EY Tax and Regulatory Alert

September 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 September 2022

- **Circular No. 180/12/2022 - GST dated 09.09.2022** was issued by CBIC stating that In accordance with the directions of Hon'ble Supreme Court, the facility for filing TRAN-1/TRAN-2 or revising the earlier filed TRAN-1/TRAN-2 on the common portal by an aggrieved registered assessee (hereinafter referred to as the 'applicant') will be made available by GSTN during the period from 01.10.2022 to 30.11.2022.

- In order to ensure uniformity in implementation of the directions of Hon'ble Supreme Court, the Board in exercise of powers conferred under section 168(1) of the CGST Act, 2017 hereby clarifies the following:

- The applicant may file declaration in FORM GST TRAN-1/TRAN-2 or revise earlier filed TRAN-1/TRAN-2 duly signed or verified through electronic verification code on the common portal. In cases where the applicant is filing a revised TRAN-1/TRAN-2, a facility for downloading the TRAN-1/TRAN-2 furnished earlier by him will be made available on the common portal.

- The applicant shall at the time of filing or revising the declaration in FORM GST TRAN-1/TRAN-2, also upload on the common portal the pdf copy of a declaration in the format as given in Annexure 'A' of this circular. The applicant claiming credit in table 7A of FORM GST TRAN-1 on the basis of Credit Transfer Document (CTD) shall also upload on the common portal the pdf copy of TRANS-3, containing the details in terms of the Notification No. 21/2017-CE (NT) dated 30.06.2017.

- No claim for transitional credit shall be filed in table 5(b) & 5(c) of FORM GST TRAN-1 in respect of such C-Forms, F-Forms and H/I-Forms which have been issued after the due date prescribed for submitting the declaration in FORM GST TRAN-1 i.e. after 27.12.2017.

- Where the applicant files a claim in FORM GST TRAN-2, he shall file the entire claim in one consolidated FORM GST TRAN-2, instead of filing the claim tax period wise as referred to in sub-clause (iii) of clause (b) of sub-rule (4) of rule 117 of the Central Goods and Services Tax Rules, 2017.

- In such cases, in the column 'Tax Period' in FORM GST TRAN-2, the applicant shall mention the last month of the consolidated period for which the claim is being made.

- The applicant shall download a copy of the TRAN-1/TRAN-2 filed on the common portal and submit a self-certified copy of the same, along with declaration in Annexure 'A' and copy of TRANS-3, whereever applicable, to the jurisdictional tax officer within 7 days of filing of declaration in FORM TRAN-1/TRAN-2 on the common portal.

- The applicant shall keep all the requisite documents/records/returns/invoices, in support of his claim of transitional credit, ready for making the same available to the concerned tax officers for verification.

- It is pertinent to mention that the option of filing or revising TRAN-1/TRAN-2 on the common portal during the period from 01.10.2022 to 30.11.2022 is a one-time opportunity for the applicant to either file the said forms, if not filed earlier, or to revise the forms earlier filed.

- The applicant is required to take utmost care and precaution while filing or revising TRAN-1/TRAN-2 and thoroughly check the details before filing his claim on the common portal.

- In this regard, it is clarified that the applicant can edit the details in FORM TRAN-1/ TRAN-2 on the common portal only before clicking the "Submit" button on the portal.

- The applicant is allowed to modify/edit, add or delete any record in any of the table of the said forms before clicking the 'Submit' button. Once

"Submit" button is clicked, the form gets frozen, and no further editing of details is allowed.

- This frozen form would then be required to be filed on the portal using "File" button, with Digital signature certificate (DSC) or an EVC.

- The applicant shall, therefore, ensure the correctness of all the details in FORM TRAN-1/ TRAN-2 before clicking the "Submit" button. GSTN will issue a detailed advisory in this regard and the applicant may keep the same in consideration while filing the said forms on the portal.

- It is further clarified that pursuant to the order of the Hon'ble Apex Court, once the applicant files TRAN-1/TRAN-2 or revises the said forms filed earlier on the common portal, no further opportunity to again file or revise TRAN-1/TRAN-2, either during this period or subsequently, will be available to him.

- It is clarified that those registered persons, who had successfully filed TRAN-1/TRAN-2 earlier, and who do not require to make any revision in the same, are not required to file/ revise TRAN-1/TRAN-2 during this period from 01.10.2022 to 30.11.2022.

- In this context, it may further be noted that in such cases where the credit availed by the registered person on the basis of FORM GST TRAN-1/TRAN-2 filed earlier, has either wholly or partly been rejected by the proper officer, the appropriate remedy in such cases is to prefer an appeal against the said order or to pursue alternative remedies available as per law.

- Where the adjudication/ appeal proceeding in such cases is pending, the appropriate course would be to pursue the said adjudication/ appeal. In such cases, filing a fresh declaration in FORM GST TRAN-1/TRAN-2, pursuant to the special dispensation being provided vide this circular, is not the appropriate course of action.

- The declaration in FORM GST TRAN-1/TRAN-2 filed/revised by the applicant will be subjected to necessary verification by the concerned tax officers.

- The applicant may be required to produce the requisite documents/ records/ returns/ invoices in support of their claim of transitional credit before the concerned tax officers for verification of their claim.

- After the verification of the claim, the jurisdictional tax officer will pass an appropriate order thereon on merits after granting appropriate reasonable opportunity of being heard to the applicant.

- The transitional credit allowed as per the order passed by the jurisdictional tax officer will be reflected in the Electronic Credit Ledger of the applicant on the common portal.

- **Instruction No. 04/2022-23 (GST – Investigation) dated September 1, 2022** was issued by CBIC for laying down various checks before launching prosecution as follows:

- Prosecution should be launched where amount involved is more than Rs. 5 Cr.

- Recommending authority must consider various factors like nature and quantum of offence.

- Prosecution should not be filed merely demand has been confirmed.

- Prosecution should not be launched in case of technical nature or difference of opinion.

- Prosecution shall not be launched against all Directors. It should be launched against those directors who were part of decision making.

- Criminal proceedings and adjudication proceedings may be initiated simultaneously as held by Supreme Court in case of **Radheshyam Kejriwal, 2011 (266) ELT 294 (SC)**.

- Offer to compound the prosecution shall be given to offender by Principal Commissioner or Commissioner.

Customs and Foreign Trade Policy (FTP)

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

- **CircularNo.15/2022-Customs dated:16.08.2022** was issued by the CBIC where Reference is invited to Circular No. 54/2005-Customs dated 30.12.2005 on guidelines for compounding of offenses under Customs Act read with para 12 of the Circular 27/2015-Customs dated 23.10.2015. The Central Government has brought further changes in the Customs (Compounding of Offenses) Rules, 2005 vide Notification No.69/2022 Customs (N.T.) dated 22.08.2022.

- The salient features of the amendment are as follows:

  1.Satisfaction of compounding authority has been limited only to verify and be satisfied that the full and true disclosure of facts has been made by the applicant.

  2.The offense under section 135AA of the Customs Act has also been made compoundable. Further, the competent authority has been mandated to grant immunity when offense is only of this type.

- **Circular No. 16/2022 - Customs dated: 29.08.2022** was issued by the CBIC wherein reference is invited to para 3.6 of Circular No.14/2021-Customs dated 7th July 2021, wherein it has been informed that Board has decided to introduce RMS generated uniform examination orders at all Customs stations across the country.

- It may be recalled that, Board, vide Circular No. 45/2020-Customs dated 12th October 2020, had requested the National Assessment Centres (NACs) to review the examination orders given by different FAG officers in the same situation and streamline and standardise them, so as to avoid needless variations in practice and thereby obviate delays.

- Based/ on the inputs by NAC, National Customs Targeting Centre (NCTC) (former RMCC) has developed system generated centralized examination orders for Bills of Entry (BE), in coordination with DG Systems and National Assessment Centers (NACs), based on various parameters, which is now ready for rollout in phases.

- This functionality is expected to enhance the uniformity in examination, and lower the time taken in the process as well as reduce associated costs.

- Further details of the phases, order, bill of entry flow and manner of implementation by filed officer has been discussed in detail in the circular.

- **Circular No. 18/2022 - Customs dated: 10.09.2022** was issued by the CBIC wherein Reference is drawn to the Customs (Import of Goods at Concessional Rate of Duty or for Specified End Use) Rules, 2022. These rules have come into effect from 10th September 2022.

- CBIC had earlier introduced significant changes simplifying and automating the procedures in the (Import of Goods at Concessional Rate of Duty) Rules) IGCR, in short, vide Notification 09/2021-Customs (N.T.) dated 01.02.2021 followed by Circular 10/2021 dated 17.05.2021 and Notification. 07/2022 -Customs(N.T.) dated 01.02.2022 followed by Circular 04/2022 dated 27.02.2022. The online functionality has also been made available on the ICEGATE Portal.

- The salient changes include under IGCR rules include:

  a. Clarifying the time period of utilization to be the time period for compliance and bringing in a provision to extend the said period in certain cases for the reasons beyond the importer's control.

  b. Prescribing a procedure for immediate re-credit of Bonds by Jurisdictional customs officer, rather than waiting till the time of filing of the monthly statement.

  c. Expanding the scope of the IGCR procedure applicable to Specified End Use mentioned in Customs Notifications, i.e. apart from those

pertaining to manufacturing and in respect of those for providing output services. In case of end use, supply to the end use recipient and the nature of the supply is to be captured in the IGCR automated module.

d. Changes in the forms to capture the details where intended purpose is the export of goods using the goods imported.

e. Corresponding changes in the forms to better capture the different intended purposes (manufacturing, import for specified end use, export of goods using goods imported, supply to end use recipient or for provision of output service) and additional details such as Sl.No. of the Notification etc.

f. In Rule 13 of IGCRS Rules, 2022, it is mentioned that reference in any rule, notification, circular, instruction, standing order, trade notice or other order in pursuance of the Customs (Import of Goods at Concessional Rate of Duty for Manufacture of Excisable Goods) Rules,1996 and any provision thereof or to the Customs (Import of Goods at Concessional Rate of Duty for Manufacture of Excisable Goods) Rules, 2016 and any corresponding provisions thereof or to the Customs (Import of Goods at Concessional Rate of Duty) Rules, 2017 and any corresponding provisions thereof shall be construed as reference to the Customs (Import of Goods at Concessional Rate of Duty or for Specified End Use) Rules, 2022.

- IGCR rules has also issued certain clarifications in respect of various aspects of the rules, they have been summarized below:

- **Time period for utilization of goods:** When time period for utilization is specified in the notifications, the said time period will apply. If not specified, the time period of six months will apply.

- In order to facilitate trade in , a provision has been introduced wherein the jurisdictional Commissioner can further extend such period of six months by another 3 months. However, it is clarified that such extension can be given provided the importer furnishes sufficient reason/s for not conforming to the time period so prescribed, which were beyond the importer's control.

- **Specified End Use:** IGCRS Rule, 2022 is also expanded to include cases where the intended purpose is for putting the goods imported to specified end use and not necessarily manufacturing or for providing output services. In this regard, it is clarified that:

  a. Procedure of intimation, generation of a unique IGCR Identification Number (IIN), import of the goods, submission of bond, maintenance of records, filing of monthly statement or any other procedures remains the same. The Importer shall undertake compliance to the officer having jurisdiction over primary address specified in the Importer Exporter Code (IEC) issued by DGFT.

  b. End use may be specified by a notification under sub-section (1) of section 25 or under section 11 of the Customs Act,1962.

  c. Where the import is undertaken for a specified end use and no differential duty is involved, the value of the bond shall be equal to the assessable value of the goods.

  d. In cases where the intended purpose of import is supply of the goods to an end use recipient, the importer shall supply these goods under an invoice or where ever applicable, through an e-way bill, as mentioned in the CGST Act,2017. The description and quantity of such goods shall be clearly mentioned by the importer.

  e. The importer shall maintain a record of all such goods supplied in a month and provide the details in the monthly statement.

  f. The restrictions on job work are only relating to the case where it is undertaken on the goods belonging to importer and does not apply to the end use recipient who receives the goods on the supply and deals with it as stipulated in the notification.

- **Bond & Bank Guarantee:** The norms pertaining to Surety/Bank guarantee that needs to be furnished by Importers under IGCR Rules are currently covered by Circular No. 48/2017- Cus dated 08.12.2017, while the norms for importers availing exemption benefit under Notifications No. 56/2000-customs, dated 05.05.2000 or 57/2000-customs, dated 08.05.2000 is specified in para 6(ii),(iii) & (iv) of circular 27/2016 – Cus dated 10.06.2016, as amended.

- In view of the changes introduced to the procedures, the Bank guarantee/cash security/surety shall be taken as per the following norms for the purpose of extending the benefit under the Customs (Import of Goods at Concessional Rate of Duty or for Specified End Use) Rules, 2022. It is also clarified that the Circular No. 48/2017- Cus dated 08.12.2017 and the circular 27/2016 – Cus dated 10.06.2016 stands modified to this extent mentioned in the cirucular.

- **UAE – CEPA**: The Import of Gold under the India-UAE CEPA notified vide Notification 22/2022-Customs dated 30-04-2022, as amended by Notification 43/2022 dated 20-07-2022 prescribes Tariff Rate Quotas (TRQ) and following of IGCR Rules 2017. In this context, it is clarified that:

  (i) The Importer (in most cases, the nominated agencies) shall follow IGCRS Rules, 2022 for import of gold under the UAE – CEPA and supply the gold to end use recipients who are TRQ holders.

  (ii) The importer, having provided a one-time intimation in Form IGCR-1 at the common portal, can generate an IIN number and undertake multiple imports against the same. The procedure is already elaborated in the above-referred circulars. The details of end use recipient may be mentioned in IGCR-1.

  (iii) Imports pertaining to multiple TRQ holders can be clubbed together and imported in a single lot. However, it is to be ensured that when filing the bill of entry, the quantities against each TRQ holder need to be mentioned as a separate line item.

  (iv) The importer shall maintain records of the supply made to each end use recipient and shall mention the same in the monthly statement under form IGCR-3.

  (v) Importer shall follow the IGCR procedure till its supply to end-use recipient and filing of monthly statement.

- **Other changes :**As a trade facilitation measure, a new Form IGCR-3A has been notified for confirmation of consumption for intended purpose at the common portal at any point in time for immediate re-credit of the bond by the jurisdictional AC/DC, without waiting for the filing of monthly statement on the 10th of every month. The details filed in form IGCR-3A shall get auto populated in the monthly statement of the subsequent month, which has to be only confirmed by the importer.

- **Circular No. 20/2022 - Customs dated: 22.09.2022** was issued by the CBIC in regards to classification of goods that undertake lifting and handling functions and have mobility as a function.

- A detailed examination of the relevant Section notes, Chapter notes and Explanatory notes of the headings 8426 and 8705 reveals the following aspects which guide the classification of mobile machines:-

- **Movement under load** : As a general principle it can be seen that mobile machines that can move under load are classifiable under 8705. However, when the machine does not move under load or, if they do, when movement is limited and subsidiary to their main function, it is classifiable under 8426

- **Location of propelling and control elements** : It is clear that when one or more of the propelling or control elements that are features of an automobile chassis, are located in the cab of a lifting or handling machine (such as a crane) mounted on a wheeled chassis, the product is to be included in the heading 8426.

- When there are two cabs in the mobile machine- one that houses the propelling function connected to the chassis and one having the controls for the handling and lifting, the inclusion or exclusion from a heading can only be decided by examining the

integration of the chassis with the working machine.

- **The number of engines** : Whether the mobile machine comprises of a single engine used for propelling as well as lifting, or if it consists of two separate engines i.e one each for propelling the vehicle and for the lifting function, does not have a bearing on the classification between 8426 and 8705.

- Presence of a separate engine only for the lifting and handling purpose is generally indicative of a larger load lifting capability of the mobile machine.

- **Integration of the working machine with the chassis** : When the work machine is merely mounted (not integrated mechanically) on the chassis, the goods are classifiable under 8705.

- When chassis and working machine are specially designed for each other and form an integral mechanical unit and the chassis cannot be used for any other purpose- the goods are excluded from 8705 and are thus classifiable under 8426.

- Outriggers are crucial to the functioning of the mobile machine as they provide the necessary stability in order for the machine to lifts heavy loads. If the outriggers are connected to and are a part of the sub structure i.e. the chassis and are controlled from the engine fitted with the chassis, it implies that the functioning of the outriggers which are a part of the chassis are crucial to the functioning of the crane.

- In such a scenario, the superstructure i.e. the crane and the sub structure i.e. the chassis, can be said to be working in tandem and can thus be considered to be mechanically and electrically integrated and the goods are be classifiable under heading 8426.

- In the absence of such integration of the chassis and working machine, the goods are classifiable under 8705.

- **Notification No. 33/2015 - 2020-DGFT dated: 16.09.2022** was issued by the DGFT inserting sub-para (d) under Para 2.52 'Denomination of Export Contracts' of the Foreign Trade Policy in sync with the RBI's A.P. (DIR Series) Circular No.10 dated 11th July, 2022: Invoicing, payment and settlement of exports and imports is also permissible in INR under RBI's A.P.(DIR Series) Circular No.10 dated 11th July, 2022. Accordingly, settlement of trade transactions in INR may also take place through the Special Rupee Vostro Accounts opened by AD banks in India as permitted under Regulation 7(1) of Foreign Exchange Management (Deposit) Regulations, 2016, in accordance to the following procedures:

  (i) Indian importers undertaking imports through this mechanism shall make payment in INR which shall be credited into the Special Vostro account of the correspondent bank of the partner country, against the invoices for the supply of goods or services from the overseas seller /supplier.

  (ii) Indian exporters, undertaking exports of goods and services through this mechanism, shall be paid the export proceeds in INR from the balances in the designated Special Vostro account of the correspondent bank of the partner country.

- **Trade Notice No. 16/2022-23 dated: 06.09.2022** was issued by the DGFT extending the last date for uploading of all such e-BRCS, where RoSCTL scrips have been issued for shipping bills upto 31.12.2020 has been further extended till 30.09.2022, failing which action as per para 4.96 of I IBP, as notified vide PN 58 dated 29.01.2020 would be initiated by the jurisdictional RAs.

- After 30.09.2022, no further extension would be granted and action under FT (D&R) Act, 1992 may be taken by the Regional Authorities.

Direct Tax

Part-A Key Direct Tax updates

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

1. CBDT issues additional guidelines on withholding provision on payment of business perquisites to residents

Background

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

- The withholding does not apply where the value or aggregate of value of the benefits or perquisites provided or likely to be provided during the tax year do not exceed INR 20,000. Furthermore, it also does not apply to a provider, being an individual or Hindu Undivided Family, whose total sales, gross receipts or turnover does not exceed INR10m in case of business or INR5m in case of profession, during the tax year immediately preceding the tax year in which such benefit or perquisite is provided by such person.

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

- The industry stakeholders made various representations to the CBDT to clarify certain issues on interpretation or application of the new withholding provision. Accordingly, the CBDT issued Circular No. 12 dated 16 June 2022 providing guidelines on various issues on interpretation and application of S.194R of the ITL.

- Subsequently, the stakeholders requested for more clarifications on various issues, including issues arising from clarifications provided in Circular 12/2022. In response, the CBDT has now issued a new Circular (Circular 18/2022) to provide additional clarification to alleviate difficulties in implementation of provisions of S.194R of the ITL.

Clarifications apply only to the provider of benefit

At the outset, the Circular 18/2022 states that the clarifications provided are applicable only for removing difficulties in implementation of provisions of S.194R of the ITL in the hands of the provider of benefit and it does not impact the taxability of income in the hands of the recipient of benefit which shall be independently governed by the relevant provisions of ITL.

EY comments

This is an important clarification which can have impact in two ways. If an item qualifies as taxable benefit or perquisite in the hands of the payee, then merely because Circular

relieves withholding obligation as a measure of removal of difficulty will not make it non-taxable. The payee is obliged to offer it to tax in his/her return. On the other hand, if an item does not qualify as taxable benefit or perquisite, then even if payer withholds tax based on clarifications provided in the Circular 12/2022 or the new Circular 18/2022, it is possible for the payee to independently claim it as non-taxable in his/her return of income (ROI).

FAQ 1 - Withholding does not apply on loan settlement or waiver by bank

- The Circular 18/2022 states that waiver or settlement of loan by bank may be an income to the borrower. However, saddling the banks with an obligation to withhold taxes would cast an additional burden on the banks to pay additional amount in the form of taxes which are required to be withheld in addition to the haircut already suffered on account of loan waiver. Thus, in order to remove such difficulty, the Circular clarifies that withholding under S.194R of the ITL will not be applicable to waiver of loan granted on one-time loan settlement by the following institutions:
  - Public financial institution
  - Scheduled banks
  - Cooperative banks other than a primary agricultural credit society
  - Primary co-operative agricultural and rural development bank
  - State financial corporation
  - State industrial investment corporations engaged in the business of providing long-term finance for industrial projects
  - Deposit taking non-Banking financial company
  - Systemically important non-deposit taking non- banking financial company
  - Public company engaged in providing long term finance for construction or purchase of houses in India for residential purpose
  - Asset reconstruction companies
- The Circular 18/2022 further clarifies that the tax treatment of such waiver in the hands of the borrower would not be impacted by this clarification and will be independently governed by the relevant provisions under the ITL.

EY comments

- While this clarification is welcome and clarifies the ambiguity in respect of withholding on loan settlement/waiver by banks and other financial institutions, it raises some further questions for the taxpayers.
- The view expressed by the CBDT about waiver or settlement of loan by bank being taxable income for the borrower conflicts with ratio of Supreme Court (SC) decision in the case of CIT v. Mahindra & Mahindra Ltd14 which held that such waiver is not taxable in the hands of the borrower. The rationale for such contrary view adopted by Circular 18/2022, in absence of any amendment to law post the SC ruling, is not clear. While the Circular 18/2022 states that taxability of waiver is not impacted by this clarification and will be governed by relevant provisions of the ITL, it is possible for the borrower to rely on ratio of SC ruling while filing return of income.
- Absence of clarification on similar lines for similar waiver/settlement of loans or trading debts by creditors other than specified banks and financial institutions raises ambiguity on applicability of withholding in such cases. Unlike waiver of loans by banks and financial institutions, waiver of trading debt by the creditor is taxable in the hands of the debtor but not as benefit or perquisite arising from business or exercise of profession.

FAQ 2 – Non-applicability of withholding under S.194R on reimbursement of expenses to "pure agent"

- FAQ 7 of Circular 12/2022 clarified that any expenditure which is the liability of the service provider and met by the service recipient qualifies as a benefit or perquisite provided by the service recipient to the service provider. The Circular placed

emphasis on the name in which the invoice is raised for determining whose obligation it is to incur the expense.

- As per FAQ 7 of Circular 12/2022, if service provider incurs certain expense during the course of rendering service, the invoice for which is raised in the name of the service provider and reimbursed by the service recipient, the service will qualify as a benefit provided by service recipient to service provider and hence, withholding under S. 194R will apply to such reimbursement.

- Circular 18/2022 reiterates and justifies the above position by clarifying that if the expense invoice is raised in the name of the service provider, the GST input tax credit (ITC) in respect of such invoice is claimed by the service provider, then such expense would be the liability of the service provider and if such liability is met by the service recipient it would qualify as a benefit/perquisite liable for withholding as rightly explained in Circular 12/2022. Circular seems to suggest that if the obligation to incur such expense is on the service recipient, the GST ITC can be claimed by the service recipient and not the service provider.

- Post Circular 12/2022, stakeholders brought the CBDT's notice to the concept of "pure agent" under the GST laws where GST ITC is allowed to service recipient and not to service provider. Further the expenditure incurred in the capacity of a "pure agent" is excluded from the value of supply and aggregate turnover of the service provider.

- As per GST laws, a service provider will be treated as a "pure agent" only if all the following conditions are satisfied:
  - The service provider enters into a contract with recipient of supply to act as the service provider's "pure agent" to incur expenditure or costs in the course of supply of goods or services
  - The service provider neither intends to hold nor holds any title to the goods or services or both, so procured or provided as pure agent of the recipient of supply;
  - The service provider does not use for its own interest, such goods or services so procured;
  - The service provider receives only the actual amount incurred to procure such goods or services in addition to the amount received for supply it provides on its own account;
  - The service provider acts as a pure agent of the service recipient when it makes payments to the third party on authorization by the service recipient;
  - The payment made by the service provider on behalf of the service recipient is separately indicated in the invoice issued by the service provider to the service recipient; and
  - The supplies procured by the service provider from the third party as a "pure agent" of the service recipient are in addition to services provided by the service provider on its own account.
  - Circular clarifies that if the above conditions are not satisfied, such expenditure incurred is included in the value of supply under GST.
  - However, if all the above conditions are satisfied, the GST ITC is allowed to the service recipient and it is not considered as supply of the "pure agent". Accordingly, in such case, the Circular clarifies that the amount incurred by such "pure agent" for which the agent is reimbursed by the service recipient would not be treated as a benefit or perquisite for the purposes of S. 194R.

EY comments

- The earlier clarification in FAQ 7 Circular 12/2022 triggered controversy on applicability of withholding on reimbursement of out-of-pocket expenses to service providers where the expense invoices are in the name of service providers. This is contrary to stakeholders' representation that reimbursement of expenses which are necessarily and exclusively incurred for the purposes of rendering services to the service recipient does not represent benefit or perquisite of the service provider regardless of the name in which expense invoice is raised.

- Circular 18/2022 adds to the controversy by justifying the view expressed in FAQ 7 of Circular 12/2022 on the basis that since the service provider is eligible to claim GST ITC on such expense, hence it represents service provider's own liability and reimbursement thereof is a benefit or perquisite arising from business/profession liable to withholding by the service recipient.

- The clarification provided on non-applicability of withholding on reimbursement to "pure agent" is ambiguous. The clarification justifies non-applicability of withholding on the ground that GST ITC is available to service recipient in such cases and, hence, it represents service recipient's own liability. However, it is not clear whether this clarification implies that expense invoice is also in the name of service recipient. If so, it does not offer any further relief as compared to FAQ 7 of Circular 12/2022. But if it seeks to clarify that withholding will not apply even if expense invoice is not in the name of service recipient, then it represents a carve out and offer further relief as compared to FAQ 7 of Circular 12/2022.

FAQ 3 - No withholding under S.194R on reimbursement of out-of-pocket expense which is subjected to withholding under other provisions of the ITL

- FAQ 7 of Circular 12/2022 clarified that withholding under S.194R (@ 10%) applies on reimbursement of out-of-pocket expense incurred by service provider in the course of rendering service where the expense invoice is in the name of service provider.

- On the other hand, in the past, FAQ 30 of Circular No. 715 dated 8 August 1995 had clarified in context of other withholding provisions applicable payments to contractors (@ 1%/2%) or consultants/professionals (@ 2%/10%) that such withholding has to be made on gross amount of bill including reimbursements.

- This raised an issue of conflict between FAQ 7 of Circular 12/2022 and FAQ 715 of Circular No. 715 on the issue of correct withholding provision to apply in case of out-of-pocket expense reimbursement to contractors/consultants/professionals where the base payment is covered by other withholding provisions.

- Circular 12/2022 clarifies that if taxes are withheld under other sections of the ITL in accordance with Circular No 715, then there will not be further liability for withholding under S.194R. It illustrates this clarification by stating that if out-of-pocket expense is part of the consideration in the bill for professional fee that is charged to the payer and tax is withheld under S.194J on the entire consideration including out-of-pocket expense, then there is no further benefit/perquisite which requires withholding under S.194R.

EY comments

- This is a welcome clarification and clears the air on conflict of FAQ 7 of Circular 12/2022 with FAQ 30 of Circular 715/1994. The clarification is consistent with the view expressed by the CBDT in earlier Circular 720 dated 30 Aug 1995 that all withholding provisions are mutually exclusive and cover a specific type of payment to the exclusion of others. The clarification also supports that even if the withholding rate under the other withholding provision is lower (like 1% or 2%), still the lower withholding rate will apply and not 10% under S.194R.

FAQ 4 - Further clarifications on non-applicability of S. 194R on expenses incurred on dealer conference

- FAQ 8 of the Circular 12/2022 clarified that expenditure incurred on dealer/business conferences held with the primary objective to educate dealers/customers, will not be considered as benefit/perquisite for the purposes of S.194R, provided such conferences are not in the nature of incentives/benefits to select dealers who achieve particular targets.

- But it clarified that, the expenses attributable to the leisure trip or leisure component (even if it is incidental) will be treated as a benefit/perquisite.

- It also clarified that the expenditure incurred on account of overstay prior to or beyond the dates of such conference will be treated as a benefit or perquisite.

- Several representations were made seeking clarity on various issues arising on FAQ 8 of Circular 12/2022. In response, in modification of FAQ 8 of Circular 12/2022, the Circular now clarifies as follows:
  - The Circular clarifies that merely because all dealers are not invited to dealers/business conferences will not result in such expenses
  - being treated as a benefit/perquisite provided to the dealers.
  - Expenses incurred on account of stay on the day immediately preceding the actual start date of conference and a day immediately succeeding the actual end date of the conference, will not be considered as overstay and, hence, will not be subject to withholding under s. 194R.

  - The Circular also acknowledges that there may be practical difficulties in identifying expenses resulting in benefit/perquisite to the participants of business conference due to the fact that it is a group activity and reasonable allocation is not possible. Further, non-compliance with withholding obligation under S.194R will not only result in disallowance of part (30%) of such expenses but also result in the provider of benefit being treated as “assessee-in-default” under the ITL with all other consequences.

  - In order to remove the practical difficulty, the Circular 18/2022 provides that if the provider of benefit is not able to allocate the benefit or perquisite to each of the participant using a reasonable allocation key, it may, at its option, chose not to claim deduction of expenses incurred on provision of such benefit or perquisite while computing total income under the ITL. If such option is exercised, the provider would be relieved from its obligation to withhold taxes S.194R on such benefit or perquisite and will also not be treated as “assessee-in-default” for non-deduction of tax. In such case, the provider must add back the expenditure, representing such benefit/perquisite, to calculate the provider’s total income if such expenditure is debited in the account.

EY comments

- The clarifications are welcome and resolves the ambiguity created by FAQ 8 of Circular 12/2022 in respect of conferences involving only select dealers who have achieved performance targets, overstay by one day prior or after the actual conference date and group benefits.

- It may be noted that non-applicability of withholding in case of group benefits is conditional upon difficulty to match the benefit/perquisite to each participant using a reasonable allocation. For instance, it may apply in case of vehicle hire charges for leisure trip where it may be practically difficult to keep tab on participants who actually availed the benefit. Furthermore, it is optional to the payer. Hence, the payer has to choose between (a) applying withholding and claiming deduction for corresponding expense or (b) not applying withholding and forfeiting deduction for corresponding expense. Also, the Circular 12/2022 clarifies that relief from withholding does not impact taxability in the hands of the recipient. Hence, it is possible that the benefit may still be taxable in the hands of the participants.

- It is important to note that this FAQ merely relieves withholding obligation qua the benefit/perquisite arising to the participant. The payer will still need to withhold tax as applicable to payments made qua the vendor (e.g., vehicle hire charges payable to vehicle hire vendor). While there may be no expense disallowance for such primary withholding default if the payer has opted not to claim deduction of such expense, but the payer may still be liable to be regarded "assessee-in-default" if the payer fails to withhold taxes applicable qua the payment to the vendor.

- The mode and manner of conveying the option exercised by payer to the tax authority is not clear. Payers liable to tax audit can report the exercise of option in tax audit report in Form 3CD.

- It is not clear whether taxpayers governed by special provisions like tonnage tax or life insurance companies or presumptive basis will also need to add back the expenditure in computation of total income, if option is exercised for non-application of withholding. This is because the expense disallowance for withholding tax default is otherwise not applicable to such taxpayers governed by special scheme of taxation.

FAQ 5 - Depreciation allowance on benefit/perquisite received in the form of a depreciable asset

- The Circular 18/2022 clarifies that where a benefit is provided in the form of capital asset and such asset is used in the business of the recipient, then the value of such asset which is subjected to tax deduction at source under s. 194R and which is offered to tax as income by the recipient will be deemed as the "actual cost" of the asset in the hands of the recipient. The Circular 18/2022 further clarifies that the recipient will be eligible to claim depreciation in respect of such asset on such deemed "actual cost" if all other conditions for depreciation allowance under ITL are satisfied.

- Circular 18/2022 provides an illustration of "A" gifting a car to its dealer "B" and dealer "B" using the car in its business to explain this principle. In this case, dealer "B" will be entitled to depreciation on the gifted car subject to satisfaction of following conditions:

  - "A" withholds taxes on the benefit provided to "B" as per S. 194R or obtains a declaration that the dealer "B" has paid the required taxes on such benefit by way of advance tax along with the proof for payment of advance tax as per FAQ 9 of Circular 12/2022

    AND

  - Dealer "B" includes such benefit as income in its ROI

EY comments

- This is a welcome clarification and clears the air on allowability of depreciation in the hands of the recipient on fair market value (FMV) of the asset considered for withholding purpose by the payer. The clarification may also support allowability of business expense deduction if the benefit/perquisite represents a revenue expenditure incurred wholly and exclusively for business or profession. For example, while FAQ 4 of Circular 12/2022 clarifies that distribution of free sample is a benefit/perquisite liable to withholding, if such samples are used for business/professional purposes by the recipient, the recipient can claim business deduction as also claim credit for taxes withheld by the payer.

FAQ 6 - Relaxation from withholding obligation u/s 194R for benefit provided by Embassies / High Commissions, etc. of foreign governments or international organisations

- For the removal of difficulty, Circular 18/2022 clarifies that the obligation to withhold taxes under S. 194R is not applicable on benefits/perquisites provided by following persons:
  - Organisations which are eligible for privileges and immunity under "The United Nations (Privileges and Immunity Act) 1947"
  - International organization whose income is exempt under specific Act of Parliament
  - Embassies, High Commissions, legations, commissions, consulates and the trade representations of a foreign state.

EY comments

- This is also a welcome clarification. It clarifies non-applicability of withholding despite physical presence of such foreignembassies, consulates, etc. in India.
  - Non-residents who do not have taxable presence in India can argue that they do not have withholding obligation in favor of residents by drawing support from clarification provided by the CBDT in case of withholding on purchase of goods from residents.

FAQ 7 - No withholding required on issue of bonus shares/right shares issued by widely held companies

- Stakeholders made representations that issue of bonus shares by widely held companies19 does not result in any benefit or perquisite for the shareholders on the following grounds:
  - The overall value and ownership of shareholders in the company does not change on issue of bonus shares.
  - Furthermore, cost of acquisition of bonus share is taken as nil for capital gains computation when such bonus shares are sold.
- Similarly, representations were made seeking clarity on applicability of S. 194R on issuance of right shares.
  - In response, Circular 18/2022 clarifies that withholding under S. 194R is not required on issuance of bonus/right shares by widely held companies where such bonus shares are issued, or rights offer is made, to all shareholders, as the case may be.

EY comments

- While this FAQ clarifies non-applicability of withholding for bonus shares issued and rights shares offered to all shareholders by widely held companies, it raises ambiguity for bonus shares issued and rights shares offered by closely held companies. One would believe that the rationale should equally apply to bonus/rights issue by closely held companies. However, if the tax authority rely on this FAQ to assert applicability of withholding in case of closely held companies, it may give rise to further issues

on computation of FMV for the purposes of withholding.

- It may be noted that for rights issue, it is sufficient that they are “offered” to all shareholders by the widely held company. The offer need not be accepted by all shareholders.

- Apart from closely held companies, the FAQ can also create controversy in situations like bonus shares issued or rights offered to equity shareholders only and not to preference shareholders.

Part B- Case Laws

Goods and Service Tax

1. **M/s Roshan Motors Pvt Limited vs Commissioner Of Central Excise And Customs, Central Goods And Service Tax, Jaipur, Rajasthan [CESTAT New Delhi- Service Tax Appeal No. 51336 of 2019-CUS (DB)]**

Subject Matter: Ruling wherein Hon'ble Tribunal held that Amount of "incentive" or "discount support" received from manufacturer on account of sales promotion is not a consideration for service. Accordingly, no service tax is leviable on the same.

Background and Facts of the case

- The appellant is an authorized dealer for trading of passenger and commercial vehicles of Tata Motors Ltd. ("TML"). The appellant buys vehicles from TML, (Tata Motors Ltd.,) for further sale to the buyers by virtue of a dealership agreement dated 11.10.2011, entered into between Tata Motors Ltd., and the appellant.

- Under the said agreement, the appellant receives discounts from TML, which are referred to as "incentives" and "Discount support" under the schemes, which are issued in the beginning of the month.

- The Department has sought to levy service tax on the 'incentives' and 'discount support' received by the appellant under the category of "Business Auxiliary Service" being consideration for sales promotion activity for the manufacturer (TML).

Discussions and findings of the case

- The Appellant contended that the demand is not sustainable as the amount received is trade receipts being discounts, thus, excluded from the definition of "service" under the ambit of service tax law.

- Further, transactions between Tata Motors Ltd., and the appellant is on principal to principal basis and not being in the nature of principal-agent. The activities related to promotion of sales by dealers cannot be termed as rendition of service to principal, as the same are in their own interest;

- The appellant also contended that the issue is squarely covered by a series of decisions including the decision of the principal bench of the Tribunal in the matter of **Rohan Motors Ltd., vs. Commissioner of Central Excise, Dehradun reported in 2021 (45) G.S.T.L. 315 (Tri.-Del.) - 2020-VIL-512-CESTAT-DEL-ST** which were held in favour of the appellant.

- The Hon'ble Tribunal perused the above facts and observed that the appellant works on principal to principal basis, and not as an agent of TML. The carrying out of such activities by the appellant is for the mutual benefit of the business of the appellant, as well as the business of TML.

- The Hon'ble Tribunal also discerned that the position in this regard is fairly settled as held by the Hon'ble Supreme Court in the matter of case of **Moped India Ltd. vs. CCE reported at 1986 (23) E.L.T. 8 (SC) - 1985-VIL-32-SC-CE.** The amount of incentives and discount support received on such account cannot, therefore, be treated as consideration for any service. The incentives and discount support received by the appellant cannot, therefore, be leviable to service tax.

- The Tribunal also contended that the same view was taken by the Tribunal in **CST v. Sai Service Station Ltd. - 2013 (10) TMI 1155-CESTAT Mumbai = 2014 (35) S.T.R. 625 (Tribunal) - 2013-VIL-118-CESTAT-MUM-ST.**

Ruling

- In light of the above, the Hon'ble Tribunal held that the department had erred in taking a different view in this case.
- The service tax on the amount received as incentives could not, therefore, have been levied to service tax.

2. M/s ESS ESS KAY ENGINEERING COMPANY PRIVATE LIMITED [Punjab Authority for Advance Ruling- ORDER NO. AAR/GST/PB/016]

Subject Matter: Ruling wherein the Punjab GST Authority for Advance Ruling held that roof-mounted air conditioning unit used in railway coaches shall be classified under Heading 8415 as it specifically covers air conditioners.

Background and Facts of the case

- The applicant is inter-alia engaged in manufacture of "Roof Mounted Air-conditioning unit for Passenger Coaches of Railway as per RDSO specification and drawing" (in short impugned goods).
- The impugned goods are exclusively for use in railway coaches, it has no marketability except use in railways coaches. It is an integral / essential part of Air-conditioned railway coaches and accordingly classifiable under HSN 8607 99 of Customs Tariff Act as made applicable to GST vide Notification No. 1/2017 CT (R) dated 28.06.2017.
- The applicant has sought advance ruling on the classification of roof mounted Air-conditioning unit especially for use in railway coaches (manufactured as per railway design) i.e. whether they are classifiable under HSN- 8415 1090- IGST @ 28% or under HSN 8607 99 – IGST @ 18% as parts of Railway Coaches/ Locomotives?

Discussions and findings of the case

- The applicant has drawn reference to Note 3 of Section XVII of Customs Tariff Act wherein it is mentioned that References in Chapters 86 to 88 to parts or 'accessories' do not apply to parts or accessories which are not suitable for use solely or principally with the articles of those Chapters. A part or accessory which answers to a description in two or more of the headings of those Chapters is to be classified under that heading which corresponds to the principal use of that part or accessory.
- The effect of Note 3 is therefore that when a part or accessory can fall in one or more other Sections as well as in Section XVII, its final classification is determined by its principal use. The impugned goods are solely and principally for use in the manufacture of passenger coaches of railways.
- Thus, the applicant argued that the goods viz. Roof Mounted Air-Conditioning unit manufactured and supplied by them, for use in railway coaches merits classification under HSN Code 8607 of Customs Tariff Act attracting levy of GST @18% (CGST @9% and PGST @9%) instead of HSN Code 8415 of Customs Tariff Act, attracting levy of GST @28% (CGST @14% and PGST @14%).
- Further, the jurisdictional authority also contended that Roof mounted AC package unit for fitment LHB/ LGB coaches manufactured by the above mentioned firm comes under Tariff Head-8607 99 as parts of railway coaches/locomotive.
- The Authority for Advance Ruling took into consideration the submissions made by the Applicant and referred to the HSN 8607 & 8415 and the respective chapter notes of chapter 84 & 86 of the Customs Tariff Act.

- As per the explanatory notes of heading 8415, "*This heading covers certain apparatus for maintaining required conditions of temperature and humidity in closed spaces. The machine may also comprise elements for the purification of air*

They are used for air conditioning offices, homes, public halls, ships, motor vehicles, etc., and also in certain industrial installations requiring specific atmospheric conditions (e.g. in the textile, paper, tobacco or food industries)."

- Hence, the Authority inferred that Roof Mounted Air Conditioning unit manufactured and supplied by the applicant is squarely covered under HSN 84.15 irrespective of field of industry in which they are used.

- Furthermore, the Authority had perused chapter note 2 of chapter 86 and observed that 'Roof Mounted Air-conditioning units' are not covered specifically under HSN 8607.

- Moreover, the explanatory notes of the said Section XVII also state that items, which are classified under Headings from 8401 to 84.79, will not be considered as parts for classification under Section XVII even if they are identifiable as for goods of this Section.

Section XVII even if they are identifiable as for goods of this Section.

Ruling

- In light of the above, the Punjab GST Authority for Advance Ruling held Roof Mounted Air-Conditioning unit manufactured by the applicant are classifiable under HSN Heading 8415 and the classification of the goods shall not alter on account of supply by them to Railways.

Direct Tax

1. Supreme Court (SC) in the case of PCIT v. Khyati Realtors Pvt. Ltd (Taxpayer)

Subject Matter: Ruling wherein Supreme Court disallows bad debt deduction on advance given by real estate developer and financier to purchase commercial property

Background

- The provisions of the ITA dealing with business income computation include a specific provision for allowing bad debt deduction by way of s.36(1)(vii) for which relevant conditions are as follows:
  - The debt should either (a) have been taken into account in computing the taxpayer's income of the tax year in which it is written off or in an earlier tax year ("trading debt") or (b) represent moneys lent in the ordinary course of business of banking or moneylending carried by the taxpayer.
  - The bad debt should be "written off" as irrecoverable in the accounts of the taxpayer for the relevant tax year.
  - Post amendment made by Finance Act 2001 with retrospective effect from tax year 1988-89, the "write off" does not include provision for bad and doubtful debts made in the accounts of the taxpayer. In this regard, the SC in an earlier ruling in the case of Southern Technologies Ltd v. JCIT (Southern Technologies ruling) has explained the distinction between "write off" and "provision".
  - There is also a residual or general provision by way of s.37(1) which allows deduction for expenditure (not being capital expenditure or personal expenditure) incurred wholly and exclusively for business purposes. But the condition for allowance of deduction under this provision is that such expenditure should not be of the of the nature described in earlier provisions (including bad debt deduction under s.36(1)(vii))
  - 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.

- **Facts of the case**
  - The Taxpayer is engaged in real estate development business, trading in transferable development rights and financing activity.
  - In tax year 2006-07, the Taxpayer gave an amount of INR 100m to another real estate developer by way of advance against booking to purchase commercial premises in an upcoming project being developed by such developer. No interest was charged on such advance since it was towards reserving booking for purchase of commercial property.
  - But the project did not take off and Taxpayer started efforts to recover the advance back from the said developer. Since, the Taxpayer could not recover the advance, its Board of Directors passed a resolution on 28 March 2009 to write off the advance in its accounts as bad debt. Subsequently, in tax year 2011-12, the Taxpayer could recover a part of such debt written off in tax year 2008-09, which it offered to tax as business income.
  - The Taxpayer claimed deduction of write off of bad debt of INR 100m in its income tax assessment for tax year 2008-09 primarily under s.36(1)(vii) and alternatively under s.28/37(1). However, the tax authority and the FAA denied deduction under both provisions on the grounds that (a) the conditions for claiming bad debt deduction were not fulfilled and (b) since the claim fell under bad debt deduction provision but could not be allowed due to non-fulfilment of

conditions thereof, it cannot be allowed under s.37(1) as well.

- On further appeal by the Taxpayer, the Mumbai Tribunal confirmed non-admissibility of claim as bad debt deduction due to non-fulfilment of conditions thereof. More particularly, it held that the advance given did neither represent a trading debt offered as income in the past nor represented monies lent in the ordinary course of moneylending since no interest was charged thereon. However, the Tribunal allowed the deduction under s.28/37(1) on the ground that the advance was given in the ordinary course of real estate development business. It did not represent capital expenditure since the commercial premises was stock in trade for taxpayer engaged in real estate business. The Tribunal also noted that the Taxpayer had offered recovery of part of advance in subsequent tax year as business income.

- As it appears, the Taxpayer did not file any appeal against the Tribunal ruling denying bad debt deduction under s.36(1)(vii) – most probably, since the overall decision was in Taxpayer's favor whereby Tribunal allowed deduction as incidental trading loss under s.28/37(1). The tax authority filed further appeal before the Bombay HC. The question of law considered by the Bombay HC on tax authority's appeal was limited to correctness of Tribunal ruling in allowing alternate claim of deduction under s.37(1).

- The Bombay HC upheld the Tribunal ruling on allowance of deduction under s.37(1). The Bombay HC specifically noted that the Memorandum of Association (MOA) of the Taxpayer permitted to engage in wide range of activities in real estate. Hence, the loss of advance given for purchase of commercial property as a commercial venture was clearly a business loss.

- The tax authority appealed further to the SC against the Bombay HC ruling.

Taxpayer's contentions before SC:

- The undisputed facts of the case are that the Taxpayer is engaged in the business of real estate and financing; the Taxpayer's MOA permitted wide range of real estate activities as also lending of money; the Taxpayer paid advance of INR 100M as advance to purchase commercial property; the advance was given in ordinary course of business and it was written off in tax year 2008-09.

- The Taxpayer is not required to establish that the debt written off became irrecoverable. Reliance was placed on earlier SC ruling in the case of T.R.F. Limited v. CIT (TRF ruling).

- Even if the write off is not allowable as bad debt deduction under s.36(1)(vii), it is still allowable as deduction under s.37(1). Reliance, amongst others, was placed on SC ruling in the case of CIT v. Mysore Sugar Co. Ltd (Mysore Sugar ruling) where the SC allowed deduction of write of advances given by sugar manufacturer to sugarcane suppliers towards purchase of sugarcane which, due to drought conditions, the suppliers could neither supply sugarcane nor refund the advance.

Tax authority's contentions before SC:

- It is obligatory upon the Taxpayer to prove that conditions germane to bad debt deduction under s.36(1)(vii) are fulfilled. Reliance was placed on earlier SC ruling in the case of Catholic Syrian Bank v. CIT9 (Catholic Syrian ruling) for this proposition. The Tribunal and HC were in error since the Taxpayer's claim was not supported by any material or document.

- There was no material to support either that the amount was given as advance to purchase commercial property or that it was given as loan. The claim of loan was not supported by any material indicating terms of loan or conditions of repayment including interest.

- The Taxpayer's alternative claim under s.37(1) was an after-thought raised for the first time after the first appellate authority's order.

SC ruling:

Reversing the decisions of the Tribunal and the HC, the SC ruled in favor of the Tax Authority and held that the deduction was not allowable under both s.36(1)(vii) and s.37(1) for following brief reasons:

Non-admissibility as bad debt deduction under s.36(1)(vii)

- It is true that if taxpayer carries on business, it is entitled to bad debt deduction under s.36(1)(vii) but it is subject to fulfilment of conditions specified therein.

- The Southern Technologies ruling confirms the distinction between "write off" of bad debt and making "provision" in respect of bad or doubtful debt. S.36(1)(vii) allows deduction for "write off" but not for "provision". Furthermore, Catholic Syrian ruling confirms that it is obligatory upon the taxpayer to prove to the tax authority that it satisfies the conditions germane to bad debt deduction including the condition of "write off" in accounts.

- It is true that TRF ruling upheld that it is not necessary for the taxpayer to establish that the debt, in fact, has become irrecoverable and it is sufficient to show that the debt is written off in the accounts. But in this ruling, the SC did not examine other conditions for claiming bad debt deduction as in case of Southern Technologies and Catholic Syrian rulings – although one of the judges10 was common to all three rulings. Catholic Syrian ruling was a three-judge bench ruling as compared to other two rulings which were of two-judge benches. In the circumstances of the present case, the SC felt it appropriate to accord primacy to Southern Technologies ruling.

- The SC summarized the principles emerging from the above referred three SC rulings as follows:

  - The amount of any bad debt or part thereof has to be written-off as irrecoverable in the accounts of the Taxpayer for the relevant tax year.

  - Such bad debt or part of it written-off as irrecoverable in the Taxpayer's accounts cannot include any provision for bad and doubtful debts.

  - No deduction is allowable unless the debt or part of it has been offered to tax in current or earlier tax years, or represents money lent in the ordinary course of the business of banking or moneylending carried on by the Taxpayer.

  - The Taxpayer is obliged to prove to the tax authority that the case satisfies the ingredients of claiming bad deduction in terms of above referred conditions.

- In the facts of the present case, the Taxpayer could neither establish from its accounts that the advance was given in the ordinary course of Taxpayer's business nor could it establish that the amount was given as loan in the ordinary course of moneylending business. As noted by the FAA, there was no material in support of claim of advance for purchase of commercial property like time by which constructed unit was to be handed over, area agreed to be purchased etc. Similarly, there was no material in support of claim of loan like duration of loan, terms and

conditions applicable to it, interest payable, etc.

- Furthermore, the Taxpayer could not establish from its record that the bad debt was written off as irrecoverable in the books of account.

- Also, since the advance was given to acquire immovable property, it was in the nature of capital expenditure and, hence, not allowable as revenue business expenditure.

Non-admissibility under s.37(1)

- S.37(1) allows deduction for expenditure which is not covered by earlier provisions; which is not capital expenditure or personal expenditure and is incurred wholly and exclusively for business purposes. Mysore Sugar ruling confirms that even if a claim for deduction is not allowed under s.36(1)(vii), the possibility of deduction under s.37(1) cannot be ruled out. This proposition is unexceptionable.

- However, in the facts of the case, the Southern Technologies ruling is appropriate and applicable. In that case, the SC denied alternative deduction for provision for doubtful debts under s.37(1). In that case, the SC held that a "provision" for doubtful debt which is outside the scope of s.36(1)(vii) cannot be alternatively allowed under s.37(1) since s.37(1) applies only to items not covered by earlier provisions. It further held that if a provision for doubtful debt is expressly excluded from s.36(1)(vii) then such provision cannot be claimed as deduction under s.37(1) even on the basis of "real income" theory.

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