EY Tax and Regulatory Alert

August 2018

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 August 2018

Judicial Precedents

1. M/S Lally Automobiles Private Limited Vs Commissioner (Adjudication), Central Excise [2018-VIL-320-DEL-ST]

Background and facts of the case

- In the present case assesse (Lally Automobiles) is engaged in sales and services of Honda cars as an exclusive authorized dealer. It is registered for payment of Service Tax under the categories of "Authorized Service Station" and "Business Auxiliary Service" under the Finance Act, 1994.

- Assessee availed Cenvat credit of duty paid on various inputs and tax paid on better services in terms of Cenvat Credit Rules, 2004 (hereafter “the Rules”).

- Alleging that the assessee had trading activities which was not liable to service tax and that credit availed on input services attributable to trading activities was sought to be denied on proportionate basis. Proceedings were initiated which resulted in the impugned order.

- Assessee contention is that no Cenvat Credit is recoverable from them as they have not availed any CENVAT credit on the inputs which were exclusively used in the exempted services under Rule 6(3) of the CENVAT credit Rules is also not sustainable as Rule 6(3) is applicable for the common inputs which are used for providing for taxable services and exempted services which is the case of the notices since they are providing both taxable services i.e. servicing of the cars and non-taxable services of trading in cars.

- The assessee appealed to the Customs, Excise and Service Tax Appellate Tribunal (hereafter “CESTAT”) arguing that trading activity cannot be considered as exempted service prior to the introduction of explanation, in Rule 2 of Rules, w.e.f. 01.04.2011. Since trading cannot be considered as exempted service for the period prior to that date, the assessee did not have to restrict Cenvat credit attributable to that trading activity. It was submitted that there was no provision in the Rules to cover trading activity under Rule 6(3). The assessee argued that the demands were also time barred.

- Mr. J.K. Mittal, learned counsel for the assessee argues that the rules were amended w.e.f. 01.04.2011 through introduction of Explanation to Rule 2 (e), which provided that exempted services include trading and consequential amendment was also made in Rule 6, by inserting the Explanation 1 to define the value of the 'Trading' for the purpose of formula given in (3A) of Rule 6. The Rule stated such amendment unless otherwise provided came into force w.e.f. 01.04.2011, thus having no retrospective effect.

- It was submitted that in this case, the assessee was engaged in trading activities in common premises. Those activities were not subjected to service tax, as they involved distribution, sale or vending of goods. The question of any such activity being “exempt” on account of the 2011 amendment Rules, does not arise. The amendment only stated the obvious. However, that did not mean that trading was subject to service tax. If any activity was not subjected to that levy, the question of claiming any credit in respect of it could never arise. The Revenue submitted that in this background, the assessee’s claim that the extended period of limitation could not be invoked, is unsustainable.

- Therefore, the issue is whether the assessee could claim the credit on input which were not services. Input credits can be used for payment of service on output service provided such services are used to provide output services. Undoubtedly, there cannot be an exact correlation between one kind of input and corresponding. That is the reason the rules cover situations where assessees provide both exempted and taxable services. Wherever someone undertakes activities that cannot be called a service or which is not “manufacture”, that activity goes out of the purview of both Central Excise Act as well as Finance Act, 1994. In such cases, an assessee would be ineligible for claiming input-service tax credit on an output which is neither a service nor excisable goods.

- There is no provision to cover situations where an assessee is providing a taxable service and is undertaking another activity which is neither a service nor manufacture. In such a situation, the only correct legal position appears to be that it is for the assessee to segregate the quantum of input service attributable to trading activity and exclude the same from the records maintained for availing credit. This cannot be done in advance as it may not be possible to foretell the quantum of trading activity as compared with taxable activity.

- In the present case, the assessee's argument that there is no mechanism to reverse credit, once taken, in the opinion of this Court, cannot be accepted. The assessee was well aware of the exact nature and extent of its service tax liability. It was also aware of the eligible service tax inputs. Therefore, when it did claim- successfully and unchallenged input credits in respect of activities that were not subjected to service tax levy, it was aware that the claim was excessive and could not be justified.

- If, for instance, input credits were claimed in respect of goods or rents, attributable to retail business, those credits were clearly impermissible. In these circumstances, this Court finds no infirmity with the concurrent findings of the lower authority and the CESTAT, which concluded that Show Cause Notice and recoveries were in order.

- As regards the method of calculation and invocation of extended period of penalty, the assessee's contentions again, to the Court's mind, are groundless. The assessee concededly did not maintain regular separate accounts in respect of non-service tax leviable activities.

- This Court is of opinion that the lack of any method in the rules in such cases, would only mean that a reasonable and logical principle should be applied, not concededly that what should and could not be claimed as input credit, (but was in fact so claimed) ought to be "left alone" because of the composite nature of the assessee's business. While any assessee has a right to organize its business in the most convenient and efficient manner, it cannot claim that that such organization is so structured that its tax liabilities cannot be clearly discerned.

- In this case, the adjudicating authority adopted the proportionate percentage to the turnover method approach, which in this Court's opinion, is reasonable.

- In the light of the above findings, all the questions framed are answered in favour of the Revenue and against the assessee. The appeal is, therefore, dismissed.

2. M/S Piaggio Vehicles Private Limited Vs Commissioner of Central Excise, Pune-III

[2018-VIL-523-CESTAT-MUM-CE]

Background and facts of the case

- The brief facts of the case are that appellant are engaged in manufacture of Three Wheeled Motor vehicle falling under Chapter Heading No. 8704 and 8708 of Central Excise Tariff act 1985.

- They are also having Spare Parts Division (SPD) where they are carrying out activity of procuring spare parts from various vendors, packing/repacking them into unit containers, fixing MRP label on the same and clearing it to various Dealers/Customers etc under their brand.

- The case of the department is that the goods procured falling under Chapter Heading 3208, 8536 and 8539 of the Central Excise Tariff Act, 1985. The activity of Re-packing / re-labelling of the same amounts to manufacture in terms of Section 2(f)(iii) of Central Excise Act, 1944, which specified that repacking/re-labelling of goods specified under third Schedule of Central Excise Tariff Act, 1944 to make them marketable amounts to manufacture.

- These products are undisputedly covered under third schedule. Accordingly, Revenue is of the view that activity carried out by the appellant are of manufacture and excise duty on the basis of MRP of the said goods in terms of Section 4A is required to be paid. The show cause notice was issued and the same was culminated into adjudication order, wherein adjudicating authority confirmed the demand and interest and imposed equal amount of penalty. The seized goods were confiscated with an option to redeem the same on payment of redemption fine. Being aggrieved by the Order-in-original the appellant filed appeal before the Commissioner (Appeals) who concurring with the views of the adjudicating authority upheld the order of the original authority and rejected the appeal, therefore the present appeal.

- Shri. M.H. Patil, Ld. Counsel for the appellant submits that the period involved is 1-3-2003 to 19-08-2005. The product namely switches, lamps falling under Chapter heading 8536 and 8539 respectively are spare parts of the motor vehicle. In respect of parts of motor vehicle specific entry Sr. No. 97 was inserted in 3rd schedule w.e.f. 1-6-

2006 vide Notification No. 11/2006-CE(N.T.) dated 29-5-2006. As per this entry, parts, components and assemblies of auto mobile irrespective of falling under any heading is covered under this entry which came into effect on 1-6-2006, therefore before insertion of the said entry it cannot be said that product covered under third Schedule and liable for duty as deemed manufactured goods.

- Appellant's also submits that demand is time bar as there is no suppression of facts on the part of the appellant

Court's Contention

- Court finds that the goods procured by the appellant are admittedly falling under chapter heading 3208, 8536 and 8539 of Central Excise Tariff Act. Classification of the goods attained finality at the end of the supplier of the said goods. The appellant are only carrying out repacking/relabeling of the goods without bringing any change to the bought out goods, therefore there is no question of change of any classification.

- The goods in question, therefore, after repacking and relabeling, the remained classified under chapter heading 3208, 8536 and 8539. As per Section 2(f)(iii), the activity of repacking/relabeling for making product marketable is amount to manufacture if the goods are specified under third Schedule of Central Excise Tariff Act, 1944. On perusal of third Schedule for the relevant period, we find that the goods falling under Chapter heading 3208 is covered under Sr No. 34, the goods falling under Chapter 8536 is covered under Sr. No. 93 and the goods falling under Chapter 8539 is covered under Sr No. 94 of the third Schedule issued under Section 2(f)(iii) of the Central Excise Act, 1944. Therefore on this undisputed position the goods of 8208, 8536 and 8539 when repacked/re-labelled and rendered the same for marketable shall amount to manufacture.

- The submission of the Ld. Counsel that there is specific entry inserted in the 3rd schedule w.e.f. 1-6-2006, we find that though the said specific entry was inserted/described as "parts, components and sub assemblies of auto mobile" but the fact remains that the goods falling under chapter heading 3208, 8536 and 8539 were already covered under 3rd Schedule, therefore in respect of those goods, the activity of repacking and re-labelling is amount to manufacture prior to 1-6-2006 also under specific entry in respect of goods 3208, 8536 and 8539 existing during the relevant period, merely because of specific entry was inserted which covers those goods which are already specified earlier cannot be said that these goods prior to 1-6-2006 was not falling under the third schedule.

- Therefore prior to 1-6-2006 goods falls under 3208, 8536 and 8539 indeed falling under third schedule, hence repacking and relabeling of these goods was amount to manufacture.

- The assessee in the said case disputed the classification whereas in the present case classification stands settled when the goods were received by the appellant. Since only activity was carried out by the appellant is of repacking and relabeling there is no question of change of classification. In the present case department has not insisted to change the classification, whereas the same classification which was applied by the supplier was applied mutatis-mutandis when it is cleared by the appellant, therefore there is no quarrel as regard the classification in the present case hence ratio of the Ford India Limited (supra) is not applicable to the present case.

- As regard limitation, we find that since the appellant has not considered their activity as manufacture, they have not declared and disclosed the activity and removal of the said goods without payment of duty to the department, therefore there is clear suppression of facts on the part of the appellant, hence demand for longer period sustains. For the same reason penalty imposed under section 11AC is also sustained. As per our above discussion, impugned order is upheld and appeal is dismissed.

Key Indirect Tax updates

This section summarizes the regulatory updates for the month of August 2018

1) Advance Ruling on applicability of GST on the activities performed by the employees at the corporate office for the units located in the other states

<u>**Background and Facts of the case:**</u>

- The applicant is a private limited company and is an international healthcare group operating a chain of modern hospitals across Asia.

- The Company is currently operating across six different states having eleven hospitals out of which six units are in the state of Karnataka.

- The applicant has its India Corporate Office in Karnataka and some of the activities for all the units with respect to accounting, administration and maintenance of IT system are carried out by the employees of the corporate office which forms part of the registered person in Karnataka.

- In relation to the said employee costs, no invoices are raised by the management office on other offices, treating the same as activities carried out by employees in the course of or in relation to his employment.

Observation of the AAR:

- The AAR observed that the corporate office is covered under one registration in the state of Karnataka and the units are covered under different registrations, and the units are controlled by the corporate office, thus they both are related persons.

- Any supply of goods and services from corporate office to such separately registered units/distinct persons would amount to supply of goods and services, even if made without consideration.

- The employees employed in the Corporate Office are providing services to the Corporate Office and hence the employee-employer relationship is only restricted to the corporate office and since, the other offices are distinct persons, the employees in the corporate office have no employer employee relationship with such other offices.

Ruling:

- The activities performed by the employees at the corporate office in the course of or in relation to employment such as accounting, other administrative and IT system maintenance for the units located in the other states as well i.e. distinct persons shall be treated as supply and hence chargeable to GST.

2) Reverse charge mechanism deferment till September 2019

- **Notification No. 22/2018 – Central Tax (Rate)** dated 6 August, 2018 to further exempt payment of tax under reverse charge as per section 9(4) of the CGST Act, 2017 till 30 September, 2019, which was earlier exempted till 30 September, 2018 vide notification no. 12/2018 – Central Tax (Rate) dated 29 June, 2018;

- **Notification No. 23/2018 – Integrated Tax (Rate)** dated 6 August, 2018 to further exempt payment of tax under reverse charge as per section 5(4) of the IGST Act, 2017 till 30 September, 2019, which was earlier exempted till 30 September, 2018 vide notification no. 13/2018-Integrated Tax (Rate), dated the 29 June, 2018;

3) Restriction on Royalty Payments

In case of technology transfer or collaboration, the royalty payments are proposed to be capped as follows:

- 4 per cent of domestic sales and 7 per cent of exports for the first four years.

- For the next three years the limits should be 3 per cent of local sales and 6 per cent of exports.

- For further three years, these payments should be capped at 2 per cent of domestic sales and 4 per cent of exports and thereafter at 1 per cent of local sales and 2 per cent of exports.

- For use of trademarks and brand names, the royalty payments are proposed to be capped at 1 per cent of sales and 2 per cent of the exports of an entity.

4) Standing Committee to advise utilisation of Consumer Welfare Fund

- Constitution of Standing Committee under rule 97(4) of CGST Rules, 2017 r/w section 168 of CGST Act, 2017.

- Purpose: recommend proper utilisation of money credited to the consumer welfare fund for welfare of consumers.

- Consumer Welfare Fund is constituted by the government as per section 57 of CGST Act, 2017 wherein all refunds as per section 54(5) are credited.

- Standing Committee Members are from Dept of Consumer Affairs(Min of Consumer Affairs), Dept of Expenditure (Min of Finance), CBIC, Dept of

Rural Development, FSSAI, Min of Information and Broadcasting, Bureau of Indian Standards(BIS)

- The Additional Secretary/ Joint Secretary in charge of Consumer Welfare Fund in the Department of Consumer Affairs, Ministry of Consumer Affairs, Food and Public Distribution shall also be the Member Secretary of the Committee.

5) Special migration procedure for taxpayers who received provisional IDs but could not complete the migration process.

- Specifies procedure to be followed by persons who had received provisional ID's by 31.12.2017, but could not complete the migration process.
- Such persons should furnish necessary details only by 31.08.2018.
- Thereafter on receipt of an e-mail from the GSTN, such taxpayers should apply for registration by logging onto https://www.gst.gov.in and filling up GST REG-01.
- After due approval of the application by the proper officer, such taxpayers will receive an email from GSTN mentioning the Application Reference Number (ARN), a new GSTIN and a new access token.
- Upon receipt, such taxpayers are required to furnish the following details to GSTN by email, on or before the 30th September, 2018, to migration@gstn.org.in :-
  - New GSTIN;
  - Access Token for new GSTIN;
  - ARN of new application;
  - Old GSTIN (PID).
- Upon receipt of the above information from such taxpayers, GSTN shall complete the process of mapping the new GSTIN to the old GSTIN and inform such taxpayers.
- Such taxpayers are required to log onto the common portal www.gstn.gov.in using the old GSTIN as "First Time Login" for generation of the Registration Certificate.
- Such taxpayers shall be deemed to have been registered with effect from the 1st July, 2017.

6) Notification issued for extension of due dates for GSTR-1

- Notification-32/2018 Central Tax dated 10 August 2018 extends the time limit for furnishing the details of outward supplies in FORM GSTR-1 of the Central Goods and Services Tax Rules, 2017, by such class of registered persons having aggregate turnover of more than 1.5 crore rupees in the preceding financial year or the current financial year, for each of the months from July, 2018 to March, 2019 till the eleventh day of the month succeeding such month.
- Notification- 33/2018 dated 10 August 2018 specifies the time limit for furnishing the details of outward supplies in FORM GSTR-1 of the Central Goods and Services Tax Rules, 2017, by such class of registered persons having aggregate turnover of up to 1.5 crore rupees in the preceding financial year or the current financial year, as under.
  - July - September, 2018 – by the 31st October 2018
  - October - December, 2018 – by the 31st of January 2019
  - January - March, 2019 – by the 30th of April 2019

7) Notification issued for due dates for furnishing of FORM GSTR-3B

- Notification specifies that the return in FORM GSTR-3B of the said rules for each of the months from July, 2018 to March, 2019 shall be furnished electronically through the common portal, on or before the twentieth day of the month succeeding such month.
- Tax/interest/penalty/any other amount payable liability to be discharged, not later than the last date, i.e. 20th day of the succeeding month.

8) Clarification regarding applicability of GST on various goods and services

Applicable GST rate for bus body building activity:.

- Thus, fabrication of buses may involve the following two situations:
- Bus body builder builds a bus, working on the

chassis owned by him and supplies the built-up bus to the customer, and charges the customer for the value of the bus.

- Bus body builder builds body on chassis provided by the principal for body building, and charges fabrication charges (including certain material that was consumed during the process of job-work.

- It is clarified that in case as mentioned at Para (a) above, the supply made is that of bus, and accordingly supply would attract GST @28%. In the case as mentioned at Para (b) above, fabrication of body on chassis provided by the principal (not on account of body builder), the supply would merit classification as service, and 18% GST as applicable will be charged accordingly.

Applicable GST rate on Disc Brake Pad:

- It is clear, in view of the HSN Explanatory Notes that the said goods, namely "Disc Brake pad" for automobiles, are appropriately classifiable under heading 8708 of the Customs Tariff Act, 1975 and would attract 28% GST.

9) Due date for filing ISD Return- GSTR 6 extended till 30 Sept 2018

- Notification No. 30/2018-Central Tax dated 30 July 2018- supersedes notification no. 25/2018 Central Tax dated 31 May 2018

- Time limit for furnishing the return by an Input Service Distributor in Form GSTR-6 under 39(4) of the CGST Act read with rule 65 of the CGST Rules, 2017, for the months of July 2017 to August, 2018 till the 30 September, 2018

Direct Tax

This Section of Tax alert summarizes the Direct tax updates for the month of August 2018

Judicial Precedents

1. Chennai Tribunal affirms taxation of excess salary received by a managing director in contravention of law, in absence of any finding on recovery of excess salary from him

Background and facts of the case

- Section 15 of the Income Tax Act (ITA) includes the following incomes as chargeable to tax under the head "Income from Salary" (Salary head):
  - i. Salary that is "due" from an employer or a former employer, whether paid or not
  - ii. Salary that is "paid or allowed" to an employee by or on behalf of an employer or a former employer, though not due or before it becomes due
  - iii. Any "arrears of salary" paid or allowed to an employee by or on behalf of an employer or a former employer, if not earlier charged to income tax
- In the present case, the Taxpayer was a Managing Director of a company and during Tax Year (TY) 2008-09, the Taxpayer initially received salary of Rs. 1.37 crores (original salary) as per contractual terms. The company withheld appropriate taxes while making payment of salary to the Taxpayer and the same was also reflected in Form 26AS of the Taxpayer.
- However, subsequently, the said amount turned out to be in excess of Companies Act limits. Hence, the salary of the Taxpayer was revised to Rs. 0.27 crores (revised salary) after the close of the TY. The Taxpayer filed revised tax return disclosing the revised salary.
- The Tax Authority added back difference between the original salary and revised salary (excess salary) to the total income.
- In the original round of litigation, the Tribunal remitted back the matter to the Tax Authority.
- The Taxpayer contended that excess salary paid to him was in contravention of the Companies Act liable to be refunded to the company and hence, the same cannot be construed as Taxpayer's income, much less taxable income. The Taxpayer also submitted that the excess salary was recovered by the company by way of book adjustment.
- However, the Tax Authority contended that the excess salary was not recovered by the company and the same was allowed to be retained by the Taxpayer. In absence of recovery from the Taxpayer, the excess salary should be construed as income and taxable under the salary head even if the amount was paid by the company contrary to the provisions of the Companies Act.
- The First Appellate Authority confirmed the order of the Tax Authority.
- Being aggrieved, the Taxpayer appealed before the Tribunal.

Issue before the Tribunal

- Whether excess salary paid by the company in contravention of the Companies Act provisions is taxable as salary income in the hands of the Taxpayer?

Tribunal's ruling

- The Tribunal affirmed the view of the lower authorities and held that excess salary paid by the company in contravention of Companies Act provisions is taxable as salary income in absence of any evidence to support that the excess salary was recovered back from the Taxpayer. The Tribunal adopted the following reasoning for its views:-
  - As per section 5 of the ITA, any amount received by the taxpayer or which accrues or arises from any source forms part of the total income. However, only such amount can be treated as income over which the taxpayer has a legal right to retain the money. In case the taxpayer receives money with an attached obligation to return the same to another person, then the same cannot be construed as income of the taxpayer.
  - In the present case, the Taxpayer was paid original salary in the capacity of managing director of the company and at the time of

payment, the Taxpayer had the right to retain the same. In other words, the Taxpayer received the original salary in his own right.

- Subsequently, the company had to revise the salary as per the provisions of the Companies Act.

- While the Taxpayer contended that the excess amount was recovered by book adjustment, however, there was no material on record to prove this fact, except for oral submission made by the Taxpayer. No evidence was furnished in this regard by the Taxpayer before the Tax Authority, First Appellate Authority or the Tribunal.

- Merely because excess salary is paid by the company contrary to the provisions of the Companies Act does not mean that Companies Act can override the ITA. Even the illegal payment or the payment received by the Taxpayer contrary to the provisions of Companies Act by way of salary has to be assessed as income in the Taxpayer's hands provided the same was not recovered by the company.

(Source: Nate Nandha v. ACIT (ITA No. 278 (Chny) of 2017))

2. Calcutta High Court (HC) rules on date of transfer for capital gain taxation under Joint Development Agreement

Background and facts of the case

- Under the Income Tax Law (ITL), capital gains on sale of an asset is taxable in the year in which transfer of the asset takes place. The term "transfer" is defined under the ITL inclusively and is very wide.
- Traditionally, capital gains in relation to immovable property was taxable in the year in which the conveyance deed was executed and registered. This resulted in delay or non-payment of tax on capital gains pending execution and registration of conveyance deed, despite the purchaser having paid the seller, and the purchaser enjoying the possession of the immovable property in his own right to the exclusion of the seller. To overcome this, the ITL expanded the definition of "transfer" for immovable property, to include any transaction that allows possession of any immovable property to be taken or retained in part performance of a contract of the nature referred to in section 53A of Transfer of Property Act (TOPA) (expanded definition of transfer).

- Section 53A of TOPA represents equitable doctrine of part performance. In terms of section 53A of TOPA, the purchaser is entitled to protection against the seller, where the purchaser has acquired possession of such immovable property (or part thereof) pursuant to having partly performed the contract, and is willing to perform his part of the contract.

- A Joint Development Agreement (JDA) is an arrangement wherein the landowner provides land to the developer for construction against receipt of a consideration in the form of a specified quantum of constructed units, with or without monetary consideration.

- The date of "transfer" of land for capital gains taxation in the hands of the landowner entering into the JDA has been the subject matter of dispute before various Courts, having regard to the expanded definition of transfer.

- The Finance Act, 2017 introduced a specific provision for taxation of transfer of land or building under a JDA by individuals and Hindu Undivided Families (HUF). In terms of the amended provision, any capital gains arising from transfer of land or building under a registered specified agreement is chargeable to tax, subject to certain conditions, in the year in which the certificate of completion for the whole or part of the project is issued by a competent authority. The amendment is not applicable in the case of other taxpayers being landowners entering into the JDA, such as a company or a limited liability partnership.

- The Taxpayer, a company engaged in the business of developing, operating and maintaining technology parks, had obtained land on a long-term lease from West Bengal Electronic Industrial Development Corporation. The Taxpayer decided to develop said leasehold land by entering into a JDA dated 7 February 2007 with a developer having expertise in development of technology parks. Under the JDA, the developer would construct and incur all development costs and retain 61% of land and proportionate constructed area (including amenities), while the balance 39% would belong to the Taxpayer. On entering into the JDA, the Taxpayer handed over possession of the land to the developer for carrying out construction and also received a security deposit of INR 50 million from the developer.

- For TY 2006-07, the Taxpayer filed a return on the basis that no "transfer" of immovable property took place on entering into the JDA on granting possession of the land to the developer. According to the Taxpayer, on entering into the JDA, the Taxpayer had only granted a license to the developer for entering into the premises for carrying out construction, and the Taxpayer had never parted with the possession till the developer completed construction and gave physical delivery of 39% share to the Taxpayer. The Taxpayer, accordingly, offered capital gains income in TYs 2010-11 and 2011-12 when it actually received 39% share from the developer.

- For TY 2006-07, the Commissioner of Income Tax (CIT) passed an order stating that as the Taxpayer had handed over possession of the land to the developer on entering into the JDA, "transfer" had taken place under the expanded definition of transfer, making the Taxpayer liable to capital gains taxation in TY 2006-07.

- The appeal travelled to the HC.

Issue before the HC

- In case of a JDA, under the expanded definition of transfer, whether "transfer" may be considered as completed on the date of the Taxpayer handing over possession of the land to the developer for carrying out construction.

HC's ruling

- The HC ruled in favor of the Taxpayer and held that no transfer took place on the taxpayer handing over possession of the land to the developer for carrying out construction. The HC held that the expanded definition of transfer stood attracted only at a later stage when the developer became eligible for protection under Section 53A of TOPA, after completing construction and handing over 39% share of the constructed area to the Taxpayer. Refer the following reasoning by the HC:

- Scope of section 53A of TOPA and the expanded definition of transfer under the ITL:

  - On a plain reading of the expanded definition of transfer under the ITL, it is evident that handing over of possession for any and every purpose may not be considered as "transfer". Only that type of possession for which a purchaser is entitled to protection under section 53A of TOPA is regarded as "transfer" under the ITL.

  - For instance, A may agree to sell an immovable property at an agreed consideration to B. If A hands over possession to B after receiving part payment, as long as B is willing to discharge its obligation under the agreement, A cannot dispossess B from the relevant property, even if the conveyance is not executed and registered. This is the essence of section 53A of TOPA. A may be said to have transferred the property under the expanded definition of transfer when A hands over possession to B.

- Obtaining possession from the landowner for carrying out construction does not entitle the developer to protection under section 53A of TOPA

  - Normally, the terms of a JDA may indicate when "transfer" is to take place. A "transfer" rarely happens on entering into the JDA, but, if the landowner retains a right in the area to be constructed by the developer in the future, it would scarcely be a case of "transfer" taking place on entering into the JDA.

  - The developer would only be in de facto possession of the land only for the purpose of constructing on the land in question, while the de jure possession would lie with the Taxpayer. Till such time the construction comes up and 39% share of constructed area is handed over to the Taxpayer, it could not be said that the balance 61% share of the land had been transferred to the developer under the expanded definition of transfer.

  - The above aspect may be viewed from another perspective viz., merely because de facto possession is made over to a mason or a civil engineer for carrying out construction, it would not imply that possession is given for their enjoyment of the land. Such person would be in de facto possession under the de jure possession of the owner for the limited purpose of undertaking construction.

- Developer entitled to protection under section 53A of TOPA only after completing construction and only then does "transfer" happen for the ITL:

  - The Taxpayer, on entering into the JDA, handed over possession of not only 61% share, but the entire land to the developer. The developer, being in physical control of the land, could have declined to return possession to the Taxpayer. But, such resistance by the

- developer would not have been protected by section 53A of TOPA.

- The developer could have resisted dispossession under section 53A of TOPA only after completing construction and apportioning 39% share of the constructed area to the Taxpayer, despite conveyance not being executed or registered. Till such event, no capital gains arose in the hands of the Taxpayer under the expanded definition of transfer.

- In the absence of the Taxpayer earning "any profits and gains", charge of capital gains taxation under the ITL is not triggered

  - The charging provision for capital gains taxation under the ITL triggers only on accrual of profits and gains on transfer of a capital asset. In the present case, as per the HC, no monetary profits and gains had accrued to the Taxpayer on entering into the JDA. The Taxpayer earned profits and gains only on the developer completing construction and handing over 39% share of the constructed area to the Taxpayer. Hence, also as per the HC, no capital gains could be taxed on entering into the JDA.

(Source: PCIT v. Infinity Infotech Parks Ltd. [TS-404-HC-2018 (Cal HC)])

Key Direct Tax Developments

1. Central Board of Direct Taxes (CBDT) notifies additional scope of reporting in Tax Audit Report (TAR)

Background

The ITL requires specified taxpayers carrying on business or profession to get their accounts audited by an Accountant [The meaning of the term 'Accountant' is defined under the ITL and mainly includes a practicing Chartered Accountant who fulfills certain independence requirements]. The Accountant has to furnish a TAR in Form No. 3CD by uploading it in electronic form prior to taxpayer filing return of income for each TY by specified due date. The TAR includes several items which are relevant for computation of taxable income as also reporting of various tax compliances made by the taxpayers.

The CBDT [Apex body for administration of direct taxes in India] has issued Notification No. 33 /2018 dated 20 July 2018 (Notification) modifying and/or enhancing the disclosure / reporting requirements in TAR for TY 2017-18 onwards.

The modifications are effective from 20 August 2018.

Below is the summary of the key amendments made by the Notification.

Key changes in TAR:

1. Reporting of receipt of forfeited advance for transfer of capital asset [New clause 29A]

- Finance Act 2014 inserted a provision for taxation of sum of money received as advance or in the course of negotiations for transfer of capital asset if such amount is forfeited and the transfer of capital asset does not take place. The amended TAR requires the Accountant to certify whether the taxpayer has received any such income and if yes, the nature and amount of such income.

2. Reporting of gift taxation [New clause 29B]

- Finance Act 2017 significantly expanded scope of gift taxation provision which taxes receipt of sum of money or other specified properties [Like immovable property, shares, securities, jewellery etc.] by a taxpayer without consideration or for inadequate consideration (subject to certain exceptions [For instance, receipts from relatives or receipts under tax exempt business reorganisations]). The amended TAR has new clause 29B which requires accountant to certify whether the taxpayer has received any such income and if yes, the nature and amount of such income.

3. Secondary Adjustment (SA) [New clause 30A]:

- Finance Act 2017 introduced SA provisions in the ITL which trigger in a case where there is a primary transfer Pricing Adjustment (PA) under any of the following five scenarios:

  - Voluntary transfer pricing adjustment made by the taxpayer
  - Adjustment made by Tax Authority and accepted by the taxpayer
  - Determination by Advance Pricing Agreement
  - Determination pursuant to Safe Harbour Rules
  - Resolution under Mutual Agreement Procedure methodology

- In terms of SA provisions, in a case where due to a PA in the hands of the taxpayer, there results an excess cash with taxpayer's associated enterprise (AE) outside India then such excess cash is required to be repatriated to India within the prescribed time limits [The ITL, under relevant rules, prescribes time limit for repatriation of excess money and the manner of computation of interest on deemed advance]. In a case where the excess money is not repatriated to India within the prescribed time, then such amount is deemed to be an advance made by the taxpayer to its AE and interest is levied on the deemed advance, in a prescribed manner, until it is repatriated to India.

- The amended TAR requires disclosures relating to SA provisions which includes:
  - Whether there has been a PA during the relevant tax year?
  - Category of PA made
  - Amount of PA
  - Whether the excess money available is required to be repatriated to India and if yes, whether the excess money has been repatriated to India within the prescribed time limit?
  - If the excess money is not repatriated to India within the prescribed time, amount of imputed interest on such deemed advance

4. Disclosure of disallowance of interest deduction under new interest deduction limitation rule as per BEPS [Base Erosion and Profit Shifting] Action 4 [New clause 30B]

- Pursuant to BEPS Action 4 recommended by OECD [Organisation for Economic Co-operation and Development], Finance Act 2017 inserted a new provision which limits interest deduction or similar payments made by Indian company or permanent establishment of foreign company for debt borrowed from Non-resident (NR) AE or guaranteed by AE. The provision applies only if interest or similar payments on specified borrowings exceeds.

- INR10 Million in which case, interest deduction is limited to lower of actual expenditure in favour of AE or 30% of EBIDTA [Earnings before interest depreciation, tax and amortization like immovable property, shares, securities, jewellery etc.]. The amended TAR has a new clause 30B which requires the Accountant to certify the details of expenditure incurred by way of interest or similar nature, EBIDTA of the TY for which TAR is furnished, the quantum of interest expenditure or similar nature which exceeds 30% of EBDITA and unclaimed interest expenditure eligible for carry forward to subsequent TY and which has been brought forward from prior TYs.

5. Reporting of General Anti Avoidance Rule (GAAR) impacted transactions [New clause 30C]:

- GAAR provisions were introduced in the ITL effective from 1 April 2017 to deal with aggressive tax planning. In past, Shome Committee [A Committee constituted by CBDT headed by Dr. Parthasarathy Shome to give recommendations on GAAR provisions] in its first report had recommended to amend TAR to include reporting by the Accountant of impermissible tax avoidance arrangements. Shome Committee recommended to include reporting of those arrangements which are considered by the Accountant as "more likely than not" to be held as impermissible avoidance agreement.

- The amended TAR requires to report whether the taxpayer has entered into an impermissible avoidance arrangement. If yes, it further requires to report the nature of such impermissible avoidance arrangement and the amount of tax benefit in the tax year arising, in aggregate, to all the parties to the arrangement.

6. Receipt of cash in excess of INR2 lacs [New clause 31(ba)/(bb)/(bc)/bd)]:

- To discourage cash transactions and move to "cashless" economy, Finance Act 2017 inserted a provision in ITL to prohibit taxpayers (barring certain exceptions [Like Government, banks, etc.]) from receiving an amount in excess of INR 2 lacs otherwise than by an account payee cheque or an account payee bank draft or use of electronic clearing system through a bank account. The amended TAR requires disclosure of transactions which do not comply with this requirement.

7. Enhanced reporting of Statement of Tax Deducted or Collected at Source (TDS statement) [Clause 34(b)]:

- Prior to amendment, the TAR required disclosure of transactional details of tax deduction or collected at source and TDS statements filed in respect thereof. It also required the Accountant to certify whether TDS statements are furnished to the Tax Authority within prescribed time. In case TDS statements are not furnished on time, it required further disclosure of date when it was furnished (if furnished) and whether it contains information about all transactions which are required to be reported. In other words, the TAR did not require disclosure of unreported transactions in TDS statements if they were furnished within due date. The disclosure of unreported transactions was required only if TDS statements were not furnished within due date.

- The amended TAR now requires disclosure of details/transactions which are not reported even in TDS statements which are furnished within due date.

8. Deemed Dividend [New clause 36A]:

- Under the ITL, any loan or advance given by a closely-held company (CHC) to its substantial shareholder or a concern where such shareholder holds substantial interest or any payment made by such CHC for benefit of such shareholder is deemed to be "dividend" to the extent of accumulated profits possessed by payer company. Upto TY 2017-18, such payment triggered taxation in the hands of the recipient shareholder [From TY 2018-19, such payment triggers a distribution tax @30% (plus applicable surcharge and cess) in the hands of dividend paying CHC].

- The amended TAR has a new clause 36A which requires the recipient of such dividend to report the quantum of dividend received and date of such receipt. Thus, the new reporting requirement applies to the recipient of the dividend who is liable to tax audit and not to the dividend paying CHC.

9. Reporting requirement for certain Specified Financial Transactions (SFT) and compliance under Foreign Account Tax Compliance Act (FATCA) [New clause 42]

- Statement of SFT

  - The ITL makes it obligatory for taxpayers (reporting entity) to furnish details of SFTs [There are 13 types of SFTs listed in Rule 114E with varying thresholds. On illustrative basis, these include cash deposits and withdrawals from banks, fixed deposits with banks, credit card payments, issue of bonds or debentures, buyback of shares, cash sales of goods or services, etc.] and the parties with whom such transactions were entered (with their PAN) [Permanent Account Number]. The reporting entity is required to submit details in a prescribed form (i.e. Form No. 61A [On or before 31 May immediately following the relevant Tax Year]). Similar reporting requirement exists in Form 61 [Twice for one Tax Year - In relations to transactions entered prior to 30 September - due date is 31 October and in relation to transactions entered from 1 October to 31 March – Due date is 30 April] for a separate list of PAN reportable transactions [List of PAN reportable transactions are specified in Rule 114B. Reporting in Form 61 triggers if the party required to report his PAN for such transactions does not possess PAN] where counter party to the taxpayer does not possess PAN.

- FATCA and Common reporting Standard (CRS)

  - With a view to collect required information to enable India to meet its obligation of automatic exchange of information under FATCA and CRS, the ITL requires prescribed financial institutions to furnish a statement in Form No. 61B of 'reportable accounts' maintained by them.

  - The amended TAR requires the Accountant to report whether the taxpayer is required to furnish Form No. 61 / 61A / 61B and if yes, the relevant details such as Taxpayer's identification number [Income-tax Department Reporting Entity Identification Number], due date of furnishing respective forms, date of furnishing the said form. More significantly, the amended TAR also requires the Accountant to report whether submitted forms contains all details or transactions which were required to be reported and if not, list of details / transactions which are not reported by taxpayer. In other words, the amended TAR requires the Accountant to audit the submitted forms to identify unreported transactions.

10. Reporting of compliance of provisions of Country-by-Country reporting (CbCr) [New clause 43(a)]

- To implement BEPS Action 13 (Transfer Pricing Documentation and Country-by-Country Reporting) recommendations, Finance Act 2016 amended the ITL to introduce provisions for additional transfer pricing (TP) documentation, consisting of:

  i. a master file containing standardized information relevant for all members of a multinational group; and

  ii. a Cbc report containing certain information relating to the global allocation of the group's income and taxes, together with indicators of the location of economic activity within the group (CbCR information). Further, rules along with the relevant forms for implementation were issued on 31 October 2017. The first year for which CbCR became applicable was TY 2016-17 for which due date was 31 March 2018.

- The amended TAR requires the Accountant to report whether the taxpayer or its parent entity or alternate reporting entity is liable to furnish the CbCr and if yes, particulars relating to furnishing of such report.

- Since the due date for furnishing TAR [30 September or 30 November immediately following the tax year] precedes the due date for furnishing CbCR [31 March immediately following the tax year], it appears that disclosure in TAR relates to CbCR compliance made for the preceding tax year.

11. Details relating to Goods and Service tax (GST) [New clause 44]:

- Similar to the amendment made in income tax return forms, the amended TAR requires reporting of details of GST viz. break-up of total expenditure with GST registered and non-registered entities. In relation to expenditure with GST registered entities, it further requires the break-up of expenditure relating to exempt supply covered under the composition scheme and other registered entities.

(Source: Notification No. 33/2018 dated 20 July 2018)

2. Tax Return filing due date for TY 2017-18 extended to 31 August 2018

- As per the ITL [Section 139 of the Income-tax Act, 1961], in case of taxpayers being individuals and HUF, the due date for submission of their tax returns for TY 2017-18 is 31 July 2018. Further, if a taxpayer does not furnish tax return after the due date, but before 31 December of the following TY, the taxpayer shall be liable for payment of late fee of INR 5,000. On further delay, the fee will be increased to INR 10,000 [However, fee cannot exceed INR 1,000 if the income of the taxpayer is less than INR 5 Lacs].

- The CBDT vide order dated 26 July 2018 has extended the due date for filing tax return in relation to TY 2017-18 for all taxpayers who are liable to file their tax returns by 31 July 2018 to 31 August 2018.

- While the CBDT order does not specifically clarify, the interest for delay in filing tax return may not be levied as the due date itself stands extended. Further, since the time prescribed under the ITL for furnishing tax return itself is extended, fee for late filling of tax return may also not be leviable.

(Source: Order No. F. No. 225/242/2018/ITA.II issued by CBDT dated 26 July 2018)

3. CBDT reiterates Supreme Court (SC) ruling on computation of tax holiday benefit and directs the Tax Authority to withdraw or not to press any appeal on the issue

Background

- The ITL provide tax holiday for a definite period in respect of profits derived from the nature of activity performed by a taxpayer (e.g., export of goods or services), place of business (e.g., Special Economic Zone) etc.

- Amongst others, Section 10A [The provision is inoperative from tax year 2011-12] of the ITL (tax holiday provision) provides tax holiday with respect to profits and gains derived from an undertaking engaged in the export of articles or things or computer software for a period of ten consecutive years, subject to conditions specified therein. The benefit of the tax holiday provision is restricted to the profits derived from the export activity, which is determined based a normative formula as follows:

$$\text{Total profits of the business of the undertaking} \times \frac{\text{Export Turnover (ETO) of the undertaking}}{\text{Total Turnover (TTO) of the undertaking}}$$

The numerator (ETO) in the normative formula is defined to exclude recovery or consideration towards:

a. Freight, telecommunication charges or insurance incurred to deliver the articles or things or computer software outside India.

b. Expenses incurred in foreign exchange in providing technical services outside India (Specified Expenses). However, the denominator (TTO) is not defined for the purpose of the tax holiday provision.

- Substantial litigation had arisen in the past on the issue of whether any amount which is deductible from the ETO (being the numerator in the normative formula), should also be reduced from the TTO (being the denominator in the normative formula).

- This issue was put to rest recently by the SC in the case of HCL Technologies [CIT v. HCL Technologies Ltd. [(2018) 404 ITR 179]], wherein the SC had held that when the object of the normative formula is to arrive at the profits from export business, recovery of Specified Expenses excluded from the ETO is also to be excluded from the TTO, as one of the components of the TTO is the ETO and any other view would make the formula unworkable and absurd.

- Recently, CBDT issued a Circular[6] acknowledging the judgement of the SC and reiterated that if the consideration towards any of the Specified Expenses (including expenses incurred in foreign currency for providing technical services outside India) is deductible from the ETO, the same shall also be deductible from the TTO to derive the amount of profits eligible for deduction as per the tax holiday provision. CBDT also directed the Tax Authority not to file any appeal on this issue and in respect of appeals already pending before any forum, to withdraw the issue in appeal or not press the ground in the appeal hearing.

- In the wake of the SC ruling, the issue was otherwise settled; the Appellate Authority/Tribunal/Court is bound by the ratio of the SC ruling. However, issuance of this administrative Circular by CBDT may ease the process of withdrawal of the issue by the Tax Authority in pending appeals.

- While the Circular is in the context of the tax holiday provision, which is no longer on statute, it will have a persuasive effect on the interpretation of other similar provisions of the ITL, such as the provision in relation to tax holidays for units in Special Economic Zone and other provisions based on the normative formula.

(Source: Circular No. 4/2018 dated 14 August 2018 issued by CBDT acknowledging the judgement of Supreme Court in the case of CIT v. HCL Technologies Ltd. [([2018] 404 ITR 179)])

Our offices

Ahmedabad
2nd floor, Shivalik Ishaan
Near. C.N Vidhyalaya
Ambawadi,
Ahmedabad - 380 015
Tel: + 91 79 6608 3800
Fax: + 91 79 6608 3900

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

Prestige Emerald, No. 4,
1st Floor, Madras Bank Road,
Lavelle Road Junction,
Bangalore - 560001

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

Chennai
Tidel Park,
6th & 7th Floor
A Block (Module 601,701-702)
No.4, Rajiv Gandhi Salai
Taramani
Chennai - 600 113
Tel: + 91 44 6654 8100
Fax: + 91 44 2254 0120

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

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

Kolkata
22, Camac Street
3rd Floor, Block C"
Kolkata - 700 016
Tel: + 91 33 6615 3400
Fax: + 91 33 2281 7750

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,
Nirlon Knowledge Park
Off. Western Express Highway
Goregaon (E)
Mumbai - 400 063
Tel: + 91 22 6192 0000
Fax: + 91 22 6192 3000

NCR
Golf View Corporate
Tower - B
Near DLF Golf Course,
Sector 42
Gurgaon - 122 002
Tel: + 91 124 464 4000
Fax: + 91 124 464 4050

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

Pune
C–401, 4th floor
Panchshil Tech Park
Yerwada (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 Camac Street, 3rd Floor, Block C, Kolkata - 700016

- This work product has been prepared by EY LLP on the basis of a scope of work agreed with the Automotive Components Manufacturers' Association of India (ACMA), and does not purport to be all-inclusive or to contain any information that a prospective reader may expect or desire. Accordingly, if made available to ACMA's members or any other person or entity, this work product is solely for their information and should not be used, circulated, quoted, relied upon, or otherwise referred to for any other purpose, nor included or referred to in whole or in part in any document without EY LLP's prior written consent.
- The information in this document has been printed on the basis of data from various EY subscribed databases, media reports, publicly available information, internal data and other reliable sources believed to be true. While every effort is made to ensure the accuracy and completeness of information contained, EY LLP takes no guarantee and assumes no liability for any errors or omissions of the information.
- Due to the dynamic nature of the subjects covered by this document, readers of this document are cautioned that (a) any information contained in this document may not be current after the date hereof, and (b) any forward-looking statements are not predictions and may be subject to change without notice.
- Information in this publication is intended to provide only a general outline of the subjects covered, on the basis of a scope of work agreed with ACMA. It should neither be regarded as comprehensive nor sufficient for making decisions, nor should it be used in place of professional advice. EY LLP accepts no responsibility for any loss arising from any action taken or not taken by anyone using this material.
- This disclaimer forms an integral part of this work product.

EY contacts for ACMA Knowledge Partnership:

- Rakesh Batra, National Automotive Sector Leader - rakesh.batra@in.ey.com / +91 124 464 4532
- Deepshikha Anand, ACMA Knowledge Partnership Coordinator - deepshikha.anand@in.ey.com / +91 124 612157