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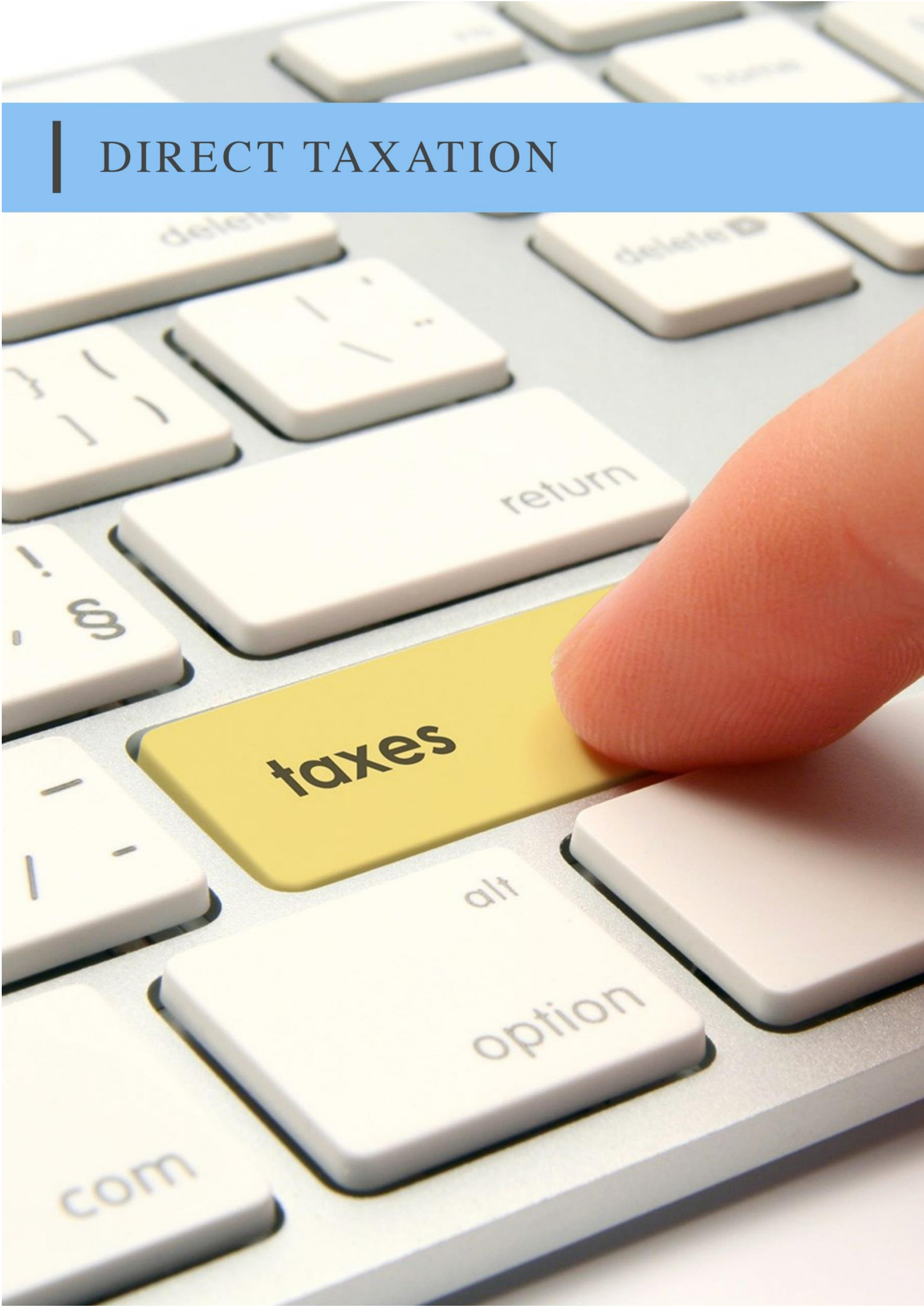
# DIRECT TAXATION



## BUDGET HIGHLIGHTS

### DIRECT TAX

- Concessional tax rate of 15% extended to new electricity generation companies
- Indian citizens deemed to be treated as resident in specified scenario to avoid double non-taxation and income from Indian business or profession taxable
- Definition of the term 'royalty' widened - not to exclude consideration for sale, distribution and exhibition of cinematographic films
- Exemption from indirect transfer provision restricted to Foreign Portfolio Investors, Categories I, as defined under the new regulations issued by Securities and Exchange Board of India
- Optional personal tax slab rates proposed, devoid of any deductions/exemptions
- Direct tax Amnesty scheme announced - "Vivad se Vishwas Scheme" - it has been issued
- Extension of approval for affordable housing projects by one year i.e. March 31, 2021
- Incidence of tax payments on ESOP of eligible start-up employees deferred
- Deduction on income of start-ups in parity with the DPIIT amendment
- TDS proposed on e-commerce transactions with exceptions
- Controversy between Section 194C and 194J removed by reducing the TDS rate on FTS to 2%
- Taxpayer charter proposed to be part of the enactment
- Tax audit limit increased to INR 5 crores
- Scope of APA extended to include income arising from business connection/permanent establishment

## RECENT CASE LAWS

**National Petroleum Construction Company [TS-807-HC-2019(DEL)]**

*While issuing lower TDS certificate under Section 197, the tax officer (TO) can't undertake PE determination*

### FACT OF THE CASE

- The taxpayer, a tax resident of UAE, entered into a contract with ONGC for carrying out work related to project management, survey, design, etc. In this regard, the taxpayer had sought issuance of a lower withholding certificate under Section 197 of the IT Act @2.6% on the gross receipts received from ONGC.
- However, the TO based on completed assessments for the preceding Assessment Year (**AY**), issued the withholding certificate @4%.
- The taxpayer argued that in the past, the appellate authority has passed favourable orders in the case of the taxpayer, wherein it was held that the taxpayer did not have a Permanent Establishment (**PE**) in India for earlier years.

### JUDGEMENT

The Hon'ble Delhi High Court (**HC**) rejected the argument of the taxpayer by holding that the decision of the co-ordinate bench for the earlier year could not be the basis to decide on PE in the present case, since the analysis of PE is a fact specific exercise.

- The HC held that determination of PE would require finding of the FACT OF THE CASEs which would have to be arrived at, after a careful consideration of terms of contract - however, this determination, cannot be undertaken in the proceedings under Section 197.
- The HC clearly stated that the judgment is only a tentative view, keeping in mind the limited scope of jurisdiction exercised under Section 197 of the IT Act.
- The HC also noted that a full-fledged investigation in this regard may be done by the TO during the course of assessment proceedings.

Thus, the HC has kept all the questions urged by the taxpayer relating to the constitution of PE vis-à-vis the contract in question as open.

**Neelu Analjit Singh [TS-799-ITAT-2019(DEL)]**

*Preference share-capital to be treated as a liability while computing the Fair Market Value (FMV) of the equity shares under Rule 11UA*

**FACT OF THE CASE**

- Taxpayer had sold shares of a closely held company (owned by taxpayer's spouse) to a Mauritius based company and offered to tax the capital gains arising therefrom.
- The TO considering the FACT OF THE CASE that the company whose shares were transferred, was a holding company and its only activity was holding the shares of an Indian company, opined that the value of the shares of the holding company had to be derived from the valuation of its subsidiary in India. Accordingly, considering the value of the subsidiary and the taxpayer's shareholding in the holding company, the TO arrived at the sales consideration.
- However, on appeal, the Commissioner of Income-tax (Appeals) (**CIT(A)**) substituted the actual sales consideration with FMV by relying on the Income-tax Appellate Tribunal (**Tribunal**) order in the case of Mr. Analjit Singh (ITA No. 4737/Del./2017 dated 01.12.2017). FMV was taken as the full value of consideration, since under the relevant agreement, the stipulation for the value of consideration was based on FMV.
- In addition to the valuation issue, the Tribunal also considered the issue of admission of additional evidence and characterization of gains.

**JUDGEMENT**

- Though the Tribunal in principle agreed with the valuation arrived at by the CIT(A) by applying Rule 11UA of the IT Rules, it highlighted one 'basic fallacy' and remarked that "there was an apparent misinterpretation of the financial statements of the subsidiaries" by the TO.
- Referring to valuation methodology of Rule 11UA of the IT Rules, the Tribunal held that while working out the total liabilities for valuation of unquoted equity shares, "paid-up capital in respect of preference shares issued by the company is required to be taken in the total liability of that company"; which was not done by TO.
- The Tribunal opined that preference shares were non-convertible, non-cumulative and redeemable, thus the company had a liability to pay the preference shareholders, before anything was paid to equity shareholders.
- In view of the above, the Tribunal directed the TO to recompute the FMV by considering the value of the preference share-capital as liability while computing the book value of the equity shares.

## Acciona Wind Energy Private Limited [TS-797-ITAT-2019(Bang)]

*Exemption under Section 47(iv) of IT Act not available in case of buy-back of shares*

### FACTS OF THE CASE

- The taxpayer during AY 2014-15, bought back shares from its Spanish Parent Company holding 99.99% of the shares of the taxpayer.
- Claiming that the transaction of buy-back of shares from its Spanish Parent Company is not liable to capital gains tax in India in view of Section 47(iv) of the IT Act, the taxpayer did not withhold tax under Section 195 of IT Act on such transaction.
- The TO and subsequently the CIT(A) rejected the position adopted by the taxpayer on the basis that the transaction of buy-back of shares was not covered under Section 47(iv) and held that Section 46A (which deems consideration received by shareholders on purchase of its own shares as 'capital gains') would be applicable in the current case, thereby confirming TO's order under Section 201(1) of IT Act.

### JUDGEMENT

- One of the criteria for claiming exemption under Section 47(iv) of IT Act is that the shares of a company should be held by the parent company or its nominees. In this regard, the Tribunal observed that exemption under Section 47(iv) of IT Act can be claimed even if there were two or more shareholders, provided the other shareholder is a nominee of the holding company.
- Section 45 covers actual capital gains on transfer of a capital asset, however, Section 46A provides for deemed capital gains on buy back of shares. In the absence of transfer of a capital asset liable to capital gains tax on buy-back of shares, exemption under Section 47(iv) of IT Act cannot be claimed.
- ITAT ruled that the provisions of Section 47(iv) of IT Act would not apply to the present facts due to the following reasons:
  - The other shareholder i.e., another Spanish company was not a nominee of the parent company.
  - Buy-back of shares is covered by Section 46A of IT Act and is not a transfer liable to capital gains tax.

## RSV Global [ TS-56-ITAT-2020(Ind)]

*Indian agent deriving more than 50% commission from non-resident supplier is not a dependent agent and TDS under Section 195 is not mandated*

### FACTS OF THE CASE

- The taxpayer who is engaged in trading activity, imported certain agro commodities from non-residents. While remitting the payment for such imports, the taxpayer filed form 15CA without deducting tax at source (**TDS**) under Section 195 of IT Act.
- The TO raised query in respect of non-deduction of TDS while making payment to non-residents. The taxpayer filed a reply along with documents and it argued that the agency clause under Explanation 2 to Section 9(1)(i) of IT Act was not attracted, as it was a general commission agent having independent status, and therefore, TDS under Section 195 of the IT Act was not mandated.
- However, the TO did not accept the explanation, and proceeded to hold the taxpayer as an assessee in default.
- On further appeal, CIT(A) upheld the TO's order. Aggrieved by the above, the taxpayer approached the Tribunal, Indore.

**JUDGEMENT**

- On these facts, the Tribunal observed that that taxpayer is not a dependent agent working for the non-resident in view of the following facts:
  - taxpayer acts on principal to principal basis in the ordinary course of business;
  - taxpayer does not conclude contracts on behalf of the non-resident;
  - taxpayer does not maintain stock for the non-resident;
  - taxpayer is not working mainly and wholly on behalf of the non-resident and it dealt with other parties as well
- In view of the above, the Tribunal ruled that merely because 52% of the revenue was from a non-resident, the taxpayer cannot be considered as a dependent agent mainly working for the non-resident and accordingly, no TDS is mandated to be deducted under Section 195 of the IT Act on payments made to such non-residents.

## Vodafone Cellular Ltd [TS-59-HC-2020(BOM)]

*Sale of SIM cards/recharge coupons at discounted rate to distributors not liable to withholding under Section 194H*

**FACTS OF THE CASE**

- The taxpayer, engaged in the business of providing cellular mobile telephone services, had sold pre-paid sim cards/ recharge coupons to its distributors. Such pre-paid sim cards/recharge coupons were given to the distributor at the Maximum Retail Price (**MRP**) less trade margin.
- The Tax Officer (**TO**), upon examining of the distributor agreements, held that the relationship between the taxpayer and the distributors is that of a principal and an agent. Further, TO held that supply and delivery of SIM cards did not constitute sale and purchase, but provision of services and accordingly, held that the taxpayer was liable to withhold tax under Section 194H of the Income-tax Act 1961 (**IT Act**). Commissioner of Income-tax Act (Appeals) upheld the order of the TO. The Income-tax Appellate Tribunal (**Tribunal**), Pune held that the sale of SIM cards/recharge coupons at discounted rate do not constitute commission/ brokerage and therefore not liable to withholding tax under Section 194H of the IT Act.

**JUDGEMENT**

- The question of law pending adjudication before the Hon'ble High Court (**HC**) of Bombay was, whether provisions of Section 194H will be applicable in case of discounts given by the taxpayer to the distributors on account of prepaid SIM cards.
- The HC placed reliance on the decision in the case *Reliance Communications Infrastructure Ltd*[1], wherein, HC of Bombay held that when transaction was between two persons on a principal to principal basis, deduction of tax at source as per Section 194H would not be made, since the payment was not commission or brokerage in nature.

On perusal of the facts, and placing reliance on earlier rulings of same HC, the HC of Bombay held that, "the Tribunal was justified in holding that the provisions of Section 194H of the Act was not applicable on discounts given by the assessee to the distributors of prepaid SIM cards."

**ELP Comments:**

- The issue of whether or not discounts granted to distributors of sim cards/recharge packs is in the nature of commission, has been a subject matter of litigation over the years, wherein divergent views have been taken by different Courts.

[1] Pr. CIT v. Reliance Communications Ltd (IT Appeal No. 702 of 2017) – followed in the case of CIT v. Idea Cellular Ltd (IT Appeal No. 1129 of 2017)

- The Karnataka HC observed that service can only be rendered and cannot be sold; however, right to service can be sold which in the instant case was sold by the service provider to the distributor. Thus, at the time of sale of a prepaid card by the taxpayer, no income had accrued to the distributor that was chargeable to tax and accordingly, provisions of Section 194H of the IT Act were not applicable in the absence of income.
- However, a contrary view was taken by the Delhi HC, wherein it was held that the ultimate agreement was entered into between subscribers and taxpayer creating legal relationship between them and the distributors were always acting for and on behalf of the taxpayer and thus, the discount offered was to be characterized as ' commission'.
- Thus, divergent views have been taken by different HCs and presently the issue has been admitted before the Hon'ble Supreme Court. A much-awaited clarity is required in this regard.

## NOTIFICATIONS/CIRCULARS

### CBDT amends Rule 10DA and 10DB of Income-tax Rules, 1962 with respect to CbCR and Masterfile

- CBDT amends Rule 10DA and Rule 10DB with respect to filing of CbCR and Masterfile to be applicable from April 1, 2020;
- Amended Rules streamlined the earlier Erstwhile Rules and changed certain filing requirements;
- Master File to be furnished with the Joint Commissioner [as against Director General of Income-tax (Risk Assessment) specified earlier]
- Requirement to furnish report in Form 3CEAD to Director General of Income-tax (Risk Assessment) removed.

### Notification No. 105/2019-Income Tax

- Section 269SU of the Income-tax Act, 1961 (**IT Act**), which mandates, maintaining facilities for accepting payment through electronic modes for certain businesses was introduced with the intent of encouraging the digital economy and moving towards a cash-less economy.
- The electronic modes have been prescribed by inserting Rule 119AA in the Income-tax Rules, 1962 (**IT Rules**). The prescribed modes are (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). The said Rule will be in effect from January 1, 2020.

### Central Board of Direct Taxes (CBDT) proposes new Form 15E for application under Section 195(2) to determine 'appropriate sum' chargeable to tax

- Form 15E is proposed to be introduced (comments/suggestions have been sought from stakeholders) for issuance of a certificate under Section 195(2) of the IT Act, to enable a payer to file an application for determination of the appropriate proportion of sum, chargeable to tax, at the time of making payment to a non-resident.
- The draft Form 15E seeks general information about the payer, payee and detailed information about the taxability of the transaction under the IT Act as well as the Double Taxation Avoidance Agreement (DTAA) provisions.
- The draft Form 15E also requires uploading of the relevant copies of documents applicable to the case (viz. copy of contracts, bank statements, share certificates and tax residency certificate etc.). Additionally, details of existing liabilities of the payee, taxes paid etc have also been sought.

## NEWS

- **CBDT releases MLI synthesised text[2]** - CBDT released MLI synthesised text for India's tax treaties with Poland, Ireland and UK to implement measures for the prevention of Base Erosion Profit Shifting (BEPS).
- **CBDT notifies ITR for AY 2020-21** - Vide notification 01/2020, CBDT notified Sahaj (ITR-1) and Sugam (ITR-4) forms for the AY 2020-21. In contrast to the earlier years, this is the first instance of notification of ITR forms before the start of the AY by CBDT. However, only the ITR Forms have been notified currently and corresponding return filing utility is yet to be updated.
- **Computer aided selection of cases for scrutiny (CASS) Committee reconstituted** - CBDT reconstituted CASS committee under the Chairmanship of DGIT (Risk assessment).
- **Taxation Laws (Amendment) Act, 2019** - The Taxation Laws (Amendment) Bill, 2019 seeking amendment to the Income-tax Act, 1961, received the Presidential assent on December 11, 2019.

[2] Reference: https://www.incometaxindia.gov.in

# INDIRECT TAXATION

## UNION BUDGET 2020 PROPOSALS – HIGHLIGHTS

### Customs

- Various tariff and non-tariff changes to promote Make in India and reduce the impact of global trade war
- Scheme for administering the verification of the country of origin of imported goods
- New system of 'Electronic Duty Credit Ledger' proposed
- Introduction of 'Tariff rate quota' as a safeguard measure
- Introduction of Health cess on import of specified medical equipment
- New incentive scheme for exporters to be implemented in current year

### Goods and Services Tax

- Provisions prescribing time limit for availing credit based on debit note proposed to be amended
- Extension of time limit for issuance of removal of difficulty order
- Proposal to levy penalty on specified offences on the person who retains the benefit and at whose instance the transaction is conducted
- Fraudulent availment of input tax credit made cognizable and non-bailable

## NOTIFICATIONS/CIRCULARS

### Circular No. 130/49/2019 - GST dated 31.12.2019

The Circular clarifies the notification issued (pursuant to the 37th meeting of the GST Council) in relation to GST payable under reverse charge mechanism (RCM) on renting of motor vehicles, w.e.f. October 1, 2019. The circular states that there are two rates applicable on the service of renting of vehicles: 5% with limited ITC and 12% with full ITC, and the service recipient shall be liable to pay GST under RCM only where the supplier does not charge 12% GST to the service recipient.

The Circular clarifies that RCM shall be applicable only on renting of motor vehicle services to carry passengers where the cost of fuel is included in the consideration charged from the service recipient, only if the supplier: (a) is other than a body-corporate; (b) does not issue an invoice charging GST @12% (6% CGST + 6% SGST) from the service recipient; and (c) supplies the service to a body corporate. The circular further specifically states that it is clarificatory and hence is applicable for the period October 1, 2019 onwards since any other interpretation shall render the RCM notification unworkable.

### Instruction F.No.275/65/2013-CX.8A (Pt.) dated 07.01.2020

- Issued by CBIC (Legal Cell) for compilation and dissemination of favourable orders passed by the various courts pertaining to GST to enable the same to be considered while filing any affidavit before the Hon'ble courts;
- directing that, any order/judgment, passed by Hon'ble HCs may be informed to Commissioner (Legal), CBIC and any order in favour of Revenue passed by Hon'ble SC may be informed to Principal Commissioner (Directorate of Legal Affairs), CBIC, for their circulation and consideration before finalizing Revenue's defence in the Writ Petitions; and
- providing that said favourable orders would be subsequently, uploaded on CBIC website on fortnightly basis under "Legal Affairs" section.

## Circular No. 02/2020-Customs dated 10.01.2020

Social Welfare Surcharge (SWS) is levied on certain imported goods. It has been a prevalent practice for duty credit scrips such as MEIS, SEIS etc. to be debited for payment of SWS. It has also been a practice to consider SWS as exempted in cases where the underlying customs and additional customs duties are exempted.

In this regard, the CBIC clarified that:

- In terms of the decision of the Hon'ble Supreme Court in its judgement in Unicorn Industries vs. Union of India [2019-VIL-42-SC-CE] a separate notification has to be issued for providing exemption from cesses, absent which, the same cannot be said to have been exempted. Since there is no notification exempting SWS, the same is payable.
- Payment of SWS by debit of duty credit scrips is not envisaged in the FTP or any exemption notifications, hence is not allowed.
- However, to ensure ease of doing business, it has been decided that past debits of duty credit scrips for payment of SWS will not be disturbed; such debits of duty credit scrips will be accepted as revenue duly collected and recoveries in cash shall not be insisted.

**ELP Comments:** While the circular clarifies that there is no exemption of SWS and such surcharge is payable in cash and not by debit of duty credit scrips, the CBIC has decided not to disturb past instances where debits of SWS were already made in duty credit scrips. This is a favourable facilitation.

## Circular No. 02/2020-Customs dated 10.01.2020: CBIC issued the following notifications and order to implement decisions taken in the 38th GST Council Meeting held on December 18, 2019

| Sr. No. | Notification (Central Tax) | Subject |
|---|---|---|
| 1 | 74/2019 - Central Tax dated December 26, 2019 | Provides waiver of late fee payable under section 47 of the CGST Act for registered persons who furnished the details of outward supplies in FORM GSTR-1 during the period December 19, 2019 to January 10, 2020. |
| 2 | 75/2019 - Central Tax dated December 26, 2019 | Inserts new Rule 86A *empowering* Department to restrict ITC of a person in cases where ITC has been fraudulently availed or is ineligible for the following reasons:<br>ITC availed on the basis of documents prescribed under rule 36: (i) issued by a registered person, found non-existent or not conducting business from registered place of business or (ii) without receiving goods and / services<br>ITC availed on the basis of documents prescribed under rule 36, where the tax charged has not been paid to the Government; or<br>Person availing ITC is found to be non-existent or not conducting business from registered place of business; or<br>Person availing ITC is not in possession of any document prescribed under rule 36 |

| | | |
|---|---|---|
| 3 | 76/2019 - Central Tax dated 26 December, 2019 | Extends the due date for furnishing of return in FORM GSTR-1 for registered persons in Assam, Manipur or Tripura having aggregate turnover more than 1.5 crore rupees for the month of November 2019. |
| 4 | 77/2019 - Central Tax dated 26 December, 2019 | Extends the due date for furnishing of return in FORM GSTR-3B for registered persons in Assam, Manipur, Meghalaya or Tripura for the month of November, 2019 |
| 5 | 78/2019 - Central Tax dated 26 December, 2019 | Extends the due date for furnishing of return in FORM GSTR-7 for registered persons in Assam, Manipur or Tripura for the month of November 2019. |
| **Removal of Difficulty Order** | | |
| 1 | Order No. 10 / 2019 - Central Tax, Dated 26th Dec. 2019 | Extends the last date for furnishing of annual return/reconciliation statement in FORM GSTR-9/FORM GSTR-9C for FY 2017-18 till 31.01.2020. |

**ELP Comments:** The above notifications come as a welcome relief for taxpayers as regards compliances pertaining to furnishing of returns and availment of ITC.

## Trade Notice Nos. 46/2020 dated 17.10.2020 and 47/2019-20 dated 29.01.2020

- *Vide* an earlier advisory (Trade Notice No. 37/2019-20 dated 22.10.2019), the DGFT noted that a wide range of goods are being imported under the 'Others' category instead of identifying the specific customs classification at 8-digit level. Referring to this advisory, the DGFT has now issue Trade Notice 46/2020 noting that the 'Others' category is still being widely used and reiterates that Trade should exercise caution in this regard.
- The said Notice also states that where the traders are of the opinion that the existing HS codes do not cover their respective goods, they should suggest appropriate HS codes, at eight digit level. For this purpose, a platform has been created for online submission of representations for seeking a creation of an alternate HS code. The said notice also states that the Government may also consider introducing a licensing regime for all items imported under 'Others' category by shifting these items from 'free' to 'restricted category'

## Notification No 07/ 2020 – Central Tax dated February 2, 2020

Extends due date for furnishing Form GSTR 3B for the months of January 2020, February 2020 and March 2020, for taxpayers having an aggregate turnover up to INR 5 crores in the preceding financial year, as follows:

| | States | January 2020 | February 2020 | March 2020 |
|---|---|---|---|---|
| 1 | Chhattisgarh, Madhya Pradesh, Gujarat, Maharashtra, Karnataka, Goa, Kerala, Tamil Nadu, Telangana or Andhra Pradesh or the Union territories of Daman and Diu and Dadra and Nagar Haveli, Puducherry, Andaman and Nicobar Islands and Lakshadweep | February 22, 2020 | March 22, 2020 | April 22, 2020 |
| 2 | Himachal Pradesh, Punjab, Uttarakhand, Haryana, Rajasthan, Uttar Pradesh, Bihar, Sikkim, Arunachal Pradesh, Nagaland, Manipur, Mizoram, Tripura, Meghalaya, Assam, West Bengal, Jharkhand or Odisha or the Union territories of Jammu and Kashmir, Ladakh, Chandigarh and Delhi | February 24, 2020 | March 24, 2020 | April 24, 2020 |

**ELP Comments:** Staggered due dates would help overcome technical glitches on GSTN portal.

## Notification No 06/ 2020 – Central Tax dated February 3, 2020

Extends the due date for filing annual return, audited annual accounts and a reconciliation statement in terms of Section 44 of the CGST Act as follows:

| No | States | Extended Due Date |
|---|---|---|
| 1 | Chandigarh, Delhi, Gujarat, Haryana, Jammu and Kashmir, Ladakh, Punjab, Rajasthan, Tamil Nadu, Uttarakhand | February 5, 2020 |
| 2 | Andaman and Nicobar Islands, Andhra Pradesh, Arunachal Pradesh, Assam, Bihar, Chhattisgarh, Dadra and Nagar Haveli and Daman and Diu, Goa, Himachal Pradesh, Jharkhand, Karnataka, Kerala, Lakshadweep, Madhya Pradesh, Maharashtra, Manipur, Meghalaya, Mizoram, Nagaland, Odisha, Puducherry, Sikkim, Telangana, Tripura, Uttar Pradesh, West Bengal, Other Territory. | February 7, 2020 |

**ELP Comments:** In a public interest litigation filed by Tax Bar Association, the Division Bench of Rajasthan High Court directed Revenue to accept annual return and reconciliation statement in Form GSTR 9 & Form GSTR 9C, without charging any late fees, till **February 12, 2020**. The petition was filed primarily on account of technical glitches and errors at the time of filing Form GSTR 9 & Form GSTR 9C on the common portal. High Court directed Revenue to file a detailed reply by February 12, 2020 about their preparedness and GSTN capacity.

## Circular No 07/ 2020 – Customs dated February 5, 2020

Central Board of Indirect Taxes and Customs has prescribed revised procedure for valuation of second hand second-hand machinery, in supersession of Circular No 25/ 2015 dated October 15, 2015. The revised procedure *inter alia* involves furnishing inspection/appraisement report issued by an overseas Chartered Engineer or equivalent

## Removal of Difficulty Order No 01/ 2020-GST dated February 7, 2020

Central Board of Indirect Taxes and Customs extends the due date of furnishing GST Form TRAN-1 to March 31, 2020 for the class of registered person who could not submit the said declaration by the due date on account of technical difficulties on the common portal and whose cases have been recommended by the Council. Earlier, the due date was extended up to March 31, 2019 vide Order No 1/ 2019-GST dated March 31, 2019

## RECENT CASE LAWS

### Lalitha Muraleedharan vs. Range Forest Officer & Ors [WP (C) No 24675 of 2018]

#### FACTS OF THE CASE

- Assessee, an industrial unit in Madras Export Processing Zone, participated in an e-auction of sandal wood conducted by the Forest Department. Auction was confirmed in assessee's favour and as per the terms of e-auction, goods were delivered to assessee at Government Sandal Depot, Marayoor. Assessee was called upon to discharge sale value and IGST thereon at the rate of 18%.
- Assessee contested the levy of GST on such transaction, claiming GST is not applicable on supplies made to SEZ in terms of Section 16 of the IGST Act. A writ petition was filed before Madras High Court against levy of IGST, which in assessee's view was illegal and unauthorized.
- Respondent contended that since offer, acceptance, receipt of consideration and delivery of goods concluded at Mayaroor Depot, instant transaction should not qualify as inter-State supply. Even if transaction is treated as inter-State, benefit of zero-rate supply would not be available since delivery of goods is not effected within SEZ. Respondent also relied on earlier JUDGEMENT: of Madras High Court in the context of VAT laws, wherein the Court had held that such transactions were exigible to levy of VAT.

#### JUDGEMENT

- High Court observed that pursuant to introduction of GST, earlier rulings in the context of VAT laws would not have relevance and instant case should be decided by analysing provisions of GST law. High Court further observed that as per Section 7(5) and proviso to Section 8(1) of IGST Act, supply of goods or services to or by a SEZ developer or unit is to be treated as inter-State supply.
- In the instant case, although goods are handed over to petitioner at Marayoor Depot, such delivery of good is for onward movement to Madras SEZ in the State of Tamil Nadu. Acceptance of goods at Marayoor Depot does not result in termination of movement of goods but results in further movement of goods at the hands of recipient to SEZ. The place of supply, by plain interpretation of Section 10(1) of IGST Act, is within the SEZ (i.e., the place where movement of goods terminate for delivery to the recipient).
- Basis the above, High Court held that instant transaction should qualify as inter-State and GST should not apply.

**ELP Comments:**

The above favorable judgement has laid down following key points:

- Taxability and place of supply under the GST regime cannot be determined basis concepts of 'sale' and 'delivery', as applicable in the context of earlier VAT regime.
- Section 10(1)(a) of the IGST Act should be interpreted contextually and strict interpretation thereof is not warranted. Further, such contextual interpretation would not only apply to SEZ, but also supply of goods in domestic tariff area(s).

The ruling provides a reasonable guiding principle for determination of place of supply for ex-factory transactions

**Sal Steel Limited vs. Union of India [TS-1244-HC-2019(GUJ)-ST]**

*Levy of Service Tax and IGST on Ocean Freight under CIF contracts on reverse charge basis quashed*

**FACTS OF THE CASE**

The constitutional validity of the following provisions was challenged by the petitioners:

- Rule 2(1)(d)(EEC) of the Service Tax Rules, which makes the importer liable to pay service tax on service of transportation of goods by a vessel from a place outside India upto the Customs Station of clearance in India.
- Notification No. 15/2017-ST providing that such services are taxable under reverse charge mechanism.
- Notification No.16/2017-ST inserting Sub Rule (7CA) in Rule 6 of Service Tax Rules for providing an option to pay service tax at 1.4% of the CIF value for such services.

**JUDGEMENT**

*The provisions challenged and the proceedings initiated against the petitioners were quashed on the following basis*

- Rule 2(1)(d)(EEC) of the Service Tax Rules was held to be ultra vires Sections 64, 66B and 65B(2) of the Finance Act on the basis that the service proposed to be taxed is an extraterritorial event since the transportation of goods was up to the port and beyond the land mass of India, where the levy of service tax did not extend to.
- The notifications challenged were held to be ultra vires Sections 68 and 94 of the Act since the importers on whom the liability to pay tax is fastened are neither providers nor recipients of the transportation services, and hence, do not come within the purview of Section 68(1) and (2) of the Act wherein tax can be recovered from a service provider and service recipient respectively. It was further noted that Section 94 of the Act does not empower the Central Government either to charge and collect service tax on extra-territorial events, or to make rules for recovering service tax from third parties.
- Rule 6(7CA) inserted vide Notification No. 16/2017 held to be ultra vires Section 67 and 94 of the Act - Absent a machinery provision for valuation of the service under Section 67 when the same is not provided in the CIF contract, and since the Central Government is not vested with any power to fix a value for any service by rule/ notification, insertion of Rule 6(7CA) of the Service Tax Rules is ultra vires the rule making power. The option under Rule 6(7CA) to pay Service tax on the amount calculated @1.5% of CIF value of the imported goods if not exercised by importer results in a void because actual value of this service is not known to the Revenue officers.

**Mohit Mineral Pvt. Ltd. vs UOI [TS-29-HC-2020(GUJ)-NT]**

*Challenge to the levy of IGST on Ocean Freight under CIF contracts [in the case of Mohit Mineral]*

**FACTS OF THE CASE**

The constitutional validity of Notification No. 8/2017 – IGST (Rate) and Notification No. 10/2017 IGST (Rate) ('Impugned Notifications') levying IGST on ocean freight charges for services provided by a person located in a non-taxable territory by way of transportation of goods by a vessel from a place outside India up to customs station of clearance in India, was challenged.

**JUDGEMENT**

The said Notifications were held to be ultra vires the IGST Act on the following basis:

- Section 5(3) of the IGST Act empowers the Government to specify the categories of supply on which GST shall be payable by the 'recipient'. The Notifications issued under Section 5(3), in casting the liability to pay GST on a person other than the 'recipient' as defined, travels beyond the parent statute, since under the CIF arrangement, the importer is not the recipient of ocean freight services.
- The Notifications challenged seek to exempt levy of service tax on supply of service of transportation of goods by a person in a non-taxable territory to another person in a non-taxable territory, from a place outside India up to

the customs station of clearance in India, which are not taxable as inter-state or intra-state supplies per Section 7 and 8 of the IGST Act.

- The Hon'ble Court also noted that various other critical aspects of the taxation scheme including time of supply, taxable value, admissibility of input tax credit, filing of returns and reporting of the subject transactions therein etc., do not apply to or fail to provide adequate mechanism in relation to the subject transaction.
- The Hon'ble Court held that the Notifications seek to levy tax again on the supply of services without any express sanction by the statute, when IGST is already been paid on the freight value as part of the value of imported goods.

**ELP Comments:** The above judgements are significant in respect of all CIF import contracts. Many importers have been discharging service tax / IGST on the ocean freight charges despite the FACT OF THE CASE that the service recipient is a third party located outside India (and not the importer) and the services are in respect of transportation of goods beyond the customs frontiers of India. In all such cases, in light of the above judgements, where service tax / IGST has been deposited under protest, importers are eligible to claim refund of tax paid. It is relevant however, that these judgements will most likely be challenged by the tax department before the Hon'ble SC.

## Otis Elevator Company (India) Ltd. [TS-13-SC-2020-VAT]

*Revenue's SLP against HC order rejecting sales-tax levy on inter-state works-contract dismissed*

### FACTS OF THE CASE

- The Respondent engaged in the business of supply, erection, commissioning and installation of lifts/ elevators in residential buildings, government offices and hospitals etc., is a registered dealer under Delhi Sales Tax Act, 1975 and has its manufacturing unit at Mumbai, where its components are produced and stored.
- The Delhi Sales Tax Authorities ("Appellant") assessed transactions of the Respondent and held that the local sales tax was to be paid by the Respondent as the supply of goods from Mumbai to Delhi for executing works contract is taxable under Delhi Sales Tax Act for the following reasons:
  - the contracts were indivisible work contracts, wherein the title of each elevator in the said contracts was passed onto the customer upon payment; and
  - for dispute resolution purposes, Courts in Delhi had exclusive jurisdiction.

### JUDGEMENT

- The said assessments were challenged in appeal and the contentions of the Respondent were dismissed by the appellate authority. The Respondent approached the Tribunal which set aside the appellate authority's order and held that the goods that moved outside Delhi for execution of works contract, were appropriated to the contract in Mumbai, upon acceptance of the offer / placing orders. It was therefore held that the supply of goods from Mumbai to Delhi to execute works contract by the Respondent is not taxable under Delhi Sales Tax Act.
- The Hon'ble Tribunal's order was upheld by the Delhi HC on the grounds that placement of an order by the agent for procurement of lifts in this case was merely an offer and it is only upon its acceptance and further steps taken by the supplier that this offer crystallizes into a binding promise or contract, which took place in Mumbai.
- Relying on Thyseenkrupp Elevator (India) Private Ltd. vs. Assistant Commissioner of Commercial Taxes & Anr [TS-150-HC-2018(KAR)-VAT], it was observed that per well-settled law, the incidence of CST on sale of goods, occurs where the goods are appropriated to the contract and in the present case, the goods were appropriated to the contract in Mumbai.

**ELP Comments:** The Revenue had challenged the Hon'ble Delhi High Court's order before the Hon'ble Supreme Court. The Hon'ble Supreme Court however declined to interfere and accordingly, dismissed the Revenue's petition.

**Assistant Commissioner of CGST and Central Excise & Ors. vs. Sutherland Global Services Private Limited [TS-37-HC-2020 (MAD)-NT]**

*Challenge to provisions disallowing transition of Education Cess and Krishi Kalyan Cess into GST*

**FACTS OF THE CASE**

A writ appeal was filed by the Revenue against an order of a Single Judge bench of the Hon'ble Madras High Court in the case of Sutherland Global Services Private Limited [TS-971-HC- 2019(MAD)-NT] which allowed transition of credit of Education Cess (EC), Secondary and Higher Education Cess (SHEC) and Krishi Kalyan Cess (KKC) into the GST regime by reading Section 140(1) of the CGST Act as allowing transition of all eligible credit, including credit of the cesses availed.

**The Revenue has challenged this order before the Division bench of the Hon'ble HC on the following grounds:**

- The term "eligible duties" occurring in Section 140(1), as amended *vide* the CGST (Amendment) Act, 2018 does not include EC, SHEC and KKC;
- Provisions of 140(1) read with the proviso as a whole, clarifies that the intention of the legislature was to allow transition of only CENVAT Credit accumulated and carried forward in the return pertaining to the period immediately preceding the appointed day. Since cess credit would have been availed in returns not immediately preceding the appointed day, it is not intended to be allowed;
- As the said cesses had been abolished in 2015 and 2017, there was no possibility of accumulation of credit pertaining to lapsed cesses in the light of Rule 3(7)(b) of erstwhile CENVAT Credit Rules, 2004.

**JUDGEMENT**

The Hon'ble Madras HC has stayed the order of the Single Judge.

**ELP Comments:** The stay appears to have been allowed to prevent it from being used as a precedent in other matters of similar nature. The Hon'ble Court has directed that the writ appeal be listed after 6 weeks.

**Nuvoco Vistas Corporation Ltd. and others vs. The State of Jharkhand [TS-18-HC-2020(JHAR)-VAT]**

*State Government directed to issue Form-C towards HSD purchase under GST regime*

**FACTS OF THE CASE**

- Petitioner, engaged in manufacturing and mining activities, was a bulk purchaser of 'high speed diesel', which came within the definition of 'goods' as defined under the CST Act.
- A Circular dated October 11, 2017 was issued by the Commercial Taxes Department, Jharkhand denying the issuance of Form-C for all the items included in the definition of 'goods' given under Section 2 (d) of the CST Act, including the 'high speed diesel'. The Circular had been issued on the pretext that after coming into force of GST w.e.f. July 01, 2017, all six items which were excluded in the Jharkhand GST Act, 2017 and on which the liability to pay tax under the State GST Act was deferred till the notification issued under Section 9(2), were still governed by Jharkhand VAT Act.
- Therefore, the petitioner dealing in the goods, except those six items, were not liable to pay tax under the JVAT Act and their registration under the JVAT Act came to an automatic end w.e.f. July 1st, 2017. Consequently, the petitioners were denied the issuance of Form-C in view of the Circular dated October 11, 2017.

**JUDGEMENT**

- Hon'ble HC noted that the questions involved in the present case had been dealt with elaborately and answered by the Hon'ble Jharkhand HC in Tata Steel Limited, Jamshedpur vs. The State of Jharkhand [TS-701-HC2019(JHAR)-VAT] and analogous matters whereby the Circular dated October 11, 2017 was quashed by this Hon'ble Court.

- In case of Tata Steel Limited judgment (Supra), Hon'ble HC relied on the order of P&H HC in Carpo Power Ltd. vs. State of Haryana and Others [TS-131-HC-2018(P &H)-VAT] as upheld by the Hon'ble SC [TS-371-SC-2018-VAT], and decision of various High Courts on similar FACT OF THE CASEs that the issuance of Circular dated October 11, 2017 was unsustainable in law given that the registration under JVAT Act of a dealer dealing in goods other than the six goods included in the definition of "goods" in Section 2(i) of the CST Act came to an automatic end with the introduction of GST w.e.f. July 1, 2017. It was accordingly observed that there was no reason to deviate from the said position.
- The Hon'ble HC had also directed Revenue to either give effect to the provisional credit notes given to the petitioners or give the required refund of deposit made by respective oil companies to the State exchequer. It was also clarified that so far as the misuse or mis-utilization of Form – C is concerned, appropriate action can be taken after giving due notice to the individual dealer and that there cannot be a blanket denial of the benefit of Form-C, as has been done by virtue of Circular dated October 11, 2017.
- In the present case it was observed that the directions/observations made by the Hon'ble Court in Tata Steel judgment (supra) would be applicable and accordingly, the State Government was directed to issue Form – C to the petitioner for the purchases made by them of high-speed diesel for the manufacturing process.

**Shriram Transport Finance Company Limited vs. The Commissioner of Service Tax [TS-14-SC-2020-ST]**

*Levy of service tax on 10% interest component in lease/ hire purchase challenged*

**FACTS OF THE CASE**

- The issue in the present case arose as a result of confirmation of service tax demand with interest and penalty on the consideration received by Appellant from lessees and hire-purchasers in the form of EMI as a provider of 'banking and other financial services' under Finance Act, 1994 *vide* SCNs issued to the Appellant for the periods 2003-04 – 2007-08, 2008-09, 2009-10.
- Relying on the clarification issued by CBEC in F No. B.11/1/2001-TRU dated July 09, 2001 and judgment of the Hon'ble SC in *Association of Leasing and Financial Service Companies v. Union of India [2001 (20) STR 417 (SC)]*, the adjudicating authority had held that service tax liability arises on the interest charge component of the EMI paid by lessee/hire purchaser. Further, the exemption available to the petitioner from levy of service tax on 90% of the interest amount in relation to services of financial leasing including equipment leasing and hire-purchase in terms of Notification No. 4/2006-ST dated March 01, 2006 was considered and the confirmed demand was accordingly scaled down.

**JUDGEMENT**

- It was observed by Hon'ble CESTAT that since interest earned on loans is not chargeable to service tax under Section 67 of Finance Act, 1994 and Service Tax (Determination of Value) Rules, 2006, income in the nature of interest earned by a bank or financial institution cannot be collected. It was further observed that out of the three components of EMI i.e. the interest cost, principal recovered and other administrative costs for each hire-purchase or financial lease transaction, only tax liability on the interest component is extinguished and that justifies the abatement of 90% of the interest income from the computation of taxability *vide* Notification No. 4/2006-ST.
- Hon'ble CESTAT accordingly held that recovery of tax on interest for the period prior to March 01, 2006 was without authority of law as there was a presumption of attributing the entire amount to interest in the absence of any mechanism to isolate the component of processing or management cost in EMI. Hon'ble CESTAT therefore held the recovery of service tax on 10% of the interest component of the EMI being within the sanction of law and set aside the demand for the period prior to March 01, 2006 and sustained the demand for the period thereafter.

Note: Against the above order of Hon'ble CESTAT, the Appellant has preferred an appeal before the Hon'ble SC. Hon'ble SC has issued notice to Revenue and has listed the matter after 4 weeks.

## KCP Limited vs Commissioner of Central Excise [TS-46-HC-2020(MAD)-EXC]

### FACTS OF THE CASE

Assessee had challenged the order of CESTAT before the Supreme Court, since the issue pertained to rate of duty/ valuation. Supreme Court dismissed not only the appeal, but also subsequent review petition filed by assessee. Assessee thereafter filed an appeal before High Court under Section 35G of the Central Excise Act, 1944.

### JUDGEMENT

High Court held that once the question relating to rate of duty / valuation has been appealed before Supreme Court, the assessee was estopped from now filing an appeal before High Court by application of principle of *res judicata*. Basis this, Madras High Court dismissed the appeal of the assessee.

## Paresh Nathalal Chauhan vs State of Gujarat [TS-1262-HC-2019(GUJ)-NT]

### FACTS OF THE CASE

Search and seizure proceedings were effected at the residential premises of the assessee, pursuant to an authorization issued under Section 67(2) of the CGST Act. Such search spanned for a period of 8 days. During the search, family members were confined to the searched premises and kept under surveillance.

Special Civil Application was filed before High Court.

### JUDGEMENT

High Court observed as follows:

- Provisions nowhere allow officer to search for any person or to remain in the premises after the search is over, or to monitor either what the persons residing in the premises are doing and to reside in the premises;
- No provision under the Code of Criminal Procedure, 1973 permits even the investigating officer to continuously stay inside the residential premises to apprehend an accused as and when he returns home;
- The powers vested in the officer armed with a search warrant are limited to searching the entire premises.

Basis the above, High court observed that there was no necessity for officers to stay at the searched premises and the intent of officer to intimidate the family members to extract the information was outside the ambit of the powers vested with such officers.

Accordingly, High Court held that authorization was not in good faith and outside the purview of any statutory provisions

**ELP Comments**: With increased investigation activities by the Revenue department, it is imperative for taxpayers to understand their rights and limitations of the Revenue officers. The said ruling would set a good precedent so that the Revenue authorities do not abuse their powers.

## MGF Event Management vs Commissioner of Central Excise, Delhi [2020-VIL-69-CESTAT-DEL-ST]

### FACTS OF THE CASE

- Appellant operates parking areas by providing parking to visitors of shopping malls. For this, Appellant has appointed an agency who collects 'parking fees' on behalf of Appellants from visitors and remits the proceeds to Appellant.
- The agency raises invoice for operating cost and its management fee and charges service tax on these amounts. Remainder amount of gross collection is paid to Appellant, on monthly basis.

- Appellant records parking income as revenue in its books of accounts and nothing is remitted to the mall owners from the collections made or otherwise.
- Pursuant to an audit, Revenue authorities contended that activity of appellant amounted to rendering of 'management, maintenance or repairs' services to mall owners and such activity was leviable to service tax. Appellant claimed that it has no written contract with mall owners and is not paying any amount by way of rent or space allocation for operating the parking area.

**JUDGEMENT**

The matter was litigated up to CESTAT level. CESTAT did not accept Appellant's plea that a huge parking space area was given to the appellant without any agreement, especially without an agreement with respect to contingent liabilities. CESTAT further held that it is not necessary that the service recipient, which are the mall owners in this case, should receive any pecuniary benefit from the service. Even a service without any direct pecuniary benefit to the service recipient is also a service

CESTAT observed that even if the interest of mall owners is that Appellant should provide hassle free parking, it is a service to the mall owners by the Appellant. If the consideration is in terms of some benefit to the service provider which can be measured or converted into money it will constitute a valid consideration.

Relying on Section 67 of the Finance Act, 1994, CESTAT held that where consideration is not wholly or partly consisting of money, it would be such amount in money as, with the addition of service tax charged, is equivalent to the consideration. Thus, there is no doubt that the right to collect parking fees given by the mall owners is nothing, but a consideration provided to the Appellant by the mall owners and the measure of such consideration is the gross income generated through the parking fees.

**ELP Comments**: This ruling carves out an important principle that in transactions of exchange, barters, etc transaction taxes like erstwhile service tax (or say current GST) would apply. Also, in such cases it would be in interest of the parties to recognize and record the consideration of exchange/ barter upfront as non-availability of value exposes entire amount settled between the parties notwithstanding the collection and remittances being in capacity of pure agent.

## Lykis Limited vs CC Mundra [2020-VIL-62-CESTAT-AHM-CU]

Application for conversion of 204 shipping Bills from Drawback scheme to Duty Free Import Authorization ('DFIA') was rejected on the ground that Appellant made the request for conversion after 3 months from the date of let export order, in violation of period prescribed under Board Circular No 36/ 2010 - Custom dated September 23, 2010.

**JUDEGMENT**

CESTAT observed that Section 149 of the Customs Act, 1962 does not prescribe any time limit for conversion. Further, since the time limit has not been prescribed under the Act, same cannot be fixed by way of the circular. Therefore, if at all there is a time limit by way of circular, it is only procedural requirement and can be dispensed with.

Basis the above, CESTAT allowed Appellant's application for conversion

**ELP Comments:** This ruling clarifies the established judicial principle that Circular/ public notices, etc cannot prescribe substantive legal provisions, which is beyond what is stipulated and intended under the law.

## Servo Packaging Limited vs Commissioner of GST & Central Excise, Puducherry [2020-VIL-72-CESTAT-CHE-CE]

### FACTS OF THE CASE

- Assessee availed the benefit of Advance Authorization for import of goods purported to be used in manufacture of export. Appellant could not fulfil its export obligations in some cases and paid custom duty on account of short-export and to close export obligation.
- Appellant has contended that since inputs imported were used in manufacture of final products on which excise duty/GST was paid or to be paid, they were eligible for refund of Countervailing Duty (**CVD**) and Special Additional Duty (**SAD**).
- This was owing to the FACT OF THE CASE that with introduction of GST, Appellant was left with no option to claim credit under CENVAT Credit Rules or avail as part of transitional credit.
- Adjudicating authority disallowed the refund on the ground that such amount was not covered under Section 142(3) of CGST Act.
- Appellant filed an appeal before CESTAT.

### JUDGEMENT

CESTAT disallowed the refund on following grounds:

- Availability of CENVAT credit paid on inputs, despite failure to meet with the export obligation, may not hold good since it was a conditional import and such import was to be exclusively used as per FTP
- Moreover, such imported inputs cannot be used anywhere else but for export and hence, claiming input credit upon failure would defeat the very purpose/mandate of the Advance Licence
- Import, which would have normally suffered duty, having escaped due to the Advance Licence, but such import being a conditional one which ultimately stood unsatisfied, naturally loses the privileges.

Having disallowed the refund, CESTAT in the end made a positive observation that at best, Appellant could have availed the CENVAT Credit, but that would not ipso facto give them any right to claim refund of such credit in cash with the onset of GST because CENVAT is an option available to an assessee to be exercised and the same cannot be enforced by the CESTAT at this stage.

**ELP Comments:** Assessee should not be rendered remedy-less merely because of absence of facility to avail credit under GST regime. Nonetheless, positive remark of CESTAT to, at best allow CENVAT Credit, would be welcome since this principle would also apply under the GST regime

## A F Babu vs Union of India & Ors [WP(C ) 27940 of 2019]

- Although the prescribed due date for filing Form GST TRAN-1 was December 27, 2017, assessee came across a press release by the GST Council indicating the last date was extended up to December 31, 2017 (which was a mistake). Relying on this, assessee attempted to file the said form on December 30, 2017.
- Revenue argued that the assessee had not made any attempt to log into the system before December 27, 2017.
- Kerala High Court, relying on the decision of Delhi High Court in case of Aman Motors vs Union of India and Ors [WP(C) 2478/2019] directed Revenue to either open the online portal or accept the form manually on or before December 31, 2019.

**ELP Comments:** Central Goods and Services Tax (Amendment) Act, 2018 has retrospectively amended Section 140 of the CGST Act to exclude & restrict transition of any cess under GST. Single member judge, after taking cognizance of

the said amendment, allowed transition of cess since said amendment was not applicable to Section 140(8) which relates to transition of credit by person having centralized registration.

It would be interesting to see if Division Bench allows claim of the Respondent. A Positive JUDGEMENT: would have far-reaching impact on the number of assessees, however, on the other hand, would certainly impact the Government's collection target.

**Sheikh Parith vs. The Commissioner of Customs [TS-1209-HC-2019(MAD)-CUST]**

*Directorate of Revenue Intelligence (DRI) cannot retain seized documents after completion of investigation*

**FACTS OF THE CASE**

A Writ Petition was filed challenging a hearing notice issued by the DRI, on the basis that the documents seized by the DRI during investigation were not returned to the Petitioner. The Petitioner had requested for 3 months to file a reply to the notice and requested the DRI to return the documents seized to enable it to prepare the reply. The said documents had not been returned despite the FACT OF THE CASE that writ petitions had earlier been filed by the Petitioner and the other notices (in the SCN), whose IECs were used by the Petitioner for the concerned imports.

**JUDGEMENT**

The Hon'ble HC held that the WP is premature since a hearing notice is not an order. It was however held that the DRI, as an investigative agency, cannot retain seized documents and must return the same or photocopies of the same to the Petitioner. The Hon'ble HC accordingly directed the DRI to provide copies of the documents and granted the petitioner 90 days without any further delay to file its reply (per Circular No. 394/15/88-Cus A.S dated 13.6.1996 and Circular No. 207/09/2006-CX).

**Abbott Healthcare Private Limited vs. The Commissioner of State Tax Kerala & Ors. [TS-4-HC-2020(KER)NT]**

*Authority for Advance Ruling (AAR) order deeming 'medical supplies' as 'composite supply' held to be beyond jurisdiction, and remands the matter*

**FACTS OF THE CASE**

- As part of its business model, the Petitioner places medical equipment owned by it at the premises of unrelated hospitals, labs etc. for their use for a specified period without charging any consideration under a Reagent Supply and Instrument Use Agreement. In terms of the Agreement, the hospitals are only required to pay for the reagents purchased by them from the Petitioner's distributors, which are required for using the equipment.
- The Petitioner approached the AAR querying whether the provision of medical instruments by the Petitioner to unrelated hospitals and labs for use, without consideration, constitutes a "supply" or "movement of goods otherwise than by way of supply".
- The AAR held that such provision of goods constitutes a "composite supply" of equipment and reagents, the principal supply being of transfer of right to use goods, liable to 18% GST.
- The Petitioner approached the AAAR, which upheld the ruling of the AAR.

**JUDGEMENT**

The Petitioner challenged the AAAR's order before the Hon'ble HC, which held that that the AAR's findings are without jurisdiction, and remitted the matter to the AAR for re-consideration, for the following reasons:

- AAR did not go into the real issue of whether supply of instruments per se constituted a taxable supply;

- The concept of enhancement of utility of instrument through supply of reagents/calibrators/disposables though relevant for valuation of the supply of instruments, cannot be imported into concept of composite supply under GST Act as distinction has to be drawn between the nature of a supply and the valuation thereof.
- The fact that the supplies are made by two different taxable persons (i.e. equipment from the Petitioner and reagents from its distributor) and do not fall within the scope of services "naturally bundled and supplied in conjunction with each other in the ordinary course of business" demonstrates that the provision of goods cannot be considered to be a composite supply.

The Petitioner's business model shows that in ordinary course of business, supplies are not bundled, and a finding of composite supply must consider supplies as effected at a given point in time on an "as is where is" basis.

**ELP Comments:**

The High Court has sought to bring some clarity on the contentious issue of composite supplies under GST and laid down guiding principles on what defines a composite supply.

## RECENT ADVANCE JUDGEMENTS

**Chowgule Industries Private Limited. [GST -ARA- 18/2019 -20/B]**

*Input Tax Credit ('ITC') charged on inward supply of Motor Vehicle for demo purposes can be availed as ITC on capital goods and utilized for payment of outward tax liabilities*

**FACT OF THE CASE**

- Applicant, an authorized dealer for Maruti Suzuki India Limited and other commercial vehicle manufacturers, made purchases of motor vehicles to be used as demo cars for providing trail run to customers to understand the features of the vehicle as per the dealership norms.
- The said purchases were made against tax invoices which are reflecting in their books of accounts as capital goods and under fixed assets of the Company excluding GST component. The Applicant has neither claimed any depreciation on tax component of the said demo cars nor have they claimed it as a business expenditure u/s 37 of Income Tax Act.
- Since these demo cars are generally replaced every two years or 40,000 kms, whichever is earlier. And the models keep on changing, the old models are sold after paying the applicable tax on sale value at that point of time.

**Question(s)**

- Whether ITC charged on the inward supply of Motor vehicles used for demonstration purpose in the course of business can be availed as ITC on capital goods and whether the same can be utilized for payment of outward tax payable under GST Act

**JUDGEMENT**

- ITC charged on inward supply of demo car vehicles can be availed as ITC on capital goods since the demo cars are Capital goods under Section 2(19) of CGST Act, 2017 and the eligibility criteria and conditions to avail ITC under Section 16 of CGST Act 2017 have been fulfilled given that the demo cars are intended to be use in the course or furtherance of business. Further, given that the demo cars are sold out after two years, the Applicant is engaged in further supply of such vehicles after paying the applicable taxes and therefore not barred from taking credit under Section 17(5) of the CGST Act.

- ITC availed on such demo cars can be utilized for payment of outward tax payable under this Act in terms of Section 18(6) of the CGST Act. The Applicant will have to pay an amount equal to the ITC taken on the demo cars reduced by such percentage as prescribed or tax on transaction value of such vehicles, whichever is higher.

**In re: Crown Tours and Travels [Advance JUDGEMENT: No Raj/ AAR/ 2019-20/ 25]**
*Classification of support services rendered to tour operator*

- Applicant is engaged in the business of tour operator and support services. The instant dispute pertains to service orders received by Applicant from tour operators to provide range of services to passenger/tourist. While the tourist contracts with the main tour operator to provide a complete tour, the tour operator contracts with the Applicant to provide on or more of support services (such as boat ride, elephant ride, lunch or dinner at local restaurant, etc).
- Applicant seeks an advance ruling on whether ancillary support services rendered qualify as 'supply of tour operator service' (attracting GST @ 5%) or support services (attracting GST @ 18%).
- It was observed by Rajasthan Authority for Advance Ruling that although Applicant would qualify as 'tour operator', one essential condition to charge lower GST rate of 5% is that supplier should charge for the accommodation as well as transportation. In the instant case, Applicant does not charge for accommodation and thus, benefit of lower GST rate would not be available.

**In re: Manju Devi [Advance JUDGEMENT: No Raj/ AAR/ 2019-20/ 29]**
*Classification of manpower service for agriculture and availability of exemption*

Applicant is engaged in supply of labour to its clients. In the instant case, Applicant supplied manpower for working in agriculture farms. In terms of entry 54 of Notification No 12/ 2017 – Central Tax (Rate) dated June 28, 2017, *'9986 - services relating to cultivation of plants and rearing of all forms of life forms of animals, for food, fibre, fuel, raw material, or other similar products or agricultural products by way of supply of farm labour'* is exempt.

Applicant has sought advance ruling on whether manpower services rendered for working in agriculture farms would be eligible for said exemption.

**JUDGEMENT**

Rajasthan Authority for Advance Ruling held that services rendered by Applicant qualify as support services, including manpower supply, falling under heading 9985. Supply of farm labour services are covered under heading 9986 *'support services to agriculture, hunting, forestry, fishing, mining and utilities*.

Basis above observation, it was held that exemption is not available to manpower services rendered by Applicant.

**ELP Comments:** While pronouncing the above ruling, the advance JUDGEMENT: authority did not advert any potent reason to disallow the benefit of exemption notification. Authority should have considered FACT OF THE CASEs of the case and not disallowed exemption benefit merely basis classification heading. Such narrow interpretation would render exemption entry futile.

**In re: Ishan Resins & Paints Limited [40 of WBAAR/ 2019-20 dated 17.01.2020]**
*Classification of service of leasing of 'goods transport vehicle' without operator*

- Applicant intends to lease trucks or tankers without operator to goods transport agency (GTA), entailing transfer of right to use. Applicant seeks JUDGEMENT: on whether supply of such services would be exempt under serial number 22(b) of Notification No. 12/2017 – Central Tax (Rate) dated June 28, 2017 ('Exemption Notification') – *'services by way of giving on hire read to a goods transport agency, a means of transportation of goods'*.
- As per Applicant, leasing out a vehicle without the operator where the control and possession is transferred to the lessee, is different from giving the vehicle on hire. In this regard, Applicant relies on High Court JUDGEMENT: in

case of *Commissioner of Customs & Central Excise vs Sachin Malhotra [2015 (37) STR 684 (Uttarakhand)]*. Basis this, exemption should not be available to Applicant.

- West Bengal Authority for Advance JUDGEMENT: held that under the rate Notification No 11/ 2017 – Central Tax (Rate) dated June 28, 2017 service of transferring the right to use any goods for any purpose (whether or not for a specified period) is taxable at the same rate as applicable to supply of goods. Such express entry in said notification would restrict the meaning of term 'hire' in Exemption Notification to only those transactions that do not involve transfer of the right to use goods.
- Basis the above, it was held that since control and possession of the vehicle will be transferred to the lessee, who will engage the operator and bear the cost of repair, insurance, etc, the said services will be classified as 'transfer of right to use any goods' and attract GST.

## UPDATES

- National Anti-Profiteering Authority (NAA) has filed a petition before Supreme Court seeking to transfer all writ petitions challenging NAA Orders to Delhi High Court. Pursuant to this, Bombay High Court adjourns the hearing in case of Macrotech Developers Limited (formerly known as Lodha Developers Limited) & Anr to March 11.
- Madras High Court grants interim relief to Heeranandani Realtors Private Limited and Shree Mahalakshmi Enterprises ('Petitioners')
  - NAA had upheld the claim of profiteering against petitioners. The order of NAA was challenged by way of filing writ petition before Madras High Court. Madras High Court granted interim relief by way of stay of the order of NAA, basis following observations:
    - There is no mechanism or methodology for determination of the quantum of profiteering.
    - Mechanism adopted is arbitrary and not prescribed under statute.
- Government has issued updated concept note and FAQ(s) on e-invoice.
- CBIC introduces machine release of goods:
  - Currently, imported goods are made available for examination or clearance after the applicable duties are paid by the importer.
  - Under the new dispensation, Customs officer will be able to do all compliance verification such as examination of goods even before duties are paid, and once the importer pays the duty, the Customs system would automatically give clearance or 'Out of Charge' to imported goods.
  - A new initiative has been launched as a pilot at two ports, Chennai and Nhava Sheva from February 6, 2020 and will soon be rolled out to all ports across India.
  - This new initiative will fasten the Customs processes by not waiting for the duty payment and will give additional time to importer who will now be able to pay the duties even while the goods are being verified.
- E-way bill system has been integrated with Vaahan system of Transport Department and the vehicle (RC) number entered in e-way bill shall be verified with the Vaahan data for its existence/correctness. Government has released FAQs on verification of vehicle number on the E-way Bill Portal.
- In re: Macro Media Digital Imaging Pvt. Ltd. [TS-1208-AAAR-2019-NT] - Supply of 'printing trade advertisement material' a composite supply of 'service', upholds AAR:
  - The Appellant had sought a JUDGEMENT: on: (i) whether the job of printing of content provided by the customer on PVC banners and supplying such printed trade advertisement material amounts to supply

of goods under GST, and (ii) classification of such trade advertisement material under GST Tariff if the transaction is a supply of goods.

- The AAR observed that:
  - the Appellant prints the content provided by the recipient on the base of PVC, paper, etc., where it provides both the printing ink and the base material;
  - the content printed on the base material is owned by the customers of the Appellant only and the Appellant has no right of usage on the content; and
  - the purchase orders mentioned the order description as "Digital Printing – Outdoor" and "Printing charges for blackboard flex" respectively.
- Accordingly, the WB AAR observed that the transaction involves a composite supply of:
  - goods / printed PVC material and
  - service of printing, which are inseparable in the execution of the contract. The AAR found that the printed material has no utility other than displaying the printed content, and hence, the service of printing is the predominant element of the composite supply. Thus, the AAR held that the composite supply is classifiable under SAC 9989 (SI No. 27(i) of Notification No. 11/2O17 - CT (Rate) dated 28/06/2017), i.e. "Services by way of printing of all goods falling under Chapter 48 or 49 [including newspapers, books (including Braille books), journals and periodicals], which attract CGST @ 6 per cent or 2.5 per cent or Nil, where only content is supplied by the publisher and the physical inputs including paper used for printing belong to the printer".
- The AAAR upheld the AAR's observations of the supply being a composite supply with the predominant supply being one of service. The AAAR held that the Appellant's case was akin to the case represented in Circular No. 11/11/107-GST dated October 20, 2017 in terms of which items covered have no secondary use other than carrying the printed content and PVC sheets have no other usage than displaying the advertisement content.

**ELP Comments:**

The issue as regards whether printing service, which inherently involves a supply of goods, constitutes a supply of goods or services has been a bone of contention since the erstwhile indirect tax regime. This issue continues under the GST regime as well.

- **In re: Kalyan Jewellers India Ltd. [TS-1188-AAR-2019-NT] – Vouchers are not actionable claims, and are liable to GST as supply of goods:**
  - The Applicant manufactures and trades in jewellery. As a part of their sales promotion initiatives, the Applicant introduced the facility of different types of Pre-Paid Instruments (PPIs) in the form of gift vouchers to customers which can be redeemed by the customer or holder of such PPI in any of the Applicant's outlets in India for purchase of jewellery. The gift vouchers are either given directly to customers or through the distribution network of Qwikcilver, engaged in distribution and marketing of vouchers. The Applicant's agreement with Qwikcilver was entered into by its Kerala office. These vouchers are loaded with value that can be redeemed for purchase only at specified stores of the Applicant.:
  - The questions raised before the AAR and its judgement is summarized below:

| S. No. | Questions | JUDGEMENT: |
|---|---|---|
| 1 | Treatment of issue of Own Closed PPIs by Applicant to customers as supply of goods or supply of services under GST | Own closed PPIs issued by the Applicant are vouchers as defined under CGST Act 2OI7 and are a supply of goods (vouchers) under GST |
| 2 | Whether time of issue of own customers is the time of supply of liability, | Time of supply of such gift vouchers / gift cards by the applicant to the customers shall be the date of issue of vouchers if the vouchers are specific to any particular goods specified against the voucher. If the gift vouchers/gift cards are redeemable against any goods bought, the time of supply is the date of redemption of voucher. |
| 3 | Rate of taxes applicable for such supply of goods or services | Paper based gift vouchers are classifiable under CTH 4911 and liable to 12% GST and gift cards are classifiable under CTH 8523 and liable to 18% GST |
| 4 | Whether issue of PPIs by Third Party PPI Issuers will be subject to GST at the time of issue in their hands | Questions raised at SI. No. 4, 5, 6 and 7 pertains to supplies of vouchers made by Qwikcilver to customers of applicant and supplies to the Kerala office of the applicant. Since the Kerala office of the applicant is a distinct entity from the applicant and Qwikcilver is based in Bangalore, the said questions are outside the jurisdiction of the AAR and have therefore not been answered. |
| 5 | Whether the amount received by the Applicant from third party PPI issuers is subject to GST. | |
| 6 | If No, whether GST collection at the time of sale of goods or services on redemption of PPIs i.e. own and from Third Party will be a sufficient compliance under GST. | |
| 7 | Treatment of discount (the difference between Face value and discounted value) in the hands of issuer of PPI in case of third-party PPIs. Whether the GST is liable to be paid on this difference value? | |

**ELP Comments:** This ruling is another one in a series of AARs demonstrating a pro-revenue approach. The ruling that GST will be applicable on gift vouchers per se, taxable upfront at the time of issuance of the voucher may prove to be litigious given the widespread impact that it will have. This impact may prove to be most damaging in cases where the GST rate on underlying supplies is 5%, however, by virtue of this ruling; GST will have to be discharged on the vouches issued on a higher rate.

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