EY Tax and Regulatory Alert

January 2020

Prepared for ACMA

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INDIRECT TAX

Part A - Key Indirect Tax updates

1. Goods and Services Tax

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

- **Press Release** – dated 22.01.2020, issued by Ministry of Finance announces new due dates for return filing based on turnover and State registration, so as to facilitate filing of returns in a 'staggered' manner. New due dates for filing the said GSTR-3B returns are 20th, 22nd and 24th of every month, where the big taxpayers with annual turnover of Rs 5 crore or more would have to file returns on 20th of every month. The taxpayers having annual turnover below Rs 5 crore in previous financial year have been classified into 2 categories based on which State they are registered in, which shall then determine whether they shall file the return by 22nd or 24th of each month.

- **Notification No. 74/2019 - Central Tax** dated 26.12.2019 waves late fee payable by the registered persons who failed to furnish the details of outward supplies in FORM GSTR-1 for the months/quarters from July, 2017 to November, 2019 by the due date but furnishes the said details in FORM GSTR-1 between the period from 19th December, 2019 to 10th January, 2020.

- **FAQs released by GSTN** on the subject of e-invoicing. Below are the changes in the FAQs :
  - API specifications can be viewed at https://einv-apisandbox.nic.in/
  - IRP shall introduce certain validations other than GSTIN – Invoice Number - type of document - FY combination, if needed, from time to time to validate correctness of e-invoice.
  - IRN cannot be created by the supplier/supplier's vendor directly.
  - The limit of line items in e-invoice has been removed. Earlier the same was limited to 10,000 per e-invoice.
  - If the business wants to cancel an already reported invoice, he may do so by uploading the IRN on the IRP by using the Cancel IRN API. However earlier, business was allowed to cancel reported invoice by uploading the IRN or by uploading the following:
    - GSTIN
    - Type of document
    - Document Number
    - Document Date
  - E way bill Part B details, which are optional, can be entered in the e-invoice schema and be used to populate the contents of the e-way bill proforma
  - Since IRN will be a part of the QR code, it is not required to be printed separately
  - On a printed invoice, QR code returned by IRP will be printed on top right of the printed invoice.

2. Customs and Foreign Trade Policy (FTP)

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

- **Trade Notice No. 46/2019-20** – DGFT dated 17.01.2020 requesting importers to mention the complete & correct 8 digit HSN (if available) while filing Bill of Entry (BOE). The DGFT observed that importers were abstaining from mentioning specific HSN and rather used "others" category instead while filing BOEs. Therefore, the importers are advised to properly file the same and avoid, as far as possible, the use of "others" category.

Direct Tax

Key Direct Tax updates

Government prescribes mandatory electronic modes of receiving payments for large businesses

- The Government of India (GOI) has adopted several fiscal and non-fiscal measures to move towards a less cash economy, to reduce the generation and circulation of black money and to promote the digital economy.

  There are low-cost digital modes of payment such as BHIM UPI , UPI-QR Code, Aadhaar Pay, certain debit cards, NEFT, RTGS etc., which can be used to promote cashless payments.

  The Finance Minister (FM), in her Budget Speech on 5 July 2019, announced a proposal to make it mandatory for business establishments with an annual turnover of more than INR 500 million to offer such low-cost digital modes of payment to their customers, and no charges or Merchant Discount Rate (MDR) shall be imposed on customers, as well as merchants. Furthermore, the FM clarified that the RBI and banks will absorb these costs from the savings that will accrue to them on account of handling less cash, as people move to these digital modes of payment.

- The Finance (No.2) Act, 2019 (FA 2019) inserted Section 269SU in the Income Tax Act, 1961 ('the Act') to provide that every person carrying on business shall provide the facility for accepting payment through prescribed electronic modes, in addition to the facility for other electronic modes of payment, if any, being provided by such person if his turnover in business exceeds INR 500 million during the immediately preceding tax year.

  Furthermore, FA 2019 also inserted a new penalty provision for levy of penalty of INR 5,000 per day in case of default in providing such facility. The penalty shall be imposed by the Joint Commissioner. However, no penalty shall be imposed if the person proves that there were good and sufficient reasons for such failure.

  Furthermore, FA 2019 also inserted a new provision in the Payment and Settlement Systems Act, 2007 ('PSSA') to provide that no bank or payment system provider shall impose any charge upon payer or payee, either directly or indirectly, for using the electronic modes of payment prescribed under section 269SU of the Act. This provision applies to all persons regardless of the level of turnover whether or not it exceeds INR 500 million in the immediately preceding tax year.

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

  Vide notice dated 18 October 2019, the GOI invited applications from banks and payment system providers operating authorized payment systems under the PSSA, that are willing for their payment systems to be taken into consideration for being prescribed u/s 269SU of the Act.

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

- **Notification prescribing mandatory electronic modes of payments:** The Notification notifies following three electronic modes of payments as mandatory modes of electronic payments with effect from 1 January 2020 for specified persons viz.

  (i) Debit Card powered by RuPay;

  (ii) Unified Payments Interface (UPI) (BHIM-UPI); and

  (iii) Unified Payments Interface Quick Response Code (UPI QR Code) (BHIM-UPI QR Code).

These modes are in addition to any other electronic modes being provided by such person.

RuPay is India's indigenous card scheme created by the National Payments Corporation of India. It was conceived to fulfill RBI's vision to offer a domestic, open-loop, multilateral system which will allow all Indian banks and financial institutions in India to participate in electronic payments. It is made in India, for every Indian to take them towards a "less cash" society.

Bharat Interface for Money (BHIM) is a payment app that lets a person make simple, easy and quick transactions using UPI. One can make direct bank payments to anyone on UPI using their UPI ID or scanning their QR with the BHIM app. One can also request money through the app from a UPI ID.

- **Circular clarifying the impact of prescribed electronic modes of payments:** The Circular clarifies that from 1 January 2020, the specified person must provide the facilities for accepting payment through above referred prescribed electronic modes. Further, in view of a new provision in the PSSA, any charge including the MDR shall not be applicable on or after 1 January 2020 on payment made through the above referred prescribed electronic modes.

  The Circular also clarifies that a penalty of INR 5,000 per day is applicable in case of failure by specified person to comply with section 269SU of the Act. However, in order to allow sufficient time to the specified person to install and operationalize the facility for accepting payments through prescribed electronic modes, no penalty shall be levied if the specified person installs and operationalizes the facilities on or before 31 January 2020. However, if the specified person fails to do so, he shall be liable to pay a penalty of INR 5,000 per day from 1 February 2020 for such failure.

  However, there are practical difficulties/challenges being faced by blanket application of the aforesaid provisions across many businesses regardless of nature of their activities. As of now these provisions are applicable to both B2B as well as B2C transaction.

CBDT publishes draft of new Form 15E for making online application for lower withholding on payments to non-residents

- Section (S.) 195 of the Act provides for deduction of tax at source on any sum chargeable to tax under the provisions of the Act (barring some exceptions) which is payable/paid to an NR.

- Where the payer believes that the whole of such sum would not be taxable in the hands of the payee, the payer may make an application to the Tax Authority to determine the appropriate portion of such sum so chargeable to tax ('lower withholding order'). Further, the CBDT can notify class of persons or cases in which, regardless of whether or not such sum is taxable, the payer has to mandatorily make an application to the Tax Authority to determine the appropriate portion of the sum chargeable to tax.

  However, the Act has not prescribed any format for making such application. As per extant practice, the payer has to make an application in plain paper containing the required information and physically submit it to the Tax Authority. Thereafter, the Tax Authority examines the application and issues lower withholding order. But there are no standard operating procedures in respect of processing and disposal of application. This increases uncertainty and inconvenience to payers. There was demand from various stakeholders to streamline the process of passing lower withholding orders.

  With a view to reduce the human interface and streamline the process for making application for lower withholding order, the Finance (No.2) Act, 2019 amended S.195 with effect from 1 November 2019 to empower the CBDT to prescribe the form and manner of filing of an application. To operationalize the amendments, the CBDT

has issued the office memorandum to publish draft of new Form 15E for seeking stakeholders' comments.

- **CBDT office memorandum**

The office memorandum does not contain text of new rule 29BA which is expected to set out the procedure for electronic filing of application for lower withholding. But it contains draft of new Form 15E for making such application.

Comments/Suggestions may be sent electronically (in word format) through email at ustpl3@nic.in within 15 days of publication of the draft on the Income Tax website (i.e., by 15 January 2020).

The significant particulars required by Form 15E are provided in Annexure A. Broadly, it requires furnishing of elaborate details of the payer, NR payee, transaction details and taxability under the ITL including relief claimed under DTAA. It also requires copies of transaction documents to be uploaded along with the application. This is expected to streamline the process of applying for and obtaining lower withholding orders.

3. Regulatory

Reserve Bank of India revises the guidelines relating to Merchant Trading Transactions

Reserve Bank of India ("RBI") has issued the revised guidelines pertaining to Merchanting Trade Transactions (MTT) superseding the erstwhile guidelines.

In this regard, the key amendments, inter-alia, include the following:

As per the erstwhile guidelines, for the transaction to be classified as a MMT, it was mandatory that the state of goods do not undergo any transformation. However, on account of the fact that in some cases, the goods acquired may require certain processing/ value addition, the state of goods may be allowed some transformation subject to the AD Bank upon being satisfied with documentary evidence and bona-fides of the transaction. Accordingly, the second condition for a trade to be classified as MTT i.e. "The state of the goods should not undergo any transformation" has been amended.

In the erstwhile guidelines, the AD Bank had been given the power to verify documents like invoice, packing list, transport documents and insurance documents on the basis of non-negotiable copies duly authenticated by the Bank handling documents to satisfy itself about the genuineness of the transactions, in absence of original documents. As per the revised MTT guidelines, the AD Bank may, if satisfied, rely on online verification of Bill of Lading/Airway Bill available on the website of International Maritime Bureau or Airline web check facilities. However, the AD bank shall ensure that the requisite details are made available /retrievable at the time of Inspection/Audit /investigation of the transactions.

As per the erstwhile guidelines, any receipts for the export leg, prior to the payment for import leg, was required to be earmarked for making payment for the respective import leg. As per the revised guidelines, the said advance received against export leg has been permitted to be parked either in Exchange Earners Foreign Currency (EEFC) account or in an interest-bearing INR account till the import leg liability arises. Further, the said advance against export leg shall be strictly earmarked/ lien-marked for the payment of import leg and the liability of the import leg, as soon as it arises, shall be extinguished out of these funds without any delay. If such receipts are kept in interest-bearing INR account, hedging thereof may be allowed by the AD bank at the request of its customer, as per extant regulations. No fund/non-fund-based facilities shall be extended against these balances.

Further, the revised guidelines impose a restriction on availing of short term credit by Merchanting trader prohibiting issuance of Letter of Undertaking (LoU)/ Letter of Comfort (LoC) for

supplier’s/ buyer’s credit.

In addition to above, the revised guidelines permit the AD Bank to write off the unrealized amount of the export leg of the MMT, without any ceiling in cases where (a) the MMT buyer has been declared insolvent, (b) the goods have been auctioned or destroyed by the customs/port/health authorities and (c) the unrealized amount of the export leg represents the balance due in a case settled through the intervention of the Indian Embassy, Foreign Chamber of Commerce or similar Organization. The said permission of write off has been granted subject to certain conditions mentioned therein.

The revised guidelines restricts the third party payments for export and import legs of the MTT.

The revised guidelines restricts payment of agency commission under MTT. However, AD banks may allow payment of agency commission up to a reasonable extent by way of outward remittance under exceptional circumstances, subject to the following conditions:

MTT has been completed in all respects.
The payment of agency commission shall not result in the MTT ending into a loss.
The Merchanting trader shall make a specific request to the AD bank in this regard.
The merchanting trade shall result in profit which shall be determined by subtracting import payments and related expenses from export proceeds for the specific MTT.

In terms of the revised guidelines, AD bank may approach Regional Office (RO) concerned of RBI for regularization of the MTT for deviation, if any, from the prescribed guidelines and the MTT shall be closed only after receiving approval from the RO concerned of RBI.

Source: A.P. (DIR Series) Circular No.20 dated 23 January 2020

Part B – Case Laws

Goods and Services Tax

1. Shree Nanak Ferro Alloys Pvt Ltd Vs The Union of India

[2020-VIL-30-JHR]

Subject Matter: The writ petition is filed by the petitioner on denial of adjustment of paid tax from one head to the other head and being asked for interest on the same.

Background and Facts of the case

- The petitioner Company were supposed to discharge their tax liability under the IGST head, but inadvertently or otherwise, the petitioner deposited the amount under the CGST head.
- Due to the initial stage of the GST regime, due to some confusion, the cash was wrongly deposited in the wrong electronic cash ledger.
- The petitioner is aggrieved by the letter issued by the respondent, whereby the petitioner Company has been saddled with the liability to pay the short paid IGST, amounting to Rs.41,98,642/-, along with due interest within a period of one week, failing which, appropriate action under the Provisions of the Central Goods & Services Tax Act, 2017, and the Rules framed there under, was to be initiated against the petitioner for recovery of the IGST amount along with due interest.

Discussion and findings of the case

- It was observed that it is not the case that the petitioner Company has concealed the transaction or has committed any fraud in discharging its tax liability. Further, by deliberately depositing the cash in the electronic cash ledger for the CGST head, at the place of IGST head, possibly no benefit was going to be derived by the petitioner.
- Section 77(1) of the CGST Act r/w Section 19(2) of the IGST Act, clearly lays down that a registered person who has paid the Central tax, treating the transaction to be intra-State supply but which turns out to be inter-State supply, is entitled to the refund of the amount of tax so paid and at the same time such person cannot be saddled with the liability of interest in view of the provision of Section 19 (2) of the IGST Act.
- There is nothing on the record of this case to show that the petitioner had not acted bona fidely, particularly in view of the fact that the transaction relates to the early stages in which the GST regime had been implemented, and there might be some confusion prevailing at that initial stage.
- Further, there is no plausible reason to deny the petitioner the benefit of the provisions of Section 77 (1) of the CGST Act, read with Section 19(2) of the IGST Act

Ruling

- The petitioner is directed to deposit the said amount under the IGST head.
- The petitioner shall not be liable to pay any interest on the said amount.
- The petitioner shall also be entitled to get the refund of amount deposited by them under the CGST head, or they may get the amount adjusted against their future liabilities.

2. Mohit Minerals Pvt Ltd. Vs The Union of India

Subject Matter: The petition is filed with respect to applicability of IGST on services supplied by a person located in non-taxable territory by way of transportation of goods by a vessel from a place outside India up to the customs station of clearance in India.

Background and Facts of the case

- The writ-applicant, at the time of importation, in addition to the customs duty, pays the 'Integrated Tax' (known as IGST)under the IGST Act, 2017, on the imported coal on the value as determined under the Customs Tariff Act, 1975 (vide proviso to Section 5(1) of the IGST Act, 2017). The said value also includes the value of the Ocean Freight, when the goods are purchased on FOB basis, whereas in case of goods purchased on CIF basis, the cost itself is the sum of cost, insurance and freight basis.

- The petition is filed with respect to applicability of IGST on services supplied by a person located in non-taxable territory by way of transportation of goods by a vessel from a place outside India up to the customs station of clearance in India. Thereby the applicant is bound to pay IGST twice on ocean freight.

- Entry no. 9 of Notification No.8 of 2017 – Integrated Tax (Rate) dated 28th June 2017, specifies the levy of IGST at the rate of 5% on the service of transport of goods in a vessel including the services provided or agreed to be provided by a person located in a non-taxable territory to a person located in a non-taxable territory by way of transportation of goods by a vessel from a place outside India up to the customs stations of clearance in India

- Per Entry no. 10 of Notification No.10 of 2017 – Integrated Tax (Rate) dated 28th June 2017, the importer as defined in clause 2(26) of the Customs Act located in the taxable territory shall be the person liable to pay tax under reverse charge on above service.

- Section 14 of the Customs Act, 1962 read with the Customs Valuation Rules provides that the custom duty is payable on the CIF value of imported goods and hence, the levy of integrated tax again on the Ocean Freight under the impugned Notifications amounts to double taxation.

- In view thereof, the writ-applicant challenges the legality and validity of the impugned Notification No.8/2017-Integrated Tax (Rate), dated 28.6.2017 and Entry 10 of the Notification No.10/2017-Integrated Tax (Rate), dated 28.6.2017 as the same are lacking legislative competency, ultra vires to the Integrated Goods and Services Tax Act, 2017.

Discussion and findings of the case

- In case of purchases made on CIF basis, the freight invoice is issued by the foreign shipping line to the foreign exporter, the writ-applicant neither has any invoice of such freight and nor has any idea of payments and the amount of such freight.

- In a case of CIF contract, the contract for transportation is entered into by the seller, i.e. the foreign exporter, and not the buyer, i.e. the importer, and the importer is not the recipient of the service of transportation of the goods

- The writ-applicant cannot be made liable to pay tax on some supposed theory that the

importer is directly or indirectly recipient of the service. The term 'recipient' has to be read in the sense in which it has been defined under the Act.

Ruling

- The impugned Notification No.8/2017 – Integrated Tax (Rate) dated 28th June 2017 and the Entry 10 of the Notification No.10/2017 – Integrated Tax (Rate) dated 28th June 2017 are declared as ultra vires the Integrated Goods and Services Tax Act, 2017, as they lack legislative competency. Accordingly no IGST should be levied on ocean freight on reverse charge basis, if the imports are made under CIF contract, as the overseas supplier of goods is the receiver of the transportation service.

Customs and FTP

1. M/s Mercedes Benz India Private Limited Vs Commissioner of Customs State of Gujarat, Delhi & Others [2020-VIL-28-CESTAT-DEL-CU]

Subject Matter: The appeal is filed by the appellant demanding that they cannot be held responsible for any manipulation by the transferor of Telegraphic Release Advice (TRA) on the basis of which duty free goods are imported

Background and Facts of the case

- The appellant has imported duty goods by use of false and fabricated Telegraphic Release Advice (TRA)
- The licenses were obtained in a fraudulent manner by the transferor of the license, but appellant contends that they have purchased these licenses through various brokers on payment of consideration through banking channels and, therefore, they cannot be held responsible for any manipulation by the transferor of these licenses

Discussion and findings of the case

- It is observed that in case forged license is purchased from the market, the burden of proof remains with the purchaser of the license.
- The appellant purchased these licenses, which were transferrable from the license brokers. After the purchase of license, the appellant did not apply for the issue to Telegraphic Release Advice from the port of Registration as was required to be obtained the TRAs from the brokers.
- The appellant also failed to ascertain the veracity of such TRAs from the Port of Registration. Thus, the due diligent that was required to be exhibited by the appellant was not carried out.
- The entire racket has been carefully planned and executed three persons, they circumvented all the laws, be it Customs, Foreign Trade or Exim Policy.
- They attempted to hoodwink all the government agencies and committed a fraud, which could only be detected, subsequently, in the investigation by the DRI Ruling

Ruling

- It was held that in case of fraudulently obtained DEPB and TRA's, demand would be sustainable against the transferee under

the Customs Act along with interest and penalty.

- The impugned orders are upheld. The appeals filed by the Revenue are allowed by way of remand

Direct Tax

1. Deputy Commissioner of Income-tax, Mumbai Vs Brand Marketing (India) (P.) Ltd. (113 Taxmann.com 15) (Mum Trib.)

Subject Matter : Mumbai Tribunal upholds deletion of addition u/s 56(1) for receipt of high share premium from independent foreign investors

Background

- S.56(1) of the Income Tax Law (ITL) provides that any income which is not covered by other heads of income shall be taxed under the residual head of 'Income from other sources'.

- With regard to taxation of share premium, s.56(2)(viib) was introduced vide Finance Act 2012 (w.e.f. A.Y. 2013-14) as an anti-abuse provision. It provides that where a Closely Held Company (CHC) receives from a resident, consideration for issue of shares and where such consideration exceeds the fair market value of shares, such excess consideration shall be taxable in the hands of CHC.

- Separately, S.68 of ITL, which is also an anti-abuse provision, specifically provides for taxation of unexplained cash credit in the form of share capital, share premium, share application money in the books of a CHC, in the circumstances where the explanation for such credits offered by the CHC are not satisfactory in the opinion of the Tax Authority. In this regard, there is greater onus on CHCs in relation to issue of share capital to not only explain the 'source' of such credit but also the 'source of source' (i.e. source of funds in the hands of the shareholder).

- S.78 of erstwhile Companies Act 1956 provides for a specific manner in which the share premium account can be utilised like issue of bonus shares, writing off share or debenture issue expense, etc.

Facts

- The decision covers batch of appeals. The Tribunal evaluated the issue by considering one of the appeals as the lead case.

- The Taxpayer company is a CHC and is engaged in the business of import and wholesale trading in branded ready-made garments and has international brand management experience. The Taxpayer created six subsidiaries which carried on cash and carry trading activity of 7 luxury international brands with an intention to encash the success of a particular brand through sale of subsidiary and derive rich gains. The aforesaid businesses of the subsidiaries required substantial capital investment and working capital for day to day operations. Hence, the taxpayer approached international markets as well as various private equity investors for financing its retail venture in India.

- During Tax Year 2007-08 & 2008-09, Taxpayer identified 2 potential investors who are residents of Mauritius and issued CCPPS at a price of Rs.220 each, which was arrived at considering the fair value of business taking into account the future prospects of the business. One of the investors was a SEBI-registered Foreign Venture Capital Investor (FVCI).

- The terms of conversion were agreed between the taxpayer and investors at the time of issue of CCPPS itself. Accordingly, during tax year 2009-10, Taxpayer converted the said CCPPS into equity shares of face value of Rs. 10 each at a premium of Rs.210 and also issued fresh equity shares at face value of Rs. 10 each at premium of Rs. 9. The relevant share premium was credited to share premium account in the books of Taxpayer.

- Taxpayer had obtained requisite regulatory approvals with regard to aforesaid investment by non-residents and also undertaken the valuations required thereunder. The valuation report obtained from a CA indicated the value to be 'NIL' basis adoption of erstwhile valuation guidelines of RBI (i.e. average of

the net book value of the company and the profit earning capacity value based on past earning).

- Tax Authority contended that –

  - Share premium on both fresh issue and conversion of CCPPS ought to be taxed under s.56(1) considering the share valuation to be 'Nil' and recurrent losses in the past years. Accordingly, Tax Authority considered the entire transaction to be sham and made addition under s.56(1) of ITL by treating share premium credited on conversion of preference shares as also fresh issue of equity of shares as taxpayer's income. The Tax Authority also relied on s.68 dealing with unexplained cash credit for making the addition.

  - The Tax Authority also alleged that since the share premium proceeds were utilised for making further investments and/or giving loans to subsidiaries, there was violation of s.78 of Companies Act 1956 which prohibits the company from utilising the share premium account for any purpose other than specified purposes like issue of bonus shares, writing off share or debenture issue expenses, etc.

  - The Tax Authority also contended that amount received by the taxpayer in the guise of share premium is not share premium, rather it is transfer of funds in the nature of revocable transfer of assets within the purview of s.61 to s.63 and the same is also within the scope of income under s.5 and charging provisions under s.4 of ITA.

- CIT(A) deleted the addition on account of the fact that there were no fresh monies in receipt on conversion of preference shares into equity. Also, considering the various judicial precedents, it held that even in case of fresh issue of shares, the amount is received from foreign investors through normal banking channels and necessary formalities with regulatory bodies are complied with. Hence, CIT(A) deleted the addition u/s 56(1) and rejected the allegation of unexplained cash credit in the form of share capital/ premium u/s. 68 CIT(A) also disapproved Tax Authority's contention that the receipt of share premium was a revocable transfer.

- Being aggrieved by CIT(A) ruling, the Tax Authority appealed further to the Tribunal.

Tribunal's Ruling:

The Tribunal ruled in favour of the Taxpayer and held no addition was warranted in the facts of the case u/s. 56(1) or s.68 on account of following reasons :-

Genuineness and capital nature of share issue transaction

- The Tribunal held that there were material evidences to substantiate that the shares were issued to independent foreign investors at fair value and hence, there is no case treating such an issue / conversion as a means of tax avoidance:

  - The investors were independent third parties without any direct or indirect interest in the Taxpayer.

  - Taxpayer had sought necessary approvals from regulatory bodies and also made requisite submissions with regard to investments by non-residents.

  - The terms of conversion of CCPPS were already determined at the time of the issue of the CCPPS to the Mauritian investors. The conversion price was also determined at the FMV.

  - The investment was made from long-term point of view considering the future prospects and immense

potential of the Taxpayer's business in India including the future business plan, future cash generating capacity, growth of the business, the PE multiple etc. Thus, issue price of shares/ conversion price of CCPPS was appropriately justified.

- While the valuation report by a CA indicated the value of company to be 'Nil', the said valuation was conducted based on the erstwhile guidelines of the RBI (whereby shares were valued based on average of the net book value of the company and the profit earning capacity value based on past earning) and was issued only to meet the RBI requirements for the issue of shares to non-resident. Further, it only indicated the minimum or floor price for issue of shares to non-residents and there was no bar on issuing the shares at higher value.

- Tribunal also upheld the Taxpayer's argument that that 'sham' means non-existent or bogus and Tax Authority had failed to appreciate the documentary evidence such as regulatory approval, registration certificate of the investor under SEBI as Foreign Venture Capital Investor (FVCI), which proved the genuineness of the transaction.

- The receipt of share capital and share premium by the Taxpayer being on capital account admittedly is not chargeable to tax under any of other heads of income. But that does not mean that the said receipt would automatically get taxed under the head 'income from other sources'.

- S.56(2)(viib) which was introduced only with effect from AY 2013-14 cannot be applied to the year under consideration. And even assuming the section had retrospective effect, it cannot be applicable in the present case for the reason that 56(2)(viib) is not applicable for issue of shares to non-residents.

- The Tribunal also placed reliance on the decision of Vodafone India Services Pvt Ltd Vs UOI and others wherein it was held that share premium has been made taxable by a legal fiction under S.56(2)(viib) and same is also treated as income under S.2(24)(xvi). The Tribunal also relied on co-ordinate bench decision in the case of Green Infra Ltd, wherein it was held that since receipts and expenditures in relation to share capital are capital in nature, share premium could not be treated as income u/s 56(1) and since the entire transaction of allotment of shares had been done through banking channel, s.68 will not be applicable.

- **No revocable transfer**

  Also, the Tribunal held that conversion/issue of shares at premium will not result in any transfer of any assets or income therefrom on which the taxpayer has right to reassume powers. Hence provisions of revocable transfer u/s 61 to 63 cannot be invoked. In any case, the provisions of s.61 and 63 are applicable in the hands of transferor and the taxpayer in the present case is a recipient of funds from the foreign investor and accordingly it is only transferee. Hence, provisions of s.61 and 63 does not come into operation at all.

- **No violation of s.78 of the Companies Act, 1956**

  Tribunal noted the Taxpayer's submission that the s.78 places restriction only on the manner of utilisation of share premium account and there is no bar is placed on the manner of utilisation of amount received pursuant to issue of shares at premium.

2. Emmar MGF Construction (P.) Ltd. Vs Assistant Commissioner of Income-tax, New Delhi (113 Taxmann.com 270) (Del Trib.)

Subject Matter: Delhi Tribunal upholds treatment of SPV's disbursement to Holding Company based on revenue-

sharing agreement as diversion of income by overriding title

Background

- S. 4 read with S. 5 of the Income Tax Act, 1961 (ITA) provides for taxation of income arising to a person provided such income accrues or arises or is deemed to accrue or arise to him during the relevant tax year.
- As evident from the above, one of the basic necessities to trigger taxation in the hands of a taxpayer in respect of any income, is the fact that the income should accrue/ arise to him and not to any other person.
- However, where, by reason of an overriding title or obligation, income is so diverted that it never reaches the person who has received it, income from the stage of accrual itself belongs to someone else, and the recipient cannot be brought to tax in respect of such income despite it being received by him.

Facts

- Delhi Development Authority (DDA) had issued a Request for Proposal inviting bids for construction of the Commonwealth Games Village i.e. housing for athletes and officials participating in the CWG 2010 held in Delhi.
- In this regard, a bid submitted by a consortium comprising of the Emmar Group and MGF Group, both based out of Dubai, was accepted, who, for execution of the project, set-up an Indian SPV i.e. Emmar MGF Construction Pvt. Ltd. (Taxpayer). The project was granted to it by the Delhi Development Authority (DDA) on the basis of the technical expertise and goodwill of Emmar MGF Land Limited (Hold Co).
- The consortium members had mutually agreed that the Hold Co. would provide entire finance and guarantees in lieu of 25% of revenue proceeds from the project.
- To give legal form to the above understanding, the Taxpayer entered into an agreement with Hold Co., wherein the Hold Co provided technical and financial support to execute the project. Following were commercial factors for such a consideration:
  - The contract was awarded on the basis of goodwill of Hold Co and fulfilment of technical qualification in the bid which, only Hold Co possessed. The Taxpayer was a newly created and hence could not boast of experience and technical qualification required to bid in the contest
  - Bid security, reserve price and working capital could only be provided by Hold Co
  - Net worth required to compete in the bid could be possessed only by the Hold Co
- In this regard, while the Taxpayer would execute the project, appoint sub-contractors, ensure agreed quality of work and be responsible for time-overruns, the Hold Co would provide support in the form of :
  - Capital and debt funding (towards meeting initial fund requirements such as deposits and advances);
  - Guarantor for the loans provided by banks/ financial institutions to the Taxpayer and performance guarantees provided to the Govt.
- Further, the Hold Co would also take the commercial risk related to delay in completion of project, drop in sales and financial crunch. Towards this end:
  - Hold Co was to be consulted by the Taxpayer for:
  - Appointment of directors/ office bearers;
  - Creation of charge on any assets;
  - Prices or other terms and conditions of

the sale of stocks/ rights of the project.

- Hold Co could inspect books of accounts of Taxpayer;

The above control was to be exercised in a manner similar to that exercised by banks/ financial institutions lending funds to protect its interest.

- In lieu thereof, it was agreed that the Hold Co would receive:
  - Interest in the range of 5-7% on funds lent;
  - Attribution of 25% of gross revenue (provided the project stands completed to the extent of 30% or above - being the threshold limit for recognition of revenue by Taxpayer).

Contentions of Tax Authority and Taxpayer

- In accordance with the agreement above, the Taxpayer recorded the 25% gross revenue payment as reduction from turnover thereby not offering such income to tax which was contested by the Tax Authority on the following grounds to which the Taxpayer responded as below:

- **Tax Authority's Arguments:** Agreement is a sham and transactions of sharing of 25% of the gross revenue is arranged to reduce tax liability of the Taxpayer and is a colourable device

Taxpayer's Contentions:

- Both Taxpayer and Hold Co are subject to tax at same rate. Accordingly, there is no material to show that the agreement is intended to reduce tax liability.

- Moreover, Hold Co is technically and financially capable of executing the entire project on its own. However, the SPV was created to execute the project only for the satisfaction of consortium members and DDA. Therefore, creation of SPV has legitimate commercial purpose and is not a sham.

- In fact, had the entire contract been executed by Hold Co then profit arising from the contract would have been absorbed against Hold Co's losses brought forward from earlier years.

Tax Authority's Arguments

- Hold Co was already paid interest towards deployment of funds which was adequate compensation for its services.

- Alternatively, even where it is concluded that the interest is not adequate compensation, the interest payment is kept deliberatively low to facilitate revenue sharing to set-off losses of the Hold Co.

Taxpayer's Contentions

- The cost of capital provided by Hold Co to the Taxpayer was not commensurate with the market rate of the services received. Hence, it is incorrect to draw inference that holding company was adequately compensated.

- The revenue share is not merely for provision of funds but also for risk bearing functions.

Tribunal Ruling

- The Tribunal accepting genuineness of the arrangement and contentions of the Taxpayer, observed as under:
  - For the financial security cover, the Hold Co is being compensated through a revenue sharing arrangement.
  - Since, the land for the CWG contract was owned by DDA, the Taxpayer did not have any asset which could have been mortgaged with the financial institutions to arrange vital funds for the projects. Hence,

Hold Co had provided the entire necessary guarantee to the financial institutions for securing funds from them.

- The Taxpayer is under the obligation to part away with the source of income to Hold Co and it was not its volition alone, to give away the revenue that could have been otherwise accrued to them. It is not a case that the entire sale proceeds of flats (and therefore, the income therefrom) would have accrued to the Taxpayer and 25% thereof had been applied or given away by the Taxpayer to the Hold Co. The Taxpayer merely acts as a collector of revenue for the Hold Co of the receipt to the extent of 25% of the sale proceeds.

- Accordingly, placing reliance on the various past judicial precedents, which had held that as long as there was a compulsion to contribute and the obligation pre-existed the accrual of income, it was a diversion of income by overriding/ superior title, the ITAT held that the instant case was diversion by overriding title and hence not taxable in the hands of Taxpayer.

3. Kelly Services Inc. Vs Deputy Commissioner of International Taxation, Mumbai (ITA No. 5527/Mum/2017) (Mum Trib.)

Subject Matter : US Co.'s management fees not linked to royalty income, rejects FIS taxability

Background and Facts of the case

- The assessee is a company incorporated in USA and is engaged in carrying on business of staffing and recruitment outside India and it does not have a permanent establishment ("PE") in India.

- A Service Agreement entered into by the assessee on 01.01.2007 with Kelly Services India Private Limited ("KSIPL") for provisioning of business consulting services including, but not limited to, technical assistance, managerial and administrative, to be used in KSIPL's day-to-day activity, the Service Agreement is in fact ancillary and subsidiary to the enjoyment of the rights granted by the assessee to KSIPL for which the assessee receives royalty from KSIPL.

- During the course of assessment proceedings, the Assessing Officer ("AO") noted that the assessee has received an amount of Rs. 9,60,026/- towards management fees from KSIPL, which, accordingly to the assessee was not taxable in India in view of provision of article 12(4) in as much as it did not satisfy the make available clause therein. The AO, however, rejected the said claim, of non-taxability, in the draft assessment order. Aggrieved assessee raised objection before the Dispute Resolution Penal ("DRP") but without any success.

- The AO in its final order after considering the direction of DRP characterize management fee amounting to INR 9,60,026 as Fees for Included Services ("FIS") under Article 12(4) of the India-USA Double Tax Avoidance Agreement ("DTAA") and held that services rendered by assessee 'make available' technical clause or know-how or skill to KSIPL, and hence are taxable as FIS under Article 12(4) of the India-USA DTAA .

Tribunal Ruling

- In appeal before Income Tax Appellate Tribunal ('ITAT'), the ITAT held that Article 12(4)(a) of the India-USA DTAA deals with the payments for rendition of technical or consultancy services which are ancillary and subsidiary to the application or enjoyment of a right, property or information for which a payment described in Article 12(3) is received. The services in question are independent services on standalone basis, and, as such, article 12(4)(a) does not come into play.

- As for the application of article 12(4)(b), they held that there is nothing on record to show that there is any transfer of technology so as

to satisfy the make available clause. Further, ITAT held that as for the application of article 12(4)(b), they find that there is nothing on record to show that there is any transfer of technology so as to satisfy the make available clause. Reliance in this regard placed on the Hon'ble Delhi High Court in the case of **DIT v. Guy Carpenter & Co Ltd. [2012] 346 ITR 504** Wherein Lordships held that to fit into the terminology "making available", the technical knowledge, skill, etc., must remain with the person receiving the services even after the particular contract comes to an end. It is not enough that the services offered are the product of intense technological effort and a lot of technical knowledge and experience of the service provider have gone into it. The technical knowledge or skills of the provider should be imparted to and absorbed by the receiver so that the receiver can deploy similar technology or techniques in the future without depending upon the provider.

In view of the above discussions and hearing in mind entirety of the case, ITAT uphold the plea of the assessee and the Assessing Officer is, accordingly, directed to delete the aforesaid addition of Rs. 9,60,026/-.

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