EY Tax and Regulatory Alert

June 2022

Prepared for ACMA

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2.	**M/s Sanchita Kundu & Anr. Vs. The Assistant Commissioner of State Tax, Bureau of Investigation, South Bengal & Ors. [Writ Petition in High Court Calcutta]**	Ruling wherein the Hon'ble High Court had held that ITC shall be allowed in case of genuine transactions before cancellation of the GST Registration.

INDIRECT TAX

Part A - Key Indirect Tax updates

Goods and Services Tax

This section summarizes the regulatory updates under GST for the month of June 2022

- **Memo No.367/GST-2 dated 24.05.2022** was issued by the department of Excise and taxation to instruct regarding the processing of application for registration in FORM GSTR-1 where few Proper Officers in the State are insisting on personal appearances or seeking extraneous information from the applicants seeking fresh registration under GST.

- **The following instructions need to be noted:-**

  1) All applicants for registration are to be processed in accordance with provisions laid down in Section 25 and Rules framed there under.

  2) The Act does not mandate physical appearance/personal statements of the applicants at the time of processing of registration. This practice shall be discouraged. However, in case of doubt/suspicion, physical verification of the business premises may be conducted under Rule 25 of the HGST Rules, 2017.

  3) The list of documents to be uploaded with the application for registration are already provided in FORM GST REG-01. Ideally, no extraneous information/documents shall be sought by the Proper Officer while processing such applications. However, in case of doubt/suspicion, the proper officer may call for information as he may deem fit but information shall be relevant to the application and frivolous /extraneous information shall not be called for.

- **Notification No. 07/2022–Central Tax dated 26.05.2022** was issued by CBIC to waive the late fee payable for delay in furnishing of **FORM GSTR-4** for the Financial Year 2021-22 under section 47 of the said Act for the period from the 1st day of May, 2022 till the 30th day of June, 2022.

- **Circular GST No 01/2022-23 dated 02.06.2022** was issued by CBIC on revocation of cancelled GSTN beyond 90 days. As per Section 29(2)(c), the proper officer may cancel the registration of a person from such date, including any retrospective date, as he may deem fit, where any registered person has not furnished returns for a continuous period of six months.

- A taxpayer whose registration is cancelled by the proper officer can apply for reversal of such cancellation of GST registration by applying **Form GST REG-21**.

- This application is required to be filed within **30 days** of receiving the notice for the cancellation of GST registration, this was extended till 90 days on certain conditions.

- Some of the tax payers did not apply for revocation of cancelled GSTIN beyond 90 days, as the result of which the common portal did not allow filing Revocation application. Hence, in such cases, the taxpayers can approach the appellate authorities or the high courts for the redressal of the issue.

- In order to revoke the cancelled registration after 90 days, which was allowed by the concerned appellate authority or the High Court, there was no electronic module in place to revoke such cancelled registration.

- Now a module has been developed and tested in order to revoke cancelled GSTIN beyond 90 days. With the help of the module – Revocation after Appeal / Court Orders, LGSTO's/SGSTO's can revoke cancelled GSTINs of the Tax payers who have not applied for Revocation beyond 90 days and preferred the appeal.

- The path for revocation of cancellation at GST Pro is **Registration Request> Approve Revocation Request> Revocation after Appeal/High Court Order**.

- To enable the revocation, the proper officer has to select the GSTIN and upload the pdf copy of the Appeal order or High Court order along with the Revocation Proceedings drawn to revoke the cancelled GSTIN. All the actions have to be done with the **Digital Signature Certificate of the Officer**.

- If any grievances in this module, officers are directed to raise a grievance on the GST Pro and can contact the e-Governance section of this office.

- **GSTN Advisory dated 18.06.2022** was issued by GSTN regarding an issue in relation to duplicate entries in GSTR-2B. In this regard, taxpayers have been advised to check and ensure that the value of ITC that they are availing is correct as per law.

- The taxpayer can check the correct ITC value from download of Auto drafted ITC statement GSTR - 2B or pdf of system generated GSTR 3B or on the ITC observed on the mouse hover on Table 4 of GSTR-3B.

- **Instruction No.03/2022-GST dated 14.06.2022** was issued by CBIC by Central Board of Indirect Taxes and Customs (CBIC) pertaining to deposit of tax during search, inspection or investigation.

- CBIC noticed instances where some of the taxpayers have alleged use of force and coercion by the tax officers for depositing Goods and Services Tax (GST) liability during search, inspection or investigation.

- As per Section 73(5) and 74(5) of the Central Goods and Services Tax Act, 2017 (CGST Act) a taxpayer has an option to voluntarily deposit tax through DRC-03 before issuance of show cause notice (SCN) in order to avoid penal implications.

- Recovery of taxes not paid or short paid can be made by the Revenue under Section 79 of CGST Act only after following due legal process of issuance of SCN and subsequent confirmation of demand by adjudication order.

- Therefore, it is clarified that situation may not arise where recovery of tax dues on account of any issue detected during the proceedings, has to be made by the tax officer during the course of search, inspection or investigation.

- However, there is no bar on the taxpayer for voluntary payment of any tax liability, ascertained by him or the tax officer, before or at any stage of the proceedings.

- In case any complaint is received from a taxpayer regarding use of force or coercion by any of the officers for getting the amount deposited during search, inspection or investigation, the same may be enquired.

- In case of any wrongdoing on the part of any tax officer, strict disciplinary action as per law may be taken against the said officer.

Customs and Foreign Trade Policy (FTP)

This section summarizes the regulatory updates under Customs and FTP for the month of June 2022

- **Trade Notification No. 12/2015-20-DGFT dated 30.04.2022** was issued by the Ministry of Commerce & Industry notifying about an appendix 4R which is aligned with the Finance Act, 2022.

- This new Appendix 4R, with effect from 01.05.2022, containing the eligible RoDTEP export items, rates and per unit value caps, wherever applicable is available at the DGFT portal www.dgft.gov.in under the link **'Regulatory Updates >RoDTEP'**.

- **Trade Notice No. 12/2023-DGFT dated 30.05.2022** issue by the DGFT wherein Attention of the trade and industry members is brought to **Para 4.96 (d) of Public Notice 58 dated 29.01.2020**.

- In the paragraph it has been stipulated that under RoSCTL, the rebate allowed is subject to the receipt of export proceeds within time allowed under the Foreign Exchange Management Act, 1999 failing which such rebate shall be deemed never to have been allowed.

- Action under the FT (D&R) Act, 1992 may be taken by the Regional Authorities for repayment of erroneous or excess paid RoSCTL.

- Earlier a **Trade Notice No 13 dated 4th August 2021** had been issued urging all exporters to comply with the extant guidelines on realization of export proceeds and get the process of uploading of **eBRC**s at the DGFT server completed by the AD Banks.

- As per RBI guidelines, it is expected that all shipping bills upto **31.12.2020** would have their export proceeds realized by now.

- Accordingly, all exporting firms, who have been issued scrips under RoSCTL for exports / shipping bills upto 31.12.2020, are requested to get the relevant e-BRCs uploaded in the DGFT server by their AD banks latest by **15.07.2022**

- Failing the to get the relevant e-BRCs uploaded as per the aforementioned date action as per **para 4.96 of HBP, as notified vide Public Notice 58 dated 29.01.2020** would be initiated by the jurisdictional RAs.

- **Public Notice No. 11/2015-2020-DGFT dated 07.06.2022** issued by the DGFT amending Para 2 (b)(i) of the Guidelines for Applicants under ANF-4F of Handbook of Procedures 2015-2020 for deemed exports,

- Under the amendments a copy of the invoice or a statement of invoices duly signed by the unit receiving the material certifying the item of supply, its quantity, value and date of such supply.

- However in case of supply of items which are non-excisable or supply of excisable items to a unit producing non-excisable product(s), a project authority certificate (PAC) certifying quantity, value and date of supply would be acceptable in lieu of excise/GST certification.

- In respect of supplies to EOU/EHTP/ STP/ BTP, a copy of CT-3/ARE-3 duly signed by the jurisdictional excise/GST authorities certifying the item of supply, its quantity, value and date of such supply can be furnished in lieu of the excise/GST attested invoice (s) or statement of invoices as given above.

- However in case of supply of the product by the Intermediate supplier to the port directly for export by the ultimate exporter (holder of Advance Authorization or DFIA) in terms of paragraph 4.30 of HBP, copy of the shipping bill with the name of domestic supplier as Intermediate supplier endorsed on it along with the file No. / Authorization No. of the ultimate exporter and the intermediate supplier shall be required to be furnished.

- **Public Notice No. 13/2015-2020-DGFT dated 09.06.2022** was issued by the DGFT to extend the last date file returns for the year 2022-23 till **30.9.2022**. Late fees of **Rs. 5000/-** is applicable on late filing of returns due to be filed from the year 2022-23 onwards.

- **Policy Circular No. 39/2015-2020-DGFT dated 07.06.2022** was issue by DGFT to Relax the provision of submission of 'Bill of Export' as an evidence of export obligation discharge for supplies made to SEZ units in case of Advance Authorization.

- 'Bill of Export' for supplies made to SEZ is prescribed under the Foreign Trade Policy. This requirement was challenged by several exporters before various High courts in the country on the ground of hardships suffered by them due to non-availability of this provision for the period covered upto **FTP 2009-14**.

- In most of the cases, Hon'ble Courts granted relief to the Advance Authorization holders as a result it has been decided to relax this condition of requirement of submission of 'Bill of Export' in case of exports made to SEZ units under Advance Authorization, for all such **supplies made prior to 01.04.2015**. the exporters can submit corroborative evidence in lieu of 'Bill of Exports' such as:

  a) ARE- T form duly attested by jurisdictional Central Excise/GST Authorities of AA holder.

  b) Evidence of receipt of the supplies by the recipient in the SEZ.

  c) Evidence of payment made by the SEZ unit to the AA holder.

Direct Tax

Part-A Key Direct Tax updates

This section summarizes the Direct Tax updates under for the month of June 2022

1. **Circular issued by Central Board of Direct Taxes (CBDT) dated 16 June 2022 is issued with a view to remove difficulties and provide guidance on various issues on interpretation and application of a newly inserted withholding provision, Section (S.) 194R, under the Income Tax Act (ITA).**

Background

- Finance Act, 2022 introduced a new provision, S.194R, in the ITA, which mandates a person responsible for providing any benefit or perquisite to a resident arising from the business or profession carried on by such resident to deduct tax at the rate of 10% of the value or aggregate value of such benefit or perquisite, subject to certain conditions. It takes effect from 1 July 2022.

- The withholding does not apply where the value or aggregate of value of the benefits or perquisites provided or likely to be provided during the tax year do not exceed INR20,000. Furthermore, it also does not apply to a provider, being an individual or Hindu Undivided Family, whose total sales, gross receipts or turnover does not exceed INR10m in case of business or INR5m in case of profession, during the tax year immediately preceding the tax year in which such benefit or perquisite is provided by such person.

- Subsequently, at enactment stage of Finance Bill, 2022, a specific provision was inserted in S.194R to give power to the CBDT to issue guidelines for the purposes of removal of any difficulty in giving effect to S.194R. Such guidelines shall, as soon as may be after they are issued, be laid before the houses of parliament and shall be binding on the tax authorities and on the person providing any such benefit or perquisite.

- The industry stakeholders made various representations to the CBDT to clarify certain issues on interpretation or application of the new withholding provision.

- Accordingly, the CBDT has issued the Circular providing guidelines on various issues on interpretation and application of S.194R.

- This Tax Alert discusses the guidelines on various issues provided by the Circular.

- **No nexus of withholding obligation under S.194R with taxability under S.28(iv)**

- The Circular clarifies that withholding obligations under S.194R of ITA applies on provision of any benefit or perquisite to a resident arising from carrying out of business or profession by such resident. It also clarifies that the provider of benefit is not required to verify whether the benefit or perquisite is taxable in the hands of the recipient under S.28(iv) of ITA. The Circular suggests that the benefit or perquisite may be taxable under S.28(iv) or 41(1) or any other provision of ITA. The Circular further clarifies that, unlike general withholding provision on payments to non-residents2 where the payer is required to verify

whether the amount paid to non-resident is chargeable to tax in the hands of 2 S.195 of ITA the payee, there is no such requirement to verify whether the amount is chargeable to tax in the hands of the recipient. Hence, the provider of benefit is not required to verify whether the benefit or perquisite is chargeable to tax and, if yes, the provision under which it is taxable. The Circular compares withholding obligation under S.194R with specific withholding provision on payments to non-resident sportsmen at specific rate where the Supreme Court (SC), in the case of PILCOM v. CIT3 held that the payer has to deduct taxes at the rate specified therein without considering treaty benefit.

EY Comments

- The clarification considerably expands the scope of withholding obligation under S.194R.
  - Based on the explanatory memorandum accompanying Finance Bill, 2022 which introduced the provision and identity of the language with provisions of S.28(iv), it was generally understood that the withholding obligation is restricted to benefits and perquisites which are taxable in the hands of the recipient under S.28(iv). But, the Circular takes a contrary view. It may be interesting to see how courts will resolve this controversy.
  - Practical implementation of the Circular may give rise to considerable challenges for taxpayers. For instance, issues may arise whether withholding is required in case of bad debt write-off of trade debts settled with debtors or compensation for termination of business contracts. Issue may also arise on overlap with other withholding provision – in this regard, reference may be made to past Circular No. 720 dated 30 August 1995, which clarifies that all withholding provisions are mutually exclusive.

- **Withholding under S.194R applies to monetary benefits**
  - S.194R provides that the withholding obligation applies on provision of benefit or perquisite, whether convertible into money or not, which is identical to the language of S.28(iv). But, unlike S.28(iv), it further contains a proviso which provides that in a case where the benefit is provided fully in kind or partly in kind and partly in cash, but the cash component is not sufficient to meet the withholding obligation on whole of the benefit, the provider of benefit is required to ensure that tax which is required to be deducted is paid before providing the benefit or perquisite.
  - The Circular clarifies that withholding under S.194R covers even monetary benefits. According to the Circular, the proviso indicates the legislative intent of S.194R to cover monetary benefits.

EY Comments

- As stated earlier, the explanatory memorandum to Finance Bill, 2022 and the literal language of S.194R support that its scope is restricted to benefits/perquisites taxable under S.28(iv). It may be noted that SC, in the case of Mahindra and Mahindra, had held that the monetary benefits are not covered by S.28(iv). In that case, the SC had held that waiver of loan, being monetary benefit for a debtor, is not taxable under S.28(iv).

- The clarification, which is contrary to the ratio of the SC ruling on the scope of S.28(iv), raises controversy on the interpretation of the proviso – whether it expands the scope of S.194R beyond

S.28(iv) to cover monetary benefits as clarified in the Circular or whether it merely clarifies the mechanism to ensure payment of tax on benefits provided in kind. This is another contentious issue which may come up before the courts.

- In the same Circular, it is clarified that withholding under S.194R does not apply on sales discount, cash discount and rebates.

- The practical application of withholding on monetary benefits may raise challenges of overlap between different withholding provisions. Reference may be made to past Circular No. 720 dated 30 August 1995 which clarifies that all withholding provisions are mutually exclusive. Issue will arise whether, in case of such overlap, the payer has to apply withholding under S.194 R if its rate (10%) is higher than other withholding provisions.

- **Withholding applies to benefit in the form of a capital asset**

  - The Circular clarifies that there is no requirement to check whether the perquisite or benefit is taxable in the hands of the recipient and the section under which it is taxable. It provides illustrations of certain judicial precedents which, as per the Circular, support that asset given as benefit or perquisite may be capital asset in the general sense of the term, like car, land etc., but it constitutes a taxable benefit or perquisite in the hands of the recipient. Hence, the Circular clarifies that payer is required to withhold tax in all cases where benefit or perquisite (of whatever nature) is provided.

EY Comments

- The clarification seems to be aligned with judicial thinking on the scope of S.28(iv) which can cover benefits or perquisites, in the course of carrying on business or profession, in the form of capital assets like car, land, etc.

  - However, its practical application to situations of any perceived benefit or perquisite in the course of acquisition of capital asset to be used for business/ profession, is likely to pose challenges. In the case of Motor Machinery Tools, subsidy provided by a manufacturer to a dealer to acquire a delivery vehicle bearing manufacturer's logo was held to be not taxable under S.28(iv) in the hands of the dealer. The subsidy goes to reduce the "actual cost" of the asset in the hands of the dealer, resulting in lower depreciation allowance.

- **Withholding does not apply on sales discount, cash discount and rebates**

  - The Circular clarifies that withholding under S.194R does not apply in the following situations:

  - Sales discount, cash discount or rebates granted to customers from the listed retail price results in lesser realization of sale price for the seller and lower purchase cost for the purchaser. The Circular clarifies that though such discounts result in a benefit related to sales/purchase, applicability of S.194R would put the seller in a difficulty. Hence, with a view to remove such difficulty, the Circular clarifies that no taxes are required to be deducted u/s 194R on sales discount, cash discount or rebates allowed to customers.

  - Free goods (stock) (say, two items) given by a seller to a purchaser on purchase of a specified quantity of stock (say, 10 items at INR12 each) amounts to sale of higher quantity of goods (i.e., 12

items) at the price of lesser quantity of goods (i.e., 10 items). The purchaser is also eligible to claim lower purchase cost (i.e., INR120 for 12 items) on such goods. The Circular states that levy of S.194R in such cases would create difficulty in application of S.194R. Thus, with a view to remove the difficulty, the Circular clarifies that withholding under S.194R will not apply to such transactions

- However, the Circular clarifies that the exemption from S.194R in the above two cases is a specific relaxation and such relaxation from applicability of S.194R does not extend to other benefits provided by sellers in connection with its sale. The Circular lists some such benefits on an illustrative basis, such as:
  - Incentives (other than discount, rebate) given in the form of cash or kind, such as car, television, computer, gold coins etc. Sponsoring of a trip for the recipient and their relatives on achieving certain targets.
  - Provision of free tickets for an event.
  - Free medical samples given to medical practitioners.

EY Comments

- The Circular acknowledges that sale discounts are in the nature of lesser realization of sale price. Read with the ratio of the SC ruling in Mahindra & Mahindra's case, it was expected that the CBDT may clarify that it is not covered by withholding under S.194R. However, the clarification on non-applicability of withholding is couched in the form of exercise of removal of difficulties to convey that, but for such dispensation, it was otherwise liable to withholding. This approach is debatable.
  - Except for illustration of free medical samples, other illustrations provided in the Circular align with the general understanding of the scope of S.28(iv) and withholding under S.194R.

- **Withholding to be made in name of recipient entity where the benefit or perquisite is used by owner/director/employee of the recipient entity or relative of the recipient**
  - The Circular acknowledges that there are instances where the benefit or perquisite provided are ultimately used by the personnel (owner/director/employee or their relatives) of the recipient entity. The personnel themselves may not carry on any business or profession.
  - The Circular clarifies that the personnel receive such benefit or perquisite on account of their relationship with the recipient entity and, hence, withholding under S.194R is required to be made in the name of the recipient entity to whom, in substance, the benefit is provided.
  - The Circular further clarifies that, subsequently, when the benefit is "used" by the personnel of the recipient entity, it would qualify as a benefit or perquisite provided by the recipient entity to the personnel and a corresponding deduction can be claimed by the recipient entity in respect of provision of such benefit.
  - In addition, the recipient entity would be required to comply with the salary or business perquisite withholding having regard to the status of the person (employee or non-employee) to whom such benefit is passed on.

- However, in case where the benefit is passed on by the recipient entity to a consultant, then the Circular provides an option that the provider of benefit may directly undertake withholding under S.194R in the name of the consultant as a recipient.

- The Circular further clarifies that the threshold of INR20,000 for applicability of withholding under S.194R is to be seen with respect to recipient entity.

- The Circular illustrates the above principle by providing example of free medicine samples provided to employee-doctors and consultant doctors of a hospital. It states that, in substance, the benefit/perquisite is provided to the hospital and, hence, the payer is required to withhold tax under S.194R in the name of the hospital. Subsequently, where the free medicine sample is used by the employee-doctor, the hospital may treat it as salary perquisite, apply salary withholding and claim deduction as salary expenditure. Thus, ultimately the benefit is taxed in the hands of the employee and not in the hands of recipient entity. The hospital can get credit of tax withheld under S.194R by furnishing its tax return.

- Where the free medicine sample is provided to consultant doctor, the payer may withhold in the name of the hospital or, alternatively, directly in the name of the consultant doctor. If the payer withholds in the name of hospital, the hospital may again withhold tax under S.194R for providing the same benefit or perquisite to the consultant doctor.

EY Comments

- The issue of withholding in the name of recipient entity or actual beneficiary was a contentious one. The clarification on the approach to be adopted by payers and recipient entity may be helpful in resolving the practical difficulty faced in such cases. It can apply to cases of clear benefits like provision of motor car used for personal purposes or gold coin or television installed at residence of personnel, free tickets for entertainment or sports event etc.

- However, the illustration of free medical samples in the Circular is extremely contentious and debatable. The free medicine samples are seldom used by the doctors themselves and are generally dispensed to patients free of cost. There are statutory and voluntary regulations/ guidelines governing the provision of such free medicine samples. The pharmaceutical industry had hoped that the Circular may clarify that provision of free medicine samples will not be liable to withholding under S.194R. The contrary clarification causes concern not only to the pharmaceutical industry but also other industries where there is a customary practice of providing free samples.

- **Non-applicability of S.194R to recipient entities not carrying on business**

  - S.194R applies to benefit or perquisite arising in the course of carrying on business or profession. The Circular clarifies that government entities like government hospitals do not carrying on business or profession and, hence, any benefit or perquisite provided to such entities

will not be subject to withholding under S.194R.

EY Comments

- It may be noted that the government as a payee or recipient is, in any case, protected from withholding under S.196 of the ITA, whether or not carrying on business.
- The clarification may be useful as an analogy for provision of benefits or perquisites to other entities not carrying on business or profession like charities.

- **Valuation of benefit or perquisite**
  - S.194R requires withholding on the "value" of benefit or perquisite provided. However, there are no valuation rules prescribed for computing the value of benefits/perquisites.
  - The Circular provides guidance on the manner in which "value" is to be determined. The Circular clarifies as follows:
  - The "value" for the purposes of S.194R means the "fair market value" (FMV) of the benefit or perquisite, except in the following cases:
  - In case where the benefit/perquisite provider has "purchased" the benefit/perquisite before providing it to the recipient, then the value of such benefit/perquisite would be equal to the purchase price.
  - In case where a manufacturer provides a benefit/perquisite in the form of items manufactured by it, then the price which the manufacturer charges to its customers in respect of such items shall be the value of such benefit/perquisite.

EY Comments

- While the Circular clarifies FMV to be value for withholding purposes, the term FMV is not defined in the Circular. Under the ITA, FMV is defined generally in relation to a capital asset to mean the price such capital asset would fetch in the open market or where such price is not ascertainable, then the price as determined in accordance with the rules made under the ITA. It may be noted that till date no rules have been prescribed under the ITA for determination of FMV where it is not ascertainable.
- The first exception to the FMV rule is a case where there is a "purchase" of a benefit/perquisite. While the term used in the Circular is "purchase", it may be reasonably interpreted to also cover cases of procurement of facility or service such as hotel accommodation, travel facility etc.

- **Benefit or perquisite by way of free use of product granted to a social media influencer**
  - The Circular acknowledges that many a times, a social media influencer is given a product of a manufacturing company so that they can use that product and make audio/video about that product in social media. Issue arises whether product given to such influencer is a benefit or perquisite.
- The Circular clarifies that whether it is a benefit or perquisite will depend upon facts of the case. If such products (like car, mobile, outfit, cosmetics etc.) are returned to the manufacturing company after using for the purpose of rendering service, then it will not be treated as a benefit/perquisite for the purposes of

S.194R. However, if the product is retained by the social media influencer, it would qualify as a benefit or perquisite to which S.194R applies.

EY Comments

- The Circular seems to be aligned with the ruling of the Mumbai Income Tax Appellate Tribunal (Tribunal) in the case of Priyanka Chopra, where the Tribunal had held that motor car or watch given to the actress for sales promotion is a benefit or perquisite taxable in her hands under S.28(iv).

- The Circular extends the principle to social media influencers where there can be some debate whether they are carrying on business or profession (including a vocation).

- But it raises an issue on provision of free use of assets to persons other than social media influencers, like distributors or retailers. In many cases, the recipient of the free-of-cost asset is allowed to use it for its entire economic life for storage or manufacturing/processing or promotion of payer's products. The Circular clarifies that if they are returned to payer, it does not constitute benefit or perquisite. But if they are not returned, it can qualify as benefit or perquisite. This raises issue on applicability and timing of withholding (whether on initial provision or decision of non-return of asset). But the Circular does clarify that the applicability of withholding requires examination of facts of each case.

Withholding on reimbursement of out-of-pocket expenses incurred by service provider in the course of rendering service

- The Circular clarifies that any expenditure which is the liability of one person carrying on business or profession, if met by another person, qualifies as a benefit/perquisite provided by the second person to the first person in the course of business/ profession.

- The Circular provides an illustration of a consultant rendering services to a person X for which the consultant has to travel to a different city from the place where they are regularly carrying on business or profession. The Circular provides the following clarification in respect of applicability of withholding on travel and boarding and lodging expenses incurred by the consultant and reimbursed by X:

  - If the consultant incurs the travel/hotel expenditure and invoice is in the name of the consultant and it is either reimbursed by X or paid directly by X, then it is benefit or (i) New product being launched. (ii) Discussion as to how the product is better than others. (iii) Obtaining orders from dealers/customers. (iv) Teaching sales techniques to perquisite provided by X to the consultant and, hence, X is required to withhold tax. This is because the expenditure is the consultant's business expenditure which is met by X.

  - But if the invoice is in the name of X, initially paid by the consultant and subsequently reimbursed by X to the consultant, then such reimbursement will not be considered as benefit/perquisite and, hence, not liable to withholding under S.194R.

EY Comments

- The Circular places emphasis on the name in which the invoice is raised by the travel vendor or hotel. If the invoice is raised in the name of the consultant/service provider, then the

Circular clarifies that it is benefit/perquisite liable for withholding.

- On the other hand, if the invoice is raised in the name of the client/service recipient, the Circular clarifies that if it is reimbursed by the client to the consultant, it is not a benefit/perquisite liable for withholding.

  - While the Circular is not so explicit, a similar conclusion may apply where the invoice is raised in the name of the client/service recipient and paid directly by the client/service recipient – it is not a benefit/perquisite liable for withholding.

  - The distinction based on raising of the invoice in the name of service provider or service recipient may pose practical challenges in implementation.

Applicability of withholding to dealer conferences in certain cases

- The Circular clarifies that expenditure incurred on dealer/business conferences held with the primary objective to educate dealers/customers on various aspects illustrated in the Circular, would not be considered as benefit/perquisite for the purposes of S.194R, provided such conferences are not in the nature of incentives/benefits to select dealers who achieve particular targets.

- Furthermore, the Circular clarifies that the expenditure would be considered as benefit or perquisite for the purposes of S.194R in the following cases:

  - Expense attributable to leisure trip or leisure component, even if it is incidental to the dealer/business conference.

  - Expenditure incurred for family members accompanying the person attending dealer/business conference.

  - Expenditure on participants of dealer/business conference for days which are on account of prior stay or overstay beyond the dates of such conference.

EY Comments

- To the extent the Circular clarifies that expenditure incurred on dealer conferences for business purposes without any leisure component involved, is not liable for withholding under S.194R, it is a welcome clarification. The Circular also refers to "business" conference and education of customers, which can cover other than dealer conferences.

- The clarification about expenditure incurred on accompanying family members or prior/overstay being liable for withholding is reasonable.

- However, practical difficulties may be faced in the following illustrative circumstances:

  - Identification of leisure component in a dealer/business conference.

  - Identification of incremental expenses for family members or prior/overstay.

- **Mechanism to comply with withholding where benefit is provided in kind**

  - S.194R places an obligation on the provider of a benefit to ensure that in case where the benefit is provided wholly or partly in kind, the requisite

amount of taxes to be withheld is paid before releasing the benefit or perquisite. The Circular addresses the issue of how a payer can ensure such compliance.

- The Circular clarifies that if the recipient furnishes a challan of payment of advance tax along with the declaration to the provider of benefit to the effect that the tax required to be withheld under S.194R has been deposited by way of advance tax, then the payer can rely on such documents.

- The provider of benefit would, however, be required to provide details of payment of such advance tax in the tax deducted at source (TDS) statements furnished by him. The TDS forms are amended to allow reporting of such transactions. As an alternate option, the Circular clarifies that the provider of benefit may withhold the tax under S.194R and pay to the government. In such a case, the withholding should be made after taking into account the fact that the tax paid by the provider as withholding tax is also a benefit for the purposes of S.194R. The provider will need to show it as tax withheld on benefit provided in TDS forms.

- **EY Comments**
  - This is a welcome clarification and provides certain guidance on how the provider of benefit can comply with withholding obligation in cases where the benefit is provided in kind.

  - While the Circular clarifies that the taxes borne by the provider of benefit qualify as benefit or perquisite and, hence, requires gross up, the exact manner in which grossing up should be made having regard to specific provision in the ITA10 and withholding under S.194R, may be subject to interpretation.

  - While the Circular does not explicitly clarify, it may also be possible for the provider to collect the tax amount from the recipient and pay it as withholding tax where the recipient is agreeable to bear such tax.

- **Computation of threshold of INR20,000 for trigger of S.194R for benefits/perquisites provided prior to 1 July 2022**

  - S.194R applies where the value of benefit or perquisite provided to a resident exceeds INR20,000 in a particular tax year. However, as the provisions of S.194R are applicable only from 1 July 2022, for the tax year 2022-23, the Circular clarifies that the threshold will also be required to be seen from 1 April 2022 to 31 March 2023 and the provisions of S.194R would trigger if the aggregate of benefit provided during such period exceeds the threshold of INR20,000.

  - However, the Circular also clarifies that the withholding obligation would arise only in respect of benefit or perquisite provided on or after 1 July 2022. As a corollary, benefits provided during the period from 1 April 2022 till 30 June 2022 will not be subject to withholding under S.194R even if they exceed the threshold.

2. Circular issued by Central Board of Direct Taxes (CBDT), with a view to remove difficulties and provide guidance for giving effect to the newly inserted provision for tax deduction at source (TDS) on consideration arising from transfer of virtual digital asset (VDA) under the Income Tax Law (ITL).

Background

- Finance Act 2022 introduced several new provisions governing taxation of VDA under the ITL viz. definition of VDA, 30% tax on income arising from transfer of VDA, a new withholding provision on consideration arising on transfer of VDA and amendment to apply gift taxation in hands of recipient of VDA.

    - Under the ITL, VDA is broadly defined to mean any information or code or number or token (not being Indian currency or foreign currency), generated through cryptographic means or otherwise and meeting certain additional criterion. Non-fungible token (NFT) and any other digital asset as notified by the Government are also included in the definition of VDA. The Government is yet to notify any NFT's or other digital assets as VDA.

    - The new withholding provision, effective from 1 July 2022, provides that a person responsible for paying any sum as consideration on transfer of VDA to a resident, will be required to undertake TDS @ 1% at the time of payment or credit, whichever is earlier. Taxes are required to be withheld even where consideration is in kind. However, TDS on VDA will not apply in certain cases where the transaction value does not exceed the following monetary threshold:

        - Where the consideration is payable by 'specified person' and its total value does not exceed INR50,000 during the tax year. For this purpose, 'specified person' means:

            - an individual or Hindu Undivided Family (HUF) not having any income from business or profession.

            - an individual or HUF having income from business or profession, whose total sales or gross receipts or turnover from business is up to INR10Mn or from profession is up to INR5Mn in the tax year, prior to the year of transfer of VDA.

        - In other cases, where the total value of consideration payable on transfer of VDA does not /exceed INR10,000 during the tax year.

    - Similar to certain other withholding provisions, the CBDT (with the approval of Central Government) is empowered to issue guidelines for removal of any difficulty in giving effect to TDS on VDA. Such guidelines are required to be laid before the Houses of Parliament and are binding on the tax authority and on the person responsible for paying the consideration on transfer of VDA.

    - Stakeholders from industries made various representations to the CBDT to clarify certain issues on TDS on VDA. Pursuant thereto, the CBDT vide the Circular, has issued its guidelines clarifying and removing difficulty on six different issues for TDS on VDA.

    - Additionally, the CBDT has amended the procedural rules and notified various forms for undertaking procedural compliances in relation to TDS on VDA.

- This Tax Alert explains the Circular issued by the CBDT providing guidelines on TDS on VDA.

The Circular

- The Circular applies to transfer of VDA taking place on or through an "Exchange". In other cases (like peer-to-peer transactions), the statutory provisions of TDS on VDA and clarification on determination of threshold (Clarification 6) will apply.

- **Clarification 1 - Determining person required to undertake TDS where transfer of VDA between buyer and seller is routed through Exchange (and consideration is not in kind):**

  - Where the transaction is taking place on or through an Exchange, it is possible that TDS on VDA is applicable at multiple stages. The Circular states that the person responsible for doing TDS in different scenarios will be as tabulated below:

- **Clarification 2 - Applicable withholding mechanism where transfer of VDA takes place through the Exchange and consideration is in kind or in exchange for another VDA:**

- **Transactions with consideration in kind or VDA to VDA exchange –**

  - As per the ITL, where transfer of VDA is undertaken for a consideration in kind or in exchange of another VDA or partly in kind and cash, the person responsible for paying such consideration is required to ensure that the applicable TDS is paid to the Government, before releasing the consideration.

  - The Circular states that the buyer will release the consideration in kind only after the seller provides proof of payment of such tax.

- Where VDA "A" is exchanged for VDA "B", both the persons owning VDA "A" and "B" would be the buyer and seller for each VDA respectively. Thus, both need to pay tax with respect to the transfer of VDA and furnish evidence to each other so that VDAs can then be exchanged. Such transactions are required to be reported in a prescribed manner.

Scenarios	Person required to undertake TDS	Other Clarification
Transfer of VDA takes place on or through the Exchange, where VDA is owned by a person other than the Exchange and payment is made by buyer or his/her broker to the Exchange and thereafter by the Exchange to the seller (multiple players)		
Payment made or credited by Exchange directly to seller (without involvement of a broker) or where a broker itself owns and sells VDA.	Exchange	
Payment to seller (other than broker) and credit/ payment between Exchange and seller is routed through a broker	Both Exchange and broker	• If there is written agreement between Exchange and broker, the broker will be deducting tax on such credit/payment, then broker alone may do TDS on VDA. • The Exchange is required to furnish a quarterly statement in the prescribed manner for all such transactions.
Transfer of VDA takes place on or through the Exchange and the VDA being transferred is owned by the Exchange		
Payment made by the buyer to the Exchange	Buyer or his/her broker OR Exchange (with Additional compliances)	• In this scenario, multiple players are not involved but buyer may not be aware that the Exchange is the owner of VDA. Clarification is provided to remove genuine doubt of buyer. • Primary responsibility to withhold tax remains with buyer (or his/her broker). • Alternative provided by the Circular – • Vide a written agreement between the Exchange and buyer (or his/her broker), Exchange may undertake to deduct and pay the tax before the due date on all such transactions. • Exchange is required to furnish a quarterly statement in the prescribed manner for all such transactions. • Exchange is also required to furnish its return of income and include such transactions therein. • Where above compliances are duly undertaken by the Exchange, buyer or his/her broker shall not be regarded as assessee-in-default under the ITL.

- **Clarification to remove practical difficulty where above transaction is through the Exchange-** Where such transaction of payment in kind or VDA to VDA exchange is carried out through Exchange, there is practical difficulty in implementing TDS on VDA for both the parties. In order to address and remove this difficulty, it has been clarified that, as an alternative,
    - The Exchange may undertake TDS on VDA based on a written agreement with the buyers/sellers.
    - The Exchange would be required to deduct tax for both legs of the transactions and undertake related compliances. The buyer and seller would not be independently required to deduct TDS on VDA in such a situation.
- **Mechanism to convert amount of TDS into INR:** Where the Exchange opts for TDS on VDA, there is a possibility that the TDS on VDA is undertaken in kind and needs to be converted into INR before it can be deposited with the Government. To facilitate the monetization of TDS in kind, the following mechanism shall be adopted by the Exchange:
    - To understand the mechanism provided, consider an example that A and B have entered into barter transaction on the Exchange wherein A wishes to sell 1000 Monero and B wishes to sell 800 Deso. It is assumed that 1000 Monero can be exchanged for 800 Deso on that day and A and B become buyer and seller respectively. It is also assumed that Monero and Desos are not primary VDAs i.e., they cannot be easily converted into INR. The Exchange has opted to withhold tax on such transaction before release of consideration to A and B. In such case, the Circular provides that Exchange shall undertake steps as under:
        - Step 1 - Withhold tax in kind: Exchange to withhold 1% TDS on VDA i.e., the Exchange will deduct 10 Monero and 8 Deso at the time of the transaction. The balance (i.e., 990 Monero and 792 Deso) are transferred to the respective parties.
        - Step 2 - Conversion into primary VDA (if the transaction relates to non-primary VDAs): In absence of any direct conversion into INR, Exchange shall convert 10 Monero and 8 Deso into a primary VDA (for instance- USD Tether (USDT), Ethereum (ETH), Bitcoin (BT) etc.) which is readily convertible into INR. For e.g., 10 Monero is converted into 2 USDT and 8 Deso is converted into 1 USDT basis respective conversion ratio between the VDAs. Thus, TDS on VDA shall be converted into USDT on immediate basis. Exchange is required to maintain time stamps of timing of orders to ensure conversion into primary VDAs. Exchange is required to maintain records of VDAs deducted in such exchange transactions.
        - Step 3 - Conversion of primary VDA into INR: In the above example, TDS done by the Exchange in form of 3 USDT to be accumulated for a day from 00:00 hours to 23:59 hours. The Exchange to place market order for converting 3 USDT into INR at 00:00 hours. These sell orders to be matched with open buy orders in the Exchange by system. Exchange cannot act as buyer in such transactions. Exchange is required to maintain the price and quantity data of conversion into INR as available for verification. It shall be verifiable from the system coding that the conversion into INR happened at the first available buy order based on the prevailing buy order book of the respective Exchange at the time of conversion.

- The Exchange is required to deposit such TDS on VDA converted into INR as per the applicable provisions of ITL.

- The Exchange is required to issue contract notes over email to customers informing TDS on VDA withheld in kind and its equivalent INR value which is realized.

- The Circular clarifies that no further TDS shall be applicable for converting tax held in form of VDA into INR or from one VDA to another VDA and thereafter into INR.

- **Clarification 3 - TDS on VDA overrides TDS on purchase of goods**
  - Stakeholders sought clarification on applicability of general provision of TDS on purchase of goods to transaction of transfer of VDA.
  - The Circular states that, without evaluating whether VDA can be regarded as "goods", if tax is deducted under TDS on VDA, no tax is required to be deducted under TDS on purchase of goods.

- **Clarification 4 - Consideration on transfer of VDA to be undertaken on "net" basis after certain exclusions**
  - TDS on VDA requires the deductor to withhold tax on consideration paid or credited for transfer of VDA. A transaction of transfer of VDA may involve several items like levy of indirect taxes (like GST), commission, facilitation fee, service charges, brokerage, etc. Since the taxes are required to be withheld on sale consideration rather than income component, ambiguity arose whether tax is required to be withheld on gross consideration including GST/commission or on "net" basis.
  - The Circular clarifies that, in order to remove difficulty, the TDS on VDA is required on "net" consideration after excluding GST/charges levied by deductor for rendering services.
  - Presently, the exact scope of service charges is unclear.

- **Clarification 5 - Conditional relief to payment gateways involved in transaction of VDA**
  - The question considered by the CBDT contemplates a situation where transaction of transfer of VDA is undertaken between buyer and seller, but the payment is carried out through payment gateway. In such case, both buyer and payment gateway may be required to undertake withholding obligation on such transaction of transfer of VDA resulting in duplicated TDS.
  - In order to remove such difficulty, the Circular clarifies that payment gateways will not be required to deduct tax if tax is already withheld by person responsible for paying to the seller. Further, to facilitate proper implementation, the payment gateway may obtain an undertaking from the buyer or person responsible for making payment to seller, regarding taxes being withheld.

- **Clarification 6 - Computation of annual threshold of INR50,000 (in case of specified person)/INR10,000 (in other cases) for trigger of TDS on VDA on transfer of VDA undertaken prior to 1 July 2022:**
  - As aforesaid, TDS on VDA applies where consideration is payable by specified person is at least INR50,000 or more during a particular tax year

and INR10,000 in any other case. Since TDS on VDA comes into effect from 1 July 2022, stakeholders sought clarifications on computation of the threshold for transactions on transfer of VDA undertaken during the transitional period from 1 April 2022 to 30 June 2022.

- The Circular clarifies that the threshold will also be required to be computed from 1 April 2022 to 31 March 2023 and TDS on VDA would trigger if the aggregate of value of transaction provided during such period exceeds the threshold of INR50,000/INR10,000.

- It is also clarified that the withholding obligation would arise only in respect of consideration paid or credited on transfer of VDA undertaken on or after 1 July 2022. In other words, consideration credited or paid on transfer of VDA during the period from 1 April 2022 till 30 June 2022 will not be subject to withholding even if they exceed the threshold of INR50,000/INR10,000.

Foreign Exchange Management Act (FEMA)

Part-A Key FEMA updates

This section summarizes the FEMA updates under for the month of June 2022

1. Amendment to Master Direction on Import of Goods and Services pertaining to Import of Gold by Qualified Jewelers as notified by IFSCA

Qualified Jewelers ('QJs') are now permitted to import gold through IIBX or any other exchange approved by IFSCA and DGFT, Government of India in accordance with the following directions:

- QJs are allowed to remit advance payments for eleven days for import of gold through IIBX in compliance to the extant Foreign Trade Policy and regulations issued under IFSC Act. AD banks should ensure that advance remittance for such import through exchange/s authorized by IFSCA should be as per the terms of the sale contract/other document in the nature of an irrevocable purchase order in terms of IFSC Act and regulations made thereunder. AD bank should carry out all the due diligence and ensure the remittances are sent only for the bona fide import transactions through exchange/s authorized by IFSCA.

- The advance remittance for import of Gold should not be leveraged for importing gold worth more than the advance remittance made.

- In case the import of Gold through IFSCA authorised exchange, for which advance remittance has been made, does not materialise, or the advance remittance made for the purpose is more than the amount required, the unutilized advance remittance should be remitted back to the same AD bank within the specified time limit of eleven days.

- For gold imported through IIBX, QJs should submit the Bill of Entry ('BOE') (or any other such applicable document issued/approved by Customs Department for evidence of import), issued by Customs Authorities to the AD bank from where advance payment has been remitted.

- All payments by QJs for imports of gold through IIBX, should be made through exchange mechanism as approved by IFSCA in terms of IFSC Act and regulations. Any deviation from the extant guidelines for import of Gold through IIBX need to be approved in advance by IFSCA and other applicable and appropriate authorities.

- IFSCA would conduct all required due diligence on the exchange – IIBX including all other entities involved in enabling import of Gold by QJs in terms of the IFSCA regulations. IFSCA should also put in place necessary system to ensure that the advance remittance received from QJs are solely for the purpose for import of gold through IIBX.

Further, AD Bank should ensure that:

- all required documentation, custom duty related procedures and filing BOE as evidence of import, etc. is complete for the import of gold by QJ within the specified applicable period.
- single/multiple Outward Remittance Message ('ORM') created and matched with corresponding BoEs and closed appropriately in IDMPS.
- QJs comply with the related extant instructions relating to imports under FEMA, 1999, FTDR Act 1992, Foreign Trade Policy and regulations of IFSCA.
- AD banks may frame their own internal guidelines to deal with such cases, with the approval of their Board of Directors.

Further, AD bank should undertake following reporting:

- Create ORM for all such outward remittances in IDPMS in terms of extant guidelines.
- All the transactions need to be reported in FETERS in terms of extant guidelines.
- Report the import of gold through QJ in XBRL.

Discontinuance of Return on Guarantees under Foreign Exchange Management Act, 1999 ('FEMA')

- "Statement for reporting of non-resident guarantees issued and invoked in respect of fund and non-fund based facilities between two persons resident in India" was required to be reported by AD Bank to RBI, for which the details are sought from the person resident in India, in a prescribed format containing details of guarantee availed/invoked by person resident in India from a person resident outside India, has been discontinued with effect from June 09, 2022.

Part B- Case Laws

Goods and Service Tax

1. **M/S Baba Autolink Pvt Ltd Vs Commissioner Of Central Excise & Cgst- Ujjain [CESTAT Ruling- 2022-Vil-440-CESTAT-Del-St]**

   Subject Matter: Ruling wherein the Hon'ble CESTAT had set aside demand on warranty claim and tax under RCM on repair & maintenance and security charges. CENVAT credit was also allowed to the appellant.

Background and Facts of the case

- The appellant is a dealer in automobiles and also provides after sale service.
- The issue involved in this appeal-allegation of short payment of service tax, non-payment of service tax on reverse charge basis, irregular availment of CENVAT credit and late fee imposed for late filing, non-filing of return, further Rs. 10,000/- have been imposed by way of penalty under Section 77(1) for failing to appear on the date fixed for hearing.

Discussions and findings of the case

- The bone of contention is that the appellant have not included receipts under the head 'other income' in their taxable turnover. Under this head he major receipt is on account of warranty claim receipt, which is prima facie for the price of the parts they have replaced under warranty, and the same is reimbursed by the manufacturing company.
- Further, the other income also includes 'depot charges' which is explained to be in nature of 'vehicle parking charges' received from the manufacturer company.
- After considering the rival contention on the issue, the Hon'ble CESTAT has held that service tax is not attracted on receipt for replacement of parts received from the manufacturing company. So far 'depot charges' are concerned, the same are in the nature of renting of immovable property, or for use of space, accordingly this amount is held to be taxable.
- Furthermore, in relation to the repairs and maintenance expenses, the Hon'ble CESTAT there is no contract of service entered into with any particular service provider and amount has been incurred for repair and maintenance by way of petty expenses, below Rs. 1000/-. Accordingly, it was contended that there is no service tax attracted on repair and maintenance expenses.
- Further, as far as the security charges under Reverse Charge Mechanism are concerned, the Hon'ble CESTAT has observed that the appellant has already paid service tax on security services under Reverse Charge basis, and have also declared the same in the returns.
- As regards the disallowance of CENVAT credit of 3,06,939/- for the period October 2016 to June 2017, the same has been disallowed on the ground that the appellant-assessee have not filed their ST-3 return for the above period. Thus, it has been deemed that they have taken the CENVAT credit after delay of more than one year.
- In this regard, the appellant has contended that they have taken credit before one year from the date of receipt of voucher for the service, as permissible under the rules.

- The Appellant further urged that on a harmonious reading of Rule 3 and Rule 9 of CENVAT Credit Rules, read with Rule 4 of Service Tax Rule, the only condition for taking credit is that the credit should be based on proper voucher and the credit should have been taken within a period of 12 months from the date of the voucher. There is no such condition that for not filing of return within time, the CENVAT credit can be disallowed.

- In light of the above explanation of the Appellant, the Hon'ble CESTAT agreed that there is no adverse finding as regards not taking of credit within a period of 12 months from the date of the voucher. Accordingly, it held that CENVAT Credit is allowed to the appellant.

- Further, the appellant had admitted delay in filing of the returns and the appellant had not filed return for the period October 2016 to June 2017. In this view of the matter, the imposition of penalty amounting to INR 25000/- under Section 77(1) has been upheld.

Ruling

- In light of the above observations, the Hon'ble CESTAT held that:
    - The demand on warranty claim is set aside.
    - The demand on depot charges is set upheld.
    - Tax under RCM on repair and maintenance and security services is set aside. Tax under RCM on legal & professional expenses was partly set aside and was partly upheld.
    - The CENVAT Credit is allowed.
    - Penalty under Section 77 for late filing returns –Reduce to Rs. 25,000/-.

2. M/s Sanchita Kundu & Anr. Vs. The Assistant Commissioner of State Tax, Bureau of Investigation, South Bengal & Ors. [Writ Petition in High Court Calcutta]

Subject Matter: Ruling wherein the Hon'ble High Court had held that ITC shall be allowed in case of genuine transactions before cancellation of the GST Registration.

Background and Facts of the case

- Sanchita Kundu & Anr (hereinafter referred as "The Petitioners") had claimed input credit as per the invoice raised by its suppliers after checking all the required provisions of GST laws.
- The registration of the respective suppliers had been cancelled with retrospective effect covering the transaction period.
- However, GST officer had disallowed the benefit of Input Tax Credit (ITC) by their impugned order dated 27th December 2021, on purchase of the goods in question from the suppliers and asked the petitioners to pay the penalty and interest under the relevant provisions of GST Act, on the ground that the registration of the suppliers in question has already been cancelled with retrospective effect covering the transaction period in question.
- Therefore, being aggrieved by this order, the Petitioner approached the Hon'ble High Court of Calcutta by way of writ petition challenging the order passed by GST officer, under Section 79(1)(c) of the WBGST Act.
- The Petitioner humbly prayed to allow the disputed input tax credit because the transactions in question were genuine and valid. Further the petitioner contended that he had availed the Input tax credit by relying upon all the supporting relevant documents required under law and after requisite due diligence of respective suppliers.

Discussions and findings of the case

- The main contention of the petitioner in these writ petitions is that the transactions in question are genuine and valid by relying upon all the supporting relevant documents required under law. Further the petitioner contended that he had verified the genuineness of the supplier after requisite due diligence.
- The Petitioner had submitted that they have limitation on their part in ascertaining the validity and genuineness of the suppliers in question and they have done whatever possible in this regard and more so.
- Further, when the names of the suppliers as a registered taxable person were already available with the Government record and in Government portal at the relevant period of transaction, petitioners could not be faulted if the suppliers appeared to be fake later on.
- Petitioner argued that they have paid the amount of purchases in question as well as tax on the same and all transactions were through banks.
- Petitioners are helpless if at some point of time after the transactions were over the revenue finds on enquiries that the aforesaid suppliers were fake and bogus and on this basis petitioners could not be penalized unless the department/respondents establish with concrete materials that the transactions in question were the outcome of any collusion between the petitioners/purchasers and the suppliers in question.
- Petitioners further submitted that all the purchasers in question invoices-wise were available on the GST portal in form GSTR-2A which are matters of record.
- Further, the petitioner in support of its contention had relied on judgment in the case of M/s. LGW Industries Limited & Ors.

Vs. Union of India & Ors in W.P.A No.23512 of 2019 where Hon'ble HC of Calcutta held that if the selling dealer has failed to deposit the tax collected by him from the purchasing dealer, the remedy for the Department would be to proceed against the defaulting selling dealer to recover such tax and not deny the ITC availed by the purchasing dealer who has bona fide entered into a purchase transaction with a registered selling dealer who has issued Tax invoice reflecting the TIN number.

Ruling

- In light of the above, the Hon'ble HC quashed the impugned orders passed and directed the GST department to consider afresh the issue of their entitlement of benefit of input tax credit.

- The Hon'ble High Court also held that if it is found upon that all the purchases and transactions in question are genuine and supported by valid documents, in that event the petitioners shall be given the benefit of input tax credit.

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