EY Tax and Regulatory Alert

October 2022

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 October 2022

- **Notification No. 18/2022–Central Tax dated: 28.09.2022** was issued by the CBIC and had notified the Finance Act, 2022 (Finance Act) to give effect to the financial proposals of the Central Government for the financial year 2022-2023 that was introduced in Lok Sabha on February 1, 2022.

- The said finance act provided that certain sections (Section 100 to Section 114) shall come into force from the date on which the Government notifies.

- In view of above, it may be noted that Section 110(c) and Section 111 was notified by the Government w.e.f. 5 July 2022 vide Notification No. 09/2022 – Central Tax dated 5 July 2022. Further, Government has now issued Notification No. 18/2022 – Central Tax Dated 28 September 2022 to notify the remaining sections of the Finance Act. The said notification provides that the following provisions shall come into effect from 1 October 2022:

  - Change in timeline for various activities: Vide above mentioned notification, the Government has notified change in timelines for certain activities i.e., from due date of furnishing return for the month of September following the end of financial year to 30th November following the end of financial year. The gist of such activities is as follows:
    - Claiming ITC in respect of any invoice or debit note for supply of goods or services or both;
    - Declaration of credit note in GST returns;
    - Rectification of error or omission in respect of the details furnished in GSTR-1;
    - Rectification of any omission or incorrect particulars in GSTR-8 (TCS return);

  - Section 100 (a) - Amendment in Section 16 (Input tax credit) of CGST Act, 2017:New clause (ba) is inserted as a part of conditions which are prescribed under Section 16 to avail eligible ITC. The recipient shall be eligible to claim ITC only if the same is not restricted as per the above details communicated to him via GSTR-2B.

  - Section 100 (b) - Amendment in Section 16 (Input tax credit) of CGST Act, 2017:The time line to avail ITC under Section 16(4) is amended vide Finance Act. The ITC in respect of any invoice or debit note for supply of goods or services can be availed up to 30 November following the end of financial year to which such invoice or debit note pertains or furnishing of the relevant annual return, whichever is earlier.

  - Section 101 - Amendment in Section 29(2) (Cancellation or suspension of registration) of CGST Act, 2017:The proper officer may cancel the registration of a person paying tax under Section 10 (Composition dealer) where he has not furnished the return for a financial year beyond three months from the due date of furnishing the said return.

  - The proper officer may cancel the registration of any registered person (other than a Composition dealer), where he has not furnished returns for a such continuous tax period as may be prescribed.

  - Section 102 - Amendment in Section 34 (Credit notes and Debit notes) of CGST Act, 2017:The time line to declare the details of Credit notes in GST return is amended vide Finance Act. The details of Credit notes in GST return may be declared up to 30 November following the end of financial year in which such supply was made, or furnishing of the relevant annual return, whichever is earlier.

  - Section 103 - Amendment in Section 37 (Furnishing details of outward supplies) of CGST Act, 2017:The rectification of error or omission in respect of the details furnished in GSTR-1 shall be allowed up to 30 November following the end of the financial year to which

such details pertain, or furnishing of the relevant annual return, whichever is earlier.

- Insertion of Sub-section (4) to Section 37, stating that the furnishing of details of outward supplies in GSTR-1 for a tax period shall not allowed in case GSTR-1 is pending for filing for any of the previous tax periods.

- However, it shall be noted that the relaxation can be provided at the discretion of the Government via notification, to allow the filing of GSTR-1 for a tax period even if the same is pending for filing for one or more previous tax periods.

- Section 104 - Amendment in Section 38 (Communication of details of inward supplies and input tax credit) of CGST Act, 2017:Section 38 is amendment in entirety and it states that the auto-generated statement containing details of ITC shall be communicated to the recipient. The statement shall also contain details of supplies in respect of which credit is restricted due to specified events like:

- Supplier has defaulted in tax payment continuously for period as may be prescribed,

- Supplier has short paid the output tax, beyond a prescribed limit, as compared to details of outward supplies furnished.

- Section 105 – Amendment in Section 39 (Furnishing of returns) of CGST Act, 2017: Every Non Resident Taxable Person ('NRTP') shall furnish a return electronically within 13 days after the end of a calendar month or within seven days after the last day of the period of registration specified, whichever is earlier.

- Section 39(7) of the CGST Act is proposed to be amended to provide an option to the person furnishing return under proviso to Section 39(1) to pay either the self-assessed tax or an amount that may be prescribed.

- The time limit for rectification of any omission or incorrect particulars in the returns shall be thirtieth day of November following the end of the financial year to which such details pertain, or the actual date of furnishing of relevant annual return, whichever is earlier.

- A registered person shall not be allowed to furnish the return for a tax period, if the return for any of the previous tax periods or details of outward supplies for the said tax period has not been furnished.

- Further, Government may allow registered person or a class of registered persons to furnish return even if the returns for one or more previous tax period or the details of outward supplies for the said tax period he has not been furnished, subject to conditions and restrictions as may be prescribed.

- Section 106 - Amendment in Section 41 (Availment of input tax credit) of CGST Act, 2017:The taxpayer shall be eligible to avail ITC on self-assessment basis, subject to prescribed conditions and restrictions. However, if the tax is not paid by the supplier on such supplies, the recipient shall need to reverse credit along with applicable interest. Such ITC can be re-availed once the tax is paid by the supplier.

- Section 107 - Sections 42, 43 and 43A of the CGST Act which were kept in abeyance has now been omitted from the said Act.

- Section 108 - Amendment in Section 47 (Levy of late fee) of CGST Act, 2017:Late fees for delayed filing of return shall also be applicable to return (i.e. GSTR-8) filed by E-commerce operator for tax collected at source under Section 52 of CGST Act.

- Section 109 – Amendment in Section 48 (Goods and services tax practitioners) of CGST Act, 2017:Consequential change due to substitution of Section 38 (Returns - inwards) of the CGST Act, 2017.

- Section 110 - Amendment in Section 49 (Payment of tax) of CGST Act, 2017:Balance in CGST cash ledger under the head Tax, Interest, Penalty, Fee or any other amount can be transferred to IGST/ SGST/ UTGST/ Cess cash ledger within same GSTIN or to CGST/ IGST ledger of a distinct person. – Already made

effective w.e.f. 5 July 2022 vide Notification No. 09/2022.

- Sub-section 12 to Section 49 is inserted to empower the Government to prescribe maximum proportion of output tax liability which can be paid by utilizing credit.

- Section 111 – Amendment in Section 50 (Interest) of CGST Act, 2017:Levy of interest only in cases where ITC has been wrongly availed and utilised and not only where such credit has been wrongly availed but not utilised. – Already made effective w.e.f. 5 July 2022 vide Notification No. 09/2022.

- Section 112 - Amendment in Section 52 (Collection of tax at source) of CGST Act, 2017:The time line to make rectification of error or omission in respect of the details furnished in GSTR-8 shall be allowed up to 30 November following the end of the financial year to which such details pertain, or furnishing of the relevant annual statement, whichever is earlier.

- Section 113 - Amendment in Section 54 (Refunds) of CGST Act, 2017:The relevant date for filing refund in case of zero-rated supply of goods or services or both to a SEZ developer or a SEZ unit shall be the due date for furnishing of return under section 39 in respect of such supplies.

- Section 114 - Amendment in Section 168 (Power to issue instructions or directions) of CGST Act, 2017:Consequential change due to substitution of Section 38 (Communication of details of inward supplies and input tax credit) of the CGST Act, 2017.

- **Notification No. 19/2022–Central Tax dated: 28th September, 2022** was issued by the CBIC the summary of which are reproduced below:

  - Cancellation of Registration: Rule 21 has been amended wherein clauses (h) & (i) have been inserted basis which it is notified that where a registered person is required to file a return under Section 39(1), does not furnish the returns for a continuous period of six months, then his registration will be liable to be cancelled.

  - Similarly, it would be applicable for quarterly filer if he doesn't file it for a continuous period of two quarters.

  - Reversal of ITC under Rule 37 has been amended as follows: In sub-rule (1), the following changes have been notified:

    a. ITC in relation to RCM is excluded from the provision so that reversal of ITC in the case of non-payment to vendor would not be applicable.

    b. Reference of interest applicable as per Section 50 has been specifically inserted i.e. interest is also made applicable directly vide Rule 37.

    c. Instead of Form GSTR-2, now reference of Form GSTR-3B has been given w.r.to ITC availed in which return.

  - Furthermore, the Sub-rule (2) of Section 37 has been amended to reinstate that where the registered person subsequently makes the payment of the amount towards the value of supply along with tax payable thereon to the supplier thereof, he shall be entitled to re-avail the input tax credit referred to in sub-rule (1).

  - Earlier the said provision stated that the amount of input tax credit referred to in sub-rule (1) shall be added to the output tax liability of the registered person for the month in which the details are furnished.

  - Moreover, Sub-rule (3) of the said section has been omitted which used to prescribe interest under sub-section (1) of Section 50 for the period starting from the date of availing credit on such supplies till the date when the amount added to the output tax liability, as mentioned in sub-rule (2), is paid.

- **Advisory on Filing TRAN-1/2 Forms to claim Transitional Credit:** GSTIN has issued detailed advisory for smooth filing of TRAN-1 or TRAN-2 forms in pursuance to Supreme Court order. Important points as enumerated in advisory are as under:

- Current status shall be "Not filed" for all the taxpayers. Taxpayers who do not want to make any change in already filed forms are not required to file or revise forms again.

- Taxpayers should select "Yes" option if there is data saved in Table 5 or 8 of TRAN-1. Selecting "No" option with data saved in Table 5 or 8 of TRAN-1 may lead to denial of credit by the officer.

- Taxpayers who wish to revise the TRAN-1 or TRAN-2 should fill the complete form again, not only differential values.

Customs and Foreign Trade Policy (FTP)

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

- **CircularNo.21/2022-Customs dated:26.09.2022** was issued by the CBIC where the RoDTEP scheme notification No. 76/2021-Customs (N.T.) dated 23.09.2021 has been amended vide notification No. 75/2022 – Customs (N.T.) dated 14.09.2022 whereby the para 4(2), para 5(5) and the words "or the transferee" in para 6 of the principal notification have been deleted. The effect of these amendments is the deletion of certain conditions related to transferee-holder of the scrip.

- Further, the Electronic Duty Credit Ledger Regulations, 2021 issued vide notification No. 75/2021-Customs (N.T.) dated 23.09.2021 have been amended vide notification No. 79/2022 – Customs (N.T.) dated 15.09.2022. In Regulations 6(2) and 7(3) of the principal regulations, the words "two years" have been substituted for the words "one year". The effect of these amendments is that the validity period of scrips is increased from one year to two years from the date of their generation.

- **Circular No. 22/2022 - Customs dated: 26.09.2022** was issued by the CBIC wherein the RoSCTL scheme notification No. 77/2021-Customs (N.T.) dated 24.09.2021 has been amended vide notification No. 76/2022 – Customs (N.T.) dated 14.09.2022.whereby the para 4(2), para 5(5) and the words "or the transferee" in para 6 of the principal notification have been deleted. The effect of these amendments is the deletion of certain conditions related to transferee-holder of the scrip.

- Further, the Electronic Duty Credit Ledger Regulations, 2021 issued vide notification No. 75/2021-Customs (N.T.) dated 23.09.2021 have been amended vide notification No. 79/2022 – Customs (N.T.) dated 15.09.2022. In Regulations 6(2) and 7(3) of the principal regulations, the words "two years" have been substituted for the words "one year". The effect of these amendments is that the validity period of scrips is increased from one year to two years from the date of their generation.

- **Instruction No 25/2022-Customs dated 03.10.2022** was issued by CBIC pursuant to various representations received regarding the divergent practices pertaining to classification of 'automobile parts' in light of the Supreme Court judgement in case of M/s Westinghouse Saxby Farmer Ltd vs Commissioner of Central Excise, Kolkatta.

- Vide the aforementioned instruction, the Board has clarified that the instruction 01/2022 dated 05-01-2022 had brought out the distinguishing factors as to how the decisions of the Hon'ble Apex Court would apply only to the goods in the facts and circumstances.

- The Board has further stated that the law continues to remain the same and therefore, the instruction remains valid and does not require any changes.

- **Trade Notification No. 37/2015 - 2020 dated: 29.09.2022** was issued by the DGFT to extend the existing Foreign Trade Policy 2015-2020, which was valid up to 30th September, 2022 upto 31st March,2023.

- **Public Notice No 27/2015-20 dated 29.09.2022** was introduced to extend the time limit to file annual the returns relating to EPCG Scheme from 30.09.2022 till 31.12.2022.

- Hence, the last date to file the annual returns under Para 5.15 of HBP 2015-20 has been extended till 31.12.2022.

- **Public Notice No 31/2015-20 dated 14.10.2022** was issued by Department of Commerce, DGFT to insert a new entry after sub para 2.79 (C) of the HBP of FTP 2015-2020.

- The said new entry is " D. Authorization for export of same imported SCOMET items to same entity abroad under General Authorization for Export after Repair in India(GAER)"

- As per the said new entry, export of imported SCOMET items to the same entity abroad after repair in India will be allowed on the basis of one time General authorization for Export after Repair in India (GAER) subject to post reporting on quarterly basis issued by DGFT and subject to the conditions specified in the notice.

  The said public notice also specifies the documents required for GAER, post reporting for re-export of items/software/ technology under GAER, validity of GAER and its suspension/ revocation.

Direct Tax

Part-A Key Direct Tax updates

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

1. CBDT notifies rules providing manner for filing application for re-computation of income for disallowing claim for cess deduction.

Background

Prior to amendment vide Finance Act, 2022, under the provisions of the Income Tax Laws (ITL), any sum paid as rate or taxes on the profits and gains of business/profession was not allowable as deduction in computing the business income (disallowance of taxes paid).

A controversy had arisen as to whether disallowance of taxes paid will also include cess which is computed on base tax liability. Certain High Courts and Appellate Tribunals have allowed claim for deduction of surcharge and cess and based on such judicial precedents, many taxpayers have claimed benefit of deduction for surcharge and cess while filing tax returns or in the course of ongoing assessment or by filing additional grounds in pending appeals.

FA 2022 has made an amendment under the ITL to disallow surcharge and cess as business expenditure with retrospective effect from 1 April 2005. FA 2022 also empowered the tax authority to pass an order recomputing total income by such disallowance where taxpayer had claimed and was allowed the deduction in the past and in any such case, disallowance is considered as deemed under-reported income of the taxpayer under the provisions of the ITL (deemed penalty provision).

However, amendment also provided that where a taxpayer makes an application to the tax authority in the prescribed form and within the prescribed time. Requesting for re-computation of the total income of the tax year without allowing the claim for deduction of cess and pays the amount due thereon within the specified time, the adverse consequences of penalty for under-reported income will not apply.

In order to facilitate taxpayer for filing such application, the CBDT is empowered to specify (a) the manner in which application is to be made for re-computation of total income (b) time limit within which such application is to be filed and (c) time limit within which taxes due are to be paid. In deference of these powers, the CBDT, vide Notification No. 111/2022 dated 28 September 2022, has prescribed Rule 132 along with Forms No. 69 and 70.

Notification

- Application requesting for re-computation of total income without allowing claim for deduction of cess is to be made in Form No. 69 during the period from 1 October 2022 to 31 March 2023.
- Form No. 69 is to be furnished electronically with tax authority (Systems) who in turn will forward application to jurisdictional tax authority.
- The tax authority on receipt of Form No. 69 is to recompute total income by amending the relevant order and issue demand notice specifying time period within which amount of tax payable, if any is to be paid:
  - For the tax year for which claim for surcharge and cess is disallowed.

- For tax year subsequent to the year at (i) above, if order for such tax year results in variation in carry forward of loss or allowance for unabsorbed depreciation or credit for Minimum Alternate Tax (MAT) or Alternate Minimum Tax (AMT)

- Taxpayer to intimate tax authority about the payment made of the tax determined by the tax authority at (i) and/or (ii) above in Form No 70 within 30 days from the date of making payment.

- Key contents of Form No. 69 being application for re-computation of income:

Besides routine details of name, address and PAN or Aadhaar Number (if available), email id and mobile number of person filing application along with his/her PAN, as also name of deceased person or predecessor in respect of which application is filed and his/her PAN. Form requires following details in respect of subject issue:

- Tax years for which application is filed.

- Amount of surcharge and cess claimed and allowed as deduction.

- Total income of taxpayer under the normal provisions of the ITL and the book profit provisions calculated after claiming the deduction of surcharge and cess and tax/ surcharge/interest paid thereon as per latest assessment or reassessment or re-computation order.

- Total income of taxpayer under the normal provisions of the ITL and as also under the book profit provisions calculated without allowing deduction of surcharge and cess and tax/surcharge/interest payable thereon.

- The differential tax to be payable.

    - Impact of disallowance of surcharge and cess as deduction on carry forward of losses or allowance of unabsorbed depreciation or MAT credit or AMT credit.

- Form No. 69 is to be verified by the applicant by affixing his/her signature.

- After making payment as determined, taxpayer is required furnish details of payment in Form No. 70 within thirty days from date of making payment.

- Key open questions which require clarity are regarding cases where no order has been issued so far, impact in case of delay in payment of taxes and filing of form 70 and whether any closure order will be issued by the tax officer post filing of Form 70.

- **Key contents of Form No. 70 (intimation to tax authority of payment of tax)**

    In Form No. 70, taxpayer is required to quote relevant tax year, date and document identification number of orders passed by tax authority determining the demand, amount of tax (including interest, surcharge and cess) so determined and date of payment and other challan details.

2. CBDT notifies rules providing manner for filing application for re-computation of income for disallowing claim for cess deduction.

- Chapter XXII of the ITL contains provisions relating to prosecution for offences. Provisions enlist various categories of offences, which are punishable with imprisonment and fine. Imprisonment can extend from three months to seven years depending upon the gravity of offence and the quantum of sum involved.

- Section (S.) 279(2) of the ITL empowers Pr. CCIT/ CCIT/ Pr. DGIT/ DGIT to compound the offences under the ITL.

- Compounding of an offence in the context of tax law means an amicable settlement on

payment of compounding charges to avert prosecution for an offence. In case of compounding, the matter is resolved between Tax authorities and account holders, without any intervention by courts.

- The CBDT, with a view to provide uniform policy for compounding issues guidelines from time to time and updates the same by issuing Revised Guidelines.

- The CBDT has, issued Revised Guidelines dated 16 September 2022 (Revised Guidelines) to announce reviewed norms for compounding of offences under the ITL. The Revised Guidelines supersede earlier guidelines including the guidelines issued vide 285/08/2014-IT (INV.V)/147, DATED 14 June 2019 (Erstwhile Guidelines).

Brief snapshot of Erstwhile Guidelines

- Erstwhile Guidelines prescribes computation method of compounding charges. The Compounding charges comprised of compounding charges determined specific to each offence sought to be compounded along with prosecution establishment expenses of 10% of compounding fee(minimum INR 25,000) and litigation expenses (including Counsel's Fee).

- For this purpose, offences are classified into the following two categories:

- Category A: Covers 11 compoundable offences which include failure to pay tax deducted/ collected at source, failure to furnish income-tax return making or abetting false statement in return, etc. These offences may generally be compounded on atmost three occasions.

- Category B: Covers 9 compoundable offences which include wilful attempt to evade tax, failure to produce accounts or falsifications of accounts and documents, etc. Only first offence is compoundable for these offences.

- In terms of the procedure for compounding, Taxpayer may make application for compounding before jurisdictional Pr. CCIT/CCIT/Pr. DGIT/DGIT in the prescribed format within 12 months from the end of the month in which prosecution complaint, if any, has been filed in the court of law in respect of the offence for which compounding is sought. A delayed application for reasons beyond account holders control may be permitted upto 24 months subject to payment of 1.25 times specified compounding charges. For this purpose, pendency of appeal was not treated as valid reason for delay in filing compounding application.

- Application may also be filed suo-moto at any time even if offence has not come to the notice of tax authority.

- Payment of all outstanding dues and withdrawal of related appeals as pre-requisite for acceptability of compounding application

- Erstwhile Guidelines also enumerated various circumstances whereby offences would not be compoundable, such as:

- Taxpayer was convicted earlier under Direct Tax Law.

- Cases involving money laundering, anti-national or terrorist activity.

- Offence which has bearing on undisclosed foreign bank account/assets, Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Act, 2015, Benami Transactions (Prohibition) Act, 1988.

- On receipt of compounding application, competent authority is required to pass a speaking order within 6 months accepting or rejecting the application and within one month thereof, applicant is required to deposit compounding charges.

- Thereafter, competent authority is required to pass compounding order within further one month.

Revised Guidelines:

Effective date

- The Revised Guidelines come into effect from 16 September 2022 and shall apply to all applications received on or after that date. Applications received prior to 16 September 2022 will continue to be dealt in accordance with the Erstwhile Guidelines dated 17 June 2019.

By and large, Revised Guidelines are largely along the lines of Erstwhile Guidelines except for certain changes/revisions of which key changes are captured herein.

Key changes in Revised Guidelines as compared to Erstwhile Guidelines

- General
  - Erstwhile Guidelines contained a categorisation of offences into Category A Offences which could be compounded on three "occasions" and Category B offences which could be compounded only on the first "occasion". While in the Erstwhile Guidelines, there was no clarity on the basis for such categorisation, the Revised Guidelines expressly stated that Category A offences are technical offences caused by an act of omission while Category B offences are non-technical offences attributable to an act of commission.
- Offences normally not compoundable
  - As discussed above, Erstwhile Guidelines had blanket prohibition to compound the offence in a case where person has been convicted earlier for any offence under Direct Tax Law irrespective of duration for which taxpayer was imprisoned. Revised Guidelines now relax the condition and compounding is now permitted if conviction under direct tax law involves imprisonment of less than 2 years.
  - Separately, the Erstwhile Guidelines also provided discretionary power to Pr.CCIT/ CCIT/ Pr.DGIT/ DGIT to deny compounding of offences based on factors such as conduct of person, nature and magnitude of offence, etc. This may also include power to deny compounding even to first time offenders. Now, under Revised Guidelines such discretionary powers are limited to deny compounding for cases involving only habitual/repeat offenders.
- Compounding of S. 276 offences
  - S.276 (w.e.f. 01 April 1989), which relates to offences on removal, concealment, transfer or delivery of property to thwart tax recovery, was earlier unspecified under the Erstwhile Guidelines and hence was not compoundable. Under Revised Guidelines the same is now considered as a compoundable Category B Offence subject to outstanding recovery amount being deposited before filing compounding application. For this purpose, Compounding Fee is specified at 75% of recovery sought to be thwarted.
- Compounding charges
  - Under Erstwhile Guidelines, Compounding Fee was capped to aggregate amount of TDS and interest thereon for defaults under S.276B only in case the default in TDS deposit is less than INR 1 lakh. The Revised Guidelines

now cap the Compounding Fee to TDS amount in all cases.

- Additionally, Revised Guidelines also introduce a cap on Compounding Fee in case of S.276C(2) offences for wilful evasion of payment of any tax, interest and penalty to the extent of such tax, interest and penalty sought to be evaded.

- Under Erstwhile Guidelines, calculation of Compounding Fee in case of S.276CC offences (failure to furnish tax return within statutory time) was a factor of the amount of returned income as reduced by TDS and advance tax. Where such amount exceeded INR 25 lakh the scale of compounding fee is higher at INR 4,000 per day (in contrast with the general compounding fee of INR 2,000 per day). In this regard, there existed ambiguity whether self-assessment taxes paid post end of financial year but before return filing due date are to be to be reduced while determining threshold of INR 25 lakhs. The Revised Guidelines now expressly require determination of the threshold of tax default of INR 25 lakhs after considering deduction of taxes if any paid under S.140A(1)10 before the due date of filing of return for that assessment year in addition to TDS and advance tax.

- In cases of offences under S.276CC and S.276CCC, the Revised Guidelines provide that the compounding fee is not to exceed the tax in default on returned income or assessed income, whichever is higher.

- Erstwhile Guidelines did not provide for a specific compounding fee for offence under S.277A (Falsification of books of account or document, etc.) and accordingly, general discretionary power was given to competent authority to determine compounding fee having regard to nature and magnitude of offence, loss of revenue to the government subject to minimum compounding fee of INR 1 lakh. Revised Guidelines now provides for specific compounding fee charged at the rate of 100% of the sum equal to the aggregate amount of such false or omitted entry involved in respect of S.277A offences.

- Further, it is now specifically clarified in the Revised Guidelines that, in calculating compounding fee, the word "tax" shall not include interest component.

- Under Erstwhile Guidelines, a specific Compounding Fee of 20% of the amount deposited/ repaid in contravention of S.269SS/ 269T was prescribed by the Compounding Guidelines for Compounding of Offences under S.276DD and S.276E. The Revised Guidelines now deletes such specific prescribed fee thereby providing discretion in this respect to competent authority in accordance with the miscellaneous category of offences to determine Compounding Fee based on nature and magnitude of the offence, loss of revenue directly or indirectly attributable to such offence, subject to levy of a minimum compounding fee of INR 1 lakh for each such offence.

Foreign Exchange Management Act (FEMA)

Part-A Key FEMA updates

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

1. Reserve Bank of India ('RBI') provides uniformity in Late Fee Submission ('LSF')

RBI has revised the matrix for calculation of LSF to bring uniformity in imposition of LSF across functions.

The key highlights are summarized as below:

- LSF amount for delay in reporting of Form ODI Part-II/ APR, FCGPR (B), FLA Returns, Form OPI, evidence of investment or any other return which does not capture flows or any other periodical reporting has been reduced to INR 7,500 per return as against INR 10,000 earlier

- Further, RBI has provided a uniform formula for calculation of LSF for delay in reporting of FC-GPR, FCTRS, Form ESOP, Form LLP(I), Form LLP(II), Form CN, Form DI, Form InVi, Form ODI-Part I, Form ODI-Part III, Form FC, Form ECB, Form ECB-2, Revised Form ECB or any other return which captures flows or returns which capture reporting of non-fund transactions or any other transactional reporting

- As per the revised formula, the minimum amount of LSF shall be INR 7,500 as against INR 100 earlier

- Maximum LSF amount will be limited to amount involved in the delayed reporting. In case of Form ECB 2 return, for any number of delayed return filings, delayed submission for each LRN will be treated as one instance.

The facility for opting for LSF can be availed up to three years from the due date of reporting/ submission

LSF is to be paid within 30 days from issuance of LSF payment advice

Part B- Case Laws

Goods and Service Tax

1. Sri. Puthusserikudy Thankappan Santhosh, M/s. Oyester Auto Body (GST AAR Kerala Appeal No Advance Ruling No. KER/ 144/2021)

Subject Matter: Ruling wherein the Kerela Authority of Advance Ruling ("AAR") has held that activity of commercial vehicle body building on the chassis supplied by the customer is a supply of service and is classifiable under SAC 998881 and liable to 18% GST.

Background and Facts of the case

- M/s. Oyester Auto Body (hereinafter referred to as the applicant) is an assesee registered under the GST Act bearing GSTIN 32BRRPS1291N1Z3.
- The applicant is engaged in the business of body building of commercial vehicles used for carrying goods in the normal course of trade, the customers purchase the chassis and hand it over to the applicant for fabricating the vehicle's body for carrying goods.
- The applicant on receipt of the chassis, fabricates the body of the vehicle as per the needs of the customer.
- The applicant has sought advance ruling on the following questions:
  - Whether the activity of commercial vehicles bodybuilding on a job-work basis, on the chassis supplied by the customer, is a supply of goods or a supply of services?
  - If it is a supply of goods, what is the applicable rate of GST?
    - If it is a supply of services, what is the applicable rate of GST?

Discussions and findings of the case

- The Applicant has contended that the applicant's activity in respect of which the Advance Ruling is sought is in the nature of Works Contract.
- The Applicant further contended that motor vehicles for the transport of goods (other than refrigerated motor vehicles) fall under heading 8704, chassis fitted with engines fall under heading 8706, bodies including cabs for motor vehicles used for transport of goods falls under heading 8707; and all of it attracts 28% tax. However, manufacturing services on physical inputs (goods) owned by others falls under SAC 9988 and attract 18% GST.
- Moreover, the applicant contended that the applicant is engaged in Job work as per Section 2(68) of the CGST Act, 2017. In support of this contention, the applicant has placed reliance on paragraph 3 of Schedule II wherein it is deemed that "treatment or process which is applied to another person's goods" is a supply of service.
- Furthermore, the applicant has relied on Circular 52/2018 wherein the CBIC has clarified that wherein the bus body builder builds on chassis provided by the principal for bodybuilding and realizes fabrication charges, it constitutes as supply of services. The applicant contended that the said circular would also apply in the said case of the applicant.
- Upon perusing the submissions of the Applicant, the Kerela AAR observed that the applicant is fabricating the body on the chassis belonging to the customer.
- It also observed that the ownership of the chassis remains with the customer and at

no stage of the process of fabrication of the body, the title in the chassis is transferred to the applicant. Therefore, the applicant is fabricating the body on the chassis belonging to another person and hence the activity is squarely covered under Para 3 of Schedule II of the CGST Act, 2017 as a treatment or process which is applied to another person's goods and accordingly is a supply of services.

- Moreover, the AAR observed that the heading 9988 covers manufacturing services in which the output is not owned by the unit providing this service and the sub heading 998881 pertains to Motor Vehicles and trailer manufacturing services. Therefore, the activity of the applicant as discussed above is appropriately classifiable under Service Accounting Code 998881.

- Accordingly, the rate of GST leviable would be 18% as per entry No 26(iv) of Notification No 11/ 2017- Central Tax (Rate) dated 28.06.2017.

Ruling

- In light of the above, the Authority of Advance Ruling Kerala held that activity of commercial vehicle body building on the chassis supplied by the customer is a supply of service.

- It also held that the said activity is liable to GST at the rate of 18% as per entry no 26(iv) of Notification No 11/2017 Central Tax (Rate) dated 28.06.2017.

2. M/s SRF LIMITED (GST AAR Gujrat in ADVANCE RULING NO. GUJ/GAAR/R/2022/41)

Subject Matter: Ruling wherein the Gujrat GST Authority for Advance Ruling has held that provision of Services of transports and canteen facility to its employees is as per the contractual agreement between the employee and the employer in relation to the employment cannot be considered as a supply of goods or services and hence cannot be subjected to GST.

Background and Facts of the case

- M/s SRF Limited (hereinafter referred to as "the applicant"), is a multi-business chemicals conglomerate engaged in the manufacturing of industrial and specialty intermediates.

- The applicant business portfolio covers fluorochemicals, specialty chemicals, packaging films, technical textiles, coated and laminated fabrics.

- The applicant has submitted that it provides canteen facilities to the employees of the company, for which it has entered into a contract with the 3rd party service providers. The charges for the canteen services is partially borne by the applicant and is partially recovered by the applicant from its employees.

- Additionally, the applicant provides transportation facility for its employees to ensure that the employees reach the factory premise and back home safely at subsidized rates. For this purpose, the applicant has entered into a contract with the 3rd party.

- Accordingly, the applicant sought advance ruling on the following questions:

- Whether GST would be payable on nominal & subsidized recoveries made by the Applicant from its employees towards —

  a. Provision of canteen facility by 3rd party service provider to Applicant's employees at Applicant's premises.

b. Provision of bus transportation facility by 3rd party service to provider Applicant's employees; and

- If the answer to any of the question above is yes, what is the applicable rate of GST thereupon?

Discussions and findings of the case

- In relation to the canteen services, the applicant contended that it is maintaining canteen facility for its employees in factory premises because it is a mandatory requirement as per Section 46 of Factories Act, 1948.

- For this purpose, the Applicant receives the invoice thereof along with GST from 3rd party canteen service provider and in turn the Applicant charges a nominal sum from its employees.

- The Applicant further contended that it is not the service provider for the services rendered to the Applicant's employees and merely receiving a part of sum to be paid to 3rd party canteen service provider which is paid as it is without retaining any portion thereof or charging any markup therein.

- Furthermore, the applicant has contended that the business of the applicant is not that of providing canteen or outdoor catering services and the said transaction does not tantamount to services provided in the course or furtherance of business.

- The applicant also placed reliance on various advance rulings in support of its contention such as Emcure Pharmaceuticals Ltd cited in [2022] 134 taxmann.com 74 (AAR — MAHARASHTRA), Amneal Pharmaceuticals Pvt. Ltd., cited in 2021 (9) TMI 1293 (AAAR — GUJARAT), Bharat Oman Refineries limited, bearing no. MP/AAAR/07/2021 Dated: 08 November 2021 (AAAR – MADHYA PRADESH), Tata Motors Ltd., cited in [2021] 129 taxmann.com 277 (AAR — GUJARAT), Cadila Healthcare Limited cited in 2022 [4] TMI 1339 taxmangementindia.com (AAR — GUJARAT), etc.

- In addition, in relation to the bus transportation facility, the applicant has submitted that the service of bus transportation is being provided to the employees of the company and not by the applicant to its employees as a part of its HR policy.

- It is merely arranging for bus transportation facility at a subsidized nominal rate for the comfort and ease of its employees and the bus transporters are raising monthly invoices along with GST thereon (as per rates fixed in advance in accordance with the agreement) to the Applicant and a small portion of such charges are being recovered by the Applicant from its employees as per internal HR policy.

- Post considering the submissions made by the applicant, the Authority for Advance Ruling Gujrat observed that applicant is providing transport and canteen facility to its permanent employees (on payroll) as per contractual agreement between employer-employee relationships.

- Further, the AAR Gujrat relied on Circular No. 172/04/2022-GST dated 06-07-22 wherein it has been clarified that perquisites provided by the employer to the employee in terms of contractual agreement entered into between the employer and the employee, will not be subjected to GST when the same are provided in terms of the contract between the employer and employee.

- Hence, the AAR concluded that referring to the provisions of Schedule III and the aforementioned circular, he provision of the services of transportation and canteen facility cannot be considered as supply of goods or services and hence cannot be

subjected to GST.8415 and the respective chapter notes of chapter 84 & 86 of the Customs Tariff Act.

Ruling

- In light of the above, the Gujrat GST Authority for Advance Ruling held GST is not leviable on the amount representing the employees portion of canteen and transportation charges, which is collected by the applicant and paid to the Canteen and bus transporter service provider

Direct Tax

1. Supreme Court resolves judicial conflict on the due date of payment of employees' contributions to Social Security Schemes('SSS') for tax deduction

Subject Matter: Ruling wherein Supreme Court rules on the due date of payment of employees' contributions to Social Security Schemes for tax deduction

Background

- Under the ITL, any sum received by taxpayer from its employees as contributions to any SSS is treated as income of the taxpayer. The taxpayer is eligible for deduction of such sums if it deposits them to the relevant SSS before the statutory due date. [Section (S.) 36(1)(va)].

- Under a separate provision of the ITL, the employer's contribution is allowed as deduction on actual payment made on or before the due date of filing Return of Income (ROI due date) for the relevant tax year; else, they are allowable in the year of actual payment [S.43B]. S.43B not only covers employer's contributions to SSS but many other statutory and non-statutory liabilities like tax, duty, cess, bonus, leave encashment, interest to specified financial institutions, etc. which are also allowable on payment by ROI due date.

- S. 43B as originally introduced by FA 1983 from tax year 1983-84, inter alia, covered only employer's contributions and allowed deduction on actual payment by ROI due date.

- Subsequently, FA 1987 introduced separate provisions dealing with employees' contributions in terms of which definition of "income" was amended to include contributions "received" from the employees but allowed as deduction under S.36(1)(va) on payment by statutory due date.

- Simultaneously, FA 1987 also amended, S. 43B to change the due date for payment of employer's contributions from ROI due date to statutory due date. These amendments were effective from tax year 1987-88 onwards.

- However, FA 2003 again amended S.43B to restore the due date for employer's contributions from statutory due date to ROI due date with effect from tax year 2003-04. This amendment was pursuant to recommendations of Kelkar Committee which advocated uniform tax treatment of statutory liability relating to labor with other statutory liabilities. The Committee opined that complete disallowance of such payments for delay beyond statutory due date was too harsh a punishment for delayed payments.

- Although the amendment by FA 2003 to S.43B was stated to be effective from tax year 2003-04 onwards, the Two-Judge Bench of the SC in the case of CIT v. Alom Extrusions (Alom Extrusions ruling) held that the amendment was curative in nature, intended to remove difficulties faced by taxpayers and, hence, applied retrospectively from tax year 1987-88 itself. For this conclusion, it relied on the earlier Three-Judge Bench of SC ruling in the case of Allied Motors (P) Ltd v. CIT5 which had similarly held an earlier

amendment to S.43B in tax year 1987-88 to be curative in nature, having retrospective effect from tax year 1983-84, having regard to object of removal of hardships faced by the taxpayers under the pre-amended law.

- Basis Alom Extrusions ruling, majority of HCs held that the FA 2003 curative amendment to S.43B also had the effect of changing the due date for employees contributions under S.36(1)(va) from statutory due date to ROI due date on a retrospective basis from tax year tax year 1987-88.This view favored the taxpayers.

- However, minority view of Gujarat HC and Kerala HC favored the tax authority. They held that amendment to S.43B dealing with employer's contributions had no impact on S.36(1)(va) dealing with employees' contributions for which due date continued to be statutory due date.

- While the issue was pending before the SC, FA 2021 further amended S.36(1)(va) and S.43B in line with the minority view with effect from tax year 2020-21 onwards. However, the language of the amendment states that it is "for removal of doubts" and "it is hereby clarified" raising an issue whether the amendment is clarificatory in nature. In this regard, some courts , following the majority view, held the amendment to be prospective in nature.

- The tax years involved in appeal before the SC were prior to tax year 2020-21. Another well-settled principle of relevance is that incidental trading losses incurred in the ordinary course of business can be claimed as deduction u/s. 28/29.

Taxpayer's Contentions

- In terms of SSS, the employer is required to make composite payment comprising employer's and employee's contributions by statutory due date. Thus, S.43B covers both employer's and employees' contributions which the taxpayer is statutorily obliged to make as an employer.

- S.43B starts with a "non-obstante clause". Hence, it overrides the statutory due date provided in S.36(1)(va) and provides for ROI due date for both employer's and employees' contributions. Furthermore, Alom Extrusions ruling held the amendment by FA 2003, to S.43B to restore due date from statutory due date to ROI due date, to be curative having retrospective effect. Hence, relevant due date for employees' contributions is also ROI due date and not statutory due date.

- Alternatively, S.36(1)(va) merely covers contributions "received" from the employees and not those which are "deducted" from employees' salary. Under Provident Fund law, the principal employer is required to ensure deposit of contributions in respect of employees of its contractor as well, if the contractor itself does not do so.

Tax Authority's Contentions

- The legislative history of S.36(1)(va) and S.43B shows that the ITL has always differentiated between employees' contributions and employer's contributions. While S.36(1)(va) covers employees' contributions, S.43B covers employer's contributions and both provide for different due dates for claiming tax deduction.

- Employees' contribution is deducted from employee's salary and deposited by employer. It cannot be regarded as employer's contribution. Employer's contribution is not deducted from

employee's salary but required to be paid by the employer itself.

- S.43B was inserted in tax year 1883-84 to address the mischief of taxpayers claiming deduction of statutory liabilities (including SSS contributions) by simply making provision in books under mercantile method of accounting without actual payment.

- On the other hand, S.36(1)(va) was specifically inserted in tax year 1987-88 along with amendment to definition of "income" to provide the contributions collected from employees shall be treated as income of the taxpayer and allowed as deduction only upon payment by statutory due date. If they are not paid by statutory due date, the taxpayer forfeits the deduction.

- Thus, both the provisions have differing objectives and provide for different due dates for employees' and employer's contributions.

SC Ruling

The SC upheld the minority view of the HCs in favor of the tax authority and held that the due date for claiming tax deduction for employees' contribution as per S.36(1)(va) is **statutory due date and not ROI due date.** It adopted the following reasoning for its conclusion:

- There is distinction between provisions like S.43B on one hand and S.36(1)(va) on the other. S.43B and similar provisions are concerned with and enact different conditions, that the tax authority has to enforce, and the taxpayer has to comply with, to secure a valid deduction. On the other hand, provisions like S.36(1)(va) deal primarily with business, commercial or professional expenditure under various heads along with conditions to be met. It is, therefore, necessary to bear in mind that specific enumeration of deductions, dependent upon fulfilment of particular conditions, would qualify as allowable deductions whereas taxpayer's failure to comply with those conditions, would render the claim vulnerable to rejection.

- In the light of the above scheme of the ITL, the provisions of S.36(1)(va) have remained unaltered since the inception from 1987 whereas provisions of S.43B have undergone changes from time to time. There is significant difference between nature of contributions covered by S.36(1)(va) and S.43B and conditions for deduction thereof.

- By inserting S.36(1)(va) and amending definition of "income", the Parliament intended that amounts not earned by the taxpayer, but received by it – whether in the form of deductions or otherwise, as receipts, were to be treated as income. Since these receipts did not belong to taxpayer but were held by them as trustees, S.36(1)(va) was inserted to ensure that if these receipts are deposited in the relevant SSS on or before the "due date", they could be treated as deductions. The "due date" is specifically defined as the date by which the amounts have to be credited by the employer, in the concerned SSS.

- Most importantly, this condition does not apply to employer's contributions which is covered by separate provision. The essential character of employees' contribution is that it is part of employees' income, held in trust by the employer and has to be deposited by the statutory due date.

- On the other hand, the object of S.43B, as noted in a series of earlier SC rulings, is to curb the practice of taxpayers who did not discharge their statutory liabilities (including employer's contributions to SSS) for long periods but claimed deductions in that

regard from their income on the ground that the liability to pay these amounts was incurred by them in the relevant tax year.

- The Parliament while introducing S.36(1)(va) was very conscious of the distinction between employer's contributions and employees' contributions. While introducing S.36(1)(va) in 1987, Parliament also amended S.43B to provide for uniform statutory due date for claiming deductions for both employers and employee's contributions. However, after 14 years, on the recommendations of Kelkar Committee, Parliament amended S.43B to restore the due date for employer's contributions to ROI due date. In Alom Extrusions ruling, the SC held this amendment to be curative and applicable since inception.

- However, in Alom Extrusions ruling, the SC did not consider the separate provisions of the ITL for employer's and employees' contributions or the amendment treating employees' contribution deposited beyond the statutory due date as employer's income.

- The following principles of interpretation of taxing statutes are relevant:

  - A taxing statute has to be construed strictly – one has to merely look at what is said in the relevant provision. There is no presumption as to tax. Nothing is to be read in, nothing is to be implied.

  - If a deduction or exemption is available on compliance with certain conditions, the conditions are to be strictly complied with. There is no room for equitable considerations.

  - When the competent legislature mandates taxing certain persons/certain objects in certain circumstances, it cannot be expanded/interpreted to include those, which are not intended by the legislature.

- The HCs, laying down the majority view, principally relied upon the amendment in 2003 to S.43B held by Alom Extrusions ruling to be curative in nature. No doubt, many of these rulings also dealt with S.36(1)(va), but they primarily adopted the approach set out in Alom Extrusions ruling which did not consider the provisions relating to employees' contributions.

- The legislative development since 1984 clearly shows that Parliament has treated employer's contributions and employees' contributions separately. S.43B and S.36(1)(va) have differing objectives. Employer's contributions are to be paid out of employer's income and allowed as deduction if paid by ROI due date. Employees' contributions, deducted from employees' income and held in trust by the employer, are artificially treated as employer's income unless paid by statutory due date. The marked distinction between nature and character of two amounts has to be borne in mind while interpreting the two provisions. Hence, the HCs taking minority view were correct in holding that "non-obstante clause" in S.43B does not dilute or override employer's obligation to deposit employees' contribution by statutory due date.

- The ruling may have an adverse impact on taxpayers falling within jurisdiction of majority view of HCs or other jurisdictions where the lower appellate authorities followed the majority view. Wherever the issues are pending in litigation, the taxpayers may need to pay up the shortfall in taxes, with consequential interest (unless waived by the tax authority in accordance with administrative instructions provided by the Central Board of Direct Taxes).

Our offices

Ahmedabad
2nd floor, Shavlik Ishaan
Near. C.N Vidyalaya
Amba wadi
Ahmedabad – 380 015
Tel: +91 79 6608 3800
Fax: +91 79 6608 3900

Bengaluru
12th & 13th floor
"U B City" Canberra Block
No.24, Vital Malia Road
Bengaluru - 560 001
Tel: +91 80 4027 5000
+91 80 6727 5000
Fax: +91 80 2210 6000 (12th floor)
Fax: +91 80 2224 0695 (13th floor)

Ground Floor, 'A' wing
Devisee Chambers
11, O'Shaughnessy Road
Langford Gardens
Bengaluru – 560 025
Tel: +91 80 6727 5000
Fax: +91 80 2222 9914

Chandigarh
1st Floor
SCO: 166-167
Sector 9-C, Madhya Marg
Chandigarh - 160 009
Tel: +91 172 671 7800
Fax: +91 172 671 7888

Chennai
Tidal Park
6th & 7th Floor
A Block, No.4, Rajiv Gandhi Salami
Tar Amani, Chennai – 600 113
Tel: +91 44 6654 8100
Fax: +91 44 2254 0120

Delhi NCR
Golf View Corporate
Tower – B
Sector 42, Sector Road
Gurgaon – 122 002
Tel: +91 124 464 4000
Fax: +91 124 464 4050

3rd & 6th Floor, Worldmark-1
IGI Airport Hospitality District
Atrocity New Delhi – 110 037
Tel: +91 11 6671 8000
Fax +91 11 6671 9999

4th & 5th Floor, Plot No 2B
Tower 2, Sector 126
NOIDA - 201 304
Gautam Bodh Nagar, U.P.
Tel: +91 120 671 7000
Fax: +91 120 671 7171

Hyderabad
Oval Office
18, labs Centre
Hitech City, Madhapur
Hyderabad – 500 081
Tel: +91 40 6736 2000
Fax: +91 40 6736 2200

Jamshedpur
1st Floor,
Shanti Niketan Building
Holding No. 1, SB Shop Area
Bistoury, Jamshedpur – 831 001
Tel: + 91 657 663 1000

Kochi
9th Floor "ABAD Nucleus"
NH-49, Maraud PO
Kochi - 682 304
Tel: +91 484 304 4000
Fax: +91 484 270 5393

Kolkata
22, Camaca Street
3rd Floor, Block C"
Kolkata - 700 016
Tel: +91 33 6615 3400
Fax: +91 33 6615 3750

Mumbai
14th Floor, The Ruby
29 Senapati Bapat Marg
Dadar (west)
Mumbai - 400 028
Tel: +91 22 6192 0000
Fax: +91 22 6192 1000

5th Floor Block B-2
Nylon Knowledge Park
Off. Western Express Highway
Goregaon (E)
Mumbai - 400 063
Tel: +91 22 6192 0000
Fax: +91 22 6192 3000

Pune
C—401, 4th floor
Pinch-hit Tech Park
Yeravda (Near Don Bosco School)
Pune - 411 006
Tel: +91 20 6603 6000
Fax: +91 20 6601 5900

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EY contacts for ACMA Knowledge Partnership:

- Rakesh Batra, National Automotive Sector Leader – rakesh.batra@in.ey.com / +91 124 464 4532