EY Tax and Regulatory Alert

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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 May 2020

- **Notification No. 38/2020-Central Tax, dated 05.05.2020** has been issued to provide the following amendments:
  - Insertion of Proviso in Rule 26(1): The registered person who is registered under the provisions of Companies Act, 2013 shall be allowed to verify Form GSTR 3B through Electronic Verification Code (EVC) during the period 21st April 2020 to 30th June 2020
  - Insertion of Rule 67(A): The registered persons who are required to furnish NIL return in Form GSTR-3B shall be allowed to file the said return through SMS facility using the registered mobile no. and the same will be verified through OTP. The rule shall be effective from a date to be notified later.
- **Notification No. 40/2020 -Central Tax, dated 05.05.2020** has been issued seeking to provide extension of validity period of e-way bills which have been generated on or before 24.03.2020 and their period of validity is expiring during the period from 20.03.2020 to 15.04.2020, till 31.05.2020.
- **Notification No. 41/2020 -Central Tax, dated 05.05.2020** has been issued to provide that the due date for furnishing of Annual return under Form GSTR 9 and reconciliation statement under Form GSTR 9C for FY 2018-19 has been extended till 30.09.2020.
- **Notification No. 43/2020 -Central Tax, dated 16.05.2020** has been issued to appoint 18.05.2020 as the date on which provisions of section 128 of the Finance Act 2020 shall come into force. Section 128 of the Finance Act 2020 amended section 140 of the Central Goods and Services Tax Act, 2017 (CGST Act) retrospectively w.e.f. 01.07.2017. The amendment provides power to the Government to prescribe time limit and manner of transition of the credits of duties and taxes from earlier tax regime into Goods and Services Tax (GST).

Customs and Foreign Trade Policy (FTP)

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

- **Circular No. 17/2020**, issued by Ministry of Finance clarifying the relaxation given, in the context of lockdown announced by the Government due to COVID-19 pandemic, to accept an undertaking in lieu of a bond required during customs clearance. The facility was extended till 15.05.2020 vide circular 21/2020 dated 21.04.2020. The lockdown was further extended for two weeks with effect from 04.05.2020 and taking into consideration that it might take sometime after the end of the lockdown for the situation to normalize, the Board has decided to further extend the facility of accepting undertaking in lieu of bond for the period till 30.05.2020. Consequently, the date for submission of proper bond in lieu of which the undertaking is being temporarily accepted is extended till 15.06.2020.
- **Notification No. 04/2015-2020, dated 06.05.2020,** issued by Ministry of Commerce and Industry amends Notification No 53/2015-2020 dated 24.03.2020 related to export policy

of sanitizers. In this regard, the said notification has been amended to prohibit the export of sanitizers only to the extent of 'Alcohol based Hand Sanitizers' falling under the ITC HS codes ex3404, ex3401, ex3402 and 380894 or any other ITC HS Code. Further, any other items falling under the said ITC HS code are freely exportable

- **Notification No.06/2015-2020, dated 16.05.2020,** issued by DGFT which amends Notification No. 44 dated 31.01.2020 read with Notification No. 52 dated 19.03.2020 related to the export policy of masks. In this regard the said notification has been amended to prohibit the export of all masks except non-surgical/ non-medical masks of all types (cotton, silk, wool, knitted) falling under ITC HS codes ex392690, ex621790, ex630790, ex901890, ex9020. Further, all other types of masks falling under any ITCHS code, including the above mentioned HS codes would continue to remain prohibited for exports.

Direct Tax

Part-A Key Direct Tax updates

CBDT defers reporting of GAAR and GST particulars in the tax audit report till 31 March 2021

- Income-tax laws ('ITL') require specified persons to furnish tax audit report ('TAR') in Form 3CD. Central Board of Direct Taxes ('CBDT') last amended TAR vide Notification No. 33/2018 dated 20 July 2018 to enhance the reporting requirements in TAR to be furnished on or after 20 August 2018 . Amongst others, it introduced following two additional reporting requirements in TAR:

  1. **Clause 30C of TAR: General Anti Avoidance Rule ('GAAR') –** TAR requires to report whether a taxpayer has entered into an impermissible avoidance arrangement and if yes, it further requires to report the nature of such impermissible avoidance arrangement and the amount of tax benefit in the tax year arising, in aggregate, to all the parties to the arrangement.

  2. **Clause 44 of TAR: Details relating to Goods and Service Tax ('GST') –**TAR requires reporting of details of GST viz. break-up of total expenditure with GST registered and non-registered entities and for the former, it further requires the break-up of expenditure relating to exempt supply covered under the composition scheme and other registered entities.

- Stakeholders perceived the above reporting requirements to be highly subjective and/or onerous. Hence, various representations were made to CBDT for deferring GAAR and GST reporting obligations.

- In response to such representations, CBDT initially deferred the aforesaid reporting obligations till 31 March 2019 vide Circular No. 6/2018 dated 17 August 2018 and further till 31 March 2020 vide Circular No. 9/2019 dated 14 May 2019.

CBDT order dated 24 April 2020

- In wake of various representations made before CBDT for difficulty in reporting compliances in relation to aforesaid clauses in view of the global pandemic due to COVID-19, CBDT has deferred the reporting obligation in respect of GAAR (i.e., Clause 30C of TAR) and GST law (i.e., Clause 44 of TAR) till 31 March 2021.

- Thus, TAR issued till 31 March 2021 for any tax year (including tax year 2019-20) need not contain GAAR and GST particulars, reducing compliance burden on taxpayers and tax auditors.

Government of India announces first tranche of COVID-19 direct tax relief measures under "Self-Reliant India Movement" announced by Prime Minister

- In the present unprecedented and difficult times due to the global pandemic COVID-19, the Hon'ble Prime Minister announced that the Government of India is rolling out an INR 20 trillion economic stimulus package (equivalent to 10% of India's Gross Domestic Product) under the theme of 'Self-Reliant India Movement' to provide relief to various sectors and drive the country towards self-reliance.

- In first tranche, the FM announced the following direct tax relief measures:

  1. **Reduction in the rate of withholding of tax :** The rate of withholding/collection of taxes for non-salaried specified payments (such as payment for contract, professional fees, interest, rent, dividend, commission, brokerage, etc.) made to residents shall be reduced by 25% of their existing rates. The reduced rate will be effective from 14 May 2020 and will be applicable till 31 March 2021.

  2. **Grant of immediate refunds:** All pending refunds to charitable trusts and non-

corporate businesses/ professions including proprietorship, partnership, Limited Liability Partnerships and co-operatives societies shall be issued immediately.

3. **Extension for furnishing tax returns for tax year 2019-20:** Due date of furnishing tax returns for tax year 2019-20 for all taxpayers (whether corporate or noncorporate) shall be extended from 31 July 2020/ 31 October 2020, as the case may be, to 30 November 2020.

4. **Extension for furnishing tax audit report for tax year 2019-20:** Due date of furnishing tax audit report for tax year 2019-20 for all taxpayers shall be extended from 30 September 2020 to 31 October 2020.

5. **Extension for period of limitation for completion of assessments:** The period of limitation in relation to assessments which are getting time barred on 30 September 2020 (i.e., for tax year 2017-18) shall be extended to 31 December 2020.

   Further, the period of limitation in relation to assessments which are getting time barred on 31 March 2021 shall be extended to 30 September 2021.

6. **Extension for benefit of settlement under the Direct Tax Vivad se Vishwas Act 2020 (VSV Act) without payment of additional tax:** The benefit of settlement under VSV Act without payment of additional amount shall be extended from 30 June 2020 to 31 December 2020. Therefore, any settlement under VSV Act made on or before 31 December 2020 shall not require payment of additional 10% of the tax amount.

Clarifications in respect of prescribed electronic modes under section 269SU of the Income-tax Act, 1961

- The Government of India (GOI) has adopted several fiscal and non-fiscal measures to move towards a less cash economy, to reduce the generation and circulation of black money and to promote the digital economy.

- With a similar objective, the Finance (No.2) Act, 2019 (FA 2019) inserted Section 269SU of the ITL which requires every person carrying on business and having sales/turnover/gross receipts from business of more than Rs 50 Crores ("specified person") in the immediately preceding previous year to mandatorily provide facilities for accepting payments through prescribed electronic modes.

- Further, in order to ensure the compliance, FA 2019 also inserted a new penalty provision by way of S. 271DB for levy of penalty of INR 5,000 per day in case of default in providing such facility.

- Pursuant to above, the CBDT issued a Notification No. 105/2019 dated 30 December 2019, prescribing three electronic modes of payments viz. (i) Debit Card powered by RuPay (ii) Unified Payments Interface (UPI) (BHIM-UPI) and (iii) Unified Payments Interface Quick Response Code (UPI QR Code) (BHIM-UPI QR Code) as mandatory modes of electronic payments by inserting Rule 119AA to the Income Tax Rules, 1962 for the purpose of Section 269SU of the ITL (hereafter referred as prescribed electronic modes). These modes are in addition to any other electronic modes being provided by such person

- Pursuant to to various representations made by stakeholders, the CBDT has clarified vide **Circular No. 12/2020 dated 20 May 2020** that the provisions of section 269SU of the ITL shall not be applicable to a specified person having on only B2B transactions (i.e. no transaction with retail customer/consumer) and at least 95% of aggregate of all amounts received during the previous year, including amount received for sales, turnover or gross receipts, are by any mode other than cash.

Clarification in respect of residency under Section 6 of the Income Tax Act, 1961

- Section 6 of the ITL contains provisions relating to determination of residency of a person. The status of an individual, as to whether he is resident in India or a non-resident or not ordinarily resident, is dependent, inter-alia, on the period for which the person is in India during a previous year or years preceding the previous year.

- Various representations have been received stating that there are number of individuals who had come on a visit to India during the previous year 2019-20 for a particular duration and intended to leave India before the end of the previous year for maintaining their status as non- resident or not ordinary resident in India.

- However, due to declaration of the lockdown and suspension of international flights owing to outbreak of Novel Corona Virus (COVID-19), they are required to prolong their stay in India. Concerns have been expressed that this extra stay in India may make them a resident of India under section 6 of the ITL.

- In order to avoid genuine hardship in such cases, CBDT vide **Circular 11 of 2020 dated 8 May 2020**, has decided that for the purpose of determining the residential status under section 6 of the ITL during the previous year 2019-20 in respect of an individual who has come to India on a visit before 22nd March, 2020 and:

  (a) has been unable to leave India on or before 31 March, 2020, his period of stay in India from 22 March, 2020 to 31 March, 2020 shall not be taken into account, or

  (b) has been quarantined in India on account of Novel Corona Virus (Covid-19) on or after 1 March, 2020 and has departed on an evacuation flight on or before 31 March, 2020 or has been unable to leave India on or before 31 March, 2020, his period of stay from the beginning of his quarantine to his date of departure or 31 March, 2020, as the case may be, shall not be taken into account, or

  (c) has departed on an evacuation flight on or before 31 March, 2020, his period of stay in India from 22 March, 2020 to his date of departure shall not be taken into account.

Key Regulatory amendments

Reserve Bank of India (RBI) extends time limit for realization of import proceeds

- In terms of the extant guidelines on imports of goods and services, remittances against normal imports (i.e. excluding import of gold/diamonds and precious stones/ jewellery) should be completed not later than six months from the date of shipment, except in cases where amounts are withheld towards guarantee of performance, etc.

- In view of the disruptions due to outbreak of COVID- 19 pandemic, the RBI has extended the time period for realization of such import proceeds from six months to twelve months from the date of shipment for such imports made on or before July 31, 2020.

Source: *AP (DIR Series) Circular No. 33 dated 22 May 2020 read with the Statement on Developmental and Regulatory Policies dated 22 May 2020*

RBI provides relaxations under Voluntary Retention Route (VRR) for Foreign Portfolio Investors (FPI)

- In terms of the extant guidelines on VRR for FPIs, successful allottees are required to invest 75% of their Committed Portfolio Size (CPS) within three months from the date of allotment.

- In view of the disruptions caused by COVID-19 pandemic, the RBI has allowed FPIs that have been allotted investment limits, between January 24, 2020 (the date of reopening of allotment of investment limits) and April 30, 2020 an additional time of three months to invest 75% of their CPS.

- For FPIs availing the additional time, the retention period for the investments (committed by them at the time of allotment of investment limit) would be reset to commence from the date that the FPI invests 75% of CPS.

Source: *AP (DIR Series) Circular No. 32 dated 22 May 2020 read with the Statement on Developmental and Regulatory Policies dated 22 May 2020*.

Central Government further amends the Foreign Exchange Management (Non-debt Instruments) Rules, 2019 (NDI Rules)

The Central Government has further amended the NDI Rules and the key features of the amendment are as follows:

- In terms of the erstwhile NDI rules, an investment by a person resident outside India in equity instruments issued by an Indian company as rights issue that were renounced by a person resident in India, was not subject to the specified pricing guidelines. However, pursuant to the amendment, such investments will now be subject to specified pricing guidelines as prescribed under the NDI Rules.

- The Press Note 1 of 2020 issued by Department for Promotion of Industry and Internal Trade (DPIIT) has been notified, thus allowing foreign direct investment (FDI) up to 100% in intermediaries or insurance intermediaries, including, inter alia, insurance brokers, re-insurance brokers, insurance consultants, corporate agents, third party administrator, Surveyors and Loss Assessors and such other entities, as may be notified by the Insurance Regulatory and Development Authority of India from time to time, subject to compliance with certain other conditions.

- In terms of the erstwhile FDI guidelines on single brand retail trading (SBRT), the date of opening of the first brick and mortar store was construed to be the date of commencement of business. However, given that entities engaged in SBRT have been allowed to start online retail business before opening the brick and mortal store, It has been further clarified that the sourcing norms shall not be applicable for a

period of three years from commencement of business, which could be either opening of the first brick and mortar store or start of online retail, whichever is earlier.

- It has been clarified that, on account of breach of prescribed limits of investments by FPI, such FPIs shall have the option of divesting their holdings within five trading days from the date of settlement of the trades causing the breach. In case the FPI chooses not to divest, then the entire investment in the company by such FPI and its investor group shall be considered as investment under FDI and the FPI and its investor group shall not make further portfolio investment in the company concerned. The FPI, through its designated custodian, shall bring the same to the notice of the depositories as well as the concerned company for effecting necessary changes in their records, within - seven trading days from the date of settlement of the trades causing the breach. The divestment of holdings by the FPI and the reclassification of FPI investment as FDI shall be subject to further conditions, if any, specified by Securities and Exchange Board of India and RBI in this regard. The breach of the said aggregate or sectoral limit on account of such acquisition for the period between the acquisition and sale or conversion to FDI within the prescribed time, shall not be reckoned as a contravention in terms of the NDI rules.

Source: Foreign Exchange Management (Non-Debt Instruments) (Second Amendment) Rules, 2020 dated 27 April, 2020

Part B – Case Laws

Goods and Services Tax

1. M/s Bharti Airtel Limited vs. Union of India & Ors (W.P.(C) 6345/2018, CM APPL. 45505/2019)

Subject Matter: Advance ruling wherein the Delhi High Court upheld that rectification of the return for that very month to which it relates is imperative and thus allowed the petitioner to rectify Form GSTR-3B for the prior period and seek refund of the excess taxes paid.

Background and Facts of the case

- The Appellant is a company engaged in the business of providing telecommunication services in India. While filing GSTR 3B for the period July-September 2017, the Company recorded the ITC on estimate basis due to non-availability of exact details. Later, when government operationalized GSTR 2A the Company discovered under reported ITC which lead to excess tax payment to the tune of INR 923 Crores approx. during the said period.

- The petitioner is the present case impugns circular No. 26/26/2017-GST dated 29 December 2017 as ultra vires the provisions of CGST Act, to the extent it did not provide for the rectification in return of the tax period to which it relates, on the following grounds –

  - Section 37 to 43 of CGST Act, prescribes scheme to be followed for filing returns which ensures validation of the data in the month itself and thereafter any error can be rectified in subsequent months. Inability of the Government to run their IT system as per the structure provided cannot prejudice the rights of the Company;

  - The summary scheme introduced by Rule 61(5) being in complete variance with the machinery originally contemplated under the GST Scheme, stifled the rights of the Petitioner by not permitting the validation of the data prior to same being uploaded. In absence of such validation, the excess payment of tax made by petitioner went unnoticed;

  - Delay in operationalizing Form GSTR-2A, a process which was statutorily mandated, cannot defeat the rights of the Petitioner to take and use credit in the month in which it was due;

  - Further petitioner explained that accumulated credit benefit due to erroneous reporting could not be realised in the subsequent months since the output tax liability substantially reduced on account of low tariff in the telecom sector and there would be further inflow of ITC in later months.

- Therefore, petitioner contented that there is no rationale for not allowing rectification in the month for which the statutory return has been filed. Thus the Company shall be allowed to file rectification in the month to which the return relates and granted refund claim on account of excess tax paid.

Discussion and findings of the case

- It is observed that the scheme of filing of returns as envisaged by the CGST Act under Section 37, 38, 39 provided not just for a procedure but a right and a facility to a registered person by which it can be ensured that the ITC availed and returns can be

corrected in the very month to which they relate, and the registered person is not visited with any adverse consequences for uploading incorrect data.

- If statutorily prescribed returns i.e. GSTR 2 and GSTR 3 had been operationalized by the Government, the Petitioner would have known the correct ITC amount available to it in the relevant period, and could have discharged its liability through ITC and thus such issue wouldn't have arrived.

- Form GSTR-3B which has been brought into operation by virtue of Section 168 of the CGST Act, in comparison with Form GSTR-3 is a truncated version. Thus, the form originally contemplated got fundamentally altered. As a result, the checks and balances which were prescribed in the original forms got effaced and it cannot be ruled out that this possibly caused inaccuracies to creep in the data that is required to be filled in.

- The constraint introduced by para 4 of the Circular No. 26/26/2017, is arbitrary and contrary to the provisions of the Act and the Court could not find any cogent reasoning behind the logic for restricting rectification only in the period in which the error is noticed and corrected, and not in the period to which it relates.

- The Respondents would not have deprived the Petitioner of the benefits that would have accrued in favor of the Petitioner if prescribed statutory forms would have been enforced. Therefore, the petitioner cannot be denied the benefit due to the fault of the Respondent.

Ruling

- The Delhi Hight Court granted relief to the petitioner and concluded that rectification of the return for that very month to which it relates is imperative and accordingly allowed the Petitioner to rectify Form GSTR-3B for the period to which the error relates. Further, instructed respondent to verify the claim made with a period of two weeks.

2. Anil Kumar Agrawal [KAR ADRG 30/2020]

Background and Facts of the case

- The Applicant is an unregistered person, and is in receipt of various revue/income such as partner's salary, salary as director, interest income dividend income etc.

Questions on which Advance ruling is sought

- Out of given income which all revenue shall be considered for aggregate turnover for registration?
- Out of given income, when the supply, even if exempted, need to be considered?

Discussion and findings of the case

- Applicant contended that the income received as partner's salary and salary as director will not be includable to the aggregate turnover for registration as the same is not in the purview of GST as the same is not supply of goods or services.

- Rent received towards residential and commercial property is includable as it is a supply of services.

- The Authority referred Section 2(6) of the CGST Act, 2017 which states that, aggregate turnover means "aggregate value of all taxable

supplies (excluding the value of inward supplies on which tax is payable by a person on reverse charge basis), exempt supplies, exports of goods or services or both and inter-State supplies of persons having the same Permanent Account Number, to be computed on all India basis but excludes central tax, State tax, Union territory tax, integrated tax and cess".

- Therefore, any income to be included in the aggregate turnover need to be related to any transaction that amounts to supply in terms of Section 7(1)(a) of CGST Act, 2017.

- Further, it was observed that if the salary income received as executive director's salary then it shall become service given by employee to its employer and neither be treated as supply of goods nor service under Schedule III of CGST Act, 2017. Also, if the salary is received for the position of Non-executive director then the same is exigible to GST in the hands of the company under reverse charge mechanism, under entry no. 6 of Notification no. 13/2017 dated 28.06.2017.

- In the instant case, due to absence of documentary evidences, it was not possible to decide whether the salary is received for the position of executive director or non-executive director.

- Thus, it was decided that if the salary is received as executive director then the same shall not be considered in aggregate turnover for registration, as it is the value of service given by an employee. Whereas, if the salary is received as non-executive director then the same shall be considered in aggregate turnover for registration as it is a taxable service supplied by the applicant.

Ruling

- The income received towards salary/remuneration as a Non-Executive Director of a private limited company, renting of commercial property and residential property and the values of amounts extended as deposits/loans/advances out of which interest is being received are to be included in the aggregate turnover, for registration.

Part B – Case Laws

Customs, Foreign Trade Policy (FTP) and other laws

1. Commissioner Of Central Excise Delhi - III Vs Uni Products India Ltd [TS-250-SC-2020-EXC]

Subject Matter: The appeals is filed regarding "car matting" would come within Chapter 57 of the First Schedule to the Central Excise Tariff Act, 1985 under the heading "Carpets and Other Textile Floor Coverings" or they would be classified under Chapter 87 thereof, which relates to "Vehicles other than Railway or Tramway Rolling-Stock and Parts and Accessories Thereof".

Background and Facts of the case

- The respondent - assessee, were engaged in the business of manufacture of textile floor coverings and car matting. The subject-goods have been referred to interchangeably by the revenue also as car mattings and car carpets.

- The respondent, were clearing the goods declaring them to be goods against Heading

No.570390.90. Effective rate of excise duty on goods under that entry was 8% and education cess at the applicable rate for the subject period.

- Three show-cause-notices were issued against the respondent over clearance of goods under the said heading.

- The Appellant Commissioner found the goods to be classified under Heading no. 8708.99.00 with effective rate of excise duty to be 16%, apart from the education cess.

Discussion and findings of the case

- By the time the third show-cause notice was issued, the adjudicating authority of had passed the order against the respondent on 29.09.2006, upon considering their responses to the said two show-cause notices. The authorities' stand has been that the subject-items ought to be classified under sub-heading 8708.99.00. Against chapter heading 8708, the goods described are "parts and accessories of motor vehicles of headings 8701 to 8705".

- The Respondent argued that the Chapter heading 5703.90 covered carpets and other textile floor coverings and they were manufacturing those items only was rejected by the Commissioner. This plea, however, was subsequently accepted by the Tribunal.

- Reference was made to "Harmonized Commodity Description and Coding System", Explanatory Notes issued by the World Customs Organisation (2002).

- Reference was also made to General Rules for the Interpretation of the Harmonized System lay down the Principles of Interpretation for classification of Goods in the Nomenclature. Rule 3(a) provides "The heading which provides the most specific description shall be preferred to headings providing a more general description. However, when two or more headings each refer to part only of the materials or substances contained in mixed or composite goods or to part only of the items in a set put up for retail sale, those heading are to be regarded as equally specific in relation to those goods, even if one of them gives a more complete or precise description of the goods."

- It was also observed that "PARTS AND ACCESSORIES" under the main heading "GENERAL", in Section XVII of the HSN Explanatory Notes, 2002. Under the sub-heading "(iii) PARTS AND ACESSORIES", a three-layer test has been postulated. It is on satisfying all of these conditions a particular item would come under that chapter head.

- Moreover, the Explanatory Notes dealing with parts and accessories under chapter-head 87.08 includes floor mats (other than of textile materials or unhardened vulcanised rubber). The Commissioner found that car mattings satisfied all the tests enumerated in the said explanatory notes of HSN to be treated as parts and accessories classifiable under Chapter 87.08.

- Also, conclusion made from "market test", and concluded that if anybody asked for car matting in the market, the consumer would get a product which could only be used in a car, with fixed length and width. In the order, the Commissioner found that what was excluded was textile carpets of Chapter 57 and not car mattings.

- A case of Collector of Central Excise, Bombay-II vs. Sterling India [(2000) 115 ELT 807] was also referred, wherein it was held that the goods in

dispute were not the carpets and floor mattings but were accessories of motor vehicles. The goods in dispute are canvas canopy, floor matting and seat covers for motor vehicles. Floor matting was made from jute coated with PVC. Other items also were not used as floor coverings. The Collector of Central Excise (Appeals) has also referred to the HSN Explanatory Notes and the relevant Chapter Notes to arrive at his conclusion that the type of the goods involved in these proceedings were not to be classifiable as floor coverings.

- Two more cases were also referred, namely Collector of Central Excise vs. Swaraj Mazda [(1993) 68 ELT 258] and Jyoti Carpet Industries vs. Commissioner of Central Excise, Jaipur-I [(2001) 132 ELT 458].

- The main argument of the appellant is that because the car mats are made specifically for cars and are used also in cars, they should be identified as parts and accessories. But if we go by that logic, textile carpets could not have been excluded from Parts and Accessories.

- It has also been urged that these items are not commonly identified as carpets but are different products. The Tribunal on detailed analysis on various entries, Rules and Notes have found they fit the description of goods under chapter heading 570390.90.

Ruling

- In accordance to the above, it was held that there is no necessity to import the “common parlance” test or any other similar device of construction for identifying the position of these goods against the relevant tariff entries. Noting that HSN Explanatory Notes specifically exclude “tufted textile carpets, identifiable for use in motor cars” from 87.08 and place them under heading 57.03, also, stresses that “the level or quality of such persuasive value is very strong”.

- Accordingly, the appeal was dismissed by the Commissioner

- Hence, the impugned order is sustained.

Part B – Case Laws

Direct Tax

1. M/s. NXP India Private Limited (Successor of NXP Semiconductors India Pvt Ltd) vs DCIT [IT(TP)A No.692/Bang/2017]

Subject Matter : Appeal is filed against disallowance of share compensation expense on the basis that, tax has not been deducted at source on the amount of perquisite taxable in the hands of the employees.

Background and Facts of the case

- NXP Semiconductors N.V. is the ultimate holding company of NXP India Private Limited ('NXP India').
- Stock based compensation plans were introduced by ultimate holding company in 2007 wherein certain employees of NXP India have been granted options and restricted stock units under these plans.
- In line with the Guidance Note on 'Accounting for employee share based payments' issued by the ICAI, the Company measures and discloses the stock compensation cost relating to employee stock options using the fair value method.
- The compensation cost is amortised over the vesting period of the options. Accordingly, the Company has recorded compensation cost for all grants made to its employees by the ultimate holding company using the fair value based method of accounting.
- The provision for compensation cost recognized for the year ended 31 March, 2012 is INR 65,23,426. The said provision, being incurred during the normal course of the business, has been considered as an allowable expenditure for the purpose of computation of income.
- NXP India has relied on the Special Bench decision of the ITAT Bangalore Benches in the case of **Biocon Ltd vs DCIT: 155 TTJ 649 (Bang) (SB)** in this regard.
- Assessing Officer ('AO') in his draft assessment order held that stock compensation expense amounting to INR 65,23,426 is a perquisite taxable in the hands of employees. Hence, requirement to deduct the TDS exists. Since the TDS has not been deducted by NXP India at the time of vesting, thus, stock compensation expense will be disallowed as per section 40(a)(ia) of the ITL.
- Aggrieved by above NXP India filed an objection before the Dispute Resolution Panel ('DRP').

DRP's Directions

- The DRP is of the view that there are four stages in the grant of the ESOP, viz.,

  (a) Granting of option,

  (b) Vesting of option,

  (c) Exercise of option, and

  (d) Selling shares.
- Normally, the ESOP is designed in such a way that there is a gap of one or more years between each of the first three stages.
- The decision relied upon by the NXP India in the case of Biocon also holds that the expenditure is allowable at the time of vesting. Since this is position as per the Biocon decision, then the same becomes taxable in the hands of the employees.
- NXP India contended that the taxability arises in the hands of the employees on the date of exercise.
- According to the DRP, the gap between the date of vesting and the date of exercise is the

period for which there is a tax loss to the revenue. Each transaction has two sides, One is expenditure side and the other is income side. In the hands of the company it is an expense and in the hands of the employee it is income. The second question arises is whether the income is taxable. In the hands of the employee the taxability cannot be seen on a different basis. Thus, the same transaction becomes allowable expenditure in the hands of the assessee but does not become income in the hands of the employee. This situation is not permissible as per law. If the liability in the hands of the assessee is ascertained then the perquisite/salary in the hands of the employee also becomes ascertained because it is the same transaction which is triggering both, and the salary / perquisite is taxable on the due basis as per the section 15 of the ITL.

- Therefore, the DRP summarized that the decision in the case of Biocon holds that the expenditure is allowable at the time of vesting. Therefore, by corollary the income becomes taxable at the time of vesting itself. However, NXP India did not deducted TDS at the time of vesting on provision made for stock compensation cost, thus directed AO to disallow the same under section 40(a)(ia) of the ITL for non-deduction of TDS

- Aggrieved by the order of AO pursuant to DRP direction, the NXP India filed an appeal before ITAT.

Tribunal's Ruling

- The Bangalore ITAT relying the judgement of the Apex Court in case of CIT vs. Infosys Technologies Limited [(2008) 297 ITR 167 (SC)] hold that ESOP is not taxable as perquisite in the hands of the employees at the time of vesting of stock options as the value of benefit was 'unascertainable'.

- The taxability arises in the hands of the employees on the date of exercise only. Thus, no TDS would arise at the time of vesting transaction. Accordingly, deleted the addition made by the AO.

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