EY Tax and Regulatory Alert

August 2023

Prepared for ACMA

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INDIRECT TAX

Part A - Key Indirect Tax updates

Goods and Services Tax

This section summarizes the regulatory updates under GST for the month of August 2023

- **Notification No. 27/2023–Central Tax dated: 31.07.2023** was issued by the CBIC to appoint 1st October 2023 as that date on which provisions of section 123 of the Finance Act 2021 shall come into force.

- Hence, the following changes are notified introduced by the said notification:

- The definition of zero rated supply of goods and services under section 16(1)(b) of the IGST Act, 2017 has been amended for restricting the supply of goods and services for 'Authorized Operations'.

- Further, for Section 16(3) & Section 16(4) of the IGST Act, 2017 the following sub-sections shall be substituted:

  (3) A registered person making zero rated supply shall be eligible to claim refund of unutilised input tax credit on supply of goods or services or both, without payment of integrated tax, under bond or Letter of Undertaking, in accordance with the provisions of section 54 of the Central Goods and Services Tax Act or the rules made thereunder, subject to such conditions, safeguards and procedure as may be prescribed

  - Provided that the registered person making zero rated supply of goods shall, in case of non-realisation of sale proceeds, be liable to deposit the refund so received under this sub-section along with the applicable interest under section 50 of the Central Goods and Services Tax Act within thirty days after the expiry of the time limit prescribed under the Foreign Exchange Management Act, 1999 (42 of 1999.) for receipt of foreign exchange remittances, in such manner as may be prescribed.

  - (4) The Government may, on the recommendation of the Council, and subject to such conditions, safeguards and procedures, by notification, specify-

    (i) a class of persons who may make zero rated supply on payment of integrated tax and claim refund of the tax so paid;

    (ii) a class of goods or services which may be exported on payment of integrated tax and the supplier of such goods or services may claim the refund of tax so paid."

- **Notification No 29/2023- Central Tax dated 31.07.2023** was issued by CBIC to notify special procedure provided for manual filing of appeals against orders issued by proper officers concerning the TRAN-1/TRAN-2 claims of registered person in pursuance of the directions of the Hon'ble Supreme Court in the case of the Union of India v/s Filco Trade Centre Pvt. Ltd.

- Further, the format for manual appeal has been provided under Annexure-1 of the notification.

- **Notification 32/2023-Central Tax dated 31.07.2023** was issued by CBIC in order to exempt the registered person whose aggregate turnover in the financial year 2022-23 is up to two crore rupees, from filing annual return for the said financial year.

- **Circular No. 201/13/2023-GST, Dated 1st August, 2023** was issued by CBIC in order to clarify that the services supplied

by a director of a company or body corporate to the company or body corporate in his private or personal capacity such as services supplied by way of renting of immovable property to the company or body corporate are not taxable under RCM.

- Only those services supplied by director of company or body corporate, which are supplied by him as or in the capacity of director of that company or body corporate shall be taxable under RCM in the hands of the company or body corporate under notification No. 13/2017-CTR (Sl. No. 6) dated 28.06.2017.

- **Notification No 1/2023-Integrated Tax Dated 31st July, 2023** was issued by CBIC to notify the goods and services which may be exported on payment of integrated tax and on which the supplier of such goods or services may claim the refund of tax so paid.

- The notified goods and services are enlisted in the said notification.

Customs and Foreign Trade Policy (FTP)

This section summarizes the regulatory updates under Customs and FTP for the month of August 2023

- **Trade Notification No 23/2023 dated 3rd August, 2023** is issued by DGFT wherein import of laptops, tablets, all-in-one personal computers, ultra small form factor computers and servers falling under HSN 8741 shall be 'Restricted' and their import would be allowed against a valid license for restricted imports. The notification is effective from 3rd August 2023.
- The said restriction does not apply in the following cases:
    - Import under Baggage Rules, 2016
    - Import of one such item (except server), including those purchased from e-commerce portals, through post or courier
    - Import up to 20 such items per consignment for specified purposes subject to the condition that such goods shall be used only for the stated purposes and will not be sold. Further, after the intended purpose, the goods would either be destroyed beyond use or re-exported
    - Re-import of goods repaired abroad
    - Such items are an essential part of capital goods

- **Trade Notification No 26/2023 dated 04.08.2023** was issued by the DGFT wherein it was notified that the Trade Notification 23/2023 dated 3rd August 2023 shall be effective from 1st November 2023.

- The import consignment can be cleared till 31.10.2023 without a license for restricted imports. For clearance of import consignments with effect from 01.11.2023 a valid License for Restricted Imports is required.

- **Trade Notice No 22/2023 dated 16.08.2023** was issued by DGFT wherein a final notice is issued for on-boarding on the DGFT Common Digital platform for mandatory electronic filing of Non-Preferential Certificate of Origin (CoO) upto 31st August 2023.

- Vide the said notice, DGFT has informed that the transition period for mandatory filing of applications for Non-Preferential COO through the e-CoO Platform shall remain valid till 31st December 2023 (till then CoO applications in manual/ paper mode shall be allowed).

- However, the DGFT has provided that the agencies/chambers notified under Appendix 2E shall be given the last opportunity to onboard on the electronic platform for CoO latest by 31.08.2023 only.

- Further, it is specified that if any agency/chamber is not onboarded till 31st August 2023, it shall be de-notified from Appendix 2E.

Direct Tax

This section summarizes the regulatory updates under DT for the month of August 2023

1. CBDT amends valuation rules for accommodation perquisite.

Background

Perquisite provision relating to accommodation prior to amendment by Finance Act 2023

- Section (S.) 17(2)(i) of the Income-tax Act provides that the value of rent-free accommodation provided to the taxpayer by his/her employer shall be treated as perquisite. Valuation of such accommodation is governed by Rule 3(1) of the Income Tax Rules, 1962.

- S.17(2)(ii) provides that the value of any concession in the matter of rent relating to any accommodation provided to the taxpayer by his/her employer shall be treated as perquisite. The Explanations to this provision created a deeming fiction in respect of a concession to arise where rent recovery from employee is less than a specified rate (which was linked to valuation as per Rule 3(1)).

Legislative history with respect to Rule 3(1)

- The perquisite valuation rules in relation to accommodation prior to 2001 was linked to Fair Rental Value (FRV) of accommodation provided.

- However, the CBDT, w.e.f. 1 April 2001, amended the rule to provide for a valuation mechanism linked to percentage of salary, disregarding FRV of the accommodation. This amendment was brought with an intention to curb the litigation that arose on determining FRV of accommodation, it being subjective in nature.

- The constitutional validity of amended valuation rule linked to percentage of salary was upheld by decision of the Supreme Court (SC) in the case of Arun Kumar v. UOI. The SC noted that the amendment in rules was intended to simplify the perquisite valuation since computing FRV of different properties was very cumbersome for private sector employees. Furthermore, the amendment was made based on recommendations of an expert group constituted to rationalize and simplify the tax laws.

- However, in relation to "concession" in the matter of rent, the SC held that "concession" is a jurisdictional fact to be established to trigger perquisite and there is no deeming fiction of "concession" in the matter of rent. Thus, if all employees are charged same rent by the employer for similar accommodation, there is no "concession".

- The determination of "concession" was addressed by the Parliament by inserting Explanations in S.17(2)(ii) by Finance Act (FA) 2007 with retrospective effect to deem the "concession" to exist if the rent recovered from the employee is less than specified percentage of salary (linked to extant valuation rule).

- The Old Rule providing for a valuation mechanism linked to percentage of salary created challenge for the taxpayers. Under the Old Rule, two employees, though provided with similar type of accommodation faced different perquisite taxation if their salary was different. Furthermore, if the employee's salary was increased, there resulted in automatic increase in accommodation perquisite value even though employee

continued in the same accommodation. Also, employees provided with employer-owned accommodation faced higher perquisite valuation as compared to employer-leased or rented accommodation. This was because the perquisite value in respect of employer-leased/rented accommodation was capped to the rent paid or payable by the employer.

- Thus, the switchover from FRV to percentage of salary-based valuation resulted in employer-owned housing becoming extremely tax disadvantageous as compared to employer-leased/rented accommodation or employee making his/her own arrangement for accommodation by availing House Rent Allowance (HRA) from the employer.

- In the wake of the above challenges, various stakeholders represented to CBDT to amend valuation rules for accommodation to remove the inequity inherent in percentage of salary-based valuation.

FA 2023 amendments

- Both S.17(2)(i) and S.17(2)(ii) were amended by FA 2023 with an intent of rationalizing the provisions, providing uniform methodology and making a clear distinction of the two categories of accommodation and to empower the Central Government to prescribe rules of valuation of rent-free accommodation and accommodation at a concessional rate.

- The Explanation to S.17(2)(ii) was also amended to provide for a deeming fiction of accommodation to have been provided at a concessional rate, if the value of accommodation computed as prescribed exceeds the rent recoverable from, or payable by the employee.

- The amendments are effective from tax year 2023-24.

CBDT Notification No.65 of 2023 dated 18 August 2023

- In general, while the New Rule continues to be largely based on percentage of salary of the employee, however, it has rationalized the valuation in respect of employer-owned accommodation and also ensures that the increase in salary of the employee does not result in an artificial rise in value of the perquisite beyond the inflation level in the country.

- There is no change in valuation rule for Central/State Government employees which continues to be license fees determined by Central/State Government as reduced by the actual rent paid by the employee.

- A comparison between Old Rule and New Rule in respect of employer-owned and employer-leased accommodation is tabulated below:

Circumstances	Valuation as per Old Rule	Valuation as per New Rule
Where the unfurnished accommodation is provided by any employer other than the Central and State Government employer a. where such accommodation is owned by the employer	i. **15%** of salary in cities having population exceeding **2.5m** as per 2001 census	i. **10%** of salary in cities having population exceeding **4m** as per 2001 census
	ii. **10%** of salary in cities having population exceeding **1m** but not exceeding **2.5m** as per 2001 census	ii. **7.5%** of salary in cities having population exceeding **1.5m** but not exceeding **4m** as per 2011 census
	iii. **7.5%** of salary in other areas, in respect of the period during which the said accommodation was occupied by the employee during the previous year as reduced by the rent, if any, actually paid by the employee. 5% above INR700,000	iii. **5%** of salary in other areas, in respect of the period during which the said accommodation was occupied by the employee during the previous year as reduced by the rent, if any, actually paid by the employee.
b. Where the accommodation is taken on lease or rent by the employer	Actual amount of lease rental paid or payable by the employer or **15%** of salary, whichever is lower, as reduced by the rent, if any, actually paid by the employee.	Actual amount of lease rental paid or payable by the employer or **10%** of salary, whichever is lower, as reduced by the rent, if any, actually paid by the employee.

- The New Rule has inserted a cap in case of a furnished or unfurnished accommodation owned/taken on lease or rent by the employer and provided to the same employee for more than one tax year to ensure that the increase in salary does not result in increase in perquisite value beyond the inflation level in the country (as indicated by Cost Inflation Index (CII) which is considered for computing long term capital gains on transfer of capital asset). The formula prescribed for this purpose is as follows:

$$\textbf{Amount calculated for first tax year} \times \frac{\textbf{CII for the tax year for which the perquisite is calculated}}{\textbf{CII for the tax year in which accommodation was initially provided to employee}}$$

- The perquisite valuation for the second year/subsequent years shall be lower of (a) perquisite value computed as per the rules prescribed for furnished/unfurnished accommodation and (b) amount computed as per above formula.

- The first tax year is tax year 2023-24 or the tax year in which the accommodation is provided to the employee, whichever is later.

- There is an ambiguity in the language of inflation linked capping as per New Rule. While the initial part of the proviso refers to accommodation owned by the employer, the later part of proviso provides for capping in respect of both accommodation owned by the employer and accommodation taken on lease or rent by the employer.

- As per existing provisions, perquisite value is NIL in case of any accommodation provided to an employee working in at a mining site or an on-shore oil exploration site or a project execution site, or a dam site or a power generation site or an off-shore site having plinth area not exceeding **800** sq. ft. and not less than eight kms away from the local limits of any municipality or a cantonment board or which is located in remote area. As per the amended rules, the plinth area of such accommodation is increased to **1000** sq. ft.

- The existing provisions defined "remote area" as an area that is located at least 40 kms away from a town having a population not exceeding 20,000 based on latest published all-India census. The New Rule has substituted this definition to define "remote area" to mean any area other than the area located within local limits or located within a distance, measured aerially, of **30 kms** from the local limits of, any municipality or a cantonment board having a population of **1,00,000** or more based on the 2011 census.

Effective date of New Rule

- The New Rule is effective from 1 September 2023. Thus, the reduction in perquisite value as per New Rule will be effective from 1 September 2023. Employers will be required to consider the New Rule for accommodation perquisite valuation for salary withholding tax from 1 September 2023 onwards.

Part B- Case Laws

Goods and Service Tax

1. Jivan Jyot Motors Pvt Limited vs Commissioner of Central Excise & ST, Surat (CESTAT, Gujrat ruling in SERVICE TAX Appeal No. 13811 of 2014-DB)

Subject Matter: Ruling wherein the Hon'ble CESTAT has held that since amount towards Handling and Forwarding charges were shown as part of the sale value of the goods and VAT was paid, then on any part of such value, service tax cannot be demanded

Background and Facts of the case

- M/s. Jivan Jyot Motors Pvt Limited (hereinafter referred to as the appellant) is an is automobile dealer who purchase vehicles and resale to the individual customer.
- While selling the vehicle to the customer, in their sale bill they charge some handling and forwarding charges. However, VAT was paid on the total value of the invoice including charges of handling and forwarding.
- The case of the department is that handling and forwarding charges collected by the appellant from their customers is liable to service tax under the head of Business Support Service/ Business Auxiliary Service.

Discussions and findings of the case

- The appellant contends that the show cause notice does not conclude that the activity handling and forwarding is falling under the category of Business Auxiliary Service or Business Support Service, for this reason itself the show cause notice is ab- initio void.
- Further, the appellant relied on various judgements wherein it was held that even though the parts were used for providing authorized service of the vehicle, the same will not be chargeable to service tax since the parts were old and suffered VAT.
- The Hon'ble Tribunal also perused a copy of the sales invoice submitted by the appellant and observed that VAT @ 12.5% was was calculated on the total value i.e. basic price plus handling and forwarding charges and paid to the concerned State authorities.
- It was also observed that in accordance with the legal proposition affirmed by Hon'ble Supreme Court in the case of **CST vs. UFO Moviez India Limited - 2022-VIL-07-SC-ST,** once on total value the VAT is paid then on any part of such value service tax cannot be demanded.

Ruling

- In light of the above, the Hon'ble Tribunal held that when there is sale of goods and VAT is paid no service tax can be demanded.
- Hence, the impugned order of the department was set aside and the appeal was allowed.

2. Advance systems vs Commissioner of Central Excise and CGST [W.P.(C) 7248/2023 & CM APPL. 28227/2023]

Subject Matter: Ruling wherein it was held once the Petitioner has received a favourable order from the Appellate Authority, it is not open for the Revenue to issue a Deficiency Memo ('DM') to process a refund application.

Background and Facts of the case

- M/s Advance Systems (hereinafter referred to as "the petitioner"), had applied for refund of input tax credit in respect of exports made under Letter of Undertaking (LUT) under Section 54(3) of the CGST Act.
- However, the said request was denied and 2 Orders-in-Originals ('Order') were issued denying the refund claim to the Petitioner.
- The Petitioner aggrieved by the Order had filed an appeal before the Appellate Authority, wherein the Appellate Authority allowed the appeal partially ('Order-in-appeal'). However, tax authorities neglected to process the refund claim of the Petitioner.
- Subsequently, the Petitioner once again filed a refund claim on the basis of Order-in-appeal. However, a DM was issued by tax authorities stating that the refund application was not accompanied by an undertaking to the effect that the Petitioner would refund the sanctioned amount along with interest in case it is found that the requirements of Section 16(2)(c) of the CGST Act read with Section 42(2) of the CGST Act, were not complied with in respect of the amount refunded.
- Aggrieved by the above, the Petitioner filed a Writ Petition before the Hon'ble Delhi High Court against the issuance of DM.

Discussions and findings of the case

- The Hon'ble High Court observed that it is undisputed that the Petitioner had filed its application vide form GST RFD-01 along with the necessary declarations and undertaking initially.
- It further stated that as the Petitioner had succeeded in its appellate proceedings, there is no question of the respondent now raising any deficiency or once again requiring the Petitioner to furnish any undertaking or declaration which it had already done at the initial stage.
- It further observed that refund claim cannot be withheld merely on the ground that the tax authorities proposes to review the Orders-in-Appeal and that it is not open for the tax authorities to desist from processing the claims on any such technical grounds.
- It stated that Circular No. 111/30/2019 dated 03 October 2019 merely sets out a convenient procedure for moving the concerned authorities and must be construed as such. It was also observed that there was no requirement to furnish any further documents to substantiate the petitioner's claim.

Ruling

- In light of the above, the Hon'ble High Court allowed the petitioner's appeal and directed the authorities to sanction the refund claim in terms of Order- in- Appeal along with the applicable interest in accordance with the provisions of the CGST Act.

Direct Tax

1. High Court ('HC') rescues assessee from 'lawyer's failing' in appeal-filing

Background and Facts of the case

- The Taxpayer, a non-resident incorporated in Cayman Islands, is engaged in the business of shallow water drilling for clients engaged in the oil and gas industry.

- For the tax year 2013-14, the Taxpayer deviated from its practice to offer income on presumptive basis. Instead, in its return, the Taxpayer had exercised the option to consider actual losses for tax purposes on the basis of audited accounts.

- In the first round of assessment, tax authority passed a final assessment order (based on DRP directions) rejecting the Taxpayer's audited accounts and instead considering presumptive profits.

- On appeal against such final assessment order the Tribunal vide its order dated 4 October 2019 disapproved the actions of the tax authority and the DRP and it remanded the matter back to the tax authority for fresh adjudication.

- Subsequently, in the second round of assessment proceedings, post granting the Taxpayer an opportunity of being heard, tax authority passed a draft assessment order on 28 September 2021. General Timelines for Assessment in this case of Remand Back Matter were to lapse on 30 September 2021

- Similarly, another fact-pattern before the HC pertained to a case of the Taxpayer's associate entity wherein, a draft order was passed on 29 September 2021 in the course of original Assessment where too the General Timelines for Assessment were to lapse on 30 September 2021.

- Against such draft assessment order, the Taxpayer filed objections before the DRP on 27 October 2021. Simultaneously, the Taxpayer also filed the instant writ petition before the Bombay HC challenging the draft assessment order. The Taxpayer's contention for the challenge was on time barring of the proceedings as the final assessment order would not be passed within the General Timelines for Assessment which lapsed on 30 September 2021. For this contention, the Taxpayer relied upon division bench ruling of Madras HC in the Roca Case.

Tax authority's contentions:

- The DRP Route is a self-contained code in itself, bearing a separate and independent procedure under the ITL and takes precedence. Thus, it is not bound by the General Timelines for Assessment. Since there was no time limit prescribed to pass the draft assessment order under DRP Route, General Timelines for Assessment cannot bar the assessment.

- Alternatively, it may be stated that the General Timelines for Assessment only prescribe a limitation period to pass the draft assessment order. Subsequent timelines provided under the DRP Route procedure is in addition to General Timelines for Assessment.

- Adoption of view of Madras HC Ruling in the Roca Case, will make many final assessment orders passed in the earlier years ever since the inception of the DRP regime as time barred and will be against the commonly accepted understanding of the provisions of the ITL.

- Any interpretation making key machinery provisions unworkable should not be accepted as Taxpayers do not have any vested right in procedural aspects of ongoing assessments.

Bombay HC Ruling:

The HC accepted Taxpayer's contention that its assessment turned time barred when final assessment order could not be passed within General Timelines for assessment prescribed under ITL for following reasons.

- The HC recognized that the DRP Route is a self-contained code of assessment, wherein time limits are specified at each stage of the procedure. The DRP Route was included bearing in mind the necessity for an expert body to look into the intricate matters concerning valuation and TP. Hence, specific timelines have been drawn within the framework to ensure prompt and expeditious finalization of special assessment. Despite that the General Timelines for Assessment cannot be ignored.

- Wherever Legislature desired, it has provided for extended time limit beyond the Timelines for Assessment. For instance, extension of General Timelines for Assessment qua TP Adjustments cases or cases where a stay on assessment proceedings is granted by any court. However, the ITL does not provide for any extension of General Timelines for Assessment regarding time taken under the DRP Route.

- Any contention that no time limit is prescribed for completion of proceedings under DRP Route, will run counter to the object basis which, the DRP Route was introduced in the ITL to provide a fast-track mechanism.

- Further, the HC also reiterated the conclusion reached by the Madras HC in the Roca Case that when DRP Route overrides the General Timelines for Assessment, such override applies only at the stage of passing the Final Assessment Order. The basic purpose of such overriding is that even where larger time is available under General Timelines for Assessment, the tax authority has to pass the final assessment order within one month from the end of the month in which DRP's directions are received.

- The object is to conclude the DRP Route proceedings as expeditiously as possible. Hence, there is a limit prescribed under the statute and it is the duty of the tax officer to pass an order in time. Accordingly, considering that the time limit for passing the final assessment order lapsed as on 30 September 2021, the tax officer had no authority to pass the final assessment order in the instant case. Accordingly, the proceedings were time barred.

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