EY Tax and Regulatory Alert

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INDIRECT TAX

Part A - Key Indirect Tax updates

Goods and Services Tax

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

- **Notification No. 51/2023 -Central Tax Dated: 29.09.23** was issued by the CBIC in order to notify the following amendments to the CGST Rules, 2017 w.e.f. 01.20.2023:

- Amendment in Rule 8: The said rule is amended in order to notify that the every person liable to be registered under Section 25(1) of the CGST Act, A2017 shall before applying for registration, declare his Permanent Account Number, State or Union territory in Part A of FORM GST REG-01 on the common portal, either directly or through a Facilitation Centre notified by the Commissioner. Further, every person being an Input Service Distributor shall make a separate application for registration as such Input Service Distributor.

- However, the below persons are exempt from the said rule:

  (i) a non-resident taxable person;
  (ii) a person required to deduct tax at source under section 51;
  (iii) a person required to collect tax at source under section 52;
  (iv) a person supplying online information and database access or retrieval services from a place outside India to a non-taxable online recipient referred to in section 14 or a person supplying online money gaming from a place outside India to a person in India referred to in section 14A under the Integrated Goods and Services Tax Act, 2017 (13 of 2017),

- **Notification No. 02/2023 -Integrated Tax Dated: 29.09.23** was issued by CBIC to notify the following amendments to Integrated Goods and Services tax Act, 2017.

- Amendment in Section 5: The said rule is amended to exclude the goods imported and notified by the government on the recommendations of the Council from the purview of levy and collection of in accordance with the provisions of section 3 of the Customs Tariff Act, 1975 (51 of 1975.) on the value as determined under the said Act at the point when duties of customs are levied on the said goods under section 12 of the Customs Act, 1962 (52 of 1962.)

- Amendment in Section 10: Clause (ca) is inserted after Section 10 (1) (c) to provide that where the supply of goods is made to a person other than a registered person, the place of supply shall, be the location as per the address of the said person recorded in the invoice issued in respect of the said supply and the location of the supplier where the address of the said person is not recorded in the invoice.

- **Notification No 52/2023- Central Tax dated 26.10.2023** was issued by CBIC to notify the following amendments to the CGST Rules, 2017:

- Amendment in Rule 28: A new sub-rule 2 is inserted to provide for value of supply in case of bank guarantees. As per the said sub-rule *"the value of supply of services by a supplier to a recipient who is a related person, by way of providing corporate guarantee to any banking company or financial institution on behalf of the said recipient, shall be deemed to be one per cent of the amount of such guarantee offered, or the actual consideration, whichever is higher"*

- Amendment in Rule 142: Rule 142 has been amended to state that instead of issuing an order, the proper officer shall issue an intimation in Form DRC-05 concluding the proceeding in respect of notice issued under Section 73.

- Amendment in Rule 159: Rule 159 has been amended to state that the provisional attachment of property shall be removed only on the written instructions from the Commissioner to that effect or on expiry of a period of one year from the date of issuance of order under sub-rule (1), whichever is earlier

- **Notification 12/2023- Central Tax (rate) dated 19.10.2023** was issued by CBIC in order to amend notification 11/2017 by inserting the following condition in column (5):

  "Provided further that where the supplier of input service in the same line of business charges central tax at a rate higher than 2.5%, credit of input tax charged on the input service in the same line of business in excess of the tax paid or payable at the rate of 2.5%, shall not be taken."

- **GSTN Advisory on e-Invoice JSON download functionality Live on the GST e-Invoice**: Functionality has been enabled on the GSTN to download the generated and received e-Invoices in JSON format

  This feature enables users to access and download comprehensive e-invoice data from all six IRPs (Invoice Registration Portals). As for accessibility, you can retrieve e-Invoice JSON files for a period of up to 6 months from the date of IRN generation. This functionality is also accessible via GSP (GST Suvidha Providers) through G2B (Government-to-Business) APIs

Customs and Foreign Trade Policy (FTP)

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

- **Notification No. 69/2023-Customs (N.T) dated 27.09.2023** was issued by CBIC to extend the exemption from deposits under Section 51A (4) of the Customs Act, 1962, till November 30, 2023.

- This extension of exemption applies to:
  I. Goods imported or exported in customs stations where customs automated systems are not in place.
  II. Goods imported or exported in International Courier Terminals.
  III. Accompanied baggage.
  IV. Deposits other than those used for making electronic payments of:
    a. Any duty of customs, including cesses and surcharges levied as duties of customs.
    b. Integrated tax.
    c. Goods and Service Tax Compensation Cess.
    d. Interest, penalty, fees, or any other amount payable under the Act or Customs Tariff Act, 1975 (51 of 1975).

- **Notification No. 70/2023-Customs (N.T) dated 27.09.2023** was issued by the CBIC to extend the exemption from deposits for specified goods under Section 51A(4) of the Customs Act, 1962 (52 of 1962), until December 1, 2023.

- This extension of exemption applies to:
  I. Goods imported or exported in customs stations where customs automated systems are not in place.
  II. Accompanied baggage.
  III. Deposits other than those used for making payment of:

(a)Any duty of customs, including cesses and surcharges levied as duties of customs.
(b) Integrated tax.
(c)Goods and Service Tax Compensation Cess.
(d)Interest, penalty, fees, or any other amount payable under the said Act, or the Customs Tariff Act, 1975 (51 of 1975).

- **Notification No. 60/2023-Customs dated 19.10.2023** was issued by CBIC to amend the existing Notification No. 50/2017-Customs to align it with the recommendations made by the GST Council regarding changes in GST rates on various goods.

- Accordingly, a new entry 551A is introduced in notification 50/2017- Customs which relates to "Foreign Going Vessel converted for a coastal run"
- As per the said entry, "Foreign Going Vessel converted for a coastal run" shall attract 'nil' rate of tax provided the vessel re-converts to a foreign-going vessel within six months from the date of conversion. Explanations for terms like "Foreign going vessel" and "Conversion to coastal Vessel" are provided for clarity.

- **Notification No 77/2023- Customs(N.T) dated 20.10.2023** was issued by CBIC to notify the new All Industry rates of duty drawback subject to the conditions specified in the notification. The said 'All Industry Rates' are provided in a schedule annexed to the notification.

- The said notification shall come into force on 30th October 2023

- **Circular No. 26/2023-Customs F.No.605/13/2023-DBK dated 26.10.2023** was introduced to clarify the following salient features of the revised rates of duty drawback:

- Each tariff item in the Schedule, annexed to the above-mentioned Notification, has been provided with an AIR specified under column (4) with cap of Duty Drawback amount, wherever applicable, given under column (5). For claiming these AIRs, the relevant tariff item has to be suffixed with letter 'B'. For example, for export of goods covered under tariff item (TI) 610901, the drawback serial number should be declared as 610901B.

- AIRs of Duty Drawback have been increased for certain items pertaining to chemicals (Chapter 29), finished and lining leather, leather articles and footwear (Chapter 41, 42 and 64), textiles and articles thereof made of silk/ wool/cotton/ MMF other than of nylon) (Chapter 50 to 63), carpets (Chapter 57), glass and glass ware (Chapter 70) and gold jewellery and silver jewellery/article (Chapter 71). The increase in AIRs is on account of various factors such as changes in duties, price (OF) of imported inputs, FOB value of export goods, import intensity of inputs etc.

- New tariff items have been introduced in the Schedule pertaining to sectors, viz. sugar confectionary (2 items), chemicals (21 items), pharma (2 items), plastic (7 items), leather articles and footwear (8 items), cotton and manmade fibers/fabrics (4 items), apparels (1 item), footwear (1 item), article of stone (1 item), arms and ammunition (2 items) and furniture (4 items). Description of some of the existing tariff items have been revised for better product differentiation and for enabling tax neutralization for specific products

- Appropriate caps of duty drawback amount have been provided wherever necessary to prescribe upper limit of duty drawback.

- Additionally, the Commissioners are directed to adequate precaution to prevent any misuse.

- It is also specified in the circular that close watch should be kept by the field formations regarding any changing trend of export valuation or drawback outgo in respect of goods where caps have been removed or increased as compared to the earlier caps. Any change in pattern should be immediately brought to notice of the Board.

- **Circular No. 24/2023-Customs F.No. 450/117/2017-Cus-IV dated 30.09.2023** was introduced by CBIC to clarify certain aspects in relation to implementation of the newly amended Section 16(4) of IGST Act, 2017. The following has been clarified:
- The that the goods mentioned in the Table annexed to Notification no. 01/2023-Integrated Tax dated 31.08.2023 may be exported only under LUT.

- To implement above restrictions imposed on export of goods or services on payment of IGST, DG Systems CBIC has developed a backend functionality to restrict IGST refund route for the goods as specified in the Notification no. 01/2023-Integrated Tax. Through the said functionality, changes have been made in the system of filing of shipping bills and during amendment, with respect to the commodities mentioned in the said notification. Since IGST refund is paid at shipping bills level, the checks have been enabled at shipping bill level.

- In cases where a shipping bill contains single or multiple invoices for which IGST have been paid and even if one invoice contains an item which is restricted for export on payment of IGST under section 16(4) of the IGST Act, the shipping bill containing such items will not be allowed to be filed.

- **Circular No. 23/2023-Customs F. No.528/36/2016-STO(TU) Dated 30.09.2023** was introduced to specify the mandatory additional qualifiers in import/export declarations in respect of certain products.

- For the commodities imported under chapters 28, 29, 32, heading 3808 and chapter 39, it has been decided to seek additional details mandatorily at the time of filing import declarations as follows: (a) Chemical Category: (I) Bulk and Basic Chemicals; (II) Formulations and Mixtures or (III) Proprietary component, R&D or Others.

- In case of non-availability of information for even one ingredient with the importer for the reason that information is not shared by the supplier due to confidentiality, a self-undertaking is to be provided in the Bill of Entry.

- **Trade Notification No. 38/2023, Dated: 19.10.2023** was issued by DGFT in order to amend and clarify the Import Policy Conditions for import of specified Information Technology (IT) hardware.

- Earlier, import of laptops, tablets, all-in-one personal computers, ultra-small form factor computers and servers falling under HSN 8471 were put under 'Restricted' category w.e.f. 1 November 2023 (subject to certain exceptions) and their import would be allowed against a valid license (Import Authorization).

- Vide present Notification no. 38/2023 dated 19 October 2023, exemption from obtaining Import Authorization for importing above stated IT hardware is extended to following cases:
    - Such hardware manufactured in Special Economic Zone (SEZ) units and imported by Domestic Tariff Area (DTA) unit.
    - Import by private entities on behalf of Central Government (CG), State Government and agencies/ undertakings owned and controlled by CG for Defence and Security purposes.
    - Hardware imported after sale for repair/ return/ replacement as well as re-import of repaired IT hardware.
- Further, it is clarified that:

- SEZ units and Export Oriented Units (EOUs)/ Electronics Hardware Technology Park (EHTP) units/ Software Technology Parks of India (STPI) units/ Bio-technology Park (BTP) units are not required to obtain Import Authorization, provided the imported hardware is used only for captive consumption.

- There are no import restrictions on spares, parts, assemblies, sub-assemblies, components and other inputs necessary for IT hardware devices.

- IT hardware items essential for capital goods are exempt from import licensing requirements. However, if such hardware itself are primary capital goods, the exemption would not apply.

- The importers are allowed to apply for multiple authorizations and same are valid upto 30 September 2024. The quantity mentioned in the Import Authorization may also be amended at any point, provided that overall value of the Import Authorization remains unchanged.

- **Public Notice No. 32/2023 dated 09.10.2023** is issued by DGFT to introduce Automatic System based issue of Status Holder Certificate (e-SHC) with no requirement of filing any application by the exporter.

- Accordingly, the revised para 1.08 Status Holder: Application for grant of Status Certificate is as follows:

a. In the interest of trade facilitation, the endeavor has been to recognize and grant system-generated electronic Status Holder Certification, based on merchandise export data available with DGCI&S without the need for filing any application by the exporter.
b. Wherever required, exporters may also file an application online for recognition as well as for up-gradation of Status under the Policy in ANF IB along with CA Certificate. Online Application for Status certificate shall be filed with regional jurisdictional offices (RA) of DGFT as determined by the location of Registered Office in the case of Company and of Head Office in the case of others as per Appendix 1A.

- **Trade Notice No. 28/2023 dated 09.10.2023** was also issued by DGFT to notify Automatic System based issue of Status Holder Certificate (e-SHC) with no requirement of filing any application by the exporter.

- The said notice clarified that the individual exporters will be divided into the five Status categories based on available merchandise export figures from EDI, non EDI Ports and SEZ ports as per the eligibility criterion in Foreign Trade Policy 2023. As a result there will be no requirement by the exporter to file any kind of application and the e-SHC, for a particular status category will be generated automatically by the IT system.

- Hence, this will eliminate the earlier process of submission of an online application with supporting export performance certificate from a Chartered Accountant and will also do away with the file examination required at the DGFT Regional Offices and use existing data elements available within the Government for export certification.

- Further, the trade notice also stated that the e-SHC will be made available to the exporting entity in their registered email and the customer dashboard @ DGFTportal (https://www.dgft.gov.in/CP/), after necessary IT iterations, by 15 th of August each year. The data set used for the Status categorization will be the merchandise export performance of the preceding 3 financial years or the preceding 2 financial years (in case of gems and jewelry sector) plus the 3 month export data from April to June of the current financial year.

- Further, it is reiterated that all Status Holder Certificates issued under FTP 2015-20 will remain valid till 30th September 2023 only as provided under para 1.09 of HBP 2023 and any IEC holder willing to avail the Status Holder Certificate under the FTP 2023, and who is not getting covered under

the new mechanism of automatic issue, will need to apply online to the concerned jurisdictional RAs of DGFT as per para 1.08 of HBP 2023.

- **Trade Notice No. 30/2023 dated 19.10.2023** has been issued to invite submission of data to RoDTEP Committee for review of RoDTEP rates.

- The last date for submission of information to the RoDTEP Committee in the designated formats as given in Annexure B (Part 1 and Part 2) of the said Trade Notice is 30th November 2023.

- Further, the relevant orders and data formats etc. have also been made available in the public domain at CBIC website (cbic.gov.in) under the link > Taxpayer and Stakeholder Assistance > Public Information > RoDTEP Committee.

Part B- Case Laws

Goods and Service Tax

1. **M/s Batra Brothers Pvt. Ltd. vs. Union Territory of Ladakh and another [High Court of Jammu & Kashmir and Ladakh at Jammu] [TS-542-HCJK-2023-GST]**

Subject Matter: Ruling wherein it was held that depositing the amount in electronic cash ledger can be accepted as payment of 25% pre-deposit as mandated by proviso (1) to sub-Section (6) of Section 107 of CGST Act,
2017, read with Section 21 of UTGST Act, 2017.

Background and Facts of the case

- M/s Batra Brothers Private Limited (hereinafter referred to as “the petitioner”), had filed an appeal (Appeal No. ARN AD380722000012S) against the penalties imposed.

- However, the appeal was dismissed by the department because the petitioner did not fulfil the requirement of making a pre-deposit amounting to 25% of the penalty. Instead of depositing this amount directly with the authorities, the petitioner had placed the required sum in the electronic cash ledger.

- The respondent's objections centered on the technical nature of the petitioner's actions. While it was not disputed that the petitioner had deposited an amount equivalent to 25% of the penalty, it was argued that this deposit into the electronic cash ledger did not satisfy the precise legal requirements.

Discussions and findings of the case

- The Hon’ble High Court reviewed the arguments and found that the respondent's objections were of a technical nature. The court emphasized that the law, specifically proviso (1) to sub-Section (6) of Section 107 of the CGST Act, 2017, and Section 21 of the UTGST Act, 2017, mandated that an appeal could only be considered if the appellant made a pre-deposit amounting to 25% of the penalty with the authorities.

- Further, it observed that the petitioner had chosen to deposit this pre-deposit amount in their electronic cash ledger. Section 49(3) of the CGST Act, 2017 allows for amounts available in the electronic cash ledger to be used for making various payments under the Act. The manner and conditions for utilizing these funds are subject to the prescribed rules and regulations.

- Moreover, given that the required amount was already deposited in the electronic cash ledger by the petitioner, the Hon’ble High court deemed it appropriate and in the interest of justice to permit the authorities to access and utilize this amount as a valid pre-deposit.

Ruling

- In light of the above, the Hon’ble High Court instructed the petitioner to facilitate the utilization of these funds for the purpose of meeting the pre-deposit requirement.

- Hence, the appeal was taken up for consideration on merits.

Customs and FTP

1. M/s. Garrett Motion Technologies (India) Pvt Ltd [TS-532-AAR-2023-CUST]

Subject Matter: Ruling wherein it was held that 'Turbochargers' will get benefit of exemption only when they are suitable for use in goods other than motor vehicles/cars/cycles falling under heading 8702, 8704, 8703 and and 8711;

Background and Facts of the case

- M/s. Garrett Motion Technologies (India) Pvt Ltd (hereinafter referred to as the 'applicant') are pioneers of turbocharging systems for gasoline and diesel. They are strong players in the niche segments of electric boosting and automotive software solutions.

- The Applicant is involved in import and trading of 'Turbochargers' which are suitable for use in (a) On-highway applications such as motor vehicles and (b) Off-Highway equipments such as generators, power generation units, earth moving equipment and construction equipment, etc.

- All Turbochargers are classified under Tariff Item 84148030 of the Customs Tariff upon import.

- The applicant has applied for Customs Advance Ruling before Customs Authority for Advance Ruling ('CAAR') to seek an understanding towards the eligible benefits in terms of SI. No 448H of NN 50/2017- Customs as amended for import of 'Turbochargers' (classifiable under CTH 84148030) which are suitable only for use in Off-Highway equipments.

Discussions and findings of the case

- The Appellant's contentions in the instant matter is as follows:

- The Applicant supplies the imported Turbochargers to two of their customers- Caterpillar India Pvt Ltd and Perkins India Pvt Ltd. Those customers are engaged in Off-Highway equipment business only.

- On highway vehicles have engine displacement capacity ranging from 0.6L to 9L only, whereas the off highway equipment has massive engine displacement capacity ranging from 14L to 60L.

- The Turbochargers which are the matter of present application are incapable of being used in engines having capacity less than 14 L and can be used only in high capacity engines.

- Further, the Applicant highlighted that an investigation was initiated by DRI regarding import of the Turbochargers and Actuators.

- Pursuant to the investigation, the Applicant had surrendered the entire customs duty forgone along with interest in respect of imports of Actuators and Turbochargers suitable for use for on-highway applications only.

- As a consequence of the above, the Applicant did not claim exemption under SI NO 448H of NN 50/2017 on Turbochargers imported even if they are suitable for Off-Highway equipment only.

- Further, a Show cause notice was issued to the Applicant for Turbochargers suitable for on-highway equipment and no demand for differential duty was raised for Off-Highway equipment.

- Post analyzing the Applicant's contentions, the CAAR observed the clasdification of the Turnochargers as per Customs tariff Act 1975 and observed that there is no ambiguity in classification of the Turnochargers.

- Further, it also observed that entry no 448H of NN 50/2017 dated 30.06.2017 makes it clear that Turbochargers are chargeable for 7.5% duty instead of 15% provided they are not used in vehicles/ cars/ cycles falling under heading 8702, 8704,8703 and 8711.

Ruling

- In light of the above, CAAR held that it is difficult to distinguish Turbochargers based on its use: on-highway or off-highway. Hence, the benefit under entry no 448H of NN50/2017 cannot be linked to its use in on-highway or off-highway category of vehicles.

- Thus, the Turbochargers will get the benefit of the notification only if they are suitable for use in goods other than motor vehicles/ cars/ cycles falling under CTH 8702, 8703 8704 and 8711.

Direct Tax

1. Supreme Court rules notification to be mandatory to invoke most favored nations clause

Background and Facts of the case

- Indian constitution permits the Union of India to enter into international tax treaties. However, it requires Parliamentary nod to legislate such treaties, which can be achieved through delegated executive function through a separate statute or through a legislative device like notifications. Treaties become effective once it is notified in the Official Gazette.

- India's DTAAs with certain OECD countries have an MFN clause which provides that if after signature/entry into force of the tax treaty with the first country (original treaty), India enters into a DTAA on a later date with a third country, which is an OECD member, providing a beneficial rate of tax or restrictive scope for taxation of dividend, interest, royalty, etc. a similar benefit should be accorded to the first country.

- The application of MFN clause can be explained with the help of an illustration:

    - India-Netherlands (India-NL) DTAA was entered in 1989. The dividend article of India-NL DTAA provides that dividend paid by Indian entities to residents of Netherlands, who are beneficial owners of such dividend, are liable to tax at a rate not exceeding 10%. However, Protocol to India-NL DTAA has an MFN clause which provides that if India enters into a DTAA on a later date with a third country, which "is" an OECD member, providing a beneficial rate of tax or restrictive scope for taxation of dividend, interest, royalty, etc. a similar benefit should be accorded to India-NL DTAA as well.

    - DTAAs signed subsequently by India with countries like Slovenia, Colombia, Lithuania (third countries) provide for lower rate of 5% tax for dividend taxation, subject to certain conditions. Accordingly, if MFN clause were to be applicable, the rate under India-NL DTAA may be claimed to be reduced to 5%. However, in the present context, these third countries were not OECD members when their respective DTAAs were entered into with India. Instead, these countries became OECD members only at a later date.

    - Accordingly, issue arose whether the beneficial tax rate agreed under DTAAs with third countries could be applied to original tax treaties, say NL in our example, with the MFN clause.

    - In addition thereto, another issue which has also been subject matter of interpretation is whether a notification by the Government of India (GoI) is required to confer the benefit of MFN clause or the provisions operate on an automatic basis if any favorable treatment has been accorded to third State, subject to conditions stated therein.

Litigation before Delhi High Court:

- The above issues have been a subject matter of litigation in India.
    - Delhi HC observed that the MFN clause of the India-France DTAA is self–operational and there was no requirement to issue a notification to cover the benefit of lower rate of tax as well as the restricted scope of taxation under more than one DTAAs. Further, the Protocol

containing MFN is an integral part of the DTAA. Accordingly, once

- the DTAA has itself been notified (which contains the Protocol including MFN clause thereof), there is no need for the Protocol to be separately notified or for the beneficial provisions of third State to be separately notified.
- The Delhi HC in undernoted case extended the benefit of lower withholding rate of 5% on dividend income as available in India's DTAAs with Slovenia/Lithuania/Columbia, though these countries subsequently became OECD members on the premise that:
  - The use of the word "is" in the sentence "which is a member of the OECD" in MFN clause requires countries to be OECD members when source taxation is triggered in India and not at the time when the original DTAA (India-NL DTAA) was executed.
  - Clarification issued by Netherlands authorities confirms the benefit of 5% basis MFN trigger.
  - The Protocol of a DTAA forms an integral part of the DTAA and there is no requirement of issuing a separate notification in order to apply the provisions of the Protocol.
  - Further, the above decision of the Delhi HC was subsequently followed by courts in various cases where courts allowed the benefit of lower withholding rate pursuant to MFN clause.

Appeal before the SC

- In a batch of appeals arising from the favorable Delhi HC decisions in various cases on interpretation of the MFN clause contained in various Indian DTAAs (viz. Netherlands, Switzerland and France respectively), the revenue has appealed before the Supreme Court. The issue before the SC was two-fold:
  - Whether there is any right to invoke the MFN clause when the third country with which India has entered into a DTAA was not an OECD member at the time of entering into such DTAA.
  - Whether MFN clause is to be given effect to automatically or it is to only come into effect after a notification is issued in this regard.

Supreme Court ruling

- The SC ruled that in order to invoke the beneficial provisions of a DTAA pursuant to MFN clause, India is required to specifically issue a notification to this effect. In absence of specific notification reflecting consequential amendment, MFN provisions cannot be invoked. The SC broadly concluded the controversy by laying down following three principles:

1. To give effect to a DTAA or any Protocol changing its terms or conditions, which has the effect of altering the existing provisions of law, notification under Section 90(1) of the ITL is necessary and mandatory.
2. MFN clause in a DTAA does not automatically lead to extending the benefit covered in the DTAA of third county (which is a member of OECD), with which India entered into DTAA subsequently. In such an event, the terms of the earlier DTAA require to be amended through a separate notification under Section 90 of the ITL.
3. On the aspect of the time period when a third country should be an OECD member in order to apply the beneficial treatment accorded to such country by invoking MFN clause, the SC clarified that the relevant date is the initial treaty signing date with India and not any subsequent date

when that third country becomes an OECD member.

Brief reasoning provided by the SC has been discussed below:

- **Requirement of legislation to enforce treaty provisions:**

- Having regard to the Indian Constitutional provisions (Article 253 and entries in the Union List) India has the sovereign right to enter into international treaties and conventions. However, for it to be binding on Indian nationals, treaty needs to be enacted by law or enabled through legislation. The terms of a treaty ratified by the Union do not ipso facto acquire enforceability.

- Exclusive power to legislate the treaties entered into by the Union lies with the Parliament. If Parliament refuses to give effect to treaties, even though treaties bind the Union vis a vis other Contracting State, it is not binding upon Indian Nationals.

- Unlike other countries, merely signing of a treaty does not result in it coming into force in India. A legislation is required to give effect to the treaty if it restricts or affects the rights of citizens or others or modifies the law of India. If such rights are not affected, no legislation is necessary. It is only in the event of any ambiguity in the law, that court is required to look at international instruments to get clarity.

- **Treaty practice of India in relation to DTAAs and their Protocol –**

- It has been the practice of India to give effect to MFN clause of the original country pursuant to subsequent event of a more beneficial arrangement with a third country under a treaty, through an express action of issuing notification under Section 90 of the ITL. Various notifications reflect consistent practice followed by India providing the benefit of MFN clause in different scenarios.

- In the context of controversy in the case of one of the taxpayers, the SC noted that the taxpayer wanted to claim the benefit of the restrictive definition of fees for technical services (FTS) (i.e., make available condition) given in the India-Portugal DTAA or India-UK DTAA by relying on the MFN Clause in India-France DTAA. However, the notification issued by India for providing benefit of subsequent favorable DTAAs to India-France DTAA consciously omitted the "make available" condition.

- This conscious omission suggests that presence of MFN Clause in India-France DTAA does not entitle India to grant all the benefits or favorable treatments which are granted to other countries. In the case of other country with favorable DTAA provisions, a different trajectory of negotiations might have led to different kind of benefits to the third country (UK and Portugal, in the case of France). The structure of the DTAA, and its phraseology, based on negotiations with the countries with MFN clause also plays a role in the kind of benefits that are assured through it. The structure and terms of DTAAs might be different, the coverage and definition of certain terms (FTS, permanent establishment, etc.) might be dissimilar and, hence, grant of automatic benefits based on the other country's entry into OECD may not be correct.

- The third Protocol of extant India-Switzerland DTAA, inter-alia, provides application of beneficial rate of tax to Switzerland based on third State beneficial DTAAs, while the second Protocol of India-Switzerland DTAA required the governments of both contracting states to notify each other through diplomatic channels that all legal requirements and procedures, for giving effect to the Protocol so as to extend the MFN benefit, have been satisfied. The Taxpayers, based on the language of India-Switzerland DTAA,

argued before the SC that the legislature has consciously used different terminology in its protocols suggesting that MFN clause as it stands today (after amendment vide third Protocol) is made auto-executory. The SC observed that the condition in third Protocol is more of a diplomatic formality rather than a substantial requirement, however, it does mandate the governments to notify each other about the assimilation of the Protocol into their respective domestic legal systems. Though, the provision does not give a specific timeline for this assimilation process, Switzerland cannot claim an exception from notification requirement solely based on the language of the third Protocol.

- **Unilateral decrees/clarifications of other countries** - Reliance placed by the Taxpayers on the unilateral decrees/clarifications issued by governments of other countries (viz. Netherlands, France, Switzerland) to contend that India should extend reciprocity and extend similar benefit to them, following the principle of common interpretation, is not valid. Executive orders or decrees need to be understood in relation to each country's manner of assimilation of treaties in their law.

- The manner of assimilation in other countries is radically different from India and in India either the treaty has to be legislatively embodied in law through a separate statute, or get assimilated through a legislative device (i.e., notification in the gazette) under an already enacted domestic law. Until such a step is followed, treaties and its protocols are not enforceable.

- **International perspectives and practices on treaty applicability and interpretation**

- The SC referred to Vienna Convention on Law of Treaties (VCLT), International Law Commission

    - (ILC) Draft Conclusions and International Court of Justice (ICJ) decisions for treaty interpretation and noted that it is important to consider the practice of the parties involved in interpreting treaties. The interpretation and integration of treaties into domestic law are influenced by constitutional and political factors specific to each signatory. Domestic courts cannot approach treaty interpretation in the black letter manner as is done for enacting binding law. The role of practice, especially the practice of one party, accepted generally by the international community, is relevant and sometimes determinative.

    - The treaty practice of Switzerland, Netherlands, France and India exemplify the influence of their unique constitutional and legal regimes on treaty implementation. Particularly, from India perspective, the treaty practice reveals a consistent behavioral pattern wherein notification has been issued granting the benefit of MFN clause and such practice cannot be undermined.

- **The interpretation of the term "is" –**

- The SC noted that Lithuania, Colombia and Slovenia were not OECD members when these countries entered into a DTAA with India, and they have become OECD members only on a later date.

- The SC noted Delhi HC interpretation which ruled that use of word 'is', describes a state of affairs that should exist not necessarily at the time of India entering into DTAA with third party countries, but when a request for parity or similar treatment is made under the MFN clause by the Taxpayers.

- The SC clarified that the expression "is" in the sentence "third state which is a member of OECD" of MFN clause, has a present signification and derives the meaning from

the context and, therefore, the third State should be a member of OECD when entering into DTAA with India in order to claim the favorable benefits and obtaining membership on a later date has no significance.

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