EY Tax and Regulatory Alert

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INDIRECT TAX

Part A - Key Indirect Tax updates

1. Goods and Services Tax

This section summarizes the regulatory updates under GST for the month of February 2020

- **Order No. 01/2020** - CBIC dated 7 February 2020 extends time-limit for submitting TRAN-01 to March 31,2020. The board has however clarified that the said relief is only for taxpayers who could not submit the said declaration by the due date on account of technical difficulties on the common portal and whose cases have been recommended by the GST Council.

- **Circular No.131/1/2020** - GST dated 23 January 2020 issued by CBIC regarding standard procedures to be followed by exporters. The Government has detected certain fraudulent refund claims of Integrated Goods and Services Tax on exports. In this regard, Board has clarified on migratory measures that has been taken to mitigate the risk of ineligible refund claims. Below are the details:

  - Stringent risk parameters based checks, driven by rigorous data analytics and Artificial Intelligence tools, would be applied to verify the exporters.

  - Basis above analysis, specific exporters would be identified for further verification and refund of such exporters would kept in abeyance till the verification report is furnished. Also, the export consignments/shipments of concerned exporters would be subjected to 100 % examination at the customs port.

  - Exporters, who are selected for verification would be informed at the earliest by jurisdictional CGST or by Customs.

  - Exporters, on receipt of such information or suo-motu (if violated the legal provisions), needs to furnish details to the jurisdictional CGST authorities in Annexure A (enclosed in the copy of Circular) for further verification.

  - Verification shall be completed within 14 working days of furnishing of information by the exporter. In case of delay, the exporter may escalate the matter to the Jurisdictional Pr. Chief Commissioner/Chief Commissioner of Central Tax by sending an email.

  - In case, the refund remains pending for more than one month the exporter may register his grievance at www.cbic.gov.in/issue by giving all relevant details.

2. Customs and Foreign Trade Policy (FTP)

This section summarizes the regulatory updates under Customs and FTP for the month of February 2020

- **Circular No. 07/2020 – Customs** dated 5 February 2020 issued by CBIC regarding valuation of second hand machinery. Key highlight of the said Circular is as below:

  - With respect to imports of second hand machinery/used capital goods the Circular No. 25/2015 – Customs dated 15 October 2015, requires Customs to rely upon inspection report either issued at the port

of loading by overseas Chartered Engineer issued upon import by a pre-shipment inspection agency (PSIA) notified by DGFT, or by a chartered engineer empaneled by the Custom House where the DGFT approved PSIAs are not available.

- Representations were received to the effect that PSIAs empaneled by DGFT are insufficient in number leading to delay in clearances apart from the fact that the said PSIAs are not qualified for appraising second hand machinery.

- DGFT vide O.M. No. 01/93/180/51/AM-16/PC II(B)/E-1500/176 dated 3 September 2019, had clarified that PSIAs are meant only for certifying that consignments of metal scrap are free of radio-active agents & explosives. The PSIAs are not required to be qualified engineers. Also, ascertaining the age of a second hand machine is an engineering exercise and can be performed only by a qualified engineer. Thus, certifying the age of machines is beyond the jurisdiction of PSIAs.

Board has decided henceforth for inspection/appraisement of second hand machinery, the following procedure to be followed-

- Where the machinery is sold for export to India and the sale meets all requirements of the Customs Valuation (Determination of Value of Imported Goods) Rules 2007 ('CVR, 2007') (for imports) then the price paid/payable for the goods be basis for determining the assessable value;

- Where the machinery undergoes change in condition prior to importation (such as for reconditioning, refurbishment, modernisation etc.) apart from costs such as pre-shipment inspection, dismantling and crating charges, then all such charges need to be added for arriving at the value under Section 14 of the Customs Act, 1962;

- In many cases the value for imposition of duty cannot be determined under Rule 3 of the CVR, 2007 whereupon the same to be determined under one of the subsequent methods of valuation applied in sequential order;

- Application of Rule 4 and Rule 5 of the CVR, 2007 would be difficult on account lack of data relating to sales of the machinery to India which could be considered as identical or similar;

- Application of Rule 7 of the CVR, 2007 would also be difficult as the machinery are imported for use rather than for resale;

- Also Rule 8 of the CVR,2007 which is based on cost of production plus an amount for profit and general expenses, would not be feasible;

- Hence, Rule 9 of the CVR, 2007 (residual method) would be required to be applied;

- Given the challenges in computing value of second hand machinery and to ensure an approach which reflects commercial reality and results in value which is fair and is arrived through uniform processes by all Customs Houses, it is felt necessary to obtain inspection/appraisement reports from qualified neutral parties

- For said purpose, the inspection/appraisement reports issued by Chartered Engineer or their equivalent (form prescribed) based in the country of sale of the machinery would be accepted by all Custom Houses. If such report not produced from the country of sale, the importer could engage services of Customs House empaneled Chartered Engineer.

- Upon empanelment of Chartered Engineers by the Custom Houses, the practice of accepting certification from PSIAs for valuation of second hand machinery shall be discontinued. Those customs Houses who already have empaneled Chartered Engineers for the valuation of the second hand machinery may continue with those empaneled engineers as per the terms of the empanelment unless requirements dictate otherwise.

  To sum up the following guidelines should be followed;

- All imports of second hand machinery/used capital goods shall be ordinarily accompanied by an inspection/appraisement report issued by an overseas Chartered Engineer or equivalent, prepared upon examination of the goods at the place of sale.

- The report of the overseas chartered engineer or equivalent should be as per the Form A.

- In the event of the importer failing to procure an overseas report of inspection/appraisement of the goods, he may have the goods inspected by any one of the Chartered Engineers empaneled locally by the respective Custom Houses. In cases where the report is to be prepared by the Chartered Engineers empaneled by Custom Houses, the same shall be in the Form B.

- The value declared by the importer shall be examined with respect to the report of the Chartered Engineer. Similarly, the declared value shall be examined with respect to the depreciated value of the goods determined in terms of the circular No. 493/124/86-Cus VI dated 19/11/1987 and dated 4/1/1988.

- If such comparison does not create any doubt regarding the declared value of the goods, the same may be appraised under rule 3 of the CVR, 2007').

- If there are significant differences arising from such comparison. Rule 12 of the CVR. 2007 requires that the proper officer shall seek an explanation from the importer justifying the declared value.

- The proper officer may then evaluate the evidence put forth by the importer and after giving due consideration to factors such as depreciation, refurbishment or reconditioning (if any), and condition of the goods, determine whether the declared transaction value conforms to Rule 3 of CVR, 2007. Otherwise, the proper officer may proceed to determine the value of the goods, sequentially, in terms of rule 4 to 9.

  Circular No. 25/2015 dated 15 October 2015 is superseded with the issue of this Circular.

- **Circular No. 09/2020 – Customs** dated 5 February 2020 issued by CBIC regarding

streamlining of export data to include District level details in Shipping Bills. Key highlight of the said Circular is as below:

- Vide Notification No 33/2019-Cus. (NT) dated 25 April 2019, the Shipping Bill (Electronic Integrated Declaration and Paperless Processing) Regulations 2019 were notified. Regulation 3 of the said regulations states that the authorized person shall enter the electronic integrated declaration and upload the supporting documents on the ICEGATE either by affixing his digital signature or by availing the services at the service center. The electronic integrated declaration is to be made in the electronic form provided at the website http://www.icegate.gov.in.

- In this regard, to boost domestic manufacturing and promote exports, the Board has decided to incorporate additional attributes in the Shipping Bill to enable the Customs System to capture the Districts and States of Origin for goods being exported.

- The initiative is also aimed at bringing uniformity with the data/ information captured in the Goods and Services Tax Network (GSTN).

- With effect from 15 February 2020, apart from the data/ information required to be furnished in the present Shipping Bill, the following additional information will be required to be furnished for every item in the Shipping Bill:

  - ✓ The State of Origin of goods.
  - ✓ District of Origin of goods.
  - ✓ Details of Preferential Agreements under which the goods are being exported, wherever applicable.
  - ✓ Standard Unit Quantity Code (SQC) for that CTH as per the first schedule of the Customs Tariff Act,1975.

- With effect from 15 February 2020, the declaration of GSTIN shall also be mandatory in import/export documents for the importers and exporters registered as GST taxpayers.

Direct Tax

Key Direct Tax updates

- **Abolition of Dividend Distribution Tax (DDT):** Under the current dividend taxation regime, a Dividend Distribution Tax (DDT) is levied on the payer company. Dividend income is exempt from tax in the hands of the shareholder or unit holder.

  While the regime resulted in ease of tax collection, it was considered as regressive and as having a distortive effect in cross border situations. Therefore, with the amendment, DDT has been abolished and incidence of tax has been shifted from the company to the hands of the shareholders.
  The dividend paying company will be responsible to withhold tax from the total amount of dividend distributed.

  Non resident shareholders will be taxed at 20% on gross dividends under domestic tax law, subject to benefits under the Double Tax Avoidance Agreement (DTAA). DTAAs could potentially provide lower tax rates for taxing dividends of non resident shareholders subject to them qualifying as tax residents of an appropriate DTAA jurisdiction as well as satisfying anti-abuse provisions in the DTAA and domestic tax law, as may be applicable.

  Further, a new section 80M has been introduced on order to remove the cascading affect by allowing set-off for dividend distributed through a holding subsidiary structure. The amendment will be effective from financial year starting 1 April 2020.

- **New penalty for fake or omitted entry in books of accounts**: The Government has detected several arrangements used by taxpayers to falsely reduce Goods and Services Tax (GST) liability by claiming input tax credit from fake invoices in books of accounts. The GST charged in such fake invoices is neither paid nor intended to be paid to the Government. A new penalty will be levied under ITL to deal with such fraudulent arrangements.
  The new penalty will be levied on taxpayers required to maintain books of accounts and such books contain a false entry or an omission of entry relevant for computation of total income, to evade tax liability. Penalty will be equal to a sum of such false or omitted entry.
  Penalty will be levied on taxpayer making such false or omitted entry or any other person who causes such taxpayer to make the false or omitted entry.

- **CBDT empowered to declare and adopt Taxpayer's Charter:** To strengthen the trust between taxpayers and tax administration, a taxpayer's charter is proposed to be included in the law which will enumerate taxpayer's rights clearly.

  To facilitate the above, CBDT will be empowered to adopt and declare the Taxpayer's charter. Further, CBDT will issue orders, instructions, directions and such guidelines to other income tax authorities as it may deem fit for the administration of the Taxpayer's Charter.

- **Launch of "Vivad se Vishwas" Bill:** The Direct-tax Vivad Se Vishwas, Bill,2020 has been introduced with aim of closure of these litigations pending as on 31st January 2020 and allow businesses to deploy energy and resources saved by opting for Scheme, towards business activities.

  Under Scheme, the taxpayer has to make an application in prescribed form with the designated authority (being a notified Commissioner of Income-tax) ('DA'). On acceptance of application and payment of tax determined, Scheme grants complete immunity from prosecution and substantial relief from payment of interest and penalty.

  For matters involving disputed tax, interest and penalty thereon, out of the total entire amount of disputed tax only (complete waiver of interest and penalty levied/ leviable) is payable on or before 31 March 2020 under the scheme. For matters involving disputed penalty, interest and fees, 25% of disputed

penalty/interest/ fee is payable on or before 31 March 2020.

Certain exclusions have been stated in the Bill, to whom the scheme will not apply.

Further, the procedure to opt for the scheme has also been prescribed.

- **Lower withholding rate on fees for technical services (other than professional services):** With effect from 1 April 2020, the withholding tax rate on fees for technical services (other than professional services) paid to residents, will be reduced from 10% to 2%.

  The amendment seeks to reduce litigation on application of rate of withholding, by providing a uniform rate as applicable to payments made to residents under works contract.
  Withholding at the rate of 2% on work done will now also apply to payment to residents for manufacturing or supplying of a product in accordance with the customer specification by using material purchased not only from the customer but also a party related to the customer.

- **Other relevant updates as introduced by the Finance Act 2020:**
  - 15% concessional tax regime for new domestic manufacturing companies under section 115BAB of the ITL will now be applicable to electricity-generating companies as well
  - For the purpose of computing capital gains on immovable properties acquired before 1 April 2001, the fair market value adopted will not exceed the stamp duty value as on 1 April 2001, wherever available.
  - The return filing due date for corporates and taxpayers not liable to tax audit (non-TP cases) has been extended to 31 October although due date for furnishing tax audit and other audit reports continues to be 30 September.

- **IT Dept. enables new functionality, calls taxpayers to furnish e-payment modes made available u/s. 269SU:** The Finance (No.2) Act, 2019 (FA 2019) inserted Section 269SU in the Income Tax Act, 1961 ('the Act') to provide that every person carrying on business shall provide the facility for accepting payment through prescribed electronic modes, in addition to the facility for other electronic modes of payment, if any, being provided by such person if his turnover in business exceeds INR 500 million during the immediately preceding tax year.

  The above referred amendments came into effect from 1 November 2019.

  The CBDT has recently issued Notification prescribing the mandatory electronic modes of payments with effect from 1 January 2020 and the Circular clarifying the impact of prescribed electronic modes of payments.

  In line with the above, the Income Tax e-filing portal has enabled a new functionality for such taxpayers to provide the prescribed mode of electronic acceptance of payment made available to the customers. The functionality has been enabled under the 'compliance' tab of the e-filing portal, available upon logging in, under the head 'Prescribed Payment Modes'. The Taxpayer is expected to furnish the mode through which electronic payment is made available to customers and in case such facility is not yet implemented, an estimated date of implementation is required to be provided therein.

- **'Lower/Nil' TDS/TCS certificates - IT Dept. allows receipt of applications before the start of FY and specifies cut-off of 15th March for FY 2019-20:** In view of the time being taken to process the online request for lower/ Nil deduction certificate and to facilitate the applicants to get certificates issued with effect from 1st April of the FY, CPC(TDS) intimates that applicants can apply for lower/Nil deduction certificate u/s. 197 starting from 28th February of the immediately preceding FY. For instance, applications for the certificates for FY 2020-

21 shall be allowed to be filed on or after 28 February 2020.

Further in view of the time required for obtaining relevant data from various sources and subsequent processing of online requests for lower/nil certificate, it has been decided that no such request for issue of certificates for lower/nil deduction for a particular Financial Year shall be accepted after 15th March of the Financial Year. For instance, no application for certificates for FY 2019-20 shall be allowed after 15 March 2020.

Therefore, the applicants are advised to file Form 13 application, if required, latest by 15th March of the F.Y.

The aforementioned dates shall also be applicable in case of tax collection at source.

- **CBDT prescribes "other" e-payment modes for purposes of Sec. 40A, 269SS/T and 10 other sections:** Provisions of the following sections of the ITL prohibit cash transactions and non-compliance with such provisions results in adverse consequences like disallowance, penalty etc:
  - Sec 13A [political parties income],
  - Sec. 35AD [Deduction of capital expenditure],
  - Sec 40A [Expenses or payments not deductible in certain circumstances],
  - Sec. 43 [certain definitions],
  - Sections 43CA, 50C [full value of consideration in certain cases],
  - Sec 44AD [presumptive taxation],
  - Sec. 56 [Income from Other Sources],
  - Sec 80JJAA [New workmen deduction],
  - Sections 269SS, 269T [Mode taking or accepting/ payment of certain loans, deposits] and
  - Sec. 269ST [providing Rs. 2 lakh threshold for cash transactions];

  These provisions allow payments to be made/amount to be received only by way of account payee cheque/draft or electronic clearing system through a bank account. One such provision is the “disallowance provision”. The ITL also contains rules which prescribe the transactions/payments which are exempt from the applicability of the “disallowance provision”.

  Prior to Finance Act (No. 2), 2019 (FA 2019), payments/ receipts through “other electronic modes” were not explicitly specified as acceptable mode of payment/ receipt under such provisions. FA 2019 amended these provisions to allow payments/ receipts through certain prescribed electronic modes, to encourage digital payments. The provisions relating to computation of income were amended with effect from tax year 2019-20 whereas provisions relating to penalties on transactions were amended with effect from 1 September 2019. CBDT prescribes "other" electronic payment modes for the purposes of the following sections –

  For this purpose, the CBDT vide its Notification dated 29 January 2020 has now inserted a new rule, “Rule 6ABBA”, with effect from 1 September 2019, to prescribe the following electronic modes, relating to the term “other electronic modes" as prescribed, as used in the relevant sections:
  - Credit Card
  - Debit Card
  - Net Banking
  - IMPS (Immediate Payment Service)
  - UPI (Unified Payment Interface)
  - RTGS (Real Time Gross Settlement)
  - NEFT (National Electronic Funds Transfer)
  - BHIM (Bharat Interface for Money) Aadhaar Pay;

  In addition, the CBDT has correspondingly amended existing rule pertaining to the exceptions to the “disallowance provision” (Rule 6DD) to exempt payments made through electronic modes of payments prescribed under Rule 6ABBA.

  Furthermore, consequent to the above step, the CBDT has omitted one of the exceptions to the “disallowance provision” viz. where the payment was required to be made on a day

on which the banks were closed either on account of holiday or strike. Accordingly, payments made otherwise by modes referred above on such days will henceforth not be allowed as deduction.

The amendments referred above are made with effect from date of notification in Official Gazette viz. 29 January 2020.

- **CBDT: Notifies forms for exercising option to avail lower corporate tax rate u/s. 115BAA/BAB:** Under Sections 115BAA and 115BAB of the Income Tax Act, 1961, applicable from AY 2020-21, as per which, domestic companies have the option to pay tax at a concessional tax rate (CTR) of 25.17% or 17.16% (inclusive of applicable surcharge and cess) respectively, subject to certain conditions. These sections also mandate that the domestic companies are required to exercise the option to claim CTR from AY 2020-21 onwards in the prescribed form and manner.

  Pursuant to this, the CBDT has issued a Notification inserting Rule 21AE and 21AF to the Income Tax Rules, 1962, which prescribes Forms 10-IC and Form 10-ID for exercising the option under the S. 115BAA and 115BAB respectively.

  Broadly the forms require information about the domestic company in terms of name, PAN, address, date of incorporation/ set-up and registration, nature of business activities, declaration that prescribed conditions under the relevant section will be fulfilled etc. The said forms are required to be furnished electronically under digital signature or electronic verification code.

  The contents of the Forms are largely similar to that prescribed u/s 115BA, and requests for information in line with the conditions provided in the S. 115BAA/ 115BAB. Further, as per Form 10-ID, on exercise of option u/s 115BAB, the date of commencement of manufacturing/ production is required to be specified, whereas as per S. 115BAB(2)(a), the domestic company can commence manufacture/production activities by 31 March 2023 (viz. which can be post the due date of exercising of option). Accordingly, ambiguity exists on how such information will be filled in by the domestic companies which have not yet commenced manufacture/ production on the date of when option needs to be exercised and have merely been set up.

  Further, as per the First Proviso to S. 115BAA(5), where, due to violation of specified conditions, a Taxpayer's claim of CTR u/s 115BAB has been invalidated, the Taxpayer is eligible to exercise his option u/s 115BAA of the ITA. In such cases, the taxpayer will be required to separately exercise his option u/s 115BAA by filing Form 10-IC. Pertinent to note here is that the above mechanics of separately opting in for S. 115BAA in the year of violation may pose a challenge in case of Taxpayers where violation of conditions has been alleged by Tax Authority in the course of scrutiny proceedings as one needs to exercise the option to claim the CTR benefit u/s 115BAA on or before the due date of filing the return of income.

- **CBDT: Notifies PAN to become inoperative if Aadhaar not furnished:** A person who is allotted a PAN, is required to intimate his Aadhaar number to prescribed authorities on or before 31 March 2020, failing which PAN will become inoperative after the said date.

  An inoperative PAN furnished, intimated or quoted under the Act shall be deemed as not having been furnished, intimated or quoted. In such a scenario, the person will be liable for all consequences under the Act for not furnishing, intimating or quoting the PAN.

  Further, in a scenario where a person intimates his Aadhaar number after 31 March 2020 (to prescribed authorities) then PAN

shall become operative from date of intimation of Aadhaar number for purposes of furnishing, intimating or quoting under the Act.

Further, for verifying the operational status of PAN, the formats and standards along with procedures will be specified by Principal Director General of Income-tax (Systems) or Director General of Income-tax (Systems).

Part B – Case Laws

Goods and Services Tax

1. M/s Trident Auto Components Pvt Ltd V/S The Commissioner, CGST & Service Tax, Kanpur [2020-VIL-95-CESTAT-ALH-ST]

Subject Matter: The appeal is filed by the appellant demanding refund claim of the unutilized Cenvat credit, which was rejected on the ground of time limitation

Background and Facts of the case

- The appellant registered with the Department for manufacturing machinery and fabricated parts for Indian Railways vide Service Tax Code AABCT0083GSD003, were availing the Cenvat credit facility under the CENVAT Credit Rules, 2004.
- The appellant had balance of Cenvat credit of the Service Tax, after the introduction of the GST regime since there was inverted tax structure, they were not eligible for refund of unutilized input tax credit.
- Appellant filed refund claim of this unutilized Cenvat credit, which was rejected on the ground of time limitation.
- Aggrieved by the same, the appeal has been filed.

Discussion and findings of the case

- It is observed that the refund claim filed before Departmental authorities are governed by the time limit provided under the statute - the refund claim beyond the period of limitation provided under law is totally barred by limitation.
- Even the fact that the tax was paid under a mistake of law, cannot be adopted for grant of such refund

Ruling

- The appeal was rejected

2. The Assistant Commissioner of CGST & Central Excise, Chennai Vs M/s Daejung Moparts Pvt Ltd [2020-VIL-67-MAD]

Subject Matter: The petition is filed regarding whether the interest on delayed payment of tax as contemplated under Section 50 of the CGST Act, 2017, is automatic or the same is to be determined on assessment.

Background and Facts of the case

- After the introduction of GST from July 2017, three types of returns are liable to be filed, GSTR-1 showing the details of outward supplies of goods or services by the assessee (details of purchases), GSTR-2 showing the details of inward supplies of goods or services (details of sales) and GSTR-3 stating the total purchases and total sales and the tax payable and the input tax credit permissible and also GSTR-3B, a monthly return through which the assessee has to remit the tax calculated after deducting the input tax credit available.
- While discharging the monthly dues, the available ITC can be deducted, and the balance is to be paid by way of cash.
- Because of delay in making payment by the purchasers due to recession in the market, the petitioner could not file the monthly returns for the period from July 2017 to March

2018 in time and consequently, could not remit the dues along with the returns.

- However, on receipt of the amounts from the purchasers, the petitioner filed monthly returns and paid the taxes, after crediting the ITC.

- For the period from July 2017 and September 2017, there was no delay in filing the return and also paying the tax dues. However, the Superintendent of Central Excise, Chengalpattu Range, through a communication dated 02.05.2019, demanded a sum of Rs.41,74,620/- as interest for the belated payment of tax for the period from July 2017 to March 2018. The petitioner, by letter dated 10.05.2019 informed that the interest payable works out to Rs.915121/- only.

Discussion and findings of the case

- It was observed that the liability to pay interest under Section 50(1) of the CGST Act is undoubtedly an automatic liability fastened on the assessee to pay on his own for the period for which tax or any part thereof remains unpaid.

- However, perusal of sub Sections (2) and (3) of Section 50 thus would show that though the liability to pay interest under Section 50 is an automatic liability, still the quantification of such liability, certainly, cannot be by way of an unilateral action, more particularly, when the assessee disputes with regard to the period for which the tax alleged to have not been paid or quantum of tax allegedly remains unpaid.

- Likewise, whether an undue or excess claim of input tax credit or reduction in output tax liability was made, is also a question of fact which needs to be considered and decided after hearing the objections of the assessee, if any.

- Therefore, though the liability fastened on the assessee to pay interest is an automatic liability, quantification of such liability certainly needs an arithmetic exercise after considering the objections if any, raised by the assessee.

- The term "automatic" does not mean or to be construed as excluding "the arithmetic exercise"

Ruling

- It was held that though the liability of interest under section 50 is automatic, quantification of such liability shall have to be made by doing the arithmetic exercise, after considering the objections of the assessee.

- In accordance with the above, the writ appeal is dismissed

Direct Tax

1. Maruti Suzuki India Ltd Vs Commissioner of Income-tax [2020] (114 Taxmann.com 129) (SC)

Subject Matter: Unutilised MODVAT credit not 'sum payable' u/s 43B; SC denies deduction to Maruti-Suzuki

Facts

- Deductions under section 43B are allowable only when sum is actually paid by assessee
- The assessee Company, has been engaged in manufacturing and sale of various Maruti Cars and also trades in spares and components of the vehicles. It acquires exiceable raw materials and inputs which are used in the manufacturing of the vehicles. The assessee had also been taking benefit of MODVAT credit on the raw material and inputs used in the manufacturing.
- At the end of the Assessment year 1999-2000 an amount of Rs.69,93,00,428/- was left as unutilised MODVAT credit. In the return it was claimed that the Company was eligible for deduction under Section 43B of the Income Tax Act as an allowable deduction. Similarly, the Company claimed deduction under Section 43B of an amount of Rs. 3,08,88,171/-in respect of Sales Tax Recoverable Account. The Assessing Officer disallowed the claim of deduction of Rs.69,93,00,428/- as well as Rs.3,08,99,171/-.

Contentions of Tax Authority and Taxpayer

Taxpayer's Contentions:

- The amount paid by way of Excise Duty by the assessee to its suppliers of raw materials and inputs, is accepted as Excise Duty under the provisions of Central Excise Act and Rules. Consequently, when the said payments are made by the assessee to its suppliers, they should be treated as payments of Excise Duty which straightaway qualify for deduction under Section 43B of the Income Tax Act, irrespective of whether or when the MODVAT credit arising from such payments is utilised to make payment of Excise Duty on the products manufactured by the assessee
- As soon as the raw materials and inputs are received in the appellant's factory, the assessee becomes entitled to avail of MODVAT credit in respect of Excise Duty paid on the raw materials and inputs and which is mentioned in the manufacturer-supplier's invoice.
- Alternatively, the assessee's Excise Returns establish that while the unutilised MODVAT credit as on 31.03.1999 was Rs. 69.30 crores, the entire amount was utilised in April 1999 itself. Therefore, the assessee is entitled to the deduction under the 1st proviso to Section 43B. The object and purpose of Section 43B of the Act is to ensure that an assessee does not get deduction in respect of an amount unless and until the amount has been received by the Government. In the present case the full amount of Excise Duty was paid into the coffers of Government when the manufacturer of raw material/inputs had cleared the same from his factory gate for supply to the assessee. The basic object of Section 43B of the Act is fully subserved and deduction should have been granted as claimed by the assessee.

Revenue's contentions:

- The Excise Duty becomes due and payable only when the assessee removes the finished product from the factory gate, at the point in time when the assessee makes payment to the suppliers the Excise Duty is not due and payable.
- The liability under the Central Excise Act to pay Excise Duty is only on the manufacture of the excisable goods. The assessee is not one who is liable to pay Excise Duty on the raw materials/inputs. It is merely the incidence of

Excise Duty that has shifted from the manufacturer to the purchaser and not the liability to pay the same.

- Alternatively, the liability to pay Excise Duty of the assessee is incurred on the removal of the finished goods in the subsequent year, therefore, on 31.03.1999, the assessee was not liable to pay the Excise Duty and, therefore, the proviso will also not come to the aid of the assessee.

Supreme Court's Ruling:

The SC ruled against the Taxpayer and held that the unutilised credit under MODVAT scheme does not qualify for deductions under Section 43B of the Income Tax Act:

- As per Section 43B(a) of Income Tax Act, deduction is allowed on "any sum payable by the assessee by way of tax, duty, cess or fee." The credit of Excise Duty earned by the appellant under MODVAT scheme as per Central Excise Rules, 1944 is not sum payable by the assessee by way of tax, duty, cess. The scheme under Section 43B is to allow deduction when a sum is payable by assessee by way of tax, duty and cess and had been actually paid by him.

- Furthermore, the deductions under Section 43B is allowable only when sum is actually paid by the assessee. In the present case, the Excise Duty leviable on appellant on manufacture of vehicles was already adjusted in the concerned assessment year from the credit of Excise Duty under the MODVAT scheme. The unutilised credit in the MODVAT scheme cannot be treated as sum actually paid by the appellant. The assessee when pays the cost of raw materials where the duty is embedded, it does not ipso facto mean that assessee is the one who is liable to pay Excise Duty on such raw material/inputs. It is merely the incident of Excise Duty that has shifted from the manufacturer to the purchaser and not the liability to the same.

- The crucial words in the proviso to Section 43B are "in respect of the previous year in which the liability to pay such sum was incurred". The proviso takes care of the situation when liability to pay a sum has incurred but could not be paid in the year in question and has been paid in the next financial year before the date of submission of the Return.

- In the present case, there was no liability to adjust the unutilised MODVAT credit in the year in question since had there been liability to pay Excise Duty by the appellant on manufacture of vehicles, the unutilised MODVAT credit could have been adjusted against the payment of such Excise Duty. In the present case, the liability to pay Excise Duty of the assessee is incurred on the removal of finished goods in the subsequent year i.e. year beginning from 01.04.1999 and what we are concerned with is unutilised MODVAT Credit as on 31.03.1999 on which date the assessee was not liable to pay any more Excise Duty. Hence, present is not a case where appellant can claim benefit of proviso to Section 43B.

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