EY Tax and Regulatory Alert

September 2019

Prepared for ACMA

Contents

Building a better working world

Indirect Tax

This Section of Tax alert summarizes the Indirect tax updates for the month of September 2019

Judicial Precedents

1. Krish Automotors Private Limited
Vs
Union of India & ORS.

[2019 (9) TMI 817 – Delhi High Court]

Backgrounds and Facts of the case

- The petitioner is dealer/distributor of Maruti Suzuki India Limited and is engaged in the business of trading and servicing of motor vehicles and parts and accessories of said motor vehicles

- The petitioner states that with the extended timeline for filing other GST returns prescribed as 31st December, 2017, they missed to notice the due date of filing Tran-1 which was 27th December, 2017

- The petitioner had filed two representations with the jurisdictional GST authorities, Ministry of Finance, Union of India and GST Council to allow manual filing of Tran-1 but no response was received from the aforesaid authorities

Discussions and Findings of the case

- The Court has recognized the difficulties faced by the tax payers in filing Form Tran-1 in a series of orders passed wherein in some cases the default was due to the technical glitches faced

- Reliance was placed on the earlier orders passed by the Court wherein it has observed that there were various technical glitches in the GST system since it is still in the 'trial and error' phase

Ruling

- The petitioner was unable to fill the Tran-1 Form on account of bonafide difficulties

- Accordingly, the petitioner should either given an opportunity to submit Tran-1 electronically by opening the portal for this purpose or allow to file the form manually.

2. M/s TVS Motor Company Limited
Vs
Commissioner of Central Tax, Mysuru Commissionerate

[2019 (9) TMI 577- CESTAT BANGALORE]

Backgrounds and Facts of the case

- The appellant is engaged in the manufacture of two wheeler motor vehicles and clears goods to the depots/branches and dealers

- The appellant was not aware of certain abatements viz. Freight, Free Service Charges, Discounts, Additional Discount for rural sales applicable at the time of removal of goods from the factory and hence provisional assessment of the goods cleared was resorted

- Subsequent to the sale of goods, various credit notes were issued to the dealers to pass on the benefit of the abatements on the final price of the goods cleared from depot.

- When the provisional assessment was finalised, it was held that the assessee was eligible for refund of the excess duty paid on the abatements

- Department however ordered to recover the refund sanctioned along with interest and hence, an appeal was filed before Commissioner (Appeals)

Discussion and findings of the case

- As per submission of the appellant, the impugned order is not sustainable in law as the OIO sanctioning the refund was an appealable order and department if aggrieved, should have preferred an appeal to the Commissioner (Appeals) but no appeal was filed by the department against the OIO sanctioning the refund and consequently the said OIO has attained finality

- The appellant further submitted that the test of unjust enrichment does not apply to the cases of provisional assessment and there are various settled cases in favour of the assessee which are passed by Tribunal

- It is observed in the various decisions of the Hon'ble High that Section 11A of the Central Excise Act cannot be resorted to by the Department for recovery of duty which it believes was erroneously refunded if the order passed by the Adjudicating Authority for refund of duty under Section 11B of the Act on an application filed for refund of duty attained finality for the simple reason that it cannot fall in the category of "duty erroneously refunded". Thus, the show cause notice seeking recovery of the duty refunded to the Appellant was without jurisdiction. The order passed on such a show cause notice, therefore, deserves to be set aside.

Ruling

- This impugned order is not sustainable in law and therefore the same is set aside by allowing the appeal of the appellant

Key Indirect Tax updates

This section summarizes the regulatory updates for the month of September 2019

1) 37th GST Council Meeting held on 20th September 2019

- To allow tax to be paid under RCM to suppliers paying GST @ 5% on renting of vehicles, from a registered person other than body corporate (LLP, proprietorship), when services are provided to body corporate entities.

- Passenger vehicles of engine capacity 1500 cc in case of diesel and 1200 cc in case of petrol wherein the length is not exceeding 4000mm and designed for carrying more than 10 persons but upto 13 persons would attract compensation cess of 1% for petrol and 3% for diesel vehicle. (These vehicles presently attract compensation cess at the rate of 15%).

- Rescinding of Circular No.105/24/2019-GST dated 28.06.2019, ab-initio, which was issued in respect of post-sales discount.

- Relaxation in filing of annual returns for MSMEs for FY 2017-18 and FY 2018-19 as under:
  - waiver of the requirement of filing FORM GSTR-9A for Composition Taxpayers for the said tax periods;
  - filing of FORM GSTR-9 for those taxpayers who are required to file the said return but have aggregate turnover up to Rs. 2 crores made optional for the said tax periods.
- A Committee of Officers to be constituted to examine the simplification of Forms for Annual Return and reconciliation statement.
- In order to nudge taxpayers to timely file their statement of outward supplies, imposition of restrictions on availment of input tax credit by the recipients in cases where details of outward supplies are not furnished by the suppliers in their GSTR-1.
- In order to give ample opportunity to the taxpayers as well as the system to adapt, the new return mechanism would now be introduced from April, 2020, which was earlier proposed from October 2019 and accordingly the due dates for furnishing FORM GSTR-3B and FORM GSTR-1 for the period October, 2019 to March, 2020 would be specified.
- Decision to link Aadhar with the registration of taxpayers under GST and examine the possibility of making Aadhar mandatory for claiming refunds.
- Integrated refund system with disbursal by single authority to be introduced from 24th September, 2019.

Direct Tax

This section of tax alert summarizes the Direct tax updates for the month of September 2019.

Key Direct Tax Developments

1. Taxation Law (Amendment) Ordinance promulgated

Recently the President of India has promulgated the Taxation Laws (Amendment) Ordinance, 2019 to reduce the tax rates applicable on the domestic companies. Following amendments was made in the Income-tax Act, 1961:-

- Amendment in Section 115BA

Introduction of Section 115BAA

- Applicable on all domestic companies w.e.f April 01, 2019
- Gives option to pay tax at 22% if below conditions fulfilled:-

i) No deduction allowed u/s 10AA, 32(1)(iia), 32AD, 33AB, 33ABA, 35(1)(ii), 35(1)(iia), 35(1)(iii), 35(2AA), 35(2AB), Section 35AD, 35CCC, & 35CCD or under Chapter VI-A heading "C – Deductions in respect of certain incomes" other than Section 80JJAA.

ii) No set-off or carry forward from earlier assessment year allowed for loss attributable to above deductions.

iii) Option to be exercised in prescribed manner before due date of filing return of income of FY 2019-20. Such option once exercised cannot be subsequently withdrawn

Introduction of Section 115BAB

- Applicable on all domestic manufacturing companies set-up and registered on or after 01 October, 2019 and has commenced manufacturing before March 31, 2023.
- Gives option to pay tax at 15% if below conditions fulfilled:-
  - The company is not formed by splitting up or reconstruction of business already in existence. However, this condition will not apply in case of re-establishment, reconstruction, or revival of any undertaking referred in Section 33B.
  - Does not use any plant or machinery previously used for any purpose exceeding 20% of total value of plant & machinery except when:-
    - Such plant or machinery is not used in India at any time prior to installation and
    - Such plant or machinery is imported in India from any other country; and
    - No deduction claimed in respect of such plant & machinery prior to such installation.
  - Does not use any building previously used as hotel or convention centre as defined in Section 80-ID
  - The company is not engaged in any business other than the business of manufacturing or production of any article or thing and research in relation to, or distribution of, such article or thing manufactured or produced by it.
- The company is not engaged in any business other than the business of manufacturing or production of any article or thing and research in relation to,

or distribution of, such article or thing manufactured or produced by it

- No deduction allowed u/s 10AA, 32(1)(iia), 32AD, 33AB, 33ABA, 35(1)(ii), 35(1)(iia), 35(1)(iii), 35(2AA), 35(2AB), Section 35AD, 35CCC, & 35CCD or under Chapter VI-A heading "C – Deductions in respect of certain incomes" other than Section 80JJAA.

- No set-off or carry forward from earlier assessment year allowed for loss attributable to above deductions.

- Option to be exercised in prescribed manner before due date of filing return of income of FY 2019-20. Such option once exercised cannot be subsequently withdrawn.

- Assessing officer may take the amount of profits as may be reasonably derived from such business in case the assessing officer thinks that the profit earned is more than ordinary profits owning to close relation of company with any other person.

Reduction in rates under MAT provisions u/s 115JB

- The rate of tax payable under MAT has been reduced from existing 18.5% to 15% for financial year 2019-20 onwards.

- Further, the MAT provisions will not apply on companies earning income from life insurance business referred to in Section 115B and to companies opting for lower rate of tax under section 115BAA and 115BAB

Amendment in buyback tax for companies

- The Finance Act amended Section 115QA to tax buy-back in case of listed shares as well. The said amendment cause issues for companies which has already declared the buy-back.

- Accordingly, Section 115QA is amended to exempt buy-back of shares in respect of which public announcement has been made before July 5, 2019.

Amendment in Finance Act, 2019

- Finance Act, 2019 is amended to provide that surcharge shall not exceed 15% in case of income by way of short-term or long-term capital gains arising from the transfer of securities earned by Foreign Portfolio Investors and also on the income which is liable to tax under Section 111A and 112A of the Income-tax Act;

- Further, Finance Act, 2019 is amended to provide that in case the domestic company exercises the option under Section 115BAA or 115BAB, then the surcharge shall be applicable at the rate of 10% on the tax payable by such companies.

iv)

2. Setting up of National e-Assessment Centre

CBDT has set up a national e-assessment centre having headquarter at New Delhi which shall exercise and perform concurrently, the powers and functions of the Assessing Officer to facilitate conduct of e-Assessment proceedings in centralised manner in respect of returns furnished u/s 139 or in response to notice u/s 142(1) filed on or after April 01, 2018.

Source: Notification no S.O. 3435(E) issued by CBDT

3. Higher depreciation on motor car

CBDT has revised the rate of depreciation allowable under section 32. The revised rates are made effective retrospectively with effect from 23 August 2019 are given below:

Item No.	Block of Assets	Depreciation as a percentage of WDV
2(i)	Motor cars, other than those used in a business of running them on hire, acquired or put to use **on or after the 1st day of April, 1990 except**	15%

Item No.	Block of Assets	Depreciation as a percentage of WDV
	those covered under entry (ii) below.	
2(ii)	Motor cars, other than those used in a business of running them on hire, **acquired on or after the 23rd day of August, 2019** but **before the 1st day of April**, **2020** and is **put to use before the 1st day of April, 2020**.	30%
3(ii)(a)	Motor buses, motor lorries and motor taxis used in a business of running them on hire **other than those covered under entry (b) below.**	30%
3(ii)(b)	Motor buses, motor lorries and motor taxis used in a business of running them on hire, **acquired on or after the 23rd day of August, 2019** but **before the 1st day of April, 2020** and is **put to use before the 1st day of April, 2020**.	45%

Source: Notification 69/2019 issued by CBDT

4. CBDT notified cost inflation index for FY 2019-20

- CBDT has recently notified the cost inflation index applicable for indexation of capital gains as 289 for FY 2019-20.

Source: CBDT Notification No. S.O.3266 (E)

5. High court reverses ITAT order to hold that payment to Austrian company for supply of designs & drawings is not royalty

Background and facts

- In the instant case, the Assessee entered into agreement with an Austrian company for license to use manufacturing information supplied by Austrian company by which assessee will pay an amount of 3 Million Austrian Schilling in three installments.
- The agreement also provides that the royalty shall be payable after start of the production basis the number of vehicles produced.

ITAT's Observation

- It was the case of the assessee that the payment of 3 million Austrian Schilling was for the supply of material and their use would arise when the vehicles would be started to be produced and at that stage royalty would become payable. The main plank on which the Tribunal passed its decision was its interpretation of the word 'supply and it held that 'supply' includes 'use' and concluded that the TDS was required to be deducted on payment made to Austrian company.

Punjab & Haryana High Court Ruling

- The Hon'ble High Court has held that the Tribunal has given an unnatural and strained meaning to the expression 'supply'.
- The court acknowledges that entering into the agreement and by supplying the material, Austrian company authorized its use but its actual use would start only when production and sale commenced and that would be the stage at which royalty would be payable.
- Accordingly, the court reverses the order passed by the tribunal.

Source: The Majestic Auto Ltd. [TS-486-HC-2019(P & H)]

6. Mumbai ITAT rules that Indian AE of the Assessee does not constitute its PE if the Indian AE is only involved in sale of cars in India

Background and facts

- The assessee is one of the world leading Car manufacturer and tax resident of Germany. During the year, the assessee has sold fully built-up Cars and accessories to its Associated Entities (AE) in India. The AE in turn sell the cars to dealers/ distributors in India. The business of the AE is devoted wholly on behalf of the Assessee and is the extended arm of Assessee in India.

- The assessing officer considered the AE as the PE of the Assessee and accordingly attributed income @35% of the AE to the PE in India.

DRP observations

- The DRP observed that activities of storage, marketing, advertisement, promotion of products of assessee, sale sizing clients and potential customers after sales services and support supply of spare parts and accessories, taking part in Auto Expo etc. are undertaken/done by AE on behalf of assessee and were carried out from its fixed place of business maintained in India.

- DRP relied upon the case of Aramax International Logistic Pvt. Ltd. (348 ITR 159) to held that Assessee has a PE In India.

ITAT's ruling

- The Hon'ble tribunal held that there is no dispute that the activities of manufacturing of Car is completed by assessee outside India and constitute a separate and independent activity.

- The tribunal relied on the case of Daimler Chrysler AG (52 SOT 93) to hold that The sales of goods/Car are completed outside India than income arising from sales on principle to principle by no stretch of imagination can be said to be taxed in India.

- Further, the tribunal has held that the income arising on the sales of Car by Indian AE to dealers in India is income accruing or arising in India and is taxed separately in the hands of Indian AE and thus, cannot be taxed in the hands of the Assessee.

Source: Audi AG v. ADIT [ITA No. 7335/Mum/2012]

Regulatory

This section of tax alert summarizes the Regulatory updates for the month of September 2019.

1. Press Note issued by DPIIT

The Department for Promotion of Industry and Internal Trade (DPIIT), in line with the Union Budget announcement, issued Press Note 4 (2019 series) on 18 September 2019 to incorporate changes for liberalization of the Foreign Direct Investment (FDI) Policy in key sectors such as single brand retail trading with the intent of attracting higher FDI inflows and promoting "Make in India" initiative of the Government.

Applicability

The key changes in the FDI Policy shall be effective from the date of issuance of the relevant notification by Reserve Bank of India (RBI).

Key changes

- **Contract manufacturing:** The extant FDI policy permits FDI up to 100% in "manufacturing" sector under automatic route. Presently, no specific provision in relation to contract manufacturing was provided in the FDI policy. The applicability of FDI guidelines on manufacturing undertaken through contract manufacturing was not clearly specified in the policy.

  Generally, contract manufacturing is considered a business model wherein a company hires a manufacturer to manufacture products for the hiring company. Such hiring company then sells the manufactured product(s) under its brand.

  It has now been decided that contract manufacturing should be covered under "manufacturing" sector and accordingly, FDI up to 100% will be permitted under the automatic route in contract manufacturing.

  Manufacturing activities can now be undertaken either by the investee entity itself or through contract manufacturing in India under a "legally tenable contract", whether on Principal to Principal or Principal to Agent basis.

- **Single Brand retail trading (SBRT):** In terms of the extant FDI policy, FDI in SBRT is permitted up to 100% under automatic route. SBRT entities having foreign investments beyond 51%, local sourcing of 30% of the value of goods purchased, was required to be undertaken from India, which needs to be met as an average during the first 5 years and thereafter, on an annual basis. In addition, SBRT entity was permitted to set off its incremental sourcing of goods from India, by SBRT entity or their group companies, for global operations against the mandatory sourcing norms.

  To attract more FDI in the SBRT sector, DPIIT has notified the following conditions in relation to relaxation of the local sourcing requirement:

  All procurements made from India by the SBRT entity for that single brand shall be counted towards local sourcing, irrespective of whether the goods procured are sold in India or exported. The current limitation of considering exports for sourcing purposes for 5 years only, has been removed. Further, single-brand retailers will be allowed to adjust their entire procurement of goods from India (earlier it was on an incremental basis) for their global operations for meeting the local sourcing norms.

  Further, sourcing of goods from India can be undertaken directly by the entity undertaking SBRT or its group companies (resident or non-resident), or indirectly by through a third party under a legally tenable agreement.

  In addition to the changes in local sourcing norms, it has also been decided that the SBRT entity would be permitted to sell products through e-commerce before setting up of brick and mortar stores subject to the condition that the entity opens brick and mortar stores within 2 years from date of start of online retail. The above decision may shorten the time period for starting a SBRT business by a new player.

- **Digital media:** In terms of the extant policy, FDI up to 49% is permitted under the Government approval route for up-linking of news and current affairs TV channel. Further, FDI up to 26% is permitted for print media i.e. publishing of newspapers and periodicals dealing with news and current affairs. There was no express provision in relation to digital media in the extant policy.

  Now, FDI up to 26% has been permitted under the Government approval route for uploading/ streaming of news and current affairs, through digital media.

- **Coal mining**: The extant FDI Policy permits FDI up to 100% under automatic route for coal and lignite mining for captive consumption by power projects, iron and steel and cement units and other eligible activities permitted under and subject to applicable laws and regulations. Further, FDI up to 100% is permitted under automatic route for setting up coal processing plants like washeries subject to the condition that the company shall not undertake coal mining and sell washed coal or sized coal from its coal processing plants in the open market and shall supply the washed coal or sized coal to those parties who are supplying raw coal to coal processing plants for washing or sizing.

  With the liberalisation, FDI up to 100% is permitted under automatic route for sale of coal, for coal mining activities including associated processing. Accordingly, now, foreign players would be permitted to mine coal and sell the same.

Source: DPIIT Press Note 4 (2019 series) dated 18 September 2019

Our offices

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Ernst & Young LLP

EY | Assurance | Tax | Transactions | Advisory

About EY

EY is a global leader in assurance, tax, transaction and advisory services. The insights and quality services we deliver help build trust and confidence in the capital markets and in economies the world over. We develop outstanding leaders who team to deliver on our promises to all of our stakeholders. In so doing, we play a critical role in building a better working world for our people, for our clients and for our communities.

For more information, please visit
www.ey.com/india

EY refers to the global organization and may refer to one or more of the member firms of Ernst & Young Global Limited, each of which is a separate legal entity. Ernst & Young Global Limited, a UK company limited by guarantee, does not provide services to clients. For more information about our organization.

Ernst & Young LLP is one of the Indian client serving member firms of EYGM Limited. For more information about our organization, please visit www.ey.com/india.

Ernst & Young LLP is a Limited Liability Partnership, registered under the Limited Liability Partnership Act, 2008 in India, having its registered office at 22 Camaca Street, 3rd Floor, Block C, Kolkata - 700016

EY contacts for ACMA Knowledge Partnership:

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