EY Tax and Regulatory Alert

March 2020

Prepared for ACMA

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INDIRECT TAX

Part A - Key Indirect Tax updates

Goods and Services Tax

This section summarizes the regulatory updates under GST for the month of March 2020

- **Press Release** – dated 14.03.2020, issued by Ministry of Finance announces certain changes categorized as below:

- **Law, Procedure and Compliance related changes**

  - The interest on delay in payment of GST shall be charged on the net cash tax liability w.e.f. 01.07.2017 (law to be amended retrospectively)
  - For businesses with turnover less than Rs. 5 crores, filing of GSTR-9C for FY 2018-19 waived off
  - Due Date for filing the Annual Return and Reconciliation Statements for the FY 2018-19 to be extended till June 30, 2020
  - Late fees for delay in filling GSTR 9 and GSTR 9C waived off for taxpayers having turnover less than Rs. 2 crores
  - The due dates for implementation of e-invoicing and generation of QR code to be extended to October 01, 2020
  - Certain class of registered persons (insurance company, banking Company, financial institutions, non-banking financial institutions, GTA, passenger transportation services etc.) to be exempted from issuing e-invoices or capturing dynamic QR code
  - The existing system of Form GSTR-1 and Form GSTR-3B to be continued till September, 2020 (earlier the simplified return system was to be introduced w.e.f. April 01, 2020)
  - Present exemptions from payment of IGST and Compensation Cess on imports made under AA/EPCG/EOU scheme to be extended till March 31, 2021
  - Issuance of clarifications in respect of apportionment of Input Tax Credit in cases of business reorganization under Section 18(3) of CGST Act, filing of appeals during non-constitution of the Appellate Tribunal, refund related issues and special procedure for corporate debtors under IBC, 2016.
  - Amendment to the CGST Rules as under:

    (a) to lay down the procedure of reversal of Input Tax Credit in respect of capital goods party used for affecting taxable supplies and partly for exempt supplies under Rule 43(1)(c);
    (b) fixation of upper ceiling for the value of export supply for the purpose of calculation of refund on zero rated supplies;
    (c) to allow for refund to be sanctioned in both cash and credit in case of excess payment of tax;
    (d) to provide for recovery of refund on export of goods where export proceeds are not realized within the time prescribed under FEMA etc

- **GSTN systems changes**

  - In order to put a curb on tax evasion linking of details of outward supplies in Form GSTR 1 to the liability declared in Form GSTR 3B and Input Tax Credit in Form GSTR 3B to the details of the supplies reflected in Form GSTR 2A suggested. These suggestions and initiatives are targeted to be implemented by July 31, 2020.

- **Circular No.132/2/2020** - GST dated 18 March 2020 issued by CBIC regarding filing of appeal and appropriate procedures to be followed in the absence of Appellate Tribunal. In this regard, it has been provided, through the CGST (Ninth Removal of Difficulties) Order, 2019 dated 03.12.2019, that appeal can be made within three months (six months in case of appeals by the Government) from the date of communication of order or date on which the President or the State President, of the Appellate Tribunal enters office, whichever is later. Hence, it has been clarified that the time limit to file an appeal to tribunal will be counted from the date on which President or the State President enters office.

- **Announcement by FM on 24 March 2020**

  - Taxpayers having aggregate turnover up to INR 5 crore can file Form GSTR-3B due in the month of March, April and May 2020 (i.e., for supplies made in February, March and April 2020) till last week of June 2020 without any interest, penalty and late fee.

  - Taxpayers, other than above, can also file the said returns by last week of June 2020. In such cases, interest would be payable at reduced rate of 9% on tax paid after 15 days from the due date. No late fee and penalty shall be levied if returns are filed before 30 June 2020.

  - Due date of opting for composition scheme, making payment for quarter January to March 2020 and filing of return for FY 2019-20 by composition taxpayers has been extended till last week of June 2020.

  - Last date of payment under Sabka Vishwas (Legacy Dispute Resolution) Scheme, 2019 has been extended till 30 June 2020. No interest will be charged if payment is made by the said date.

  - In cases where the last date for issuance of notice, notification, approval order, sanction order, filing of appeal, furnishing of return, statements, applications, reports, any other documents or any compliance under the GST and Customs law falls between 20 March 2020 to 29 June 2020, the same shall be extended to 30 June 2020.

  - Facility of 24X7 custom clearance shall be available till 30 June 2020.

  - Necessary amendments and circulars to give effect to the aforesaid GST relief shall follow with the approval of GST Council.

Customs and Foreign Trade Policy (FTP)

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

- **Press Release** – dated 13.03.2020, issued by Ministry of Commerce and Industry announces approval of scheme for Remission of Duties and Taxes on Exported Products. The Cabinet Committee on Economic Affairs, chaired by Prime Minister Shri Narendra Modi, has given its approval to the said scheme aiming to give a boost to the domestic industry and Indian exports providing a level playing field for Indian producers in the International market so that domestic taxes/duties are not exported. A gist of the scheme has been mentioned below:

- A mechanism will be created for reimbursement of taxes, duties and levies at the central, state and local level, which are currently not being refunded
- The rebate would be calculated as a percentage of the Freight on Board (FOB) value of exports
- An inter-ministerial committee will determine the rates and items for which reimbursement of taxes and duties will be provided in the form of transferable duty credit scrip, which will be maintained in an electronic ledger.
- RoDTEP will be introduced in a phased manner, replacing the existing Merchandise Export from India Scheme (MEIS).

► **Circular No.31/2015-20** - Dated 26 February 2020 issued by DGFT regarding providing relief in relation to Average Export Obligation in terms of Para 5.19 of Hand Book of Procedures of Foreign Trade Policy, 2015-20-reg for the FY 2018-19. Under Para 5.19 of Hand Book of Procedures of Foreign Trade Policy, exporters of those sectors where total exports has been declined by more than 5% as compared to previous year, may be given a reduction in export obligation proportionately during the relevant year as against the preceding year.

► With effect from 15 February 2020, the declaration of GSTIN shall also be mandatory in import/export documents for the importers and exporters registered as GST taxpayers.

Direct Tax

Part-A Key Direct Tax updates

Key amendments to Finance Bill (FB), 2020 at enactment stage

- Similar to individual and Hindu Undivided Family (HUF) taxpayers engaged in business, even individual and HUF taxpayers engaged in profession shall now have only a one-time option to opt for the new concessional tax regime instead of year-on-year option as proposed by FB 2020.

- An individual, being an Indian citizen or a person of Indian origin, visiting India and having India-sourced income exceeding INR 1.5 million during the relevant financial year, shall trigger residency if his/her stay in India exceeds 120 days (instead of 182 days as per existing provisions) in the relevant year. Such person shall, however, qualify as not ordinarily resident (NOR) in India.

- Trigger of deemed residency provisions restricted to only those Indian citizen individuals, who are not liable to tax in any other country or territory by reason of domicile or residence or any other criteria of similar nature and if their Indian sourced income exceeds INR 1.5 million in the relevant financial year. Such person shall, however, qualify to be NOR in India.

- Continuation of exemption for transitional dividend income received by shareholder on or after 1 April 2020 is available if the applicable DDT is paid by domestic company and higher “super rich” tax, if applicable, is paid by resident shareholder.

- Benefit of inter-corporate dividend deduction to recipient domestic company to be extended to dividend received from a foreign company or a business trust.

- Reduced withholding tax (WHT) rate of 2% to apply on royalty paid to residents in consideration for sale, distribution or exhibition of cinematographic films.

- Withholding provisions are not to be applicable where mutual funds make payment of capital gains income arising at the time of repurchase or redemption of units to its resident unit holders.

- It is proposed that a recipient who has not filed the ROI for 3 AYs relevant to 3 PYs immediately preceding the PY in which the payment of the sum is made to him, the provision of said section 194N would apply so that TDS would be at:
  - 2% when cash withdrawal in a year is more than INR 2 million but does not exceed INR 10 million (on amount exceeding INR 2 million) and
  - 5% when cash withdrawal exceed INR 10 million (on amount exceeding INR 2 million)

  Currently, TDS is applicable at 2% when the withdrawal exceeds INR 10 million.

  The CG shall be empowered to notify, in consultation with RBI, the recipient in whose case the above provision shall not apply or apply with reduced rate on satisfaction of conditions specified in the notification.

- Date of applicability of new withholding tax on e-commerce operator deferred from 1 April 2020 to 1 October 2020.

- The e-commerce operator is deemed to be a person responsible for paying to e-commerce participant and, hence, liable to withhold tax even in a case where it is contractually not responsible for paying amount to e- commerce participant.

- Subject to treaty rates, dividend paid to non-resident shareholders (other than companies) and foreign companies to be subject to withholding tax at 20% (plus applicable surcharge and cess) aligned with their final rate of tax.

- The surcharge on dividend income for a taxpayer being an individual, HUF, Association of Persons, Body of Individuals or Artificial Juridical Person is restricted to 10% if total income (including dividend income) does not exceed INR 10 million and 15% if total income (including dividend income) exceeds INR 10 million.

- Date of applicability of new tax collection at source (TCS) provisions on remittances under Liberalised Remittance Scheme (LRS), overseas tour package and sale of goods deferred from 1 April 2020 to 1 October 2020.

- TCS on sale of goods will not apply on import and export of goods.

- The scope of Equalisation Levy (EL) has been expanded to cover "e-commerce supply or services" w.e.f. tax year 2020-21. The applicable tax rate is 2% on amount of consideration received/receivable by a Non-Resident (NR) e-commerce operator from "e-commerce supply or services" made, provided or facilitated by such NR beyond threshold of INR 20 million during a tax year to:

  - a person resident in India or
  - NR (which entails) sale of advertisement targeted at a customer resident in India or accessing such advertisement through an Indian IP address or
  - NR (which entails) sale of data collected from a person resident in India or from a person who uses Indian IP address or
  - a person who buys goods or services using Indian IP address.

- The **Direct Vivad se Vishwas Bill, 2020** received the assent of the President on 17 March 2020 and promulgated into an Act (VSV Act). Further, Central Board of Direct Taxes (CBDT) via notification dated 18 March 2020, notified '**Direct Tax Vivad Se Vishwas Rules, 2020 (VSV Rules)'** along with relevant forms which includes Form 1 to Form 5, in relation to VSV Act.

Announcement by FM on 24 March 2020

- Given the rapidly deteriorating situation due to spread of COVID-19, the Finance Minister (FM) on **24 March 2020**, announced various measures to ease the burden of statutory and compliance requirements under various laws. Below are the **announcements** pertaining to **direct taxes**:

- The due date for filing **belated returns** and **revised return** for tax year FY 2018-19 has been extended to 30 June 2020 from 31 March 2020;

- The deadline for **Aadhar-PAN linking requirement** shall also be extended from 31 March 2020 to 30 June 2020. Thus, PAN shall not be treated as inoperative till 30 June 2020 even if not linked with Aadhar.

- The specified date under "**The Direct Tax Vivad Se Vishwas Act, 2020**" shall be extended from 31 March 2020 to 30 June 2020. Consequently, taxpayer who opts to make a declaration and makes the payment on or before 30 June 2020 will be required to pay only 100% of disputed tax and there will be no requirement to pay additional 10% of disputed tax;

- **No penalty or fees** would be levied on delay in payment of advance tax, self-assessment tax, tax deducted at sources, tax collected at source, equalisation levy, STT, CTT payable during the period 20 March 2020 to 29 June 2020. Further interest on delay in payment of such amounts will be subjected to a lower interest rate of **9%** as against the existing rate of 12%/18% as the case may be (i.e.

0.75% per month instead of 1/1.5% per month);

- Similarly, due dates for issue of any notice, intimation, approval, reports, documents etc. under the Income Tax Act, Wealth Tax Act, Prohibition of Benami Property Transaction Act, Black Money Act, STT law, CTT Law, Equalization Levy law, Vivad Se Vishwas law which fall within the period 20 March 2020 to 29 June 2020 shall also be extended to 30 June 2020.

- Any compliance by the taxpayer including investment in saving instruments or investments for roll over benefit of capital gains under Income Tax Act and other laws mentioned above where time limit is expiring between 20 March 2020 to 29 June 2020 shall be extended to 30 June 2020.

Further, the Government shall issue necessary legal circulars as well as make appropriate legislative amendments in due course to implement the above announcements.

Key Regulatory amendments

This section summarizes the regulatory updates for the month of March 2020

Reserve Bank of India ('RBI') amends the Foreign Exchange Management (Manner of Receipt and Payment) Regulations, 2016 ('FEMA 14R')

RBI amends the provisions of FEMA 14R to permit Japanese Yen for facilitating transactions /settlements, amongst participants in the Asian Clearing Union (ACU). The details of the amendment are provided as under:

- In terms of the erstwhile regulations, settlement of payments amongst the ACU member countries was permissible only through debit/credit to ACU Dollar Account and/or ACU Euro Account.
- However, pursuant to the amendment, the ACU member countries will have the option to settle their transactions in ACU Japanese Yen, in addition to ACU Dollar or ACU Euro.
- Accordingly, AD banks are allowed to open and maintain ACU Dollar, ACU Euro and ACU Japanese Yen accounts with their correspondent banks in other participating countries. All eligible payments are required to be settled by the concerned banks through these accounts.
- These amendments shall be effective from 06 March 2020.

Source: Foreign Exchange Management (Manner of Receipt and Payment) (Second Amendment) Regulations 2020 dated 04 March 2020 and notified in the Gazette of India on 06 March 2020 read with A.P. (DIR Series) Circular No. 22 dated 17 March 2020

Part B – Case Laws

Goods and Services Tax

- **M/s Automotive Components Technology India Pvt Ltd [2020-VIL-49-AAR]**

Subject Matter: Advance ruling is sought on the issue that whether the transfer of title in goods is liable to GST. If yes, then the buyer would be eligible to avail the ITC paid in respect of the same.

Background and Facts of the case

- The Appellant is engaged in the supply of automotive components such as door locks and strikers (in short 'parts') for various sectors of the automotive industry. They supply such parts to a wide range of customers which inter - alia include moulds and tools (in short moulds').

- The Appellant propose to supply certain parts, including the moulds to an Indian company, located in the State of Tamil Nadu and place an order for manufacturing the said parts and moulds to a Thailand Company.

- The foreign supplier manufactures the parts and the same are physically imported into India. Whereas, the moulds developed by foreign supplier are not physically imported as the same will be disposed as waste in Thailand after its usage for manufacturing the requisite parts.

- In this regard, the Appellant contended that that the said transaction does not constitute import of goods as there is no physical movement of goods into India. Thus the transactions do not qualify as an inter-state or intra state supply of goods and would fall outside the purview of CGST/SGST/IGST. Also, transaction was not taxable under the erstwhile indirect tax

- Also, the Appellant submitted tool utilization certificate which states that the tools are used for Nissan Motors India Pvt ltd (NMIPL)/Renault Nissan Automative India Pvt Ltd/ Renault India Pvt Ltd.

- In the submissions it was stated that the 'Tool Ownership Certificate' is issued by the applicant on NMIPL as transfer of title in ownership of tools on payment of consideration. The tools shall be property of NMIPL only.

- Further, NMIPL have allowed utilization of tool/ mould for manufacturing parts which are commonly used among vehicles manufactured by NMIPL, Renault Nissan Automative India Pvt Ltd, Renault India Pvt Ltd. The mould shall be the exclusive property of NMIPL.

Questions on which Advance ruling is sought

- Whether GST will be applicable on the transfer of title in moulds from applicant to Indian buyer?
- If yes, whether the Indian buyer would be eligible to take credit of the GST paid to the applicant for said purchase?

Discussion and findings of the case

- It is observed that Section 97(2) of the CGST Act / Tamil Nadu GST Act (TNGST) gives the scope of Advance Ruling Authority. The provisions provides the Authority to decide the issue on the eligibility to credit of input tax paid by the applicant alone, and not on at the buyers' hand.

- The hon’ble AAR has given reference to Section 7 of the CGST 2017, which provides that where a transaction constitutes supply, it shall be treated as either as supply of goods or services as referred under Schedule II.

- Further, Schedule II determines the list of activities to be considered as supply of goods/Services and entry Sl.No. 1 is as follows:
  1. Transfer
  (a) any transfer of the title in goods is a supply of goods;

Ruling

- Having regard to the above stated facts and provisions it was evident that transfer of transfer of the title in goods' is supply of goods.

- GST is applicable on the transfer of title in moulds from the applicant to the India buyer.

- The question in relation to availment of ITC is not answered as the same is not in the ambit of this authority as per Section 97(2) of the Act.

- **M/s Mahavir Motors & M/s Vishwakarma Auto Vs State of Himachal Pradesh and Others**
  [2020-VIL-139-HP]

Subject Matter: The petition is filed regarding non filing of Form GST TRAN-I due to technical difficulties on the common portal.

Background and Facts of the case

- The petitioners were registered as Dealers of Goods under the Himachal Pradesh Value Added Tax Act, 2005 and also under the Central Sales tax Act, 1956.

- They had paid excise duty and the National Calamity Contingent Duty (NCCD) on procurement of goods. And used to avail ITC on payment of VAT payable on sale of goods upto 30.06.2017.

- The petitioners migrated to GST after the introduction of GST regime.

- Accordingly, petitioners tried to upload their claim of ITC on the common portal through Transitional ITC/Stock Statement in Form TRAN-I, but were not successful.

- The petitioners tried to upload the Form CGST TRAN-1 on 30.12.2017, however, could not upload the same as the due date for filing the Form GST TRAN-01 was reflected as 27.12.2017 instead of 31.12.2017, whereas the due date was extended to 31.12.2017 by the GST Council.

Discussion and findings of the case

- It was observed that due to technical glitch on the common portal the petitioner were not able to file FORM GST TRAN-I.

- Also, any credit due to petitioner cannot be denied on account of procedural and technical defaults.

Ruling

- In accordance to the above, the present writ petition is disposed of by directing the respondents to allow the petitioner to file Form GST TRAN-I either electronically or manually on or before 31.03.2020.

Part B – Case Laws

Customs, Foreign Trade Policy (FTP) and other laws

1. Commissioner Of Central Excise & Customs, Aurangabad Vs M/s Skoda Auto India Pvt Ltd [2020-VIL-99-CESTAT-MUM-CE]

Subject Matter: The appeal is filed regarding cost of advertisement incurred by the dealers is to be includible in the transaction value of the Motor Cars.

Background and Facts of the case

- The respondents are engaged in the manufacture of excisable goods namely, Motor Vehicles falling under Chapter 8703.00 of the Central Excise Tariff Act, 1985.

- In the Letter of Intent/agreement with the dealers, it is mentioned that expenses related to advertisement and sales promotions of Motor Cars would be incurred by the dealers.

- Resultantly, the cost of advertisement incurred by the dealers is includible in the transaction value, periodical show-cause notices were issued to the respondent for the period from October, 1995 to Sept, 2008 for recovery of the differential duty on the revised assessable value with interest and penalty.

- It is his contention that the learned Commissioner has failed to consider that in event the conditions contained in the Letter of Intent/dealership agreement are not complied, the same shall be terminated.

Discussion and findings of the case

- It was also observed that, Letter of Intent/dealership agreement does not contain any enforcing provision by which it could be construed that such advertisement cost is includible in the assessable value of the motor vehicles sold to the dealers.

- Further, it was also observed that the Hon'ble Supreme Court in TVS Motors Co. Ltd.'s case while considering the includability of pre-delivery inspection charges and after sales service charges interpreting the expression "any amount that buyer is liable to pay to", "by reason of" or "in connection with the sale" mentioned in the definition of 'transaction value', observed that such charges cannot be includible in the transaction value of the goods.

- Further, the expression 'any amount that the buyer is liable to pay to' shows that, apart from the price of the goods, the buyer should also be liable to pay an additional amount to the manufacturer/seller.

Ruling

- In accordance to the above, the cost of the advertisement incurred by the dealers cannot be added to the transaction value.

- And hence, the impugned order is upheld and the Revenue's appeal is dismissed.

2. Commissioner Of Central Excise Customs & Service Tax, Hyderabad-I Vs TM Tyres Ltd. [2020-VIL-108-CESTAT-HYD-CE]

Subject Matter: The appeal is filed against an impugned order that Butyl rubber inner tubes are not to be classified as accessories of motor vehicles. And hence cannot dutiable under Section 4A of Central Excise Act, 1944.

Background and Facts of the case

- The Appellant is engaged in manufacture of Butyl rubber inner tubes, classifiable as excisable goods, under Central Excise Tariff Act, 1985 and discharges duty liability on the assessable value determined, under Section 4 of the Central Excise Act, 1944.

- The Central Government vide Notification No. 2/2006-CE(NT), dated 01.03.2006 has notified certain goods, as the goods to which the provisions of Section 4A ibid shall apply. The said Notification was amended vide Notification No. 11/2006-CE(NT), dated 29.05.2006 in inserting "Parts, components and assemblies of automobiles" in order to fall under the provisions of Section 4A ibid.

- Basis the above notification, department initiated show cause proceedings against the appellants to deposit the Central Excise Duty under Section 4A ibid based on the MRP rates.

- In this regard the Appellant submitted the final order passed by the Tribunal in the case of Agarwal Rubber Ltd. and also relied upon the case of J.K Tyres & Industries Ltd. to state that no differential duty liability can be fastened on to the appellants in terms of Section 4A of Central Excise Act, 1944.

Discussion and findings of the case

- It was observed that product Butyl rubber inner tubes is separately identifiable and is a distinct Marketable product and cannot be said that the same are exclusively meant for the automobile industries for use as parts and components and are not capable for use in other purposes.

- Basis above, it cannot be subjected to levy of central excise duty under Section 4A of the Central Excise Act, 1944.

- Further, refence was given to CCE Vs. Wockhardt Life Sciences Limited as reported in [2012(277)E.L.T. 299 (S.C.)] - 2012-VIL-02-SC-CE, wherein it was has held that the common parlance theory should be applied in order to ascertain whether the particular commodity is falling under specific entry either under the tariff or any notification issued by the Central Government.

- Reference was also made to the case of CCE vs. Wockhardt Life Sciences Ltd. reported in 2012 (277) E.L.T. 299 (S.C.) wherein, the Hon'ble Supreme Court reported that whether a particular article will fall within a particular tariff heading or not has to be decided on the basis of tenable, material or evidence to determine how such article is understood in "common parlance" or in "commercial world" or in "trade circle" or "in its popular sense meaning".

Ruling

- Basis the above discussion, it was decided that Butyl rubber inner tubes shall not be classified as accessories of motor vehicles.

- Further, duty liability cannot be fastened on the Appellant under Section 4A of the Act.

- Accordingly, Commissioner Appeals set aside the impugned order, allowed the appeal in favour of the Appellant.

Part B – Case Laws

Direct Tax

1. Volkswagen Finance Pvt. Ltd. Vs Mumbai Income Tax Appellate Tribunal [TS-172-ITAT-2020 (Mum)]

Subject Matter: Non-resident celebrity performing at promotional event outside India, has business connection (BC) in India, where such performance benefits business carried out in India.

Facts

- Under the Indian tax laws (ITL), taxes are required to be withheld on a payment made to a non-resident (NR) of the amount which is chargeable to tax under ITL. In case of an NR, the income is taxable in India if the same accrues or is deemed to accrue in India. Furthermore, the income is regarded as deemed to accrue or arise when the NR has a BC in India through which or from which such income accrues or arises.

- In 2014, the taxpayer along with its Indian group entity (Audi India), held a promotional event in Dubai. The event was jointly organized to support the mutual business interests of Audi India and the Taxpayer, a captive finance company, wherein sales would be generated for Audi India and the buyer would approach the Taxpayer for financing the purchase of the Audi car.

- For the purpose of the event, a US entity facilitated the appearance of a celebrity, Nicholas Cage, at the event and, accordingly, "appearance fees" of USD 4,40,000, plus other incidental costs such as travel, accommodation, were paid without withholding any taxes.

- The appearance fees were received by the Taxpayer outside India only.

- The Tax Authority contended that such fees were in nature of "royalty" and, accordingly, the same was liable to withholding tax under the ITL.

- The Tax Authority's order was upheld by the First Appellate Authority and it also indicated that such fees may qualify as business income accruing or arising in India.

- The Taxpayer appealed before the Tribunal and contended that even if the NR celebrity is considered to have a business in India, he was not carrying out any operations/activities in India as the event took place in Dubai. Thus, such appearance fees were not accruing or arising in India.

Issue before the Tribunal

- Whether such appearance fees paid to an international celebrity were taxable in India under the provisions of the ITL, thereby requiring the taxpayer to withhold taxes on such payment.

Tribunal's Ruling

- The Tribunal held that the NR celebrity had a BC in India under the ITL as there was a relationship between the event in Dubai and the business of taxpayer in India due to following reasons:

  - Though the event had physically taken place in Dubai, it was India-centric and the benefits of the event were to accrue to the taxpayer in India.

  - The predominant benefit of the Dubai event was the publicity of a new model of the Audi car on the internet, in press releases, news reports and social media, targeting a specific group/ demographic of potential customers in India. Thus, since the target audience was in India, the intended benefits were in India.

  - The audio-visual clips of the event could be used exclusively by the Taxpayer and Audi India and since such entities had business operations only in India, the event would be used as a marketing tool in

India only.

- The entire event expenses were claimed as business deduction by the Taxpayer and Audi India on the ground that such event expenses were incurred wholly and exclusively for their business purposes.

The Tribunal held that because of such relationship between the Dubai event and the business of the Taxpayer in India, the income had accrued to the NR celebrity. In this case, the BC is intangible since it is a "relationship", rather than an object. However, it is a significant BC which has resulted in income accruing to the NR celebrity, since without such relationship there would not have been any business expediency in making payment of the appearance fees.

The Tribunal noted noted the term BC is not defined under the ITL. However, the SC, in the case of R.D. Aggarwal & Co. *(supra)*, observed that "a relation, to be a BC, must be real and intimate, and through or from which income must accrue or arise, directly or indirectly, to the NR". Therefore, a BC is not only a tangible thing (like people, businesses etc.), but also a relationship.

- **Taxability under the India-US DTAA:**
  - The income was not covered under the DTAA provision dealing with entertainers since the activity was not exercised in India. Furthermore, under the "Other Income" article, the income is regarded as taxable if the same arises in the source state. Accordingly, there was no treaty protection from source taxation available to an income falling under other sources. Accordingly, the appearance fees were taxable in India even under the India-US DTAA.

Tribunal's conclusion

- The Tribunal upheld lower authority's order.
- It may be noted that the Tax Authority primarily ruled that the income was taxable as royalty under the ITL and the same was upheld by the First Appellate Authority. It was also indicated that the whole purpose of organizing an India-centric event at Dubai was to avoid "attraction of the clause regarding income accruing or arising in India", and referred to the provisions of the BC. Furthermore, there is no discussion in the Tribunal's ruling on the taxability as royalty under the ITL.

2. Tata Motors Ltd. Vs Mumbai Income Tax Appellate Tribunal [ITA No. 3424/Mum/2019]

Subject Matter: Set-off of business loss against dividend income received from foreign company taxable at special rates

Facts

- Under the ITL, dividends received from a specified foreign company is taxable at a lower rate of tax of 15% on gross basis, while corporate tax rate is 30% on net basis.

  (Specified foreign company means a foreign company in which the Indian company holds 26% or more of equity share capital)

- Any business loss incurred by the taxpayer in a given tax year is permitted to be set-off, *inter-alia*, against income taxable under head 'Income from other sources' (IFOS).

- The taxpayer during FY 2012-13, incurred business losses and earned dividend income from a specified foreign company. The taxpayer filed its ROI by declaring tax losses after setting off the business loss against the specified dividend income. Thus, no tax was paid in relation to such dividend income. This treatment was accepted by the Tax Authority in the regular assessment proceedings.

- However, subsequently, a revisionary order was passed on the ground that the assessment order was erroneous and prejudicial to the interest of the revenue, as the dividend income received from a specified foreign company is taxable @ 15% on gross basis i.e., sans set off of losses against such dividend income.

- The taxpayer appealed before the tribunal.

Taxpayer's contentions

- The assessment order passed by the tax authority is nether "erroneous" nor "prejudicial to the interest of the revenue", as:
  - There is no incorrect application of law or incorrect assumption of facts and the tax authority has applied its mind on the impugned issue.
  - Adopting one of the permissible views cannot be considered as erroneous.
  - The taxpayer had foregone carry-forward of business loss which would otherwise be available for set-off against future business profits taxable @ 30% , while the dividend income is taxable at 15%.
- Express provision for restriction for set-off of loss against specified income streams wherever intended has been provided under the ITL. Set-off of available loss is mandatory in nature and in the absence of any express restriction, set-off of loss against dividend income received from foreign subsidiary ought to be permissible.

Tribunal's ruling

The Tribunal accepted the taxpayer's contention and quashed the revisionary order on the following grounds:

- Taxable income must be first determined by allowing set-off of permissible losses. Only when there is any taxable income after set-off of losses, income is to be taxed as per the rates prescribed under the applicable provision of the ITL.
- There is no express provision under the ITL which denies set-off of losses against dividend income received from a specified foreign company, unlike as prescribed for certain other streams of income. For instance, there is an express provision for denial of set-off of losses against income assessed on account of anti-abuse provisions involving unexplained cash credits, investments, money etc. Similarly, there is an express restriction on set-off of losses against dividend income subjected to super-rich levy.
- As the taxpayer had substantial losses, taxable dividend income of the Taxpayer needs to be first determined by allowing set-off of losses.

3. Sofina S.A. Vs Mumbai Income Tax Appellate Tribunal [TS-129-ITAT-2020(Mum)]

Subject Matter: Capital gains on indirect transfer of Indian shares, not taxable under India-Belgium tax treaty

Facts

- Sofina S.A. (taxpayer), a tax resident of Belgium, is a venture capital investor having investments across many countries. Taxpayer holds 11.34% shares in Singapore company (SCo) which in turn holds 99.99% in Indian company (ICo). SCo has no other assets except investment in ICo.
- In the tax year under consideration, taxpayer sold its entire stake in SCo to another Indian company (buyer).
- SCo derived substantial value from ICo, the transfer of S Co's shares triggered indirect transfer taxation under the ITL. Buyer had withheld taxes under the ITL, while paying the consideration to taxpayer. Taxpayer filed tax return in India declaring 'nil' income and claimed refund of the taxes withheld by buyer.
- Taxpayer contended that capital gains arising from the transfer of SCo's shares, although triggers indirect transfer taxation in India under the ITL, it is exempt from tax under Article 13(6) of the treaty and taxable only in Belgium.

- Tax Authority rejected taxpayer's claim and contended that gains arising from the transfer of stake in SCo falls under Article 13(5) of the treaty and accordingly taxable in India.

- The Dispute Resolution Panel (DRP) upheld tax authority's view. Aggrieved, taxpayer preferred an appeal before the Tribunal.

Issue before the Tribunal

- Whether capital gains arising from transfer of SCo's shares is taxable in India under the provisions of the treaty?

Taxpayer's contentions

- For applicability of Article 13(5) of the treaty, the foremost condition is that the company whose shares are getting transferred should be a resident of India and such shares should represent at least 10% of participation in the capital stock of such Indian company. S Co is a resident of Singapore, holing a valid tax residency certificate therefrom. Hence, Article 13(5) of the treaty does not apply.

- Indirect transfer provisions of the ITL only deems the shares of a foreign company to be situated in India, if such shares derive value substantially from the assets located in India. It does not deem the foreign company (S Co in present case) to become a resident in India. Scope of deeming fictions under the ITL cannot be extended and read into the treaty.

- Support was drawn from ruling of Andhra Pradesh High Court (HC) in Sanofi Pasteur Holding SA Vs. Department of Revenue , as per which Article 13(5) of the treaty does not permit a "see through" approach whereby if shares of a holding company (S Co in present case) is transferred, it could not be regarded as a transfer of shares of its subsidiary entity (I Co in present case).

- Transfer of S Co shares will be governed by the residuary provision Article 13(6) of the treaty, as per which gains are taxable in Belgium.

Tax authority's contentions

- For the purpose of Article 13(5) of the treaty, the transfer of the shares of SCo is an indirect transfer of assets situated in India and the same is deemed to be the "transfer of capital stock of a company resident in India".

- Under Article 13(5) of the treaty, the phrase "forming part of a participation" and "alienation" is not defined and hence its meaning will be understood from provisions of the ITL. Based on such interpretative exercise, the word "participation" means the interest that one company enjoyed by way of shares in the other company. Further, "alienation" can be construed based on meaning of "transfer" under the ITL, which covers indirect transfer.

- Andhra Pradesh HC ruling in Sanofi Pasteur is distinguishable on facts and a petition against the said ruling is pending before the Supreme Court (SC) of India.

Tribunal's Ruling

- Gains derived by the taxpayer on alienation of shares in SCo is not be taxable in India on the basis of the following:

  - Article 13(5) of the treaty covers transfer of shares of company which is resident of India or Belgium. Accordingly, the transfer of shares in SCo, a Singapore resident, is not covered by Article 13(5).

  - Article 13(5) does not permit a see through approach. Unlike Article 13(4) of the treaty which is limited to shares deriving its value from immovable property, Article 13(5) does not use words "directly" or "indirectly". Therefore, transfer of shares of S Co cannot be regarded as a transfer of shares of its Indian subsidiary (I Co) so as to apply Article 13(5). Reliance was placed Andhra Pradesh HC ruling in the case of Sanofi Pasteur in this regard.

  - The indirect transfer provisions of the ITL deem shares or interest of a foreign company to be situated in India, if it derived substantial value from India, for the purpose of taxation of capital gains under the ITL, and not for treating the foreign company itself as a resident of India.

- In the absence of any such corresponding provision in the treaty, deeming fiction of the ITL cannot be read into the treaty. Further, the unilateral amendment in the ITL was introduced for limited purpose of taxing indirect transfers under the ITL and it does not operate to modify or override the treaty.

- In the absence of any provision for deeming a company resident of Singapore as a resident of India either in the India Singapore treaty or in the India Belgium treaty, S Co could not be held to be a company resident in India, due to its holding of shares in I Co.

- In the current fact pattern, the transaction of transfer of shares is covered under the residuary provisions of Article 13(6) of the treaty. Therefore, the gains arising therefrom would only be taxable in Belgium.

4. General Motors Overseas Corporation Vs Mumbai Income Tax Appellate Tribunal [TS-134-ITAT-2020(Mum)]

Subject Matter: Amount received by taxpayer by way of salary and other cost recharge in relation to deputing experienced engineer (Vice-President) to its Indian subsidiary constitutes FIS under Article 12 of India-USA DTAA taxability on gross basis.

Facts

- General Motors Overseas Corporation (taxpayer) is a tax resident of United States of America (USA). It is engaged in the business of providing management and consulting services solely to the group entities worldwide.

- Taxpayer entered into Management Provision Agreement (MPA) with General Motors India Limited (GMIL), who is engaged in business of manufacture, assembly, marketing, sale of motor vehicles, and other products in India. GMIL has a separate 'technical information and assistance agreement' with M/s Adam Opel AG.

- Under the MPA, the taxpayer was to provide executive personnel in connection with development of general management, finance, purchasing, sales, service, marketing and assembly/ manufacturing activities to GMIL. Further, taxpayer was to charge salary and other direct expenses related to such personnel from GMIL.

- To ascertain the tax liability, if any, of such amounts receivable under , taxpayer filed an application before Authority of Advance Ruling (AAR).

- AAR vide its order dated 19 August 1997, specifically negated that the amounts constitute fee for technical services (FTS) but held that taxpayer constitutes Permanent Establishment (PE) in India and any amount received by it will be taxable as business profits under Article 7 of India-USA Double taxation avoidance agreement (DTAA).

- During the subject year, two expatriates – President and Managing Director and Vice President Manufacturing were assigned to GMIL. President and Managing Director will be Chief Executive and Operating Officer of GMIL and will be responsible for the overall management and direction of GMI operations. The President and Managing Director will be formally appointed to such office by GMIL and will discharge his or her powers and duties from that office. Vice President Manufacturing will be responsible for the overall management of GMIL facilities to manufacture and assemble products according to required standards and for production of such products, according to those standards.

- Taxpayer raised invoices and disclosed the amount received as business receipts in return of income and salary paid to the expatriates were after deduction of tax at source under the ITL. Further, as the invoices raised were on cost-to-cost basis, no business profit was disclosed in return of income filed. During the course of assessment proceedings, the tax authorities sought copy of the service agreement of the deputationist. However, taxpayers did not file the service agreement of the employees. In absence of said service agreement, tax authorities taxed the entire receipt as business income as per Article 7 of India US DTAA as income of PE in India, on gross basis since the income is to be computed in accordance with restrictions / limitation of the domestic tax law as provided in Para 3 of Article 7 of India US DTAA.

- Aggrieved by above, taxpayer filed an appeal to the First Appellate Authority, wherein they held that services rendered by the Managing Director are managerial services and cannot be held in the nature of fees for included services, as per Article 12 of India US DTAA. Fees received for such managerial services were taxable as business income on gross basis.

- Further, First Appellate Authority held that services of Vice President (Manufacturing) will fall under the fees for included services under Article 12 of the India US DTAA and accordingly, will be taxed on gross basis as he is a qualified and well experienced technical personnel.

Tribunal's Ruling

- The Tribunal upheld the order of First Appellate Authority due to following reasons:

  - The Vice President was not an ordinary engineer but was having sufficient experience, exposure and knowledge about the technology. The experience of an expert lies in the mind of an expert and if an expert having knowledge and expertise is transferred from one tax jurisdiction to another tax jurisdiction, then it cannot be said that only the employees were per se transferred and not the technology. In other words, technology is made available by one entity situated in one tax jurisdiction to another entity situated in another tax jurisdiction, through the transfer on deputation of its experienced/ expert technical employees. In the automobile industry, assembly of product and standards of company are patented/ protected technology and owner of the standards, charges Royalty for sharing the standards and assembling of products. But in the present case, no Royalty had been charged by the taxpayer to the Indian group entity. Under the garb of sending technical experts to India, it cannot be permitted to say that they were merely employees and the cost is reimbursed by the Indian counterpart to the Assessee for the services rendered by such employee.

  - The Tribunal distinguished the decision in the case of Rolls-Royce Indl Power (I) Ltd. (ITA no 1410 / Del/2007) on the facts of the case. In that case, there was no transfer of technology in the form of sending expert technical employees. However in the present case, employees with technical expertise are not only managing but also ensuring due adherence to the standards of the assessee, by continuously monitoring and mentoring the production.

  - The Tribunal further held taxation of business income on gross basis and as per Article 7(3) of India-US DTAA while determining of profits of a PE, there shall be allowed deduction of expenses in accordance with the provisions of and subject to the limitations of the taxation laws of that state. Also, as per Section 44D(b) of the ITL, no deduction in respect of any expenditure or allowance shall be allowed under any of the said sections in computing the income by way of fees for technical services. As ITL prohibits allowing any deduction for the purpose of calculating fees for technical services/fees for included services', then, the same is taxable on gross basis.

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