EY Tax and Regulatory Alert

October 2020

Prepared for ACMA

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INDIRECT TAX

Part A - Key Indirect Tax updates

Goods and Services Tax

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

- **Notification No. 69/2020, dated 30.09.2020** issued by CBIC, to extend the due date of filing annual return and audit report for financial year (FY) 2018-19 from 30.09.2020 to 31.10.2020.

- **Notification No. 70/2020, dated 30.09.2020** issued by CBIC, to notify that e-invoicing shall be applicable to the taxpayers having turnover above INR 500 crore in any of the preceding financial year from FY 2017-18. Further, it has also been notified that e-invoice shall be applicable with respect to exports as well along with supply of goods or services or both to a registered person.

- **Notification No. 71/2020, dated 30.09.2020** issued by CBIC, to notify that e-invoicing shall be the taxpayers having turnover above INR 500 crore in any of the preceding financial year from FY 2017-18 shall have Dynamic QR code. Further, the same shall come into force from 01.12.2020.

- **Notification No. 73/2020, dated 01.10.2020** issued by CBIC, to provide relief for generation of IRN with respect to any invoice prepared between 01.10.2020 to 31.10.2020. IRN with respect to such invoices can be generated within 30 days of invoice date.

- **Notification No. 74/2020, dated 15.10.2020** issued by CBIC, provides that registered person whose aggregate turnover in preceding financial year or current year up to INR 1.5 Crore , may file quarterly GSTR-1 within 13th of succeeding month for the tax period October 2020 to March 2021.

- **Notification No. 75/2020, dated 15.10.2020** issued by CBIC, provides that registered person whose aggregate turnover in preceding financial year or current year exceeds INR 1.5 Crore , may file monthly GSTR-1 within 11th of month succeeding the quarter for the tax period from October 2020 to March 2021.

- **Notification No. 76/2020, dated 15.10.2020** issued by CBIC, provides that GSTR 3B for each of the months from October 2020 to March 2021 shall be furnished by 20th of the succeeding month. However, taxpayers whose aggregate turnover is up to INR 5 crore in the preceding financial year and have principal place of business in the states of Chhattisgarh, Madhya Pradesh, Gujarat, Maharashtra, Karnataka, Goa, Kerala, Tamil Nadu, Telangana, Andhra Pradesh, the Union territories of Daman and Diu and Dadra and Nagar Haveli, Puducherry, Andaman and Nicobar Islands or Lakshadweep, GSTR-3B for the months of October, 2020 to March, 2021 shall be by 22nd of the succeeding month. Further, for taxpayers having an aggregate turnover of up to INR 5 crore in the previous financial year, whose principal place of business is in the States of Himachal Pradesh, Punjab, Uttarakhand, Haryana, Rajasthan, Uttar Pradesh, Bihar, Sikkim, Arunachal Pradesh, Nagaland, Manipur, Mizoram, Tripura, Meghalaya, Assam, West Bengal, Jharkhand or Odisha, the Union territories of Jammu and Kashmir, Ladakh, Chandigarh or Delhi, the due date of filing GSTR-3B for the months of October, 2020 to March, 2021 24th of the succeeding month.

Notification No. 77/2020, dated 15.10.2020 issued by CBIC, has made optional for the taxpayers to file Annual return for the FY 2019-

20 for whose aggregate turnover in a financial year does not exceed INR 2 Crore.

- **Notification No. 78/2020, dated 15.10.2020**
Issued by CBIC, mandates a registered person to mention the HSN code of four digits where the aggregate turnover in the preceding financial year is up to INR 5 crores and six digit HSN code where the aggregate turnover in the preceding financial year is more than INR 5 crores on the tax invoice issued for all the products sold. The only exemption is given to the registered persons having turnover less than 5 crores is that they need not mention the HSN code in the tax Invoice in respect of supplies made to unregistered persons.

- **Notification No. 79/2020, dated 15.10.2020**
issued by CBIC, the notification has amended the CGST Rules 2017:-

- Rule 46: HSN Code- The amendment has given power to notify certain supplies and the number of HSN code that needs to be mentioned on invoice.
- Rule 67A: Filing of Return through SMS- Now GSTR 1, GSTR 3B and CMP-08 can be filed through Short messaging service (SMS) facility.
- Rule 80: Annual audit and filing of form GSTR 9C- For FY 2018-19 and 2019-20, books of accounts need to be audited under section 35(5) and GSTR 9C to be filed only if the turnover exceeds 5 crore during a financial year.
- Rule 138E: Generating Part A of E-way Bill- If any person fails to file CMP-08 (Quarterly filing by composite taxpayers within 18th month of succeeding month of the quarter) for a consecutive two tax periods or fails to file GSTR 1 and GSTR-3B for a consecutive two months, such person cannot fill the Part A of E-Way bill. Provided that the said restriction shall not apply during the period from the 20th day of March, 2020 till the 15th day of October, 2020 in case where the return in form GSTR-3B or the statement of outward supplies in form GSTR 1 or the statement in form GST CMP-08, as the case may be, has not been furnished for the period February, 2020 to August, 2020. The above restriction to be applied after the period of 15.10.2020.

Customs and Foreign Trade Policy (FTP)

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

- **Notification No. 35/2015-2020, dated 01.10.2020** issued by DGFT, has been provided that the steel manufacturer supplying steel against advance authorisation through their Service centres / distributors / dealers / stock yards shall also be eligible to claim duty drawback, provided the supplies are made in accordance with guidelines issued by the Ministry of Steel. Further, the said notification also provides that for such supplies the manufacturer would raise an invoice on the Advance authorisation holder and the same would be required to be cross referenced on the tax invoices that would be issued by the Service centres / distributors / dealers / stock yards to manufacturers.

- **Notification No. 38/2015-2020, dated 06.10.2020** issued by DGFT, has notified that the import of tyres would not be allowed under the Duty free import authorisation (DFIA) scheme.

- **Notification No. 37/2015-2020, dated 06.10.2020 issued by DGFT,** has notified that the scheme of Rebate of state levies will be implemented by the DGFT in a scrip mode for which the procedure will be notified separately.

- **<u>Notification No. 36/2015-2020, dated 06.10.2020</u> issued by DGFT, that** the export policy in relation to N-95/FFP-2 masks or its equivalent (covered under ITC HS 9020, 392690, 621790, 630790) is amended from "Restricted" to "Free" category making all types of masks freely exportable.

- **<u>Notification No. 36/2020, dated 05.10.2020</u> issued by CBIC,** wherein the Government has amended notification no. 13/2020 – Customs dated 14.02.2020 providing for the exemption of duties of Customs against scrips issued under the RoSCTL scheme and additional ad-hoc incentives for apparel and made-ups sector. The benefit has been extended for export goods under the RoSCTL scheme, where order permitting clearance & loading of goods for exportation under section 51 of the Customs Act has been made till 31.03.2021 or until such date the RoSCTL scheme is merged with the Remission of Duties and Taxes on Exported Products (RoDTEP) scheme, whichever is earlier (the benefit was earlier available on order made till 31.03.2020).

- **<u>Circular No. 45/2020-Customs and Notification No. 96/2020-Customs, dated 12.10.2020</u> issued by CBIC,** has provided certain measures for timely assessment of Bills of Entry and clarification on defacement of physical documents in following manner:

- **<u>Continuous Assessment:</u>**

➢ There may be possible delays in assessment when Bills of Entry (BOE) are assigned to Faceless Assessment Groups ('FAGs') in locations that are on an official holiday or when assessment is to be done on a closed holiday (say, Sunday).

➢ For time sensitive goods such as life-saving drugs or imports by security/defence and other Government agencies would require prompt Customs clearance at all times including outside the normal office hours.

➢ Hence, it is decided to make all Saturdays (except second Saturday) as working day for all the faceless assessment groups across the country

➢ Further, it is desired that the Co-convenors of the National Assessment Commissionerates ('NACs') must co-ordinate with the NACs for ensuring expedited assessment by the FAGs/PAGs across different zones so there is no delay in assessment and Customs clearance during holidays at all or some locations.

➢ In this direction, the Co-Convenors of the NACs may get the NACs to draw up official rosters among FAGs/PAGs so as to have adequate number of officers, depending on the volume of BOEs, working on Sundays and other holidays including second Saturdays

➢ The Port of Import should monitor clearance of time-sensitive/urgent consignments such as lifesaving drugs, security/defence related consignments etc. imported by Government and its agencies/PSUs etc. so that these are not delayed.

➢ DG Systems will facilitate this by enabling a dashboard alerting the officers if such consignments are pending beyond 4 hours. This dashboard would be accessible to both PAG and FAG.

➢ One of the five Working Groups established under the NACs is responsible for timely assessments including resolving related IT issues. In the event of increase in the pendency for a particular NAC/FAG, the NAC Commissioners heading this Working Group shall take urgent measures for co-ordination with other NAC Commissioners/DG Systems for early disposal and/or resolution of the issues.

- **<u>Raising of Queries by FAG Officers</u>**

- Board has directed the NACs to get the analysis done in respect of the queries being raised on commodities pertaining to Chapters/Articles under the Customs Tariff Act, 1975 and while weeding out avoidable queries, to the extent possible standardize the queries across Customs formations

- This would also pave the path for incorporating these standard queries in the CCR instructions centrally inserted by RMD. This exercise should be completed by 23 October 2020

- Based on this exercise, the NACs have been requested to have Public Notices/Trade Notices issued by Jurisdictional Principal Commissioners/Commissioners to apprise the trade about the details/information needed for the assessment.

- Queries should not be raised in piecemeal manner and to the extent possible multiple and repeat queries are to be avoided.

- It is also noticed that at times, the documents are uploaded on e-Sanchit but are not linked to BOE, leading to a situation where Appraising/Assessing officer is unable to view the document and is thus compelled to raise a query. The trade would be advised to avoid such situation by linking every uploaded document to the relevant BOE. Suitable Public Notices/Trade Notices would be issued accordingly. The step by step guide in this regard is available at https://www.icegate.gov.in/Download/ICES_Advisory_35_2020_on_amendment_and_query_reply_with_supp_docs_v2.pdf

- It is clarified that the verification of statutory compliances is to be checked only during Customs Compliance Verification (CCV) stage at the Port of Import. While Appraising/ Assessment officer can make a suitable remark in the system for such verification by the Port of Import, the BOE shall not be kept pending for assessment.

- The Working Group on Prohibitions/Restrictions are advised to identify the item wise CCV requirements for uniformity in the FAG and also communicate the same to RMCC for their central enforcement.

- Once this is done, the Appraising/Assessment officer would no longer need to insert a remark to this effect in the system

- **<u>Resorting to First Checks</u>**

- Board has identified the following imports/situations where First Check shall ordinarily be resorted to by the FAG officers for carrying out assessment:

  - Old and used machinery/capital goods provided the Inspection/Appraisement report from the country of export is not available in the format prescribed or is not produced at all or is insufficient as per Circular No.07/2020-Customs, dated 05 February 2020.

  - Old and used goods where the examination is essential to determine valuation, classification, and other parameters. This does not include the cases covered under 2nd proviso to Section 46(1) of the Customs Act, 1962.

  - Articles of jewellery, precious metals, imitation jewellery where valuation must be ascertained by a jewellery expert.

  - Cases of re-import of goods under various exemption notification, which requires establishment of identity to the satisfaction of Deputy Commissioner/Assistant Commissioner of Customs.

- All other instances, including the FOC (Free of Charge) and temporary import consignments, must ordinarily be resorted to only Second Check.

- However, in the exceptional instance when the FAG has genuine reasons to believe that a First Check examination report is required for completion of assessment, the same may be ordered only with the approval of Joint Commissioner/Additional Commissioner in the Customs Automated System. It is clarified that this would include the cases where importer himself requests for First Check.

- **<u>Role of Risk Management Centre for Customs ('RMCC') / Local Risk Management ('LRM') in Facilitation</u>**

- It is observed that, examination orders given by different officers in the same situation are at variance or not clear. It is also seen that at time these examination orders merely duplicate the instruction given by RMCC.

- The FAG officers shall not duplicate the RMCC instructions, rather only supplement the same to provide additional directions based on local inputs.

- The Examination orders would be made available shortly through the ICETAB, obviating the need for printing in the paper.

- To bring uniformity in LRM instructions across the country, to the extent possible, NACs may review the local risk targets related to assessment. Those targets that merit PAN India applicability would be referred to RMCC for examination and further necessary action.

- **<u>Re-assessment of BOE</u>**

- The various scenarios and the prescribed routes for carrying out reassessment are as follows:

  Scenario 1: Where the amendment is requested before OOC and would impact the assessment.

  - The request by the importers for those amendments impacting assessment would be sent to FAG for approval and consequent re-assessment.

  - Accordingly, Notification No. 96/2020-Customs dated 12.10.2020 has been issued to enable FAG officers as proper officers under section 149 of Customs Act, 1962.

  - The said scenario would apply in following instances:

  - The self-assessed BOE is verified and found in order and the importer seeks an amendment that may impact the assessment. Once recalled for re-assessment, the BOE would be sent for consideration of the same FAG which had re-assessed the subject BOE previously; or

  - The self-assessed BOE is facilitated post which the importer seeks an amendment that may impact the assessment. In such case, the BOE would be sent to the any of the FAG for assessment by the Customs Automated System; or

  - The self-assessment made by the importer is questioned by the FAG and after due process, the assessment is changed. In this case the importer may either accept the new assessment or seek an assessment order. In both situations, if the importer subsequently seeks an amendment impacting the assessment, the BOE would be sent for consideration of the same FAG which had re-assessed the subject BOE previously.

  Scenario 2: Where the re-assessment is requested before OOC but would not impact the assessment.

  - This scenario covers situations like requests for amendments like change in details of invoice based on the documentary evidence, short shipments, change in BL/AWB or fulfilment of conditionalities decided by assessment such as Bond conditions etc. These amendments may continue to be approved by PAG.

Scenario 3: Where the re-assessment is requested after OOC has been given under Section 47 of the Customs Act, 1962.

- This scenario covers situations where re-assessment with or without amendment is to be carried out for any reason after OOC has been given. The same shall continue to be done by PAG.

- **Certificate of Origin:**

- Board has instructed all field formations to adhere to directions in Circular No.32/2020-Customs, dated 06 July 2020, which requires submission of original hard copy of a COO. This approach is in line with the Operational Certification Procedures for the various Trade Agreements notified in terms of section 5 of the Customs Tariff Act, 1975.

- **Grievance Redressal**

- In addition to other functions, Turant Suvidha Kendra (TSK) at the Port of Import would act as Facilitation Helpdesk for any grievance related to clearances of the BOE filed in the port.

- The list of the TSKs and their email and telephone/ contact details are available at https://www.cbic.gov.in/htdocs-cbec/enquiry-points

- In the Circular No.40/2020-Customs, dated 04 September 2020 which provides for the establishment of the NACs and FAGs for Faceless Assessment, there were certain inadvertent errors that had crept in the Annexure I & II. Given the said ambiguities the Annexures I & II of said Circular have been suitably revised as per attachments to this Circular.

- **Public Notice No. 128/2020, dated 01.10.2020 issued by CBIC,** wherein the Government has extended the time limit under Customs Act, 1962 and Rules and Regulations issued there under Amendment of PN.73/2020 and PN 94/2020.

The due date of completion of any proceeding or issuance of any order, notice, intimation, notification or sanction or approval by whatever name called, by any authority, commission, tribunal, or filing of any appeal, reply or application or furnishing of any report document, return or statement has been extended from 30.09.2020 to 31.12.2020.

Direct Tax

Part-A Key Direct Tax updates

1. CBDT further extends due date for furnishing belated or revised tax return for tax year 2018-19 to 30 November 2020

- Under the Income Tax Laws (ITL), a taxpayer is required to furnish tax return within a specified time. The ITL also provides that a taxpayer which fails to furnish their tax return within the specified time, may furnish belated tax return.
- Further, a taxpayer may revise their tax return so filed and furnish revised tax return in a case where any mistake or omission is discovered. Such belated or revised tax return can be furnished on or before the end of the subsequent tax year to which such tax return relates.
- In view of the above, the original due date for furnishing belated or revised tax return for tax year 2018-19, as per the ITL, was 31 March 2020. However, due to the outbreak of COVID-19 pandemic in India, the said due date was first extended to 30 June 2020 vide The Taxation and Other laws (Relaxation of Certain Provisions) Ordinance, 2020 dated 31 March 2020, then to 31 July 2020 vide Notification No. 35/2020 dated 24 June 2020 and, lastly, to 30 September 2020 vide Notification No. 56/2020 dated 29 July 2020.
- On consideration of the genuine difficulties being faced by taxpayers due to the ongoing impact and spread of COVID-19 pandemic, the Central Board of Direct Taxes, vide an order dated 30 September 2020, has further extended the due date for furnishing belated or revised tax return for tax year 2018-19 to 30 November 2020.

2. CBDT issues Press Release to clarify doubts on new tax collection provisions on sale of goods

In relation to the TCS provisions, the Press Release provides the clarifications listed below:

- TCS provisions are applicable only if the turnover of the seller exceeds INR100m in the preceding tax year.
- Threshold of INR5m is calculated qua each buyer for a seller.
- TCS is to be collected only on receipt of sale consideration on or after 1 October 2020.
- The amounts received from 1 April 2020 on sale of goods are to be included for the limited purposes of computing the threshold limit of INR5m for tax year 2020-21.
- TCS collected by the seller from the buyer is akin to advance tax/withholding tax for the buyer and is available as a credit to the buyer against their income tax liability.
- In response to representations received from stakeholders requesting clarifications on various issues arising under the TCS provisions, the CBDT issued Circular No. 17/2020 on 29 September 2020 for removal of difficulties and to clarify certain aspects, such as computation of threshold, relief for stock market transactions, interplay between new TCS on sale of goods and existing TCS on sale of motor vehicles of value exceeding INR1m.
- The CBDT took note of certain media reports which raised certain doubts regarding applicability of the new TCS provisions. In order to clarify those doubts, the CBDT has issued the Press Release on 30 September 2020 which explains the scope and applicability of the new TCS.

Briefly, the Press Release clarifies the following aspects:

- To reduce compliance burden, TCS is applicable to only those sellers whose turnover exceeds INR100m in the preceding tax year. The Press Release clarifies that sellers having turnover less than INR100m in the preceding tax year are not required to collect TCS on sale of goods.
- The threshold limit of INR 5m to collect TCS is qua each buyer.
- On the threshold of INR 5m for transitional tax year 2020-21, the Press Release clarifies that TCS is applicable only on receipt of sale consideration on or after 1 October 2020.
- Therefore, it will not apply with respect to any receipt prior to 1 October 2020.
- However, for the limited purposes of computing the threshold limit of 5m, the receipts from 1 April 2020 have to be taken into account. The Press Release provides the following illustration:

Date receipt of sale consideration	Amount (INR)	Total consideration to calculate threshold of 5m	Applicability of TCS
Between 1 April 2020 to 1 October 2020	10m	10m	TCS not applicable
On or after 1 October	0.5m	10.5m	Since threshold limit of 5m is exceeded, TCS required to be collected on INR 0.5m

- The Press Release clarifies that the rationale for application of TCS on receipt of amount of sale consideration received on or after 1 October 2020, without making any adjustment for the amount received in respect of sales made before 1 October 2020, is to simplify the compliance burden on the seller and to also avoid litigation. This is because sellers usually maintain a running account of buyers and are not able to link payments to any specific invoice.
- The Press Release also clarifies that the TCS collected on sale of goods by the seller is not an additional tax, but in the nature of advance tax/withholding tax for the buyer, and the buyer will be able to avail credit of such TCS against their income tax liability. Further, in a situation where the TCS is in excess of the actual tax liability of the buyer, the buyer is eligible to claim refund along with interest thereon.
- The Press Release also rationalizes that the new TCS will not impose significant tax burden on the buyer since it is collected at very nominal rate of 0.1%.

3. CBDT notifies changes to rules, tax return and tax audit forms pursuant to concessional tax rate regimes [CBDT Notification dated 1 October 2020]

The ordinance, subsequently ratified by the Parliament, introduced into the Income Tax Act, 1961 (ITA) the following provisions:

- Grant of an option to domestic companies to avail of a CTR of 22% (totalling 25.17% inclusive of applicable surcharge and cess) subject to certain conditions, from FY 2019-20 onwards [hereinafter referred to as 22% CTR].
- Grant of an option to new domestic manufacturing companies, incorporated on or after 1 October 2019 and commencing

manufacturing on or before 31 March 2023 to avail of a CTR of 15% (totalling 17.16% inclusive of applicable surcharge and cess) subject to certain conditions [hereinafter referred to as 15% CTR].

- In this regard, where it appears to the Tax Authority that, owing to the close connection between a taxpayer availing 15% CTR and any other person, or for any other reason, the course of business between them is arranged in a manner which produces more than ordinary profits to such taxpayer, the Tax Authority shall restrict the benefit of CTR to the amount of profits as may reasonably be deemed to have been derived therefrom and for this purpose, the profits shall be computed having regard to arm's length price (ALP) as per domestic transfer pricing (TP) provisions.

- In this regard, the conditions laid down to avail the benefit of the above CTR regimes include:

  - Computation of income without availing specified tax exemptions or incentives.

  - Computation of income without setting-off of any losses or unabsorbed depreciation brought forward from earlier years attributable to specified incentives referred at (a) above.

  - However, w.r.t. the 22% CTR regime, taxpayer is entitled to recalibrate tax WDV of the block of assets as on 1 April 2019 by the unabsorbed additional depreciation allowance brought forward as on 1 April 2019 in a manner to be prescribed by rules, if the taxpayer opts for 22% CTR. The benefit of recalibration is restricted to taxpayers who opts in for 22% CTR in tax year 2019-20.

- Computation of income by claiming depreciation in the manner prescribed.

- In deference to power conferred to prescribe manner of depreciation and related other aspects, the CBDT has issued the present Notification.

Key provisions of the notification

- **Manner of claiming depreciation to avail the above CTR regimes - Restricting maximum rate of depreciation to 40%**

As discussed above, one of the conditions to avail the benefit of the above CTR regime is to claim depreciation in the manner prescribed. The Notification now introduces rules for the claim of depreciation restricting the highest rate of depreciation to 40% for all assets where the depreciation is at a rate higher than 40% while retaining rates of depreciation on all other assets as per extant rules.

Recalibration of tax WDV by adjustment of unabsorbed additional depreciation not available as deduction due to exercise of option to avail 22%.

Notification lays down rules enabling adjustment of brought forward additional depreciation allowance to the tax WDV as on 1 April 2019 thereby permitting recalibration of tax WDV of block of asset as on the dates specified above to a taxpayer who opts for CTR regime in the first year of the provision. Corresponding changes have also been made to the notified tax return form in ITR-6 and tax audit report in Form 3CD for tax year 2019-20 to give effect to the amendment.

- **Disclosure of losses forfeited for set-off or carry-forward due to exercise of option to avail 22% CTR**

Taxpayers who opts for CTR regime is to forfeit benefit of unabsorbed losses or depreciation of past years. In this backdrop, the Notification makes changes to the notified tax return form

in ITR-6 and tax audit report in Form 3CD for tax year 2019-20 to facilitate adequate and correct disclosure of such losses which are unavailable for set-off and carry forward.

Disclosure in Form 3CEB on particulars in respect of specified domestic transaction between related parties, not at arm's length

The amount of profits eligible for the benefit of 15% CTR shall be computed having regard to the ALP as per the domestic TP provisions.

In this backdrop, the Notification introduces a requirement in Form 3CEB to disclose all such transactions, including, details of name of the person with whom specified domestic transaction has been entered into, description of the transaction, amount as per books, the ALP and the method of arriving at the said ALP.

- For domestic companies availing benefit of 22% CTR or 15% CTR, Form 10-IC and Form 10-ID have already been prescribed vide Notification No. 10 dated 12 February 2020.

- **Omission of disclosures in Form 3CEB with respect to transactions with specified persons**

Finance Act, 2017 omitted from the domestic TP provisions of the ITA, the requirement to benchmark at ALP, expenditure exceeding INR 200m incurred in respect of which payment has been made to specified persons.

However, while the provision of law was amended to exclude the domestic TP compliance requirement, the corresponding disclosure requirement in Form 3CEB continued, giving rise to ambiguity.

In line with the omission of the above domestic TP compliance requirement from the ITA, the Notification now excludes such disclosure requirement from Form 3CEB also.

4. CBDT issues guidelines on provisions dealing with withholding tax on e-commerce operator and tax collection on sale of goods

Relief to payment gateways in e-commerce transactions:

- TDS on EOP is applicable where sale or service of EP is facilitated by EOP through its digital or electronic platform. However, in e-commerce transactions, the payments are generally facilitated by payment gateways.

- In such case, doubts may arise about whether there can be duplicated levy of TDS on the same transaction i.e., firstly by EOP which facilitates sale of goods or provision of services and, secondly, by payment gateways which facilitate payment of such transaction.

- In order to remove such difficulty, the Circular provides that payment gateways will not be required to deduct tax if tax is already withheld by EOP which is facilitating sale or service transaction. Further, to facilitate proper implementation, the payment gateway may take an undertaking from the EOP regarding taxes being withheld.

Computation of threshold for tax year 2020-21 for TDS and TCS:

- The TDS and TCS provisions have certain thresholds to trigger applicability. The threshold for TDS on individuals and HUFs who furnish PAN/Aadhar is INR 0.5m in a tax year. The threshold for TCS on buyer is receipt of any amount as consideration for sale of any goods of the value or aggregate of such value exceeding INR5m in a tax year. Both provisions come into effect from 1 October 2020 raising doubts for computation of thresholds for transitional tax year 2020-21.

In this regard the circular clarifies:

- In case of TDS, if the gross amount of sale or services or both facilitated during tax year 2020-21 (including the period up to 30 September 2020) exceeds INR0.5m, TDS shall apply on any amount credited or paid on or after 1 October 2020. In other words, the sale or services facilitated during April 2020 to September 2020 needs to be included for computing the threshold of INR 0.5m.

- In case of TCS, the TCS applies on receipt of sale consideration. Therefore, it will not apply for any receipt prior to 1 October 2020. Consequently, it would apply on all sale consideration (including advance received for sale) received on or after 1 October 2020 even if the sale was carried out before 1 October 2020.

- Furthermore, in case of TCS, since the threshold of INR 5m is with respect to receipts during a tax year, calculation of receipt for triggering TCS for tax year 2020-21 shall be computed from 1 April 2020. Hence, if the seller has already received INR 5m or more up to 30 September 2020 from a buyer, TCS shall apply on all receipts on or after 1 October 2020 till 31 March 2021.

Interplay of TCS on sale of motor vehicle and TCS on sale of goods:

- With introduction of TCS on sale of goods w.e.f. 1 October 2020 wherein seller is obligated to collect tax @ 0.1% on sale of goods of value exceeding INR 5Mn provided such goods are not covered under any other TCS provisions, issue which needed clarity was whether sale of all motor vehicles are excluded from TCS on sale of goods.

In this regard, the Circular clarifies as below:

- Scope of TCS on sale of goods (0.1%) and TCS on sale of motor vehicles (1%) are different.

- While TCS on sale of motor vehicle (1%) is applicable on single sale of motor vehicle exceeding INR 1m, TCS on sale of goods (0.1%) is applicable on all receipt above INR 5m in aggregate during the tax year.

- TCS on sale of motor vehicle (1%) is applicable on sale of motor car to consumers and not to dealers whereas TCS on sale of goods (0.1%) is applicable for all types of sales above the threshold.

In order to remove difficulty, the Circular clarifies as follows:

- Receipt of sale consideration from a dealer would be subjected to TCS on sale of goods (0.1%) if such sales are not subjected to TCS on sale of motor vehicle.

- In case of sale to consumer: receipt of sale consideration for sale of motor vehicle of the value of INR 1m or less to a buyer will be subjected to TCS on sale of goods (0.1%) if receipt of sale consideration of such vehicles during the tax years exceeds INR 5m during the tax year qua the buyer.

- Receipt of sale consideration for sale of motor vehicle of the value exceeding INR 1m would not be subjected to TCS on sale of goods (0.1%) if such sales are subjected to TCS on sale of motor vehicles (1%).

No adjustment towards sales return, discounts and indirect taxes on TCS:

- In this regard, the Circular clarifies that, since TCS is made with reference to receipt of amount of sale consideration, no adjustment on account of sales return, discount or indirect tax (including GST) is required to be made for TCS.

- This implies that since receipt of sale consideration includes GST, TCS is required to

be made on amount of receipt of sale consideration including GST. Further, if the amount of sale consideration is received post deduction of sales return or discount, no further adjustment is required since TCS is to be made on such net amount received from the buyer.

- However, if advance is received from customer (say, INR 10m), sale invoice is raised and subsequently there are sales returns or discount, TCS is triggered on receipt of advance of INR 10m and, hence, no adjustment can be made for subsequent sales returns or discount.

5. Extension of due date for payment of self-assessment tax by small taxpayers and furnishing tax return and tax audit report by all taxpayers, for tax year 2019-20

- To codify the reliefs, The Taxation and Other Laws (Relaxation and Amendment of Certain Provisions) Act, 2020 was enacted by the Parliament ratifying the various provisions.

- In this backdrop, as a relief to taxpayers, the Government of India (GOI) has decided to further extend the relevant due dates as below:

- Additionally, even the due date for payment of SA tax, not exceeding INR0.1m, without interest has been correspondingly extended till the revised due date of return filing for taxpayers at (A), (B) and (C) below.

- The necessary notifications in this regard shall be issued by the GOI in due course.

- The due date for filing belated/revised tax return for TY 2018-19 has already been extended to 30 November 2020 vide an order dated 30 September 2020.

S.No.	Particulars	Original due date	Extended due date as per earlier Notification	Revised due date as announced now
A	Return filing due date for TY 2019-20 in respect of taxpayers who are required to get their accounts audited (including their partners) and furnish a tax audit report	31 October 2020	30 November 2020	31 January 2021
B	Return filing due date for TY 2019-20 in respect of taxpayers who are required to furnish report in respect of international/specified domestic transactions	30 November 2020	30 November 2020	31 January 2021
C	Return filing due date for TY 2019-20 in respect of other taxpayers	31 July 2020	30 November 2020	31 December 2020
D	Due date for taxpayers at (A) above to furnish the tax audit report for TY 2019-20	30 September 2020	31 October 2020	31 December 2020

Key Regulatory amendments

This section summarizes the regulatory updates for the month of October 2020

1. Reserve Bank of India ('RBI') reviews procedure of caution/ de-caution listing of exporters

The RBI has amended the procedure of caution and de-caution listing of exporters and the key changes in this regard are as follows:

- In terms of the erstwhile procedure, the caution/de-caution listing of exporters was automated by being linked to Export Data Processing and Monitoring System (EDPMS).
- The exporters were automatically caution listed if any shipping bill against them remained opened for a period of more than 2 years without an extension being sought from the AD Bank/RBI. The date of shipment was considered for reckoning the realisation period.
- Further, the cation listed exporters would automatically get de-caution listed upon realisation and closure of related bills or extension being granted by the AD Bank.
- As per the revised guidelines, the caution and de-caution listing of exporters is to be done on the basis of recommendations made by the AD Bank to the concerned Regional Office of the RBI.
- The recommendation for caution listing would be made by the AD Bank depending upon the track record of the exporter with the AD Bank and other investigative agencies.
- Further, the AD Bank would make recommendation for caution listing in case the exporter has come adverse notice of the Enforcement Directorate (ED) / Central Bureau of Investigation (CBI) / Directorate of Revenue Intelligence (DRI) /any such other law enforcement agency and/or the exporter is not traceable and/or is not making sincere efforts to realise the export proceeds.
- Similarly, the AD bank would also make recommendations de-caution-listing as per the laid down procedure.

2. Department for Promotion of Industry and Internal Trade ('DPIIT') issues clarification on Foreign Direct Investment Policy ('FDI Policy') in digital media sector

DPIIT vide Press Note 4 (2019 Series) dated September 18, 2019 ('PN4 of 2019') permitted FDI upto 26% under the Government approval route for entities engaged in uploading/streaming of news and current affairs through digital media. There were representations made by the stakeholders seeking clarifications on what activities are covered under the ambit of 'digital media'. In this regard, DPIIT has now clarified the following:

- PN4 of 2019 would be applicable to the following entities:
  - Digital media entity streaming/uploading news and current affairs on websites, apps, or other platforms;
  - News agency which gathers, writes, and distributes/transmits news, directly or indirectly, to digital media entities and/or news aggregators;
  - News aggregator, being an entity which, using software or web application, aggregates news content from various sources, such as news websites, blogs, podcasts, video blogs, user submitted links, etc in one location.

- Indian entity would be required to ensure that:

  - Majority of the Directors on the board and the Chief executive officer (CEO) shall be Indian citizens;

  - Prior security clearance has been obtained for any foreign personnel being deployed or likely to be deployed by way of appointment, contract or consultancy or in any other capacity for functioning of the Indian entity prior to their deployment. In event such security clearance is not obtained, the Indian entity to ensure that the foreign personnel resigns or their services are terminated forthwith after receiving such directives from the Government.

- Indian entities covered under the ambit of PN4 of 2019 are required to align themselves with the FDI Policy (including directions under this clarification) and the applicable provisions under FEMA within one year from the date of this clarification.

Part B – Case Laws

Goods and Services Tax

1. M/s Sutherland Global Services Private Limited [TS-878-HC-2020(MAD)-NT]

Subject Matter: Ruling wherein the High Court reversed the single bench decision and disallowed carry forward and utilization of unutilized credit of Education Cess (EC), Secondary and Higher Education Cess (SHEC) and Krishi Kalyan Cess (KKC) against the Goods and Services Tax (GST) output liability.

Background and Facts of the case

- The assessee is registered under the Central Goods and Services Tax Act, 2017 (CGST Act) and provides information technology enabled services to customers worldwide.
- In erstwhile regime, the petitioner had obtained centralized registration under service tax.
- It was availing and utilizing CENVAT credit on inputs, input services and capital goods against payment of service tax liability.
- It had a closing CENVAT credit balance of service tax, Education Cess (EC) and Secondary and Higher Education Cess (SHEC).
- With introduction of CGST Act w.e.f. 1 July 2017 (appointed date), the petitioner sought to avail the accumulated credit.
- Single judge bench of Madras High Court (HC) allowed the assessee to carry forward and utilize accumulated credit pertaining to EC and SHEC under GST.
- Aggrieved, the revenue preferred an appeal before the Division Bench.

Discussion and findings of the case

- Division Bench observed that Cesses like EC, SHEC and KKC were standalone levies and in earlier regime, their credit could not be utilized against payment of excise duty or service tax.
- CENVAT credit or input tax credit under the GST regime is a concession and not a vested right. On abolition of levy of EC and SHEC, credit of said cesses became dead claims.
- Sub-sections of section 140 of the Central Goods and Services Tax Act, 2017 (CGST Act) do not operate in silos. Explanation 3, which clarifies that the expression “eligible duties and taxes” excludes any cess which has not been specified in Explanation 1 or 2, could not be applied in a restricted manner and would apply to entire section 140.
- Transition of unutilized credit could be allowed only in respect of taxes and duties which were subsumed in the GST law. EC, SHEC and KKC were not subsumed, either by the Parliament or States.

Ruling

- Given above, the Hon’ble Madras HC, accordingly, held that there was no entitlement to carry forward and set off unutilized EC, SHEC and KKC against output GST liability.

2. M/s. Yulu Bikes Private Limited [TS-869-AAR-2020-NT]

Subject Matter: Ruling on whether renting of e-bikes(Miracle), bicycles(Move) without operator can be classified under the SAC 9973 – Leasing or rental services without operator - Sl.No.17 (viia) of Notification No.11/2017 Central

Tax (Rate) dated 28th June 2017 as amended.

Background and Facts of the case

- The Applicant is engaged in renting of vehicles like e-bikes (Miracle), bicycles (Move) in Bengaluru, Karnataka through a technology driven mobility platform.
- They enter into contract/agreement with the customers with regard to usage / renting of the e-bikes (Miracle), bicycles (Move) and charge based on the time of usage of such vehicles.
- The applicant currently is charging GST @ 18% in respect of the services in relation to the mobility provided through a smart dockless electrical vehicle powered by state-of-the-art IoT technology wherein the vehicle is Light Weight, lighter than a scooter, faster than a bicycle and service wherein the mobility is provided through a smart lock enabled bicycle Powered by GPS, GPRS and Bluetooth technologies.
- Applicant contended that for determining the rate of tax, determination of appropriate classification becomes critical. Accordingly, reference has to be made to the provisions of Section 9 of CGST / KGST Act, 2017.
- The applicant, adhering to the principle of specific description, had classified their supply under the "HSN -9966- Rental of transport vehicles with or without operator" and discharged GST @ 18% as per the notification.
- Subsequently, an amendment was made by the Government with regard to the classification of services, wherein it has been clarified that the Heading 9966 covers "Rental services of transport vehicles with operators" and heading 9973 covers "Leasing or rental services without operator".
- The applicant, by virtue of such amendment, is eligible to shift his classification of supply of services from HSN 9966 to HSN 9973.
- The applicant understands that, the rate of tax for renting of vehicles would be applied as the same rate applicable to the respective vehicles and concludes that the rate of tax for renting of vehicles without operator under HSN 9973 would be as follows:

- Electric vehicles (i.e. Scheme "Miracle") would be @ 5% and
- Bicycles (i.e. Scheme "Move") would be @ 12%.

Discussions and findings of the case

- It was observed that, from the applicant's interpretation of law, the applicant construed the amendment to the rate notification under Notification No. 20/2019-CT(R) dated 30.09.2019 as that of the amendment to the classification, which is incorrect.
- The classification of the services does not change but the rate of tax can be changed by the rate notification.
- The Heading 9966 reads as Rental Services of transport vehicles with or without operators. Heading 9973 reads as Leasing or rental services with or without operator and includes rental or operational leasing of machinery and equipment, personal and household goods, but does not include leasing services of machinery and equipment of personal and household goods on a purely financial service basis.

- Further sub headings of 9973 pertain to other goods, IPR, etc with no mention of transport goods/vehicle.

- Thus the applicant's services are squarely covered under SAC 9966. The specific description is preferred to general one as per the Explanatory Notes and hence authority conclude that applicant's activity is classifiable under Heading 9966.

- Applicant's interpretation that post 30.09.2019, renting/leasing of all goods without operator should be falling under Heading 9973 is not correct and hence is not tenable under the law, reason being the amendment, under Notification No. 20/2019-C.T.(R) dated 30.09.2019, is to the rate of GST for the services covered under SAC 9973, but not to the classification of the services.

Ruling

- It was pronounced that, renting of e-bikes/ bicycles without operator cannot be classified under SAC 9973 - Leasing or rental services without operator and Sl.no.17(viia) of Notification no.11/2017 CT(R) dated 28th June 2017 as amended is not applicable to the instant case.

Customs and Foreign Trade Policy (FTP)

1. M/s Vedanta Limited [2020-VIL-492-MAD-CU]

Subject Matter: A writ petition was filed to allow cash refund of DEPB/FPS scrip.

Background and Facts of the case

- The Appellant had suffered an adverse order at the hands of the Assistant Commissioner of Customs, Customs House, Tuticorin, and the same was challenged by the petitioner before the Commissioner of GST and Central Excise (Appeals) Coimbatore, Tiruchirappalli.

- The appeal filed by the petitioner was allowed on 18.02.2020. And order was passed granting the refund of DEPB/FPS scrip.

- The petitioner wants is that this order should be implemented and refund due to the petitioner must be made without any delay.

- But the petitioner's request was not complied with, and hence writ petition was filed.

- The petitioner drew attention to Circular bearing No.276/186/2015-CX.8A dated 01.06.2015 issued by the Government of India which states that, refund/rebate claim arising out of order of Commissioner / Commissioner (Appeals) not to be withheld unless stay order has been obtained.

Discussions and findings of the case

- It was observed that if no interim order has been obtained by the department within a specified period, refund has to be allowed.

- Further, the same has been subject to the outcome of the appeal.

- In the instance case, the appellate authority passed the order dated 18.02.2020. On 01.10.2020, More than seven full months have elapsed in the meanwhile. If the department was aggrieved, the department should have expeditiously filed an appeal and pursued the matter and obtained interim order.

- The petitioner cannot be made to wait indefinitely.

Ruling

- Basis the above, the refund due to the petitioner at the applicable rates of interest shall be disbursed within a period of four weeks from the date of receipt of a copy of this order.

Part B – Case Laws

Direct Tax

1. Giesecke & Devrient (India) Pvt. Ltd- [120 taxmann.com 338 (Delhi ITAT)]

Subject matter: whether the rate of dividend distribution tax (DDT) under the Indian Tax Laws (ITL) can be restricted to a rate given under Article 10 of the India–Germany Double Tax Avoidance Agreement (Germany DTAA) with respect to dividend paid to its holding company in Germany.

Background

- Taxation of dividend income under the ITL has been subject to various amendments from time to time. Pre-1997, classical system of taxation was prevalent wherein dividends were taxed in the hands of shareholders and companies declaring dividends were required to withhold taxes on dividend income.
- From the year 1997 to 2020 (except for April 2002 to March 2003) the classical system was done away with and DDT regime existed. As per this regime, the company declaring dividend was made liable to pay taxes on dividends declared/distributed or paid.
- Consequently, such dividend income was regarded as exempt in the hands of the shareholders under the ITL. Recently, vide Finance Act 2020 (FA 2020), DDT regime was abolished, and the classical system of taxation was restored.
- The legislative intent for switch over to DDT regime provides that the classical system of taxation involved administrative inconvenience and DDT levy would involve single point taxation.
- Further, as per the provisions of the Germany DTAA, taxation rights are also granted to India when dividend is paid by an Indian company to a resident of Germany, being the beneficial owner, at the rate of 10%. However, the dividend income shall be taxable as per the ITL if the beneficial owner has a PE in India and such income is effectively connected to the PE.

Facts

- The Taxpayer, an Indian company, is a wholly owned subsidiary of a German company (G Co) and is engaged in the business of trading of currency verification and processing systems.
- During tax year 2012-13, the Taxpayer paid dividends to G Co and discharged DDT liability under the ITL.
- DDT, for the year under consideration i.e., tax year 2012-13, was levied at the rate of 16.22%, whereas as per the Germany DTAA the withholding tax rate on dividend income is 10%.
- During the appeal proceedings before the Tribunal, the Taxpayer raised an additional ground of appeal (amongst other existing issues of transfer pricing, expense disallowance etc.) and contended that the Tax Authority failed to appreciate that the dividend income was of non-resident shareholder (G Co), who is governed by the provisions of the Germany DTAA.
- Accordingly, DDT rate under the ITL needs to be restricted to the rate specified under the Germany DTAA and the excess DDT should be refunded.

Tribunal ruling

On admission of an additional issue on legal grounds

The Tribunal allowed additional issue on legal ground after noting that Delhi High Court (HC) has, in the case of Maruti Suzuki India Ltd., dismissed the writ petition filed by the Tax Authority against the underlying Tribunal decision. In the underlying Tribunal decision, the additional issue on similar lines was accepted as a legal issue.

On the application of beneficial rate on dividends under the Germany DTAA for the purposes of DDT

The Tribunal, based on the below reasoning, ruled that the beneficial tax rate on dividend income under the Germany DTAA prevails over DDT rate under the ITL.

- DDT is a tax on dividend though collected from the company paying dividends for administrative convenience:
  - In case of Godrej and Boyce Manufacturing Company Ltd, the Bombay HC concluded that DDT is a tax on the company paying dividends and not the shareholder.
  - The Tribunal also noted that there is no separate Income Tax return, disclosure form, separate adjudication procedure for determining DDT liability. Further, the ITL only provides for the consequences of non-payment of DDT, but there is no separate or specific provision in the ITL for collection and recovery of DDT in default.
  - While there is no dispute on DDT being the liability of payer company, as per the ITL, DDT has its genesis in charging provisions, which covers additional income tax, on the total "income" of every person.
  - Further, "income" is defined to include "dividend" within its ambit under the ITL.
  - The legislative history on dividend taxation supports that levy of DDT in the hands of the payer company at a standard rate was for administrative convenience and to reduce compliance burden rather than legal necessity and withdrawal of DDT is keeping in mind that tax was same across-the-board, irrespective of marginal rate, at which recipient shareholder is otherwise taxed.
  - Further, the reintroduction of the classical system of dividend taxation vide FA 2020 was after acknowledging that incidence of DDT is on the payer company, whereas dividend should normally be regarded as income in the hands of the shareholders. This fact is also corroborated as economic effect of DDT is at par with tax on dividend as the amount of distributed profits stand reduced to the extent of the DDT levied.
  - Also, it is a settled legal proposition that in the case where India has entered a DTAA to grant relief or avoid double taxation, the provisions of the ITL shall apply to the extent it is beneficial.
- DDT is a tax on income and charge of tax on any income is subject to the Germany DTAA
  - The Tribunal noted that when considering the rates for dividend taxation under the DTAA it may not be relevant that DDT is a liability on the payer company.
  - The Germany DTAA was notified in 1996 i.e. prior to the introduction of DDT provisions in 1997. The Germany DTAA restricts the tax on the dividend at 10% of the gross amount of dividends.

- The Tribunal has placed reliance on the Delhi HC ruling in the case of New Skies Satellite, wherein the HC did not permit application of retroactive amendment made under the domestic law to the DTAA provisions.

- Further, the Tribunal has placed reliance on the below principles emanating from the HC ruling and ruled that tax rates specified in DTAA in respect of dividend must prevail over DDT rate under the ITL:

- Treaties represent a reciprocal bargain between the two countries and need to be interpreted in good faith. They are mini legislations.

- The Parliament is the supreme authority, and it can legislate domestic laws which can lead to a breach of DTAA obligation, while such breaches are condemnable. The courts, however, are not permitted to sit in judgment over the validity of such breaches.

- Howsoever supreme the Parliament is, it cannot unilaterally amend the DTAA which operate on the principle of reciprocity. In its wisdom, the Government may decide not to follow the DTAA or may choose to renegotiate its DTAA obligation, but it cannot amend the DTAA, especially by domestic law.

- While the present ruling is in favor of the Taxpayer, the Tribunal restored the matter to the Tax Authority for limited purpose of verifying factual parameters viz. whether the beneficial owner of dividend income has a PE in India and income is effectively connected therewith, in which case the reduced rate under the Germany DTAA shall not be applicable.

2. Shri Vummudi Amarendran – [TS-520-HC-2020 (Madras HC)]

Subject matter: HC rules that an amendment to adopt stamp duty valuation prevailing on the date of agreement to transfer capital asset being land or building or both is curative and retrospective in nature.

Background and Facts

- The ITL contains a specific provision that, where the sale consideration in relation to transfer of land or building or both (the specific capital assets) is less than the value adopted by the stamp valuation authority for the purpose of payment of stamp duty on such transfer, then the amount determined by the stamp valuation authority shall be deemed to be the full value of the consideration for the purpose of computation of capital gains.

- The ITL was amended with effect from TY 2016-17 to provide that where the date of agreement for fixing the amount of consideration and the date of registration for transfer of capital asset are not the same, the stamp duty value as on the date of agreement (and, not on the date of registration) may be considered for the purposes of computing the full value of the consideration for transfer, provided the consideration or a part thereof is received through a banking channel on or before the date of said agreement (amended provision).

- The amended provision was brought in pursuant to a recommendation given by the Income Tax Simplification Committee (Easwar Committee) in its report which suggested that such amended provision is already in existence for the purpose of computing business income where the transfer is of land or building, or both, held as trading asset.

However, such provision is absent for the purpose of computing capital gains when the transfer is of specific capital assets, resulting in undue hardship to the taxpayer where seller has entered into an agreement to transfer specific capital assets much before the actual date of registration of transfer.

- In the given case, the Taxpayer entered into an agreement to sell land on 4 August 2012, against which advance consideration was received by the Taxpayer through a banking channel. However, a registered sale deed was executed on 2 May 2013, wherein the stamp duty value of the land exceeded the total consideration agreed by the Taxpayer in the agreement to sell i.e., on 4 August 2012. In computation of capital gains for TY 2013-14, the Tax Authority substituted the sale consideration by the stamp duty value prevalent as on the date of execution of the registered sale deed. The Tax Authority rejected the Taxpayer's contention that the value substitution is unwarranted as the amended provision has retrospective effect.

- The First Appellate Authority ruled in favor of the Taxpayer. On further appeal by the Tax Authority, the Income Tax Appellate Tribunal (Tribunal) dismissed the appeal. On being aggrieved, the Tax Authority further filed an appeal before the HC.

Tax Authority's contentions

- The amended provision applies on a prospective basis from TY 2016-17 and cannot be given effect for TY 2013-14 by applying the legal principle of "lex prospicit non respicit" which means the law looks forward and not backward. Reliance was placed on the language of the amended provision, as also the legislative intent, to contend that such an amendment is not clarificatory in nature to have retrospective effect.

- Reliance was placed on the Supreme Court (SC) decision in the case of Vatika Township Pvt. Ltd. , which had held that where the language is not clarificatory in nature, then the statutory provision has prospective effective from the date fixed by the Legislature.

- The Tax Authority also relied upon the Calcutta HC decision in the case of Bagri Impex , where the consideration for transfer of capital asset, being land, was received and offered to tax in TY 2005-06. However, the deed of conveyance for such sale was executed in TY 2006-07, while registration of such conveyance deed took place in TY 2007-08. The taxpayer contended that the transfer took place in TY 2005-06 but since the conveyance deed was not registered in TY 2005-06, there was no stamp duty valuation available for TY 2005-06. The stamp duty value considered at the time of registration of the conveyance deed cannot be substituted.

- However, the Calcutta HC had ruled in favor of the Tax Authority. The Calcutta HC had held that the fact that the conveyance deed was registered in the subsequent year would not allow the taxpayer to escape the substitution of the actual consideration by the stamp duty value determined in the subsequent year, even if capital gain is offered to tax in the earlier year.

- Furthermore, reliance was also placed on the HC decision in the case of Ambattur Clothing Co. Ltd. ,where the registrar refused to release the title deed of the specific capital assets transferred to the buyer unless he paid stamp duty on the higher stamp duty valuation. The buyers discharged the stamp duty on the higher valuation in order to seek possession of the title deeds and such higher valuation was substituted as the full value consideration in the assessment of the seller while computing capital gains.

- The seller contended that such higher stamp duty valuation was accepted by the buyer without any consultation with the seller and, hence, no substitution should take place in the hands of the seller for computation of capital gains. However, the HC had held that such stamp duty value was not challenged by the seller despite reasonable opportunities being available within the provisions of the ITL, as also under Stamp Duty Laws, and the Tax Authority is under obligation to adopt the stamp duty value as the full value of the consideration for computing capital gains.

HC's Ruling

The HC held in favor of the Taxpayer by concluding that the amended provision is curative in nature and applies retrospectively to the year under reference. The HC provided the following reasons to uphold the retrospective effect of the amended provision:

- The Explanatory Memorandum to FA 2016, explaining the legislative intent to introduce the amended provision, suggests that the amended provision has been introduced after taking note of the hardship to taxpayers who have executed the agreement of sale, but the registration thereof is delayed due to bona fide reasons. In such cases, the time lag between two events may give rise to a differential stamp duty value, while the taxpayer has committed to a specified consideration for transfer in the agreement for sale.
- The HC placed reliance on the SC decision in the case of Calcutta Export Company and other SC decisions for the proposition that where statutory amendment is made to remove undue hardship to the taxpayer, such amendment is curative in nature and will take retrospective effect. Such amendment may be interpreted liberally and equitably so that a taxpayer does not suffer unintended and deleterious consequences beyond the object and purpose of the provision.
- The Tax Authority had not doubted the bona fide reasons of the transaction carried on by the Taxpayer and had accepted the date of agreement and the consideration received thereunder.
- The HC distinguished the case of Bagri Impex (supra) on the ground that, for the purpose of the ITL, the seller had , in that case, claimed the transfer of specific capital assets to have already taken place in the earlier year, whereas the deed of conveyance on which the stamp duty was paid was executed in the later year. However, in the present case, the agreement to sell was entered into in the prior year while the actual transfer took place in the subsequent year, which scenario is squarely covered by the amended provision.
- The ruling in the case of Ambattur Clothing (supra) relied on by the Tax Authority was distinguished on the ground that, in that case, the seller did not contest the stamp duty valuation on which the buyer had discharged the stamp duty, despite reasonable opportunities available to the seller within the provisions of the ITL and Stamp Duty Laws. However, in the given case, the seller contested the stamp duty valuation on the ground that the amended provision is to be given retrospective effect and the stamp duty valuation at the time of the agreement to sell may be adopted, and not the time of execution of the registered sale deed as adopted by the Tax Authority.

3. **Padmini Products [TS-523-HC-2020 (Karnataka HC)]**

Subject Matter: Karnataka High Court allows depreciation allowance on intangible assets in the hands of company on its corporatization with respect to actual cost incurred

Background of certain ITL provisions

- In computing the income arising under the head "profits and gains of business or profession", the taxpayer is mandated to claim deduction of depreciation allowance.

- In certain cases, such as succession of business or corporatization of a partnership firm or conversion of a company into a limited liability partnership or amalgamation of companies etc. (succession), the aggregate allowance of depreciation in the hands of the predecessor and the successor is restricted to the extent of the depreciation that would have been allowed where succession had not taken place.

- Furthermore, the depreciation allowance so computed is allowable in the hands of the predecessor and the successor in the ratio of the number of days for which the assets were used by them. In other words, in the year of succession, depreciation on assets will be calculated on the written-down value or the cost of the block of assets before succession and then apportioned between the predecessor and the successor. (provision restricting depreciation in the hands of the predecessor and the successor).

- The provisions of the ITL give discretionary power to the Tax Authority to determine the cost of the asset for claiming depreciation allowance in a case where, in the opinion of the Tax Authority, the assets acquired by the taxpayer were used by any other taxpayer and the taxpayer had acquired these assets to reduce the tax liability by claiming higher depreciation. (fictional provision to rework actual cost).

Facts

- The Taxpayer was a private limited company and was engaged in the business of manufacturing, dealing and exporting of incense sticks and allied products. The Taxpayer succeeded the business of Padmini Products (a partnership firm) with effect from. 1 February 2005 upon corporatization of the firm into a company.

- Prior to corporatization, the firm revalued all its intangible assets using standard valuation methods.

- All assets and liabilities of the firm, including the intangible assets, were transferred to the Taxpayer and, in consideration, the Taxpayer allotted shares at face value of INR 1,000 at a premium of INR 13,500 per share to each of the partners of the erstwhile firm.

- The Taxpayer claimed depreciation on the amount at which the assets, including the intangible assets, were acquired from the partnership firm.

- The Tax Authority disallowed the claim of depreciation on the intangible assets for four tax years viz., 2004-05 (year of succession of the business by the Taxpayer), 2005-06, 2006-07 and 2007-08, on the following grounds:

  - There was no transfer involved when the firm was succeeded by the Taxpayer.

  - Intangible assets acquired by the Taxpayer on succession were valued as per the Taxpayer's own valuation and were not acquired for any consideration.

- The Taxpayer had not purchased the asset from a third party and there was no cost incurred.
- Notional valuation of an intangible asset is only a device to claim depreciation on non-existing assets.
- Since the Taxpayer had acquired assets by way of succession, depreciation can be allowed only to the extent that was allowable in the hands of the erstwhile partnership firm. Since intangibles were self-generated assets for the predecessor firm and not acquired for any cost, the question of depreciation thereon and apportionment thereof to the Taxpayer does not arise.

Taxpayer's contentions

- The Taxpayer had acquired all the assets, including intangible assets, on the business transfer from the erstwhile partnership firm. The acquisition of assets is from one existing entity by another. It is incorrect to suggest that the Taxpayer had not acquired intangibles from the partnership firm.
- The Tax Authority neither doubted the genuineness of the transaction nor did it challenge the valuation aspect.
- Fictional provision to rework cost of asset was not invoked during the audit of the Taxpayer, nor was any opportunity granted or any mention made in the assessment order.
- Provision restricting depreciation in the hands of the predecessor and the successor in the year of succession is not applicable to the facts of this case.

HC's ruling

The HC upheld the Taxpayer's claim and allowed claim for depreciation on the intangible assets, on the following grounds:

Depreciation on intangible assets

- Intangible assets, in the present case, were various trademarks registered in the name of the predecessor firm and carried real value. The HC noted that the valuation of shares in consideration for acquisition of the business was carried out by the Taxpayer as per Accounting Standards 10 and 26, which was not questioned by the Tax Authority.
- Any transfer of capital asset or intangible asset by a firm to a company as a result of succession of the firm by a company, is a recognized mode of transfer.
- Intangible assets were transferred by the firm to the Taxpayer for a valuable consideration.
- The Taxpayer and the erstwhile partnership firm were two different entities and there was transfer of intangible assets for an adequate consideration by allotment of shares. Also, the Tax Authority had not doubted the genuineness of the transaction.
- The Taxpayer was, therefore, entitled to depreciation in respect of trademarks acquired from the predecessor firm with respect to the actual cost incurred by it.

Impact of the provision restricting depreciation in the hands of the predecessor and the successor

The HC held that the provision restricting depreciation in the hands of the predecessor and the successor applies only in the year in which the succession has taken place, as only

in that year is there an aggregate deduction by the predecessor and the successor. In the tax year subsequent to the year of succession, there is no aggregate deduction in the hands of the predecessor and the successor and, consequently, that provision will have no applicability.

Applicability of fictional provision to rework cost

- For exercising the discretionary power by the Tax Authority to restrict the actual cost in the hands of the Taxpayer, the Tax Authority is required to establish that apart from claiming higher depreciation, there was no other main purpose of the acquisition of asset. Furthermore, in order to exercise such discretionary power, the Tax Authority needs to obtain prior approval from the Joint Commissioner. In the absence of satisfaction of both these conditions, the Tax Authority cannot amend the actual cost.

- In the present case, the Tax Authority did not comply with these conditions, nor has it recorded any findings to that effect in its assessment order.

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