entries of rate notifications issued under Goods and Service Tax Law?
- Whether the services rendered by the Applicant would not be liable to GST, owing to the reason that such services may qualify as 'export of services' in terms of clause 6 of section 2 of the Integrated Goods and Service Tax Act 2017 (hereinafter 'IGST Act, 2017') and consequently, be construed as 'Zero rated supply' in terms of section 16 of the said act?

Discussion and findings of the case

- The Authority had observed that the heading 9983 included specialty design services including interior design, design originals, scientific and technical consulting services, original compilation of facts/ information services, translation services, trademark services and drafting services. Hence, it contended that the applicant does not deal with the activities mentioned in the HSN 998399.

- The Authority had also held that the reliance on principal to principal relationship or calling oneself as an independent contractor is not relevant for the purpose of determining an intermediary. It had also observed that the applicant plays an important part in identifying the vendors, making them understand the product requirement, advising them and guiding them not merely on the technical aspect of the product but also ethical aspect in relation to such activities without which the Airbus Invest SAS, France would not be able to procure the goods from the vendors.

- Further, it was also held that it is not necessary that a commission payment is involved in an intermediary scenario. The Cost plus mark-up can also be one of the ways for payment. Hence, it was held that the activities performed by the applicant falls within the definition of intermediary services.

- Subsequently, in order to conclude on the rate of tax, the Authority held that SAC 998599 includes "Business services of intermediaries and brokers". Hence, these services would be accordingly classified under Heading 998599 and would be liable to GST at the rate of 18%

- The Authority further referred to Section 13(8) of the IGST Act,2017 to determine the place of supply of intermediary services. Accordingly, it held that since place of supply of the intermediary services in India, these services would not be qualified as export.

Ruling

- In light of the above observations by the Authority, it was held that the activities carried out by the applicant would be classified as intermediary services under SAC 998599.

- Additionally, it also held that the services rendered by the Applicant do not qualify as 'export of services' and consequently are exigible to GST at the rate of 18% as per Notification No 11/2017- Central Tax (R).

2. **Ms F1 Auto Components P ltd vs The State Tax officer [Madras HC- W.P. No.6631 of 2021 and WMP No.7188 of 2021]**

Subject Matter: Ruling wherein the High Court had ordered that no interest would be levied of the wrongfully availed ineligible Input Tax Credit is reversed before utilizing the same.

Background and Facts of the case

- A writ petition was filed calling for the record of the Revenue in the proceedings in GST INS - 01/ 102 / 2020-2021/ Survey- 1 / Investigation-II and to quash the order dated 27.01.2021 passed therein.

- No counter order was filed and the challenge involved only a legal issue and there were no disputed question of fact.

- The challenge was to question the interest under Section 50 of Central Goods and Services Tax Act, 2017 (in short 'Act') relating to both interest on cash remittances as well as remittances by way of adjustment of electronic credit register.

Discussions and findings of the case

- The Hon'ble High Court had inferred that the provisions of Section 42 of the CGST Act, 2017 would not be relevant in the given case as the petitioner, on receipt of the intimation of wrongful claim of ITC, had accepted the error in claim and had reversed the ITC through voluntary payment vide form GST DRC-03.

- It also contended that the provisions of Section 42 can only be invoked in a situation where the mismatch is on account of the error in the database of the revenue or a mistake that has been occasioned at the end of the revenue. In a case where the claim of ITC by an assessee is erroneous, as in this case, then the question of Section 42 does not arise at all, since it is not the case of mismatch, one of wrongful claim of ITC**.**

Ruling

- In light of the above observations, the Hon'ble High Court held that as far as the levy of interest on belated cash remittance is concerned, it is compensatory and mandatory and the levy is upheld to this extent.

Customs and FTP

1. **Volvo Auto India Private Limited vs Commissioner of Customs (Import & General)**
[Final Order No 51515 /2021]

Subject Matter: Ruling wherein the CESTAT had allowed the appeal for accepting the invoice value of the goods imported by the Appellant from its parent manufacturing company as the transaction value for the purpose of calculation of Customs duty.

Background and Facts of the case

- The appellant is a subsidy of M/s Volvo, Sweden who owns 99.99% of the appellant's shares.

- The parent company manufactures Completely Built Units (CBU) of motor vehicles which are imported and sold by the appellant. Customs duty is chargeable on most goods including motor vehicles on *ad valorem* basis.

- For determining the value for levy of Customs duty, Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 have to be considered. If the buyer and seller are related persons as per Rule 2(2) of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007, it needs to be seen if the invoice value is affected by their relationship. If it is not, the invoice value should be accepted in terms of Rule 3(3)(a).

- Each transaction has to be examined separately to see if the relationship between the importer and exporter has affected the price. It is possible it did not affect the price in one invoice but it may have affected the price in another.

- The first Order in Original No. SVB/Cus/III/SNO/2011 was passed on 25-11-2011 by the Deputy Commissioner SVB, New Delhi holding that „the importer and the foreign supplier are related in terms of Rule 2(2), however, the invoice value of the goods imported by the importer from the foreign supplier are NOT influenced by their relationship." It further held that the transaction value may be accepted as per Rule 3(3)(a). This order states that it is valid for period of three years from the date of issue (para 21) and that the decision is subject to occasional review/ a final review after a period of three years.

- After three years, a second Order in Original No. SVB/CUS/Review/YP/58/2014 dated 22.12.2014 was passed again holding that the relationship has not affected the invoice value of the goods imported and it may be accepted as per Rule3(3)(a).

- Aggrieved by this order, Revenue filed an appeal before the Commissioner (Appeals), who passed the impugned order „setting aside the order in original and allowing the appeal filed by the department."

- The Appellant has challenged the impugned order on the following grounds:

  - The impugned order has been passed after an inordinate delay of more than one year after hearing and hence needs to be set aside.
  - It has been passed against the principles of natural justice and submissions made in the first appellate authority were not considered in the order.
  - The TRUE UP payments were payments received by the appellant from the foreign supplier who is also their principal not for sale or purchase of the imported cars but as subvention payments to recoup the losses and other expenses incurred by the appellant. Subvention payments by a parent company to its loss making subsidiary are in the nature of "capital receipts" and NOT "revenue receipts"
  - In tax proceedings, there needs to be consistency. Since the first SVB order dated 25-11-2011 was not challenged by the department, the subsequent SVB order (OIO dated 22.12.2014) should be on the same lines. The department cannot challenge such an SVB order.

- The Revenue is in favour of the impugned order on the basis of the following points:

  - The first SVB order was valid for three years and after three years, the issue was re-examined and a new SVB order was passed. The principle of promissory estoppels does not apply to taxation.
  - The original authority has failed to examine and verify the quantum of losses incurred by the appellant is equal to the amounts of True up amounts received by them or otherwise.
  - As per Rule 10(1) (e) of Valuation Rules, if the advertising and marketing costs are relatable to the imported goods, they are includable in the assessable value as has been held by this bench in **Reebok India [2018 (364) ELT 581 (Tri-Delhi)]**
  - It does not matter whether True up amounts are in the nature of capital expenses or revenue expenses for the purpose of customs. The only thing which matters is whether it is includible in the transaction value

- The order of the original authority has not fully examined the books of account and balance sheets when coming to the conclusion that the relationship between the appellant and the foreign supplier has not influenced the transaction price and therefore it needs to be accepted under Rule 3(3)(a).

- The original authority has not properly verified if the difference in price between the sale to the appellant and the sale of same models of cars but with additional features to unrelated parties

Discussions and findings of the case

- For the argument that the earlier SVB order stops the department from opening up the issues in the second SVB order, the Hon'able Tribunal had observed that in Customs Act, each Bill of Entry is an assessment and can be appealed against. Hence, there is no force in the argument of the appellant that since the first SVB order had found that their relationship with the foreign supplier had not affected the prices at that time, the department cannot examine if such is the case in all subsequent imports.

- For the issue of 'True up payments', the Hon'ble Tribunal had held that the main point to be considered is the invoice price and if there is any additional consideration **flowing from the importer to the foreign supplier** so that the correct transaction value can be determined. The True Up payments are flowing not from the appellant to the foreign supplier but the other way round. Therefore, if these are reckoned to arrive at the transaction value, the invoice value will have to lowered which does not advance the case of the Revenue at all. Hence, this argument of the Revenue was set aside.

- Further, it was also contended that expenses on marketing, advertising, etc cannot be termed as expenses incurred on behalf of the foreign supplier although the foreign supplier would also indirectly benefit if the appellant's business improves. Thus, it would not be included in the assessable value as per Rule 10(1)(e).

- Additionally, the Hon'ble Tribunal had inferred that the adjudicating authority has compared the prices of cars sold to the importer (i.e., the appellant herein) and the prices at which similar cars but with extra features were sold to unrelated buyers, viz., embassies in India. It is also not in dispute that those cars were sold in retail while the appellant bought the cars in bulk, being a distributor. As a result, no substance was found in the impugned order for re-examination.

Ruling

- Basis above, it was held by the Hon'able Tribunal that the relationship has not affected the price merely on the importer's statements. It was further concluded that the original authority had given findings based on analysis.

- Hence, it was held that the order passed by the Commissioner (Appeals) allowing the appeal filed by the Department and setting aside the order-in-original cannot be sustained and the appellate would be entitled to the consequential reliefs.

2. Westinghouse Saxby Farmers Ltd vs Commissioner of Central Excise Calcutta [SC- CIVIL APPEAL NO.37 OF 2009]

Subject Matter: Ruling wherein it was held that 'relays' would be classified under the chapter heading 86 which is for *"Railway or tramway locomotives, rollingstock and parts thereof"* and not under chapter heading 85 which is for *"Electrical machinery and equipment and parts thereof"*

Background and Facts of the case

- The appellant is a company wholly owned by the State Government of West Bengal. It is engaged in the manufacture of "Relays" which is used as part of the Railway signaling system.

- While the normal electrical relays fall under Tariff Item No. 8536.90, 'Railways and Railways signaling equipment' fall under No. 8608.

- From 01.03.1986 till February1993, the effective rate of excise duty charged under both subheadings was 15% and hence the appellant had no problem with the classification of their goods under subheading No.8536.90. But with effect from 28.02.1993, the effective rate of excise duty for the goods under subheading No.8536.90 became much higher than the effective rate of duty for the goods under subheading 8608.

- On 27.08.1993, the appellant submitted a classification list for the approval of the Assistant Collector, Central Excise which provided details of the products manufactured by the appellant as Railway signaling equipment, including relays and claimed that they should be classified under subheading 8608. Accordingly, this list was approved by the competent authority.

- On 23.04.1996 the Central Board of Excise and Customs issued a circular indicating that 'plugin type relays' merited classification under the Chapter Heading 85.36. Thereafter, the Assistant Commissioner of Central Excise issued nine different show cause cum demand notices calling upon the appellant to show cause as to why the goods should not be classified under the Sub Heading 8536.90 and why the differential duty should not be collected together with the interest and penalty.

- The appellant gave reply to the show cause notices, contending that what was manufactured by them was supplied only to Railways as part of the signaling equipment and that, therefore, the show cause notices required to be dropped. However, the Assistant Commissioner passed 9 separate Orders in original on 20/21.12.2001 confirming the demand.

- Aggrieved by the Orders in original, the appellant filed statutory appeals. All the nine appeals were partly allowed by the Commissioner (Appeals) by an Order dated 29.08.2003. By this Order, the Appellate Authority confirmed the classification made by the Adjudicating Authority and the consequential differential duty demanded by the Adjudicating Authority.

- Challenging that portion of the order of the Commissioner (Appeals) upholding the proposed classification and demanding differential duty, the appellant filed an appeal before CESTAT. The CESTAT dismissed the appeal by a final order dated 26.03.2008.

- It is against the said order that the appellant has come up with the present appeal under Section 35L(b) of the Central Excise Act, 1944.

- Thus, the questions sought in the appeal were:

  - Whether the "Relays" manufactured by the appellant used only as Railway signaling equipment would fall under Chapter 86, Tariff Item 8608 as claimed by the appellant or under Chapter 85 Tariff Item No.8536.90 as claimed by the Department ?

  - Whether the show cause cum demand notices issued by the Department on various dates during the period 1995- 1998 were not barred by time under Section 11A of the Central Excise Act,1944, in the absence of any fraud, collusion, willful misstatement or suppression of facts, especially since the classification list submitted by the appellant have been approved on 27.08.1993?

Discussions and findings of the case

- It was observed by the Hon'ble Supreme Court that chapter heading 8536 covers *"Electrical apparatus for switching or protecting electrical circuits, or for making connections to or in electrical circuits (for example, switches, relays, fuses, surge suppressors, plugs sockets, lampholders and other connectors for a voltage not exceeding 1,000 volts; connectors for optical fibres, optical fibre bundles or cables."* Whereas chapter heading 8608 covers *"Railway or tramway track fixtures and fittings; mechanical (including electromechanical) signaling safety or traffic control equipment for railway, tramways, roads, inland waterways, parking facilities, port installation or airfields; parts of the foregoing".*

- Further, it was also interposed by the Hon'ble court that the Appellate Authority had taken view of Note 2(f) of Section XVII which stated that the expressions *"parts"* and *"parts and accessories*" appearing in Chapter 86 do not apply to electrical machinery or equipment, covered by Chapter 85.

  It had also placed reliance on the Rule 3(a) of the General Rules of Interpretation which suggests that a specific description would be preferred over a general one for the goods.

- However, the Apex Court had taken reference to the case of ***Central Excise*** Vs. ***Simplex Mills Co. Ltd*** which contended that the General Rules of Interpretation will come into play, as mandated in Rule 1 itself, only when no clear picture emerges from the terms of the Headings and the relevant section or chapter notes. that in any case, Rule 3 of the General Rules can be invoked only when a particular good is classifiable under two or more Headings, either by application of Rule 2(b) or for any other reason.

- The Court further referred to Note 3 of Section XVII which states that the "parts" and "accessories" can be classified in chapters 86 to 88 only if they are suitable for use solely or principally with the articles of those Chapters. Hence, **those parts which are suitable for use solely or principally with an article in Chapter 86** cannot be taken to a different Chapter as the same would negate the very object of group classification.

- It was conceded by the Revenue that the relays manufactured by the appellant are used solely as a part of the railway signaling/ traffic control equipment. Therefore, the invocation of Note 2(f) in Section XVII, overlooking the "***sole or principal user test"*** indicated in Note 3, is not justified.

- Moreover, the list classifying the items under sub-heading 8608 was approved by the competent authority. After such specific approval of the classification list, it is not proper on the part of the Authorities to invoke Note 2(f) of Section XVII.

- In regard to the second question, the Hon'ble Supreme court perceived that in this case there is no fraud, or collusion or any willful misstatement or suppression of facts or contravention of any of the provisions of this Act or of the rules made there under with intent to evade payment of duty.

- Hence, only the normal period of limitation would be available to invoke the power under Section 11-A.

Ruling

- Basis above, Hon'ble Supreme Court had answered the questions in favour of the appellant and had that the 'relays' would be classified under chapter heading 86.

- Additionally, it also held that the normal period of limitation would apply to invoke the power under Section 11-A.

Part B – Case Laws

Direct Tax

1. Nandi Steels Ltd. v. ACIT [TS-483-HC 2021]

Subject matter: Karnataka HC allows set off of past business loss against gain arising from sale of capital asset used for business

Background

- Under the ITL, income is taxable under various heads of income depending upon its nature, illustratively, income from employment is taxed under the head "salary", income from business is taxed under the head "PGBP", gains on transfer of capital assets is taxed under the head "capital gains" and so on. Furthermore, set off of losses under one head against income under the same or another head is governed by specific rules.

- It may be noted that gains arising from transfer/sale of capital assets used for business purposes, are assessable under the head "capital gains", whereas regular business income is assessable under the head "PGBP".

- Furthermore, the set off and carry forward provisions dealing with business loss have two limbs: (i.) Carry forward of current year's business loss. (ii.) Set off and carry forward of past business loss. The first limb, which allows carry forward of current year's business loss, refers to loss arising under the PGBP head. But, under the second limb, for set off of past business losses against current year's income, the law uses the phrase "profits and gains, if any, of any business carried on by him" and does not refer to the PGBP head of income.

- Additionally, the condition of set off of past business losses against the profits of the same business was also deleted from tax year 1999-2000 and, hence, a taxpayer is not required to continue the same business in order to set off past business losses. Thus, the past business loss can be set off against profits of any other business carried on by the taxpayer.

Facts

- The Taxpayer, an Indian company, was engaged in the business of manufacturing of iron and steel. During tax year 2002-03, the taxpayer claimed set off of past business losses against the capital gains arising on sale of land, factory building and borewell, which were used for business purposes.

- The tax authority denied set off on the ground that gains arising on sale of such capital assets are assessable under the head "capital gains" and past business losses cannot be set off against capital gains. The first appellate authority upheld the order of the tax authority.

- Being aggrieved, the Taxpayer preferred an appeal before the Tribunal. The Tribunal referred the matter to the SB which ruled against the Taxpayer and held that past business loss under PGBP head cannot be set off against capital gains which arose on sale of capital assets used for business purposes.

- The SB had, inter alia, relied on the SC ruling in the case of Express Newspapers Ltd., which held that gains arising on transfer of capital assets earlier used in business cannot be regarded as profits and gains of business, which can be recovered from the successor to the taxpayer's business under the extant provisions of the predecessor income tax laws.

- Aggrieved, the Taxpayer filed an appeal before the HC.

Issue before the HC:

Whether the Taxpayer is allowed to set off past business loss under the PGBP head against capital gains arising on sale of asset used for the purpose of business.

Taxpayer's contentions

- The Taxpayer is entitled to set off past business losses against the income which has attributes of business income even though the same is assessable to tax under the head other than PGBP.

- The erstwhile condition that the loss arising from a particular business should be set off against profit arising from the same business, was withdrawn by the legislature with effect from tax year 1999-2000. Hence, during tax year 2002-03, the Taxpayer was entitled to set off past business losses against gain arising from capital asset used in business.

- The SC decision in the case of Express Newspapers, which held that capital gains arising on transfer of capital assets of the business cannot be considered as business profits, is distinguishable. This is because it dealt with taxability of income arising from capital gains in the hands of the successor company and does not deal with provisions relating to carry forward and set off of business losses.

- Reliance was placed on the SC ruling in the case of Cocanada Radhaswami Bank Ltd. (supra), wherein the taxpayer earned interest on securities held as stock-in-trade. In this case, for the relevant tax year, interest income was assessable under a separate head of income viz., 'interest on securities', distinct from business head. The SC held that though such income was assessable under a separate head, it was still in the nature of business profits and, hence, eligible for set off against past business losses. The SC ruled in the taxpayer's favor after duly considering the ratio of Express Newspapers (supra).

Tax authority's contentions:

- The asset sold by the Taxpayer is in the nature of capital asset and, hence, the income arising from transfer of such asset is taxable under separate head of income viz., capital gains. It does not give rise to business income.
- In order to qualify as business income, the asset, being land, should have been held as stock-in-trade, which was not the case. Hence, the SC ruling in the case of Cocanada Radhaswami Bank Ltd. (supra) is not applicable as it dealt with set off against interest income on securities wherein securities constituted stock-in-trade.

- The provisions of the ITL mandate that past business losses can be set off only against profits from business which is assessable under the PGBP head and not against any other head of income.

HC's ruling

The HC ruled in favor of the Taxpayer and held that the Taxpayer was allowed to set off past business losses against income in nature of capital gains on sale of asset used for business based, for the following reasons:

- The HC noted that the ITL provisions relevant for the tax year under consideration allowed past business loss to be set off against any other business income. Hence, there was no requirement for the Taxpayer to carry on the same business for the purpose of set off of past business losses.

- The HC also closely analyzed the language of the provision for set off and carry forward of past business loss. It noted that the first limb of the provision which deals with carry forward of current year business loss, refers to loss arising under PGBP head. On the other hand, the second limb, which deals with set off of past business loss, refers to set off against "profits and gains, if any, of any business carried on by him".

- The HC applied the principle that interpretation should be based on the language of the provision i.e., what has been said and not what has not been said therein. Furthermore, it also relied on the proposition that while interpreting a provision, the express mention of one thing implies exclusion of other.

- Accordingly, the HC held that the provisions of the ITL enable set off of past business loss against income from "any business". The second limb does not use the reference to profit under PGBP head, unlike the first limb. Hence, the legislature has consciously left it open that any income from the business, though classified under any other head, can still be available for set off against past business loss.

- The SC ruling in the case of Express Newspapers (supra) is distinguishable as it dealt with the issue of whether capital gain income of the predecessor can be taxed in the hands of the successor and the issue of whether the character of capital gains income was in the nature of business income was not considered.

- The HC applied the ratio of Cocanada Radhaswami Bank Ltd. (supra) which, after considering the ruling of Express Newspapers (supra), held that though interest on securities was assessable under a separate head, it was still in the nature of business profits and, hence, eligible for set off against past business losses.

- Accordingly, the Taxpayer is entitled to set off past business losses against capital gains income from transfer of capital assets used for business, even if it is taxable under a head other than PGBP.

2. Nilkanth Concast Pvt. Ltd [TS-552-ITAT-2021(DEL)]

Subject matter: ITAT allowed interest on borrowing for trial run period as revenue expenditure

Facts of the case

- Assessee-Company (Nilkanth Concast Pvt. Ltd.), engaged in the manufacturing of sponge iron, MS billets and TMT bars, filed its return of income for AY 2010-11 declaring a loss of Rs. 12.67 Cr. while showing a book profit u/s 115JB of Rs.4.67 Cr.

- During the assessment proceedings, Assessee could not furnish any confirmation about purchases from 3 parties, and the AO made an addition on account of unproved purchases in absence of any evidence furnished by the Assessee before him. Further, AO disallowed interest on borrowed capital amounting to Rs.28.84 Lacs claimed by the Assessee being interest attributable to the period from installation of new plant upto the date of start of commercial use of the plant. Assessee claimed that the plant had been used for trial run from the date of installation up to its commercial use, which fact was not in dispute.

- The AO, however, made the interest disallowance on the ground that interest for the period before the commercial production ought to be disallowed without considering the period for trial run.

- Further, CIT(A) also allowed Assessee's appeal. Thus, Revenue preferred an appeal before ITAT.

ITAT Ruling

- ITAT noted the Assessee's contention that trial run was also an actual use and hence interest for the period from installation for trial run should be allowed as a deduction. Assessee relied on the SC ruling in Shri Rama Multi Tech Ltd. [TS-5183-SC-2018-O], ITAT remarked that both the facts and the ratio of that ruling are inapplicable to Assessee's case.

- ITAT relied on Bombay HC ruling in Larsen & Toubro [TS-6357-HC-2017(BOMBAY)-O] where it was held that once the plant commenced operations and a reasonable quantity of product is produced, the business is setup even if product was sub-standard and not marketable and the trial run was conducted for one day after which the commercial production of cement was initiated within reasonable time, thus depreciation was held allowable even for the trial run period.

- ITAT referred to the relevant provisions of sections 37(1), 36(1)(iii) and 43(1) and notes that interest on borrowings utilized for acquisition of an asset is to be capitalized till the date such asset is put to use. Referred to the Bombay HC ruling in Western India Vegetable Products Ltd. [TS-3-HC-1954] wherein it was held that "setting up means ready to commence while actual commencement is when the business activity actually commences, and expenses incurred during the gap between set up and commencement are allowable deductions".

- ITAT further referred to the Kolkata ITAT's ruling in Paharpur Cooling Towers P. Ltd. [TS-5437-ITAT-1992] wherein it was held that "assessee had not only set up its business but also commenced production when it started its trial production and hence allowed the expenses on trial production i.e. after setting up of business but prior to commercial production."

- ITAT relied on ICDS-IX on borrowing costs, wherein it is stated 'The capitalization of borrowing cost will cease when the qualifying asset is first put to use' and adopts the determinative factum of "put to use" as per ICDS-IX, AS-16, various judicial pronouncements and the relevant legal provisions. Notes that CBDT notified ICDS vide Notification No. 87 dt. Sep 29, 2016 with effect from AY 2017-18 and allows interest on borrowing pertaining to period prior to commercial production as revenue expenditure.

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