EY Tax and Regulatory Alert

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Contents

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Indirect Tax

This Section of Tax alert summarizes the Indirect tax updates for the month of September 2018

Judicial Precedents

1. M/s T. M. Motors Pvt. Limited
Vs
C.G.ST. C & CE, Alwar

[TS-390-CESTAT-2018 (DEL)-ST]

Background and facts of the case

- M/s T. M. Motors Pvt. Ltd. (The Company) is engaged as a dealer of Maruti cars, wherein they sell the cars and undertake servicing thereof
- An audit of the accounts of the company was conducted by the department, and a Show Cause Notice was issued on the Company contending non-payment of Service Tax on various grounds
- The Company received certain commissions from various financial institutions for promoting their loan schemes for purchase of Maruti cars by the customers. Department was of the view that the commissions received were liable to payment of service tax under the category of business auxiliary service
- In this regard, the Company accepted the ground and suo-moto discharged the applicable Service Tax amount
- While acting as a dealer for Maruti cars, the Company received certain amount by way of rebates/ discounts/ incentives in the price of the car. Some of these incentives were received by the Company on the basis of various target based incentives permitted by the manufacturers of the cars. The Department was of the view that the Company is required to pay service tax on such discounts received under the category of business auxiliary service.
- In this regard, reliance was placed on the decision of the Mumbai Tribunal in the case of M/s Toyota Lakozy Auto Pvt. Ltd. [2017 (52) STR 299 - (Tri.–Mumbai)], wherein the Tribunal observed that "..the agreement between the appellant and M/s Toyota Kirloskar Motor Limited is one of supply of vehicles by the latter on 'principal-to-principal' basis on which title and risk, as per Agreement are passed on to appellant when the vehicles are excise cleared and placed on common carrier. Depending on order quantity, the manufacturer raises invoices after according discounts which are designated as commission/incentive merely as a management terminology."
- In the aforementioned case for Toyota, reliance was also placed on the decision of Mumbai Tribunal in the case of Jaybharat Automobiles Limited vs. Commissioner of Service Tax, Mumbai [2016 (41) S.T.R. 311 (Tri.)] wherein it was held that "..Only because some incentives/ discounts are received by the appellant under various schemes of the manufacturer cannot lead to the conclusion that the incentive is received for promotion and marketing of goods. It is not material under what head the incentives are shown in the Ledgers, what is relevant is the nature of the transaction which is of sale. All manufacturers provide discount schemes to dealers. Such transactions cannot fall under the service category of Business Auxiliary Service when it is a normal market practice to offer discounts/ institutions to the dealers."
- Accordingly, following the above cited case laws and facts therein, the Hon'ble CESTAT, New Delhi set aside the demand of Service Tax on incentives provided by the manufacturers to its dealers.
- During the course of carrying out service of the vehicles as an authorised service centre for Maruti cars, the Company also used various consumables/ spare parts. The price of such consumable/ spare parts were also recovered from the customers and Department was of the view that the value of such consumables/ spare parts were also required to be included in the consideration charged by the company for carrying out service of the vehicles and accordingly, the Department proposed to demand service tax by including the value of such consumables/ spare parts.
- In this regard, it was submitted that service tax is not chargeable on the consumables/ spare parts since these have been sold by the appellant, during the course of servicing the vehicle. On perusal of sample invoice copies, it was pointed out that for the spare parts and consumables sold during the provision of service, VAT as appropriate has already been paid.
- Reliance was placed on the decision of Delhi Tribunal in the case of Krishna Swaroop Agarwal 2015 (37) STR 647 (Tri.–Del.) wherein it was held that "..It is seen that as recorded by the

Commissioner (Appeals), respondents were able to establish that amount on which the impugned Service Tax has been demanded actually pertains to the sale of spare parts/ accessories/ consumables like lubricants etc. by showing copies of the VAT assessment orders for the financial years 2006-07 & 2007-08. It would clearly entitle them to the benefit of Notification No. 12/2013-S.T. Indeed even the provisions of Section 67 lay down that the value for the purpose of levy of Service Tax is the gross amount charge for taxable service. Thus, we do not find any merit in the Revenue's appeal which is hereby quashed."

- Accordingly, following the above cited case law and the facts therein, the Hon'ble CESTAT, New Delhi set aside the demand of Service Tax on the sale of parts/ components during repair of vehicles

- The Company carried out not only service as an Authorised Service Station but also the activity of trading of Maruti cars as well as spare parts. The Company availed cenvat credit on certain common input services and used the same for payment of service tax under the category of Authorised Service Station. The Department ordered for reversal of an amount at the rate of 6% of the value of the exempted service, i.e., trading service, in terms of Rule 6(3) of the Cenvat Credit Rules, 2004

- In this regard, the Company accepted the ground and suo-moto reversed the Cenvat credit availed.

2. M/S Punjab Tractors Vs CCE-Chandigarh-I

[2018-VIL-630-CESTAT-CHD-CE]

Background and facts of the case

- Brief facts of the case are that the appellants were engaged in the manufacture of Tractors. The appellants were clearing tractors on payment of central excise duty till 08.07.2004, and w.e.f. 09.07.2004, the tractors were exempted from levy of excise duty

- Therefore, w.e.f. 09.07.2004 the appellants were clearing tractors without payment of excise duty. The appellants also used to get tractors cleared from the factory back into the factory for removal of defects

- During the month of July 2004, the appellants received tractors for removal of defects under provisions of Rule 16 (1) of Cenvat Excise Rules, 2002. The appellants availed Cenvat credit of Rs. 31,82,326/- and Rs. 11,79,933/- which was the central excise duty paid on the tractors. The said Cenvat credit was availed by the appellant under sub-Rule (1) of Rule 16 of Central Excise Rules, 2002. When the defects were cured, the tractors were cleared after 09.07.2004 and therefore the appellants did not pay any central excise duty on clearance of the same nor reversed the Cenvat credit availed on receipt of the same into the factory.

- Therefore, the proceedings were initiated by the Revenue for recovery of above stated amounts on the premise that the said tractors were not subjected to the processes amounting to manufacture and therefore in terms of Sub-Rule (2) of Rule 16 ibid, the appellants are required to reverse the Cenvat credit availed on receipt of the said tractors into the factory.

Appellant's Submission

- Appellant has submitted that the said tractors were not repaired and were once again totally remade and manufactured and the processes was carried out amounting to manufacture and since the goods were manufactured and were exempted w.e.f. 09.07.2004, there was no requirement of reversal of availed Cenvat credit or requirement of payment of central excise duty.

- The Ld. Counsel further submitted that the received goods were taken up to the assembly line after stripping off external assemblies, dash board with meters & instrumentations, seat assembly, fuel tank, radiator, air cleaner assembly, silencer and seats, etc.

- Appellant further placed reliance on the various documents submitted before the authorities below such as copy of certificate of Cost Accountant dated 11.07.2006, Copy of list of tractors on which chassis was replaced and Copy of affidavit from production head.

- Appellant has further relied on the final order of this Tribunal in the case of Maruti Udyog vs. Commissioner of Central Excise, New Delhi-III reported at 2002 (146) ELT 427 (Tri.-Del.). She has submitted that this Tribunal has held in the said case where identical processes were carried out that the said processes amounted to manufacture.

Decision taken

- Having considered the rival contention and perusal of record, Tribunal find that the subject goods were brought into the factory and were subjected to the processes which are stated in the foregoing paragraph.

- Tribunal also find from the relied upon case law that only those vehicles which are suffered heavy damages during transit are returned to the factory and they were completely dismantled and only the goods parts are salvaged and thereafter they were put to the assembly line for complete re-marking. This Tribunal in the case of Maruti Udyog (supra) held that the said process amounted to manufacture. We find that in the present case, also the returned tractors were stripped of external assemble and then put on assemble line.

- Therefore, Tribunal held that in the present case, the process amounted to manufacture. Therefore, we do not find any merit in the impugned orders. We set aside the impugned orders. The appeals filed by the appellants are allowed. The appellant shall be entitled for consequential relief as per law.

3. M/S Brakes India Private Limted Vs Authority for Advance Ruling Authority

[2018-VIL-165-AAR]

Background and facts of the case

- M/s. Brakes India Private Limited, MTH Road, Padi, Chennai 600 050 (hereinafter called as Brakes or Applicant) is engaged in the manufacture of auto components viz., caliper brakes, drum brakes, actuation systems, disc brake pads, valves, rubber hose, ABS and brake fluid for light motor vehicles, S-cam brakes, Hydraulic drum brakes and Electro Magnetic Retarders for commercial vehicles and also Dry and Wet brakes for agricultural tractors

- M/s. Brakes India Private Limited approached Authority of Advance Ruling, seeking classification of the product 'Disc Brake Pads' manufactured and supplied by them

- M/s. Brakes India Private Limited has stated that Disc Brake Pads are commonly used in the brake assembly of motor vehicles also known as caliper brakes, to cause friction, which would assist the vehicle to slow down or stop. Disc Brake Pads contain two elements, i.e., one, the Disc Pad which is made of friction materials and the backing plate made of steel which is coated with an adhesive. These two elements when brought together, form what is referred to as the 'Disc Brake Pads'

- The applicant furnished a letter and annexure with brochure of the product, technical data sheet, photograph of the product and videography of the manufacturing process undertaken. They further undertook to submit copies of POs, invoices in 10 days. They furnished sample copies of POs, invoices vide their letter dated 31.05.2018

Observation of Authority for Advance Ruling

- On examination of the documents submitted, it is seen that the product in question is an assembly consisting of friction material and a steel back plate

- Its purpose is to provide the necessary frictional force when in contact with the disc while brake is applied. The steel back plate is used to fasten or bond the friction material rigidly in order to take care of severe pressure/load applied on it under various braking conditions. As per the manufacturing process, it is seen that the Disc pads (friction material) and the backing plate undergo the process of using adhesives to bond the friction material to the backing plate and the process of moulding, where the Disc Pads are pressed, heated and cured forming one integrated component

- The Friction Material in the form of discs or pads or any other form consisting of mineral materials with or without textiles are classifiable under CTH 6813 if they are not mounted. But when they are mounted including friction material fixed to a metal plate provided with circular cavities, perforated tongues or similar fittings for disc brakes, these are classified as parts of the machines or vehicles for which they are designed

- In the present case, the product consists of a friction material (made up of organic fibers and minerals, graphite) which is bonded with a steel backing plate forming an integrated component. Heading 6813 specifically excludes such mounted brake linings which are rightly classifiable as parts of vehicles for which they are designed. It is used in automotive vehicle brakes to stop or slow down the vehicle. Parts of the motor vehicles of heading 8701 to 8705 are classifiable under Heading 8708. Explanatory Notes to CTH 8708 also covers Brakes (shoe, segment, disc, etc.) and parts thereof (plates, drums, cylinders, mounted linings, oil reservoirs fit hydraulic brakes, etc.). Thus the product to be classified 'Disk brake Pads', a part of the motor vehicle, classifiable under Heading 87083000 as 'Brakes and servo-brakes; parts thereof'.

Ruling

- 'Disc Brake Pads' manufactured and supplied by the Applicant are classified under Heading 87083000 and covered under Sl. No. 170 of Schedule IV of Notification No. 01/2017 CT (Rate) dated 28.06.2017 and Sl.No. 170 of Schedule IV of G.O. (Ms) No. 62 dated 29.06.2017 No. II(2)/CTR/532(d-4)/2017 attracting 28% GST rate.

4. M/S Toyota Kirloskar Motors Private Limited
Vs
Commissioner OF Central Tax Bangalore West

[2018-VIL-614-CESTAT-BLR-ST]

Background and facts of the case

- The facts of the present case are that the appellant is engaged in the manufacture of motor vehicles viz. passenger cars/excisable goods falling under Chapter 87 of the First Schedule of Central Excise Tariff Act 1985 and is a duly registered LTU. The appellant is availing cenvat credit of duty paid on input services, inputs and capital goods under Cenvat Credit Rules, 2004.

- During the course of the audit of the records of TKML, it was noticed that they were dispatching parts of Motor Vehicles through Courier to their Dealers and have availed CENVAT credit of Rs. 42,26,553/- (Rupees Forty Two Lakhs Twenty Six Thousand Five Hundred and Fifty Three only) on Outward Courier Bills for the period from April 2009 to March 2012. It appeared that the Outward Courier Service is not covered by the definition of "input service" as per Rule 2(l) of Cenvat Credit Rules, as the definition allows credit only on Outward Transportation upto the place of removal.

Appellant's Contention

- Learned counsel for the appellant submitted that the impugned order is not tenable in law being contrary to the facts and based on incorrect rendition of statutory provision.

- Appellant further submitted that the cost of courier transportation is included in the cost of auto-parts and the auto-parts are subjected to Central Excise duty on MRP basis under Section 4A of Central Excise Act.

- Appellant also submitted that MRP of auto-parts includes the expenditure on courier transportation and therefore the credit is available to the appellant since it is part of the expenditure irrespective of the fact whether the place of removal is a factory gate or a customer premises.

- Appellant further submitted that there is no suppression of fact and no malafide intention to evade payment of duty and therefore the extended period has wrongly been invoked.

- Appellant further submitted that the Commissioner (Appeals) in the impugned order has relied upon the decision of the Tribunal in the case of Hero Motocorp Ltd. Vs. CCE reported in 2014 (36) S.T.R. 1128 - 2014-VIL-157-CESTAT-DEL-CE-LB but the same is not applicable in the facts and circumstances. He further submitted that the definition of "place of removal" cannot be applied to goods which were subjected to specific duty. He further submitted that the Commissioner (Appeals) has invoked the extended period of limitation on the ground that the appellant has not brought this fact to the notice of the Department and thereby suppressed the material fact with intent to evade service tax.

- On the other hand the learned AR defended the impugned order and submitted that the Commissioner (Appeals) has considered the definition and scope of 'input service' as provided under Rule 2(l) of Cenvat Credit Rules 2004.

- He also submitted that the Commissioner (Appeals) has categorically held that the factory gate is the place of removal and the cenvat credit of service tax paid on service from the factory gate would not be available. The Commissioner (Appeals) has followed the decision of the Tribunal in the case of Hero Motocorp Ltd. cited supra wherein it has been held that final product if being cleared either under specific rate of duty or in terms of MRP declaration as per Section 4A of the Central Excise Act 1944, the 'place of removal' would be the factory gate and the credit of service tax paid on courier service from the factory gate is not available under Rule 3 of Cenvat Credit Rules, 2004.

Revenue's Contention

- The learned AR defended the impugned order and submitted that the Commissioner (Appeals) has considered the definition and scope of 'input service' as provided under Rule 2(l) of Cenvat Credit Rules 2004.

- The Commissioner (Appeals) has followed the decision of the Tribunal in the case of Hero Motocorp Ltd. cited supra wherein it has been held that final product if being cleared either under specific rate of duty or in terms of MRP declaration as per Section 4A of the Central Excise Act 1944, the 'place of removal' would be the factory gate and the credit of service tax paid on courier service from the factory gate is not available under Rule 3 of Cenvat Credit Rules, 2004.

- Since the Division Bench of the Tribunal has held that in case of MRP clearance of the product as per Section 4A of the Central Excise Act, place of removal would be the factory gate and the credit of service tax paid on courier service beyond the factory gate is not available under Rule 3 of the Cenvat Credit Rules.

Court findings and ruling

- Since the Division Bench of the Tribunal has held that in case of MRP clearance of the product as per Section 4A of the Central Excise Act, place of removal would be the factory gate and thus the credit of service tax paid on courier service beyond the factory gate is not available under Rule 3 of the Cenvat Credit Rules.

- Now coming to the argument of the learned counsel for the appellant that the adjudication demands are barred by limitation, Court find that the Commissioner (Appeals) has only observed that the appellant did not bring this fact of cenvat credit to the knowledge of the Department. Therefore, the appellant has suppressed the material fact.

- Further Tribunal find that the appellant has taken the cenvat credit in respect of input services in question on the bonafide belief that they are entitled for credit and the said bonafide belief was founded on the basis of various judicial decisions of the High Court and the Tribunal. Further the entire issue relates to interpretation of statutory provisions particularly the 'input service' definition in Rule 2(l) of the Cenvat Credit Rules 2004.

- Further Court find that in the Tribunal decision in the case of Hero Motocorp Ltd. cited supra on which the learned Commissioner (Appeals) has placed reliance it has been held that the Department cannot allege suppression of facts with intent to evade payment of duty and that the demands were held to be time-barred in as much as the extended time period could not be invoked. Court find that this aspect has been completely ignored by both the authorities.

- In the present case, the period of dispute is from 2009-10 up to 2011-12 and the show-cause notice was issued on 04.03.2014 which is beyond the normal time period of one year from the relevant date i.e. 10.04.2012. Therefore, by relying upon the ratio of the Hero Motocorp (supra), Tribunal is of the considered view that the entire demand is barred by limitation and the Department cannot allege malafide against the appellant particularly when the issue was not free from doubt and relates to one of statutory interpretation.

- Further Tribunal find that the Hon'ble Supreme Court in the case of SNS (Minerals) Ltd. Vs. UOI – 2007 (210) ELT 3 (SC) has held that if there was a bonafide doubt then the extended period of limitation is not applicable. Further the Department has not been able to bring on record any material which shows that there was suppression on the part of the appellant. Further the impugned order is contrary to the following judicial decisions in demanding duty by invoking the extended period of limitation.

- In view of my discussion above, Court is of the view that on merit the appellant is not entitled to the cenvat credit on courier service whereas on limitation he succeeds in view of the Division Bench decision of the Tribunal in the case of Hero Motocorp cited supra. Consequently, appeal is allowed holding that the entire demand is barred by limitation.

5. M/S Maini Precision Products Limited Vs The Authority on Advance Rulings in Karnataka Goods and Service Tax

[2018-VIL-155-AAR]

Background and facts of the case

- The Applicant is a private limited company engaged in the manufacture and supply of High Precision Components and Assemblies, catering to a global clientele in the automotive, industrial and aerospace sectors. The applicant manufactures and supplies a wide range of products including sub-assembly products, precision machined components, industrial castings, metal forgings, vacuum formed parts, engine parts, transmission parts, parts of fuel injection pumps.

- The question on which advance ruling is sought is as follows:

  (I) Whether the 'Parts of Fuel Injection Pumps' are classifiable under Tariff Heading 8413 91 90?

  (II) Whether the applicable entry in Notification 1/ 2017 – Integrated Tax (Rate), is 453 of Schedule III, for parts of fuel injection pumps, attracting a levy of 18%?

- The applicant submits that the application is preferred for the purpose of adoption of the appropriate rate of tax as different goods falling under Heading 8413 have been placed under various Schedules Sl. No. 231 of Schedule I, Sl. No. 192 of Schedule II or Sl. No. 317A of Schedule III and Sl. No. 117 of Schedule IV of Notification No. 1/ 2017 – Integrated Tax (Rate).

- The applicant submits that the product proposed to be supplied shall undisputedly be covered under Tariff Heading 8413 91 under Section XVI of the Customs Tariff Act, 1975, which deals with 'Parts of Pumps' and specific Tariff Item numbers are provided for parts of Reciprocating Pumps, Centrifugal Pumps, Deep well turbine pumps and of other rotary pumps, Hand pumps for handling water.

- The applicant states that it is understood that the fuel injection pumps are classifiable under Tariff Heading 8413 30 10, which are not being manufactured by the applicant.

- The contention of the applicant is examined. The goods dealt by the applicant are 'parts of the fuel injection pumps for diesel engines'. The parts of pumps for liquids, whether or not fitted with a measuring device' are covered under the heading 8413 91.

- Since parts of fuel injection pumps for diesel engines are parts of pumps, but are neither covered under HS Codes 8413 91 10 or 8413 91 20 or 8413 91 30 or 8413 91 40, they have to be covered under the residual entry 8413 91 90. Hence "Parts of Fuel injection pumps for diesel engines" are covered under HS Code 8413 91 90.

Ruling

- The "Parts of Fuel Injection Pumps for diesel engines" are classifiable under Tariff Heading 8413 91 90 as per the Customs Tariff Act, 1975

- The "Parts of Fuel Injection Pumps for diesel engines" are covered under the entry no. 453 of Schedule III of Notification No.1/ 2017 – Integrated tax (Rate) dated 28.06.2017 and hence liable to tax at 18% under the Integrated Goods and Services Tax Act, 2017.

6. BMW India Private Limited
Vs
Commissioner of Customs, Chennai-V

[2018-VIL-645-CESTAT-CHE-CU]

Backgrounds and facts of the case

- M/s. BMW India Pvt. Ltd. (hereinafter referred to as 'appellant') have been importing through Chennai Sea Port, goods declared in the Bills of Entry as "BMW CARS IN CKD" classifying them under Customs Tariff Heading (CTH) 8703. In these imports, BMW claimed concessional rate of customs duty @ 10% under clause (i) of Sl. No. 344 of Table appended to Notification 21/2011-Cus. and sub-clause (1)(a) of Sl. No. 437 of Notification 12/2012-Cus.

- Accordingly, a Show Cause Notice dt. 26.08.2013 was issued to the appellants inter alia demanding differential customs duty in respect of CKD kits for motor cars imported during the period 24.03.2011 to 11.04.2013 and imports of motor cars in a form other than CKD for the period 01.03.2011 to 23.03.2011. The Show Cause Notice inter alia proposed demand of differential duty amounting to Rs. 757,61,37,381/- with interest thereon and imposition of penalties under Sections 112(a) and 114A of the Customs Act, 1962.

- In the absence of a definition of CKD, and in order to obtain certainty on the position qua its proposed imports, the appellant applied for an Advance Ruling. The entire set of items imported by the Appellant was submitted as Annexure-III to the Application. Vide Order dated 28.10.2005, In Re: Bayerische Motoren Werke Aktiengesellschaft, 2006 (193) ELT 138 (AAR), the question framed for consideration was as follows:

  "Whether the import of car parts, listed at Annexure III would be considered as import of completely knocked down ("CKD") unit, eligible to the concessional rate of customs duty of 15% being covered by Entry 344 of CTH No.8703 (1) of Notification No.21/2002-Cus., dated March 1,2002 as amended by Notification No.11/2005-Cus., dated 1.3.2005?"

- After considering the Report provided by the ARAI on the referred issues, the Authority for Advance Rulings (‚AAR') was pleased to hold as follows:

  "44. [ ]From the perusal of these reports, the position that emerges is that parts listed in Annexure-III to the application represent the CKD Unit and with the assembly of seats, which will be procured locally, the parts would constitute a complete car. There are some parts, which could be taken as component form while there are other parts which could be termed as SKD form. It is true that there are no definitions of the terms "CKD" and "SKD" in the Customs Act or Rules framed thereunder. But from the material furnished by the applicant for comparison of CKD and SKD, it appears that the components for the CKD vehicle are procured from the suppliers who supply to main BMW production facility at the CKD location and approximately 1400 single parts and body parts are transported to the CKD country. In the case of SKD, the vehicles are completely built up in a main BMW production facility in Germany and subsequently certain components are disassembled; the partially disassembled vehicles are mounted on transport skids and shifted to the respective countries where the disassembled components are fitted. The reports of the expert, as may be seen, refer to Annexure–III as CKD unit. The notification does not use the term "SKD". The Notification for purposes of concessional duty refers to two categories: (i) imported as completely knocked down (CKD) unit dutiable 15%; and (ii) imported in any other form 60%. The reports of the expert do not mention that the car is not imported in completely knocked down (CKD) unit. What they say is that some parts of the car are in SKD form, thereby meaning, they can be further knocked down into components. This, in our view, may not be a relevant factor because it is clear from the report that Annexure-III represents completely knocked down unit of motor cars. If that be so, the contention of the Commissioner that Sl. No. 344 (2) prescribing 60% duty would apply, cannot be accepted; the applicable rate of duty would be 15%.(emphasis supplied)"

- Accordingly, on the basis of the expert report, the AAR ruled that the imports by the Appellant would qualify as CKD, and would be entitled to the lower rate of BCD

- The appellant continued the imports of its CKD kits by availing the 10% rate of duty, after giving prior intimation (vide letter dated 30.3.2011) to the Customs Department of its intent to do so. The Department did not respond to the appellant's letter dated 30.03.2011 nor did it seek any clarification from the appellant post the said letter dated 30.03.2011.

- The Customs Department, on a series of occasions from April 2011 to April 2013 (i.e. 20 times in 25 months), subjected the imports of the appellant to a physical examination to determine whether or not the goods were eligible for the exemption as claimed. On each and every one of these occasions, the Customs Department concluded that the appellant were eligible for the said exemption.

- In terms of the well settled rules of statutory interpretation, the proper and correct construction of Exemption Notifications is that:

  - Imports of engine sub-assembly or transmission sub-assembly which are not mated / assembled together will qualify as CKD imports entitled for the concessional rate of BCD at 10%.

  - Imports of engine and transmission assembly mated / assembled together as a single assembly, but which is not mounted on a chassis or a body assembly, will qualify as CKD imports but be subject to a higher rate of BCD at 30%.

  - Imports of mated engine and transmission assembly which is mounted on a chassis or a body assembly or a CBU will be taxed at the highest rate of BCD at 60%.

- <u>**Appellant's submission on Extended period of limitation**</u>

  - Invocation of the "extended period of limitation" in the OIO is erroneous and unsustainable inasmuch as there is no wilful or deliberate non-disclosure of correct information by the appellant. The appellant has always kept the Department in the know-how of the legal position followed by them.

  - The appellant on June 17, 2005 while filing the Applicaton for Advance Ruling with the AAR submitted the complete list of parts use in assembling the cars at the Chennai plant for 3 Series model of cars in Annexure III (containing list of parts imported for assembling the card model E 90 at their Chennai plant) of the application. The department was party to the application and was well represented before the AAR.

- The OIO itself at paragraph 11.10.2 (page 21 of the OIOO, 11.11.1 (page 22 of the OIO), 11.11.2 (page 22 of the OIO) and 12.3 (page 36 of the OIO) clearly records that there has been no change in the import pattern from the time of the AAR ruling in the appellant's case to the period covered under the SCN.

- The goods in question at the time of import during the period March 2011 to April 2013 have on various occasions been physically examined by the Customs Department and the benefit of the relevant exemption notification allowed after such physical examination.

- <u>Appellant's submission on penalty and interest and confiscation</u>

  - In terms of Section 114A of the Act, penalty is attracted only when short levy is caused by reason of collusion or wilful misstatement or suppression of facts and that in the present case, none of these circumstances exist as has already been set out herein above.

  - Furthermore, as the issue involved is only one of interpretation of the provisions of the exemption notification, it is well settled law that no penalty can be imposed in such a case.

  - As the duty demand on the appellant is itself not sustainable in light of the submissions set out hereinabove, there can be no question of payment of any interest by the appellant under section 28AB of the Act.

  - It is well settled law that provisions relating to confiscation will only stand when misdeclaration is proved and if there is no case of misdeclaration, confiscation cannot be made.

- <u>Revenue's submission on Extended period of limitation and on penalty and interest and confiscation</u>

  - If any pre-assembled engine, gearbox transmission mechanism is imported as a part of such unit, or if any of these three components are pre-installed on the chassis or body assembly, the concessional rate of duty will not be available. The claim that the Circular dated 24.03.2011 has accepted the representation of SIAM and clarified accordingly, is totally misconceived if you take into account the full text of the aforesaid clarification.

  - For availing of concessional rate of Customs Duty @ 10% for consignments of motor vehicles imported as CKD kits, the engine, gearbox and transmission mechanism imported within the CKD kit should not be "in a pre-assembled condition". The primary test for verifying the "pre-assembled condition" of an article would be to ascertain whether all the essential parts that go to make the assembled article (i.e., 'engine'/'gearbox') are present in an assembled form in the said article. Secondly, there shall be no further assembly as an 'engine' or a 'gearbox' with any parts of the article. This would be reflected in the nature of 'add-on parts' and the processes of assembly undertaken in the receiving `factory. The Department has applied these tests to arrive at the conclusion that the goods imported were in a pre-assembled condition.

  - BMW have not been able to demonstrate or describe as to how the imported part declared by them as ‚transmission sub-assembly' in the ‚Detailed Packing List' is different from a "gearbox" and they have also not been able to describe or demonstrate as to how the said transmission sub-assembly would constitute a sub-assembly of the gearbox.

  - Hence, the submission made by BMW India in their letter dt. 30.03.2011 that they imported their engines and gearboxes in sub-assembly form appears to be a clear misdeclaration aimed at misleading the Customs Authority.

  - Very few Bills of Entry filed by BMW [i.e., 20 out of 712 consignments] were taken up (on random selection by system) for assessment and examination. Most of the Bills of Entry filed by BMW during the disputed period were cleared under their own Self-assessment without any examination by Customs based on their status as an Accredited Client under the Accredited Client Programme. Out of 20 examination reports only two mentioned about the pre-assembled nature of engine and transmission. On this basis, generalization cannot be made.

  - With regard to the contention of appellant that reliance cannot be placed on the report of Dr. Ramesh Babu, the said expert had inspected the representative samples of imported goods declared by BMW as "ASSY Engine"/"ZB Engine" and "Transmission sub-assembly"/"ASSY Auto Gearbox" and was of the opinion that the above representative samples of engines were "pre-assembled engines which could be readily integrated to build the motor car" and that the samples described as "transmission sub-assembly" and "ASSY Auto Gearbox' respectively were "automatic transmission units, which were otherwise known as automatic gearboxes.

- The above report of the expert thus corroborated/validated the Department's position discussed hereinabove that the "ASSY Engine" and "transmission sub-assembly"/"ASSY Auto Gearbox" units imported by M/s. BMW India in their CKD kits of motor cars are pre-assembled engines and gearboxes respectively.

- For the reasons discussed extensively above, it emerges clearly that BMW's conduct in the matter was not above board. There was deliberate default on their part which certainly entailed severe penal action.

Court's Observation

- In the advance ruling sought by appellant majority ruling of the Three-Member Authority ruled that the import of parts assembly in Annexure-III to the application would be considered as import of motor car in CKD, eligible to concessional rate of duty under Notification No.21/2002-Cus. as amended by notification No.11/2005-Cus.

- The moot point that should be kept in mind is that for obvious reasons, the application by the appellant to the Authority for Advance Ruling was made before any actual imports had taken place. In consequence, the Advance Ruling Authority and for that matter, the ARAI, had gone only by the list of car parts submitted by the appellants in Annexure III to their application.

- From the samples of the Bill of Entry and related documents filed by appellants in page 32 onwards of compilation of documents Vol-I, we find that in a sample Bill of Entry No.7949107 dt.14.09.2012, the imported goods were declared as "BMW cars in CKD".

- It has also been admitted by appellants that the imported transmission sub assembly is not tested in any manner at the Chennai plant before the car assembling process. The adjudicating authority has correctly concluded that a critical part like gearbox cannot be assembled onto the car without first undergoing all mandatory tests and checks which clearly indicates that the product so tested and marketed as an ‚Automatic Transmission' by the manufacturer-supplier is a complete and functional automatic transmission and does not constitute any sub-assembly thereof.

- The levy of Customs duty on imported goods is always on the goods in the condition they are imported. Hence the examination of goods at the point of port alone by Dr. Ramesh Babu would be able to determine their exact nature and by implication their value for assessment as well as the eligibility or otherwise of any exemption notification. We find that Dr. Ramesh Babu has also perused copies of the detailed packing list, supplied by sub-assembly chart of engine and transmission submitted by BMW as also the list of parts pertaining to engine and transmission to be assembled to the imported engine and transmission assembly as claimed by the appellants. Only after a comprehensive analysis of all these aspects, has Dr. Ramesh Babu opined that "parts list merely comprises of nuts, screws, clips etc.; that the imported engine assemblies are actually fully assembled condition which can be readily integrated to build motor car; that similarly transmission sub assemblies are automatic transmission units, otherwise known as automatic gear box.

- For arguments' sake, even if there had been an ambiguity in the Notifications No.31/2011-Cus. and No.12/2012-Cus. as claimed by appellant, in our view, that will not have bearing effect in the case on hand. The benefit of such ambiguity even if it existed, cannot be claimed by the appellant-importer BMW and as laid down by the Hon'ble Apex Court, the same must be interpreted in favour of the Revenue. There are number of judgments and the higher courts of the land which have consistently reiterated that exemption notifications should be interpreted strictly. In a very recent judgment in the case of Commissioner of Customs (Import) Mumbai Vs Dilip Kumar and Company & Ors. in Civil Appeal No.3327 of 2007, a five Judge Bench of the Hon'ble Apex Court held that when there is ambiguity in exemption notification which is subject to strict interpretation, the benefit of such ambiguity cannot be claimed by the subject/assessee and it must be interpreted in favour of the revenue.

- We have then no doubt in our mind that the goods imported by the appellants were not of the type and nature which would merit the lowest B.C.D rate of 10% as extended vide the Notification No.21/2011-Cus. and later in

No.31/2011-Cus. as amended by Notification No.12/2012-Cus.

- Both for the periods 01.03.2011 to 23.03.2011 as also 24.03.2011 to 11.04.2013, the appellants are not entitled to a rate of B.C.D. @ 10% but will necessarily have to discharge B.C.D @ 60% and 30% respectively only.

- In relation to Extended period of limitation it is pertinent to note that that the appellant had written to the Commissioner of Customs, Chennai vide a letter dt. 05.07.2010, referring to a meeting and requesting that the CKD import duty rate being given to their 3-series CKD Kits may also be extended to their X1 and X3 models as well. 46. In response, the appellants were informed vide a letter dt. 23.07.2010 that "import of BMW X1 and X3 series car in CKD condition can be extended the benefit of Notification 21/2002-Cus., Sl. No. 344(1)".

- Precisely for the above reason, court held that the he extended period of limitation cannot be invoked in this case and hence, the differential duty liability can be confirmed and demanded only for the normal period of limitation from the date of issue of the Show Cause Notice.

- <u>Court's Ruling</u>

  - The demand is upheld, however restricted to the normal period of limitation. Only for the purpose of re-quantification of the demand for the normal period with interest liability as applicable, the matter is being remanded to the adjudicating authority.

  - Penalty imposed under Section 114A of the Act is set aside.

  - Confiscation of goods under Section 111 (m) and (o) of the Act is upheld. Imposability of Redemption fine under Section 125 (1) ibid is upheld. However, the redemption fine imposed is reduced to Rs.1,00,00,000/- (Rupees One Crore only).

  - Imposability of penalty under Section 112(a) of the Act is upheld. However, penalty imposed is reduced to Rs.1,00,00,000/- (Rupees One Crore only)

  - Appeal is partly allowed and partly remanded on above terms

Key Indirect Tax updates

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

1. Revised due dates for GSTR 1 filing for month July17 to September 18

<u>Notification No. 43/2018 – Central Tax dated 10 September 2018</u>

- The Government vide this notification has extended the due date for filing of FORM **GSTR - 1** for taxpayers having aggregate turnover up to Rs 1.5 crores. The revised due dates are highlighted in exhibit hereunder:

S No.	Period	Due date
1	July to September 2017	31 October 2018
2	October to December 2017	31 October 2018
3	January to March 2018	31 October 2018
4	April to June 2018	31 October 2018
5	July September 2018	31 October 2018
6	October December 2018	31 January 2019
7	January March 2019	30 April 2019

- Taxpayer registered in Kerala can file quarterly return for July'18 to Sept'18 till 15th November, 2018.

- Further, revised due date for filing of FORM GSTR 1 for the five quarters from July 2017 to September 2018 for newly migrated (obtaining GSTIN vide notification No. 31/2018-Central Tax, dated 6 August 2018) taxpayers will be 31st December, 2018.

<u>Notification No. 44/2018 - Central Tax dated 10 September 2018</u>

- The Government has extended the due date for filing of FORM GSTR - 1 for taxpayers having aggregate turnover above Rs 1.5 crores. The revised due dates are as follows:

S No.	Period	Due date
1	July to September 2017	31 October 2018
2	October to December 2017	31 October 2018
3	January to March 2018	31 October 2018
4	April to June 2018	31 October 2018
5	July September 2018	31 October 2018
6	October December 2018	11th day of the succeeding month
7	January March 2019	

- Further, revised due date for filing of FORM GSTR 1 for the months from July, 2017 to November, 2018 for newly migrated (obtaining GSTIN vide notification No. 31/2018-Central Tax, dated 06.08.2018) taxpayers will be 31 December, 2018

Notification No. 45/2018 - Central Tax dated 10 September 2018

- The Government has extended the due date for filing of FORM GSTR - 3B for newly migrated (obtaining GSTIN vide notification No. 31/2018-Central Tax, dated 6 August 2018) taxpayers till 31 December 2018 by amending Notification No. 21/2017 and 56/2017 – CT

Notification No. 46/2018 - Central Tax dated 10 September 2018

- The Government has extended the due date of FORM **GSTR - 3B** for newly migrated (obtaining GSTIN vide notification No. 31/2018-Central Tax, dated 6 August 2018) taxpayers till 31 December 2018 by amending Notification No. 35/2017 and 16/2018 – CT

Notification No. 47/2018 - Central Tax dated 10 September 2018

- The Government has extended the due date for filing of FORM GSTR - 3B for newly migrated (obtaining GSTIN vide notification No. 31/2018-Central Tax, dated 6 August 2018) taxpayers till 31 December 2018 by amending Notification No. 34/2018 – CT

Notification No. 48/2018 - Central Tax dated 10 September 2018

- The Government has notified CGST (Ninth Amendment) Rules, 2018 by amending the Rule 117 & 142. As per said amendment, due date for submitting the declaration electronically in FORM GST TRAN-1 and GST TRAN-2, (for registered persons who could not submit the said declaration by the due date on account of technical difficulties on the common portal and in respect of whom the Council has made a recommendation for such extension), has been extended.

2. GST Portal Update

2.1 Search Taxpayer PAN wise

- Currently, there is functionality available to taxpayers in pre-login and post-login mode to search the taxpayer details using GSTIN/UIN.
- This functionality has been amended now to search the taxpayer details using PAN of the taxpayer.
- This search (by PAN) will fetch all the GSTINs registered against the entered PAN in different States/ UT's, along with status of registration in a tabular format. On clicking of GSTIN hyperlink, taxpayer search details shall be displayed.

2.2 Form GST REG-14: Non-Core Amendment of Registration for NRTP, OIDAR, TDS & TCS taxpayers

- Facility has been provided on the GST Portal to NRTP, OIDAR, TDS & TCS taxpayers for applying for Amendment of Registration of Non-Core fields.
- APIs for these functionalities have also been released for CBIC and Model I States.

3. GST Legal Updates: Section 140(3)(iv) held unconstitutional by Gujarat High Court

- Issue in brief: Challenge to Section 140(3)(iv) of CGST Act, 2017 on the ground that it prevented first stage dealers from claiming credit on invoices which were more than a year old from the appointed date – Vested right accrued under existing law – provision takes away the right retrospectively.
- The Gujarat HC held that no just, reasonable or plausible reason is shown for making such

retrospective provision taking away the vested rights - clause (iv) is unconstitutional – It disagreed with the decision of Bombay High Court in JCB India Ltd. - 2018-TIOL-23-HC-MUM-GST.

- However, at the request of counsel for the Revenue this judgement stayed up to 31.10.2018.

4. E-way bill in case of storing of goods in godown of Transporter

- The goods in movement including when they are stored in the transporter's godown (even if the godown is located in the recipient taxpayer’s city/town) prior to delivery shall always be accompanied by a valid e-waybill.

- In case the consignee/ recipient taxpayer stores his goods in the godown of the transporter, then the transporter’s godown has to be declared as an additional place of business by the recipient taxpayer. In such cases, mere declaration by the recipient taxpayer to this effect with the concurrence of the transporter in the said declaration will suffice. Where the transporter’s godown has been declared as the additional place of business by the recipient taxpayer, the transportation under the e-way bill shall be deemed to be concluded once the goods have reached the transporter’s godown (recipient taxpayer’s additional place of business). Hence, e-way bill validity in such cases will not be required to be extended.

- Further, whenever the goods are transported from the transporters godown, which has been declared as the additional place of business of the recipient taxpayer to any other premises of the recipient taxpayer then the relevant provisions of e-way bill shall apply. Hence, whenever the goods move from the transporter’s godown (i.e, recipient taxpayer’s additional place of business) to the recipient taxpayer’s any other place of business, a valid e-way bill shall be required, as per extant state-specific e-way bill rules.

Direct Tax

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

Judicial Precedents

1. Supreme Court (SC) negates claim for 100% deduction for fresh five years of new units undertaking "substantial expansion"

Background and Facts of the case

- The Income Tax Laws (ITL) contain provisions for granting profit-linked tax holiday for industrial undertakings. Each provision is targeted at a specific class of undertakings which are set up within a prescribed qualifying period in specified areas and subject to fulfilment of prescribed conditions. The object of granting certain incentives is to promote the economic and industrial development of backward areas. The general trend of such incentives is that the incentive period starts from a year (initial assessment year) in which the undertaking begins to manufacture or produce any article or thing.

- Prior to insertion of section 80-IC, vide the Finance Act (FA), 2003, the tax holiday for industrial undertakings set up in specified backward areas was governed by section 80-IA up to tax year 1998-99 and section 80-IB from tax year 1999-2000 onwards. Similarly, section 10C, inserted with effect from tax year 1998-99, offered tax holiday for undertakings set up in the Northeastern region up to tax year 2002-03.

- The FA, 2003 inserted section 80-IC with a view to give effect to a package of fiscal and non-fiscal concessions announced by the Central Government for certain Northern and Northeastern states of India.

- For units based in specified areas of the Northern states of Himachal Pradesh (HP) and Uttaranchal, section 80-IC allows a two-tier income-linked tax holiday at a prescribed percentage for 10 years viz., a full tax holiday (100%) for the first five years followed by a partial (25%/30%) tax holiday for the next five years. In contrast, the tax holiday measure for units located in Sikkim and the Northeastern states is the full 100% for 10 years.

- Tax holiday is given either to: (a.) A new unit which begins to manufacture or produce qualifying articles or things; or (b.) An existing unit which implements "substantial expansion".

- "Substantial expansion" is defined to mean an increase in investment in the plant and machinery by at least 50% of the book value of the plant and machinery (before allowing depreciation in any year), as on the first day of the tax year in which substantial expansion is undertaken. Tax holiday for objectively defined "substantial expansion" (i.e., incremental investment > 50% of existing book value) is a new feature of section 80-IC as compared to its predecessor provisions.

- The qualifying period between which a unit should begin to manufacture/produce or complete substantial expansion in certain specified areas of Northern Indian states and HP and Uttaranchal was 7 January 2003 and 31 March 2012.

- The unit should also satisfy certain other conditions, inter alia, that it should not be formed by splitting up or reconstruction of a business already in existence and it should not be formed by the transfer to a new business of the machinery or plant previously used for any purpose (commonly referred to as "formative conditions").

- The tax holiday period of 10 years begins from the "initial assessment year" which is, inter alia, defined to mean the tax year in which the unit begins to manufacture or produce articles or things or completes substantial expansion.

- Section 80-IC also contains a specific overall period limitation which states that the total period of deduction under the predecessor provision (as applicable to units in Northeastern states only) and section 80-IC cannot exceed 10 years.

- The Taxpayer is a firm which derives income from manufacturing of cotton cover material for printed embossed book binding. It started its business activity during the tax year 2005-06 by establishing a new unit in a specified area in HP. Thus, the "initial assessment year" for claim of deduction under section 80-IC was tax year 2005-06.

- The Taxpayer claimed 100% deduction for the first five years from the initial assessment year (i.e., tax year 2005-06 to tax year 2009-10), which was allowed by the Tax Authority.

- Taxpayer undertook substantial expansion of the undertaking. The Taxpayer completed substantial expansion in tax year 2011-12 (seventh year). The Taxpayer treated tax year 2011-12 as the "initial assessment year" qua an existing unit which completes substantial expansion and claimed 100% deduction for the entirety of the profits of the unit (including a substantially expanded portion) from tax year 2011-12 onwards by contending that it became entitled to a fresh five-year tax holiday period by virtue of completion of substantial expansion (but, limited to overall period of 10 years from the year of commencement of manufacture).

- The Tax Authority held that the Taxpayer had already claimed deduction of 100% for the first five years from the date of setting up of the new unit and, hence, denied the claim of enhanced deduction of 100% in the seventh year, and restricted the deduction to 25% of eligible profits for the said year.

- The First Appellate Authority and the Income Tax Appellate Tribunal (ITAT) ruled against the Taxpayer and upheld the Tax Authority's action of restricting the deduction to 25% by relying on a ruling of the coordinate Tribunal bench in the case of Hycron Electronics and other related cases. Being aggrieved, the Taxpayer appealed before the HP HC.

- The HP HC clubbed the Taxpayer's case with many other taxpayers' cases, which had set up units and completed "substantial expansion" during different time periods.

- The HP HC ruled in favor of the Taxpayer and permitted a fresh tax holiday claim of 100% from the seventh to the tenth year in the above situation by holding that: (a.) There is no bar on more than one "initial assessment year". (b.) Since section 80-IC benefit is geared towards additional investment, the Taxpayer can claim 100% deduction for a fresh five-year period within the overall period of 10 years by making a "substantial expansion" during the qualifying period. (c.) Substantial expansion cannot be confined to one expansion. As long as the requirement of section 80-IC is met, there can be multiple substantial expansions within the qualifying period. (d.) This position emerges from a plain and literal interpretation of the provisions of section 80-IC.

- Aggrieved, the Tax Authority appealed further before the SC.

Issue before the Tribunal

- Whether the Taxpayer, which had set up a new unit during the qualifying period and thereafter completed substantial expansion before the sunset date, was entitled to 100% deduction post substantial expansion for a fresh five-year period.

SC's ruling

The SC ruled against the Taxpayer and denied enhanced claim of deduction of 100% for the seventh to the tenth year, by adopting the following reasoning:

- Section 80-IC is a special provision inserted by the FA, 2003 for units in certain special category states. Section 80-IC provides deduction to new units which commence manufacturing or production in such states and also to existing units in those states if they carry out substantial expansion. The deduction is available: (a.) @ 100% for the full 10 years in Northeastern states. (b.) @ 100% for the first five years and @ 25% for the next five years in Northern states.

- In the present case, the Taxpayer set up a new unit in HP for which section 80-IC provides deduction @ 100% for the first five years and 25% for the next five years commencing with the "initial assessment year".

- When read cumulatively, the provisions of S.80-IC bring out the following aspects:

    - A taxpayer's unit has to fulfil the condition of commencing manufacture or production or completing substantial expansion within the specified period.

    - The deduction is allowable from the "initial assessment year" which is, inter alia, defined to mean the year in which the unit commences manufacture or production or completes substantial expansion.

- The deduction is @ 100% for the first five years and @ 25% (30% for company) for the next five years.
- Total period of deduction is 10 years, which means 100% deduction for the first five years and 25% (30% for company) for the next five years.

- When the aforesaid scheme and the spirit behind section 80-IC are kept in mind, such a situation cannot be countenanced where a taxpayer is able to secure deduction @ 100% for the entire period of 10 years. If this is allowed, it will violate section 80-IC to the extent it restricts deduction to 100% for the first five years and 25% for the next five years within the overall limitation period of 10 years.

- A pragmatic and reasonable interpretation of section 80-IC would be that once the "initial assessment year" commences and the taxpayer starts enjoying deduction by virtue of either commencing manufacture/production or completing substantial expansion within the specified period, there cannot be another "Initial assessment year" for the purposes of section 80-IC within the aforesaid period of 10 years, on the basis that it carried out substantial expansion in its unit.

- It is true that in a recent ruling by the same bench of the SC in the case of Mahabir Industries v. CIT (Civil Appeal Nos. 4765-4766 of 2018 dated 18 May 2018), the SC allowed deduction beyond 10 years. However, there is a distinction between the two sets of cases, as follows:
  - In the Mahabir industries ruling, the taxpayers had availed initial deduction under different provisions which were altogether different, at a time when section 80-IC was not introduced in the statute. Section 80-IC was introduced by the FA, 2003 with effect from tax year 2003-04. The taxpayers in those cases claimed deduction under the predecessor provisions for the tax years prior to 2003-04 and their "initial assessment year" under section 80-IC commenced post tax year 2003-04 when they completed "substantial expansion" during the period specified in section 80-IC. Hence, they could avail fresh tax holiday for 10 years under section 80-IC @ 100% for the first five years and @ 25% for the next five years from the year of completion of "substantial expansion" (Further, since such units were not located in Northeastern states, the limitation of the overall period of 10 years applied only for tax holiday claimed under section 80-IC, without including the period of tax holiday claimed under the predecessor provisions).
  - In contrast, the taxpayers in the present case have availed deduction under section 80-IC alone. Initially, they claimed deduction on the ground that they had set up their units in HP and claimed 100% deduction for the first five years. Thereafter, they desired continuation of 100% deduction for the next five years, also under the same provision, on the ground that they had made substantial expansion.

- Once the Taxpayer started claiming deduction under section 80-IC and the "initial assessment year" commenced within the aforesaid period of 10 years, there cannot be another "initial assessment year", thereby allowing 100% deduction for the next five years also. Section 80-IC, in no uncertain terms, provides for deduction @ 25% only for the next five years. It is undisputed that the overall period of deduction cannot exceed 10 years under section 80-IC.

Source: Classic Binding Industries [TS -474-SC-2018 (SC)]

2. Mumbai ITAT disallows additional interest paid under Value Added Tax (VAT) law under investigation proceedings

Background and Facts of the case

- In terms of the ITL provisions, any revenue expenditure (other than those covered by specific provisions), incurred wholly and exclusively for the purposes of the business or profession, is allowable as deduction while computing income under the business head.

- However, an exception is carved out, in terms of which, any expenditure incurred for any purpose which is an offence or prohibited by law is not allowable as deduction (disallowance provision).

- The Taxpayer was governed by the Mumbai VAT (MVAT) Act for transactions of purchase and sale of goods. As per the MVAT Act, input VAT paid on purchase of goods can be generally claimed as credit and set-off against the output VAT liability payable on sale of goods.

- The MVAT Act contained the following provisions which triggered in case of shortfall in payment of VAT:

  - Simple interest in case VAT is not paid within the due date as prescribed under the MVAT Act (simple interest).

  - Additional interest @ 25% of shortfall in VAT payment (payable in addition to simple interest). This interest was payable in some special cases of demand raised pursuant to audits, inspection, survey, search action etc., under the MVAT Act (additional interest).

  - Penalty and prosecution for various defaults, including delayed payment of VAT.

- Under the scheme of the MVAT Act, in respect of any additional tax levy pursuant to audits, inspection, survey, search action etc., a taxpayer has two options: (a.) Accept the demand, file revised return and pay both simple and additional interest (voluntary acceptance). (b.) Litigate the demand, but with a risk that if the taxpayer is ultimately found guilty, it may end up with a levy of penalty in the range of 25-100% of additional tax, besides demand for tax and simple interest. If the taxpayer chooses to litigate the demand, it is not liable to pay additional interest of 25%.

- Even in respect of levy of additional interest as aforesaid, the MVAT Act provides for certain exceptions. There can be no levy of additional interest if additional VAT liability arises due to non-production of declarations or certificates as required under the MVAT Act or the amount of VAT paid as per the revised return is less than 10% of the aggregate VAT paid as per the original return filed under the MVAT Act.

- The Taxpayer is engaged in the business of manufacturing and marketing of textiles, garments and fashion accessories.

- During tax year 2011-12, the MVAT authorities conducted search and survey operations on the Taxpayer. The MVAT authorities found that input tax credit claimed by the Taxpayer was excessive, since the related purchase of goods were allegedly bogus purchases by way of accommodation entries.

- In order to buy peace and avoid litigation under the MVAT Act, the Taxpayer opted for voluntary acceptance and filed a revised return withdrawing the claim for set-off of input tax credit on alleged bogus purchases and paid additional VAT arising from such withdrawal of claim, along with simple interest and additional interest.

- In the tax return filed under the ITL, the Taxpayer claimed deduction for both simple as well as additional interest paid under the MVAT Act while computing income under the business head. However, in respect of additional interest, the tax auditor, in his report, certified it as interest in the nature of penalty not allowable under the ITL.

- The Taxpayer contended that the amount paid in the name of "interest" under the MVAT Act is compensatory in nature and is not to be misunderstood as "penalty" paid for violation of the law under the MVAT Act. For the said proposition, it relied on various case laws (Mahalakshmi Sugar Mills Co v. CIT [(1980) 123 ITR 429 (SC)], Prakash Cotton Mills (P) Ltd v. CIT [(1993) 201 ITR 684 (SC)], Lachmandas Mathurdas v. CIT [(2002) 254 ITR 799 (SC)] etc.)

- The Tax Authority, however, held that the simple interest as well as the additional interest paid under the MVAT Act are penal in nature, being paid on account of infringement of the law due to wrong claim for input tax credit, and is for depriving the MVAT Authorities of their legitimate dues of VAT. Hence, the Tax Authority disallowed deduction for both simple and additional interest.

- Being aggrieved, the Taxpayer preferred an appeal before the First Appellate Authority which ruled in favor of the Taxpayer on the basis that the MVAT Act described both these payments as "interest", and not as "penalty".

- Being aggrieved by the order of the First Appellate Authority, the Tax Authority preferred further appeal before the Tribunal.

Issue before the Tribunal

- Whether simple and additional interest paid under the MVAT Act is compensatory or penal in nature and, thereby, is the same allowable as deduction while computing business income under the ITL.

Tribunal's ruling

- The Tribunal held that simple interest paid under the MVAT Act is allowable as deduction, being compensatory in nature. However, additional interest is in the nature of penalty paid for violation of law and, hence, not allowable as deduction for the following reasons:

General test for distinguishing interest v. penalty

- It is well settled that the nomenclature or description used by law makers in the statute is not decisive of its true nature and character. Whether the levy of interest or penalty is compensatory or penal in nature has to be decided having regard to the scheme of the statute and the intent of the law.

Simple interest is compensatory

- Under the scheme of the MVAT Act, simple interest is payable if VAT is not paid within the due date as prescribed, whereas additional interest payable @ 25% of the additional tax is over and above the simple interest and is payable on filing of revised return after detection in the course of search or survey actions by authorities that show that the taxpayer defaulted in payment of correct tax.

- It is payable irrespective of whether the taxpayer voluntarily accepted the demand or litigated the matter further, with an unfavorable result.

- Thus, simple interest is interest for delay in payment of VAT and represents compensation for withholding funds of the Government and, hence, is not hit by the disallowance provision under the ITL.

Additional interest is in the nature of penalty for infraction of the law

- No additional interest is payable if the taxpayer voluntarily files revised return prior to any detection by the MVAT authorities and pays up additional tax and simple interest to cover up a bona fide omission or incorrect statement in the original VAT return.

- But, if there is detection of short payment of VAT by MVAT authorities, the taxpayer has two options: (a.) To voluntarily accept the demand, in which case, additional interest is payable over and above simple interest; or (b.) Litigate the matter, in which case, in the event of an unfavorable result, the taxpayer may need to pay penalty in addition to simple interest. Hence, additional interest represents penalty for infraction of the law viz., short payment of MVAT, whether or not caused by bona fide reasons.

- The MVAT scheme provides an alternative to the taxpayer to either settle the litigation by filing a revised return, with additional payment in the name of additional interest at a flat rate of 25% of additional tax, or continue the litigation at the risk of levy of penalty in the range of 25-100% of additional tax. Thus, additional interest represents penalty, though termed as "interest".

- Unlike simple interest, which is mandatory and applies in every case of delay in VAT payment, the MVAT Act provides for certain exclusions from levy of additional interest for minor infractions of the law (additional tax < 10% of original tax). This indicates that additional interest is in the nature of penalty, with a provision for waiver of right to recover this penal interest in cases involving minor infractions of the law.

- The nomenclature of "interest", instead of "penalty", reflects the state's policy to not use the harsh word "penalty" and, to keep up with the spirit, an opportunity is granted by the statute itself to dealers to come clean and end litigation. Since the state of Maharashtra is considered to be a business friendly state, the use of nomenclature "interest" reflects the trust reposed by the state in the business community, as every error or wrong claim in the original return may not be intentional.

Accordingly, while allowing the Tax Authority's appeal, the Tribunal directed the Tax Authority to bifurcate payments between simple interest and additional interest and allow deduction for simple interest.

Source: Gini & Jony Ltd. [TS-478-ITAT-2018(Mum)]

3. Jaipur ITAT accepts taxpayer's adoption of Discounted Cash Flow (DCF) method for angel tax provisions and holds Tax Authority cannot change the method of valuation

Background and facts of the case

- Section 56(2)(viib) of the ITL (popularly known as the "angel tax" provisions) is an anti-abuse provision which applies when a Closely Held Company (CHC) issues shares (including preference shares) to a resident at a premium and receives consideration which is in excess of the fair market value (FMV) of the shares. The excess amount so received is deemed as income from other sources in the hands of the CHC, in the year of issue of the shares.

- Rule 11UA of the Income Tax Rules (Valuation Rules) prescribes the valuation methodology for determining the FMV of various types of assets (including unquoted equity shares) for the purpose of the angel tax provisions. The FMV of unquoted equity shares for the purpose of the angel tax provisions, read with the Valuation Rules, is the higher of the following:

- Net asset value as reflected in the audited balance sheet of the CHC (break-up value method)

  OR

- The DCF value as determined by a Category-I Merchant Banker (MB) or Accountant (It may be noted that the Central Government, vide notification No. 23/2018 dated 24 May 2018, had withdrawn the option given to taxpayers to obtain a valuation report from an Accountant for determining the FMV of unquoted equity shares based on the DCF method for the purpose of the angel tax provisions.)

  OR

- The value that the company is able to substantiate to the satisfaction of the Tax Authority, basis the holding of various intellectual property rights (IPRs) like goodwill, know-how, patents, copyrights etc.

- In this case, the Taxpayer was a CHC engaged in the business of manufacturing of toughened glass and there was no business activity during the tax years 2011-12 to 2013-14, except for purchase of a land worth INR 0.3 million. During the year under consideration (i.e., tax year 2013-14), the Taxpayer issued 1,40,000 shares having face value of INR 10 each, at a premium of INR 60 per share, receiving a total premium of INR 8.4 million over and above the share application money of INR 1.4 million. The Taxpayer claimed that the value of the shares was well within the valuation as per the DCF method prescribed under the Valuation Rules, and was supported by the valuation report of an Accountant.

- The Tax Authority rejected the valuation report by noting that the Taxpayer only possessed a land and rejected the calculation made by the Taxpayer for issuance of shares at a premium. The Tax Authority further contended that the Taxpayer was justified in charging a premium of only INR 22.76 per share as per the break-up value method, as against INR 60 charged by the Taxpayer as per the DCF value method, and made an addition of INR 8.1 million to the income of the Taxpayer under the angel tax provisions, read with the Valuation Rules.

- Before the First Appellate Authority (FAA), the Taxpayer submitted a revised valuation report of the Accountant based on the DCF method, valuing shares at INR 95.9 per share due to a bona fide mistake in the earlier valuation report which valued the shares at INR 119.93 per share. The FAA, however, asked the Taxpayer to furnish a valuation report as per the actual financial result for three years ending 31 March 2016, according to which, the value came to INR 65.31 per share. Basis such valuation, the FAA held that the valuation report submitted by the Taxpayer based on the DCF value is far from the actuals and is based on imaginary and incorrect figures. The FAA confirmed the addition made by the Tax Authority.

- Aggrieved by the order of the FAA, the Taxpayer appealed to the Tribunal.

Taxpayer's contentions

- Receipt of share premium was a capital receipt and was a commercial decision which does not require justification under the law. It was the prerogative of the Board of Directors of the company to decide the premium amount and it is left to the wisdom of the shareholders as to whether or not they want to subscribe to the shares at a premium amount. Such receipts do not have the character of an income, being capital asset.

- The Valuation Rules that the Taxpayer can choose between the break-up value method and the DCF method for valuation of unquoted shares.

- The valuation method can be challenged by the Tax Authority only if it is not a recognized method of valuation. Furthermore, the valuation under the DCF method is to be done by an expert on the subject. The Tax Authority, not being an expert, is not permitted to make any adjustment in the value determined by an expert.

- The valuation under the DCF method is primarily based on future expectations, which necessarily involves estimations. The requirement of the FAA directing the Taxpayer to give the valuation report based on the actual figures and then to compare such valuation report with the earlier reports based on the DCF method, is contrary to the provisions of the law.

- Under the angel tax provisions, read with the Valuation Rules, the only responsibility cast upon the Taxpayer is to get a valuation report from an MB or an Accountant by using the DCF Method. Once the report of the Accountant under the DCF method is submitted by the Taxpayer, the FMV determined in such a manner is binding upon the Tax Authority.

- A newly-formed company can be valued only by the DCF method based on the prospects of earning and growth in the future, as newly set-up organizations have very little or no capital base.

- The Taxpayer was in the business of manufacturing of toughened glasses used in the real estate industry. The projections were basis plant capacity and likely demand in the market when real estate was at a boom at the relevant point of time. The same projection report was used to borrow a loan from a bank. Furthermore, there was a change in the management of the company and the new shareholders, which were rank outsiders, had purchased the shares of the company at a value close to the value of the shares as arrived at by using the DCF method in the valuation report.

- A recent Instruction (File No. 173/14/2018-ITA.I) dated 6 February 2018) of the Central Board of Direct Taxes (CBDT) in the context of applicability of angel tax to start-up companies, in which it had indirectly instructed tax officers to not reject the valuation of shares based on valuation reports issued by accountants, also supports the case of the Taxpayer.

Tribunal's ruling

The Tribunal accepted the valuation made by the Taxpayer and held as under:

The Taxpayer has the right to choose the method of valuation and the Tax Authority cannot interfere

- The Valuation Rules for the purpose of the angel tax provisions provide an option to taxpayers to choose between the break-up value method and the DCF method. The Tax Authority cannot compel the taxpayer to choose the break-up value method against the DCF method. This view is supported by the Hyderabad Tribunal decision in the case of Medplus Health Services (P) Ltd. v. ITO ([(2016) 158 ITD 0105 (Hyd Trib)]). The action of the Tax Authority and the FAA to thrust upon the Taxpayer the valuation basis their own choice, was contrary to the provision and, if permitted, would render the DCF method as nugatory and purposeless.

- Reliance was placed on the decisions in the cases of Universal Polysack (India) Pvt. Ltd. (] ITA No. 609/JP/2017 dated 31 January 2018 (Jaipur Tribunal)) and Vodafone M-Pesa Ltd. ([(2018) 92 Taxmann 73 (Bom)] (Bombay High Court)), wherein the Courts had held that for the valuation of unquoted equity shares for the purpose of the angel tax provisions, the taxpayer is free to choose the DCF method and the Tax Authority cannot change the method of valuation.

- In cases where the taxpayer values shares basis the holding of various IPRs like goodwill, know-how, patents, copyrights etc., the angel tax provisions require the taxpayer to substantiate value to the satisfaction of the Tax Authority. However, when the taxpayer values the shares as per the DCF method, only two conditions need to be satisfied i.e., the valuation is done by an MB or an Accountant and the valuation report is prepared by using the DCF method. The taxpayer is not required to further satisfy the Tax Authority about the valuation method adopted and, hence, the Tax Authority is not permitted to interfere in the valuation, once done in accordance with the method prescribed in the Valuation Rules.

- The Tax Authority can scrutinize the valuation report only if some arithmetical mistakes are found. But, if it finds that the assumptions made are erroneous or contradictory, it may call for an independent valuer's report or invite his comments on the taxpayer's valuation report. The necessary modifications and alterations to the valuation report must rest on sound reasoning and rational basis. Under no circumstance can the Tax Authority challenge or change the method of valuation and modify the figures as per its own whims and fancies.

Whether valuation was fair and reasonable:

The Tribunal held that the valuation of unquoted shares made by the Taxpayer basis the DCF method was proper, and held the action of the Tax Authority and the FAA in rejecting the valuation report as invalid, for the following reasons:

- The DCF method is essentially based on projections and estimates. However, the valuer cannot be expected to estimate the exact figure, as it is beyond his control.

- Even if past history is not available, still, the value of the shares can be ascertained basis the DCF method. Mere circumstance that there is no commencement of production or of business, does not suggest that the shares of a company cannot command a premium. The concept of a start-up is an example where valuation basis the DCF method is recognized by the ITL.

- The Taxpayer was able to justify its projections which were based on the plant capacity, industry and market conditions as prevalent at the relevant time and the sanctioning of the loan by the bank, which formed a reasonable basis for the projections. The Taxpayer also explained the delay in production due to non-availability of a power connection in the initial years. Furthermore, basis the subsequent year's audited accounts, the valuation based on the break-up value method also turned out to be a near estimated value, which also supported the bona fides of the Taxpayer. In view thereof, there was no sound basis or rationale to reject the valuation report on the allegation of the figures being imaginary and incorrect or completely without any basis. Furthermore, the Tax Authority had not found any fault in the valuation report which was prepared as per the guidelines issued by the Institute of Chartered Accountants of India.

- Furthermore, neither did the Tax Authority nor the FAA indicate which figure in the valuation report of the Accountant was incorrect. Furthermore, the valuations were basis projections depending upon various factors prevalent at the relevant time. Variation in estimates, as compared to actuals based on subsequent factors, is beyond the control of the valuer. There is no justification to compare the estimates with the actuals, nor do the Valuations Rules contemplate any such comparison.

Source: Rameshwaram Strong Glass [TS-523-ITAT-2018(JPR)]

Key Direct Tax Developments

1. CBDT clarifies that physical settlement in stock derivative contracts to attract securities transaction tax as applicable to delivery-based equity transactions

Background

- Until recently, all transactions in single stock futures and options (stock derivatives) were compulsorily settled in cash i.e., on expiry of the stock derivative contracts, the difference between the spot price of the underlying share and the stock derivative contract price (agreed/strike price) was cash settled.

- In line with the recommendations made by the L.C. Gupta committee, the Securities and Exchange Board of India (SEBI) decided (SEBI/HO/MRD/DP/CIR/P/2018/67) that physical settlement of stock derivatives should be made mandatory in a phased/calibrated manner to better align the cash and derivative segments. Following this, the NSE identified a list of securities (Circular No. 37/ 2018 dated 23 April 2018) to be mandatorily settled physically and issued clarifications [Circular No. 83/ 2018 dated 16 July 2018 and Circular No. 335/ 2018 dated 27 July 2018 (superseding one of its earlier Circular No. 334/ 2018 dated 20 July 2018)] on various aspects of the physical settlement of stock derivatives.

- Regarding the levy of STT, in the absence of any clarification/amendment to the existing provisions of the STT law (Chapter VII of Finance (No. 2) Act, 2004), based on an opinion from a senior tax counsel, the NSE stated [Circular No. 1/ 2018 dated 17 July 2018 and Circular No. 335/ 2018 dated 27 July 2018 (superseding one of its earlier Circular No. 334/ 2018 dated 20 July 2018)] that STT @ 0.1 per cent of the settlement price was to be collected upon taking physical delivery of the underlying shares.

- ANMI challenged this NSE circular on the levy of STT before the Securities Appellate Tribunal (SAT) [Statutory body established under the SEBI Act, 1992] , where an order [Appeal No. 260 of 2018 dated 26 July 2018] was passed urging the CBDT to provide clarity on the issue at the earliest.

- Subsequently, based on the writ petition filed by ANMI, the HC directed the CBDT to provide clarifications on the applicability of STT in the instant case.

Clarifications by CBDT to HC

- On 28 August 2018, the CBDT presented a Communication (F. No. 272/M-40/ (2018-ITJ) dated 27 August 2018) before the HC clarifying that the rates of STT as applicable to delivery based equity transactions (being 0.1 per cent of the settlement price on purchase/sale) should also be applicable to a derivative contract which is settled by way of physical delivery of the underlying shares.

- A derivative contract settled through physical delivery of shares is not different from a transaction in equity shares where the contract is settled by actual delivery or transfer of shares.

- STT is a transaction-based tax framework seeking to tax a transaction in eligible securities entered on a recognized stock exchange, which is not dependent on the purpose for which the transaction in the shares are undertaken (viz., trading, investment or to settle a derivative contract).

- The legal mandate of STT is wide enough to bring derivative contracts settled through physical delivery of shares under the purview of STT and thereby, clarified that physical delivery of shares on account of settlement of derivative contracts is no different from equity purchase/sale by actual delivery.

Order of HC

- Given that the CBDT clarified the issue on levy of STT in case of physical settlement of stock derivatives, the HC disposed the petition stating that the matter had consequentially been resolved.

- Consequentially, the NSE has now confirmed (Circular No. 2/ 2018 dated 30 August 2018) that STT @ 0.1 per cent will be recovered on physically settled stock derivatives, payable both on purchase and delivery of the securities.

(Source: Summary of the decision of the Hon'ble Bombay HC with respect to a writ petition (No. 2604/2018) filed by the Association of National Exchange Members of India (ANMI) challenging a circular (NSE Circular Ref. No. 1/ 2018 dated 17 July 2018) issued by the National Stock Exchange (NSE) directing broking members to collect Securities Transaction Tax (STT) at the rate of 0.1 per cent on derivative contracts settled by way of physical delivery of the underlying shares. Notification No. 33/2018 dated 20 July 2018)

2. CBDT proposes amendment in Income tax rules prescribing time limit for making PAN application.

- The ITL (Section 139A of the ITL casts obligation on various categories of taxpayers to obtain Permanent Account Number (10 digit alphanumeric unique identification number of each taxpayer under the ITL) (PAN) such as taxpayers having income exceeding maximum amount not chargeable to tax, taxpayers carrying on business or profession whose turnover or gross receipts exceed INR 0.5 million, or specified taxpayers such as charitable trust, political parties, etc.

- Further, Income tax rules (Rule 114 - Income-tax Rules 1962) prescribe procedure (Form No. 49A/49AA, as the case may be) and time limit within which taxpayers should file an application to obtain PAN. Further, the ITL also provides for levy of penalty of INR 0.01 million on taxpayer who does not obtain PAN in a timely manner (Section 272B of the ITL).

- FA 2018 included two more categories of taxpayers who are required to obtain PAN under the ITL viz:

  - Every resident non-individual taxpayer who enters into financial transaction of INR 0.25 million or more in a financial year;

  - Every Managing Director, Director, Partner, Trustee, Author, Founder, Karta, Chief Executive Officer, Principal Officer (Principal Officer is specifically defined under the ITL) , Officer Bearer of the taxpayer mentioned in Sr. No. 1 above or any person competent to act on behalf of the person referred in Sr. No. 1 above.

- However, the present rules did not provide for any time limit for making an application by the taxpayers who fall within the new categories mentioned above.

- CBDT (Apex administrative body of direct taxes in India) vide Press Release dated 31 August 2018 proposes to amend relevant Rules to provide time limit, for cases falling within the new categories, of 31 May of immediately following the financial year in which such financial transactions exceeding the specified limit (i.e. INR0.25 million) took place.

- The CBDT further propose to amend relevant Rules to authorize Principal Director General of Income-tax (Systems) or Director General of Income-tax (Systems) to specify format and standards along with the procedure for issuance of PAN in such cases.

- **Application forms for obtaining PAN (Form No. 49A and Form No. 49AA):** Presently, the application forms mandatorily require to mention father's name (]Married women are also required to mention father's name) for all taxpayers. The CBDT has proposed to amend the application forms for obtaining PAN in order to provide that father's name shall not be mandatory where mother is the single parent. In such cases, requirement to mention mother's name is made mandatory.

(Source: Press Release dated 31 August 2018)

3. CBDT provides tax exemption for interest income earned on specified off-shore Rupee Denominated Bonds

Detailed discussion

- Currently, interest payable by an Indian company or a business trust (Infrastructure Investment Trust registered under the Securities and Exchange Board of India (Infrastructure Investment Trusts) Regulations, 2014 or Real Estate Investment Trust registered under the Securities and Exchange Board of India (Real Estate Investment Trusts) Regulations, 2014) to non-residents (including a foreign company) on Rupee Denominated Bonds (RDBs) issued outside India up to 30 June 2020 is taxable at a concessional rate of 5% (plus applicable surcharge and education cess). Taxes are also required to be withheld on such interest income at 5% (plus applicable surcharge and education cess) under section 194LC of the Act.

- Consequent to review of the state of economy on 14 September 2018 by the Prime Minister, the government has announced a multi-pronged strategy to contain the CAD and augment the foreign exchange inflow into the country. One of the measures include incentivizing low cost foreign borrowings through issuance of RDBs.

- Accordingly, the CBDT has issued a Press Release dated 17 September 2018 providing that interest payable by an Indian company or a business trust to a non-resident, including a foreign company, in respect of RDBs issued outside India during the period from 17 September 2018 to 31 March 2019 shall be exempt from tax, and consequently, no tax shall be deducted on the payment of interest in respect of the said bond. Legislative amendments to effect the above would be proposed in due course.

(Source: Press Release dated 17 September 2018)

4. CBDT clarifies that immunity from penalty and prosecution obtained under the new penalty regime not to be adversely viewed to decide the same issue under the old penalty regime

Background

- FA 2016 had introduced a new penalty regime (Section 270A) under the ITL applicable from tax year 2016-17 and onwards. Under the new penalty regime, penalty is leviable @ 50% on the tax payable on under-reported income. Under reported income is generally defined as the difference between assessed income and returned income, subject to certain exclusions. However, if the under-reported income is classified as "mis-reporting of income" ("Mis-reporting of income" would, amongst other things, includes misrepresentation and suppression of facts.), the amount of penalty is increased to 200% of the tax payable on such mis-reporting of Income.

- Further, FA 2016 had introduced provision (Section 270AA) under the ITL which grants immunity to taxpayer from imposition of penalty and initiation of prosecution on compliance of conditions viz., (a) payment of demand raised for tax and interest as per assessment order of tax authority within the specified time and (b) taxpayer files no appeal against the assessment order of tax authority. However, the benefit of immunity provision is not available to the cases where penalty is levied for "mis-reporting of income".

- Various concerns were raised by the stakeholders that if any taxpayer has availed the benefit of immunity provision under the new penalty regime in respect of additions in the assessment, the same may be viewed as acceptance by taxpayer of default for same issues for earlier years which may influence the tax authority's decision in the penalty proceedings of such earlier years.

- Perceiving the aforesaid apprehension, the Central Board of direct Taxes (CBDT), vide a Circular (Circular No. 5/2018; dated 16 August 2018), has clarified that if an application under the immunity provision under the new penalty regime is made by a taxpayer for seeking immunity from penalty and prosecution on a particular issue, it shall not preclude the taxpayer from contesting the same issue in any earlier tax years. It is further clarified that the tax authority shall not take an adverse view in the penalty proceedings under the old penalty regime in earlier tax years merely on the ground that the taxpayer has acquiesced the issue in the later tax years by preferring immunity applicable under the new penalty regime.

- This is a welcome clarification issued by the CBDT which will forbid the tax authority from adverse inference of the immunity application against the taxpayer in the penalty proceedings under the old penalty regime for earlier tax years. In view of this, the dispute of earlier tax years will be decided on the basis of merits of the case

Source: Circular No. 5/2018 dated 16 August 2018

Key Regulatory amendments

This section summarizes the regulatory updates for the month of September 2018.

Notifications/ circulars issued by Reserve Bank of India (RBI)

1. Liberalization in external commercial borrowing (ECB) and rupee denominated bonds (RDBs) policy

- RBI has effected the following changes in the extant ECB and RDB policy framework:
  - **Relaxation of minimum average maturity period for ECBs by companies in manufacturing sector:** As per the extant norms, ECB up to USD 50 million can be raised by eligible borrowers with minimum average maturity period of 3 years subject to specified conditions. It has now been decided that ECB up to US 50 million by eligible ECB borrowers in manufacturing sector can be raised with minimum average maturity period of 1 year.
  - **Underwriting and market making by Indian banks for RDBs issued overseas:** Presently, Indian banks, subject to applicable prudential norms, can act as arranger and underwriter for RDBs issued overseas and in case of underwriting an issue, their holding cannot be more than 5 % of the issue size after 6 months of issue. It has now been decided to permit Indian banks to participate as arrangers/ underwriters/ market makers/ traders in RDBs issued overseas subject to applicable prudential norms.

Source: A.P. (DIR Series) Circular No.9 dated 19 September 2018

2. Issuance of user manual in relation to filing of Single Master Form (SMF)

- RBI had introduced SMF for all the foreign investment reporting on RBI website which has been effective from 01 September 2018 on https://firms.rbi.org.in. With the introduction of SMF, e-biz portal which was used for reporting of foreign investments would no longer be available.
- Additionally, RBI has issued the user manual for the ease in understanding the procedure with respect to filing of SMF. The key highlights of the said manual are mentioned below:
  - There are only 5 forms i.e. FC-GPR, FC-TRS, LLP-I, LLP-II and CN which have been made available and the other four forms viz., ESOP, DI, InVi and DRR would be made available subsequently.
  - ARF and FC-GPR is merged into a single revised FC-GPR.
  - The Indian entities which could not register as entity user within the stipulated time period may register for the entity master with effect from 01 September 2018 along with the reasons for not making registration within the time period along with the authority letter.
- In addition to above, detailed procedures, formats have been provided under user manual available on RBI website.

Source: User manual on SMF

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