ECONOMIC LAWS PRACTICE
ADVOCATES & SOLICITORS

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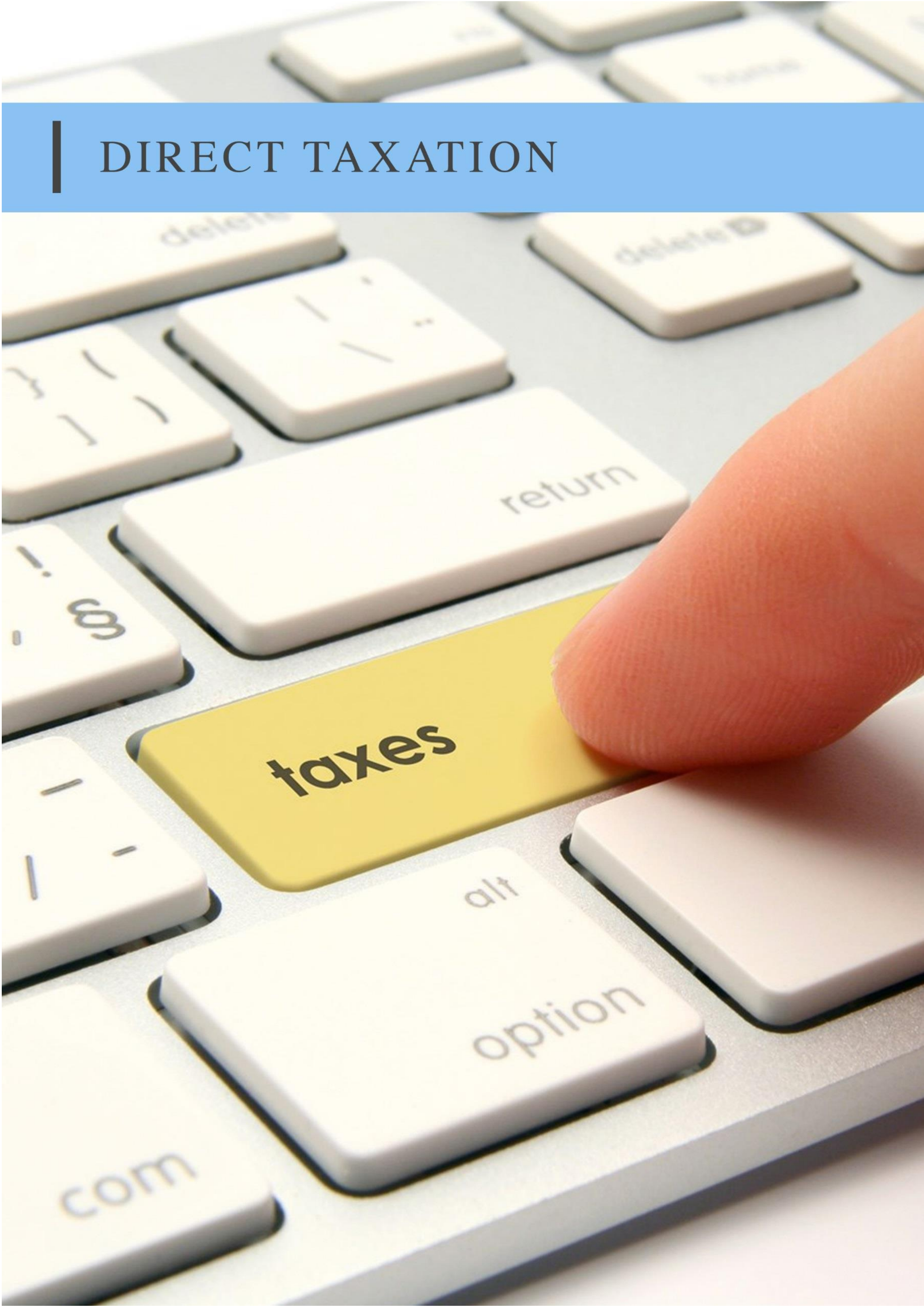
DIRECT TAXATION



RECENT CASE LAWS

Director of Income tax vs. M/s. Samsung Heavy Industries (Civil Appeal 12183 of 2016) (Supreme Court)

Project office does not constitute a fixed place permanent establishment in India sans 'core business' activity

FACTS OF THE CASE

- The taxpayer, a company incorporated in South Korea along with another Indian Company entered into a 'turnkey contract' with ONGC for carrying out the work of surveys, design, engineering, procurement, fabrication, installation and modification at existing facilities, as well as start-up and commissioning of entire facilities covered under the 'Vasai East Development Project' (**Project**).
- An application was filed with the Reserve Bank of India (**RBI**) for setting up a Project Office (**PO)** in India for coordination and execution of the Project, which was received in May 2006 without placing any restrictions on the PO's activities. The PO had only two employees and it did not incur any expenditure in relation to execution of the contract in the relevant tax year.
- The taxpayer filed its return of income (**ROI**) declaring a loss on account of activities carried out in India. The Tax Officer (**TO**) held that the work relating to fabrication and procurement of material was very much a part of the contract for execution of work assigned by ONGC. The work was wholly executed by permanent establishment (**PE**) in India and it would be absurd to suggest that PE in India was not associated with the designing or fabrication of materials. Accordingly, the TO attributed 25% of the revenues allegedly earned outside India as being the income of the taxpayer chargeable to tax in India. The Dispute Resolution Panel (**DRP**) confirmed the finding contained in the draft Order and the said Order attained finality.
- The taxpayer then preferred an appeal before the Income tax Appellate Tribunal (**ITAT**). The ITAT confirmed the Order of the TO but remanded the Order back to the TO to ascertain profits attributable to the PO after examining the necessary facts.
- On an appeal before the Hon'ble High Court (**HC**), the Hon'ble HC set aside the ITAT Order and ruled in favor of the taxpayer by observing that there was no evidence or justification on record that 25% of the gross revenue earned outside India was attributable to the business carried out by the PO in India. The TO is now in appeal before the Hon'ble Supreme Court (**SC**).

JUDGMENT

- The Hon'ble SC after placing reliance on various judgments, held that it is clear that when it comes to 'fixed place' PE, the condition precedent for applicability of Article 5(1) of the Double Taxation Avoidance Agreement (**DTAA)** is that it should be an establishment 'through which the business of an enterprise' is wholly or partly carried on. Further, the profits of the foreign enterprise are taxable only when the said enterprise carries on its core business activities through the PE.
- Various documents like RBI approval, board resolution and application filed with RBI for setting up of a PO indicates that the PO was established to coordinate and execute 'delivery of documents in connection with construction of offshore platform modification of existing facilities for ONGC'. The finding of the ITAT that the PO was involved in core activity of execution of the project is clearly perverse, since the ITAT relied upon only the first paragraph of the board resolution to conclude that that the PO was set up for coordination and execution of the Project itself. The Hon'ble SC also concluded that the finding on the maintenance of accounts cannot determine the character of PE was also perverse.
- Thus, it was held that no PE has been set up within the meaning of Article 5(1) of the DTAA, as the PO cannot be said to be a fixed place of business through which the core business of the taxpayer was wholly or partly carried on. Further, the case of the taxpayer would fall within Article 5(4)(e) of the DTAA, inasmuch as the office is solely an auxiliary office, meant to act as a LO between the taxpayer and ONGC.

ELP Comments:

- Details matter and the Hon'ble SC has emphasized on the same in this ruling by considering the entire factual background which was very much on record before all the forums.
- The Hon'ble SC has once again reiterated various aspects on the interpretation of the law relating to PE and attribution of profits. It was generally assumed that PO would constitute a fixed place PE, mainly on account of the RBI approval, which permits a PO to undertake certain business activities in India. This ruling has laid emphasis on the fact that merely because a foreign enterprise has a PO , this will not in itself become a PE in India. Further, the activities undertaken by such PO should be examined in a detailed manner to determine whether core business activities are undertaken or not. The Hon'ble SC has also eemphasized the review of documents such as board resolution to determine the intent of the foreign enterprise in establishing a PO in India, which plays a crucial role in concluding whether a fixed place PE is constituted or not. Equally important would be the expenditure incurred in India as well as the technical expertise of the employees working in India.
- The Hon'ble SC has certainly laid down new parameters in favor of the taxpayer while determining a fixed place PE in India.

Shiv Raj Gupta vs. Commissioner of Income-tax (117 taxmann.com 871 [SC])

Amount received as non-competition fee held as capital receipt, not chargeable to tax under Section 28(ii) of the IT Act

FACTS OF THE CASE

- The taxpayer together with his relatives and other group companies held 57.29% of the paid-up equity share capital of CDBL Ltd, a company listed in the Bombay and National stock exchanges.
- The taxpayer *vide* Memorandum of Understanding (**MoU**), sold controlling block of shares of CDBL Ltd. As a result of the sale, the taxpayer irrevocably handed over physical possession, management and control of the business of CDBL Ltd.
- By a deed of covenant, the MoU was reiterated with a non-compete clause wherein it was stated that the taxpayer and his relatives will not engage directly or indirectly in the business of CDBL Ltd.
- The contention of the department was whether the said deed of covenant can be said to contain a restrictive covenant which may be chargeable to tax under Section 28(ii)(a) of the Income tax Act, 1961 (**IT Act**).
- The ITAT held that the revenue cannot challenge the business perception of the taxpayer. Further, it was held that there was no colourable device involved, and that, as a result, non-compete fee payable under the deed of covenant was not taxable under Section 28(ii)(a) of the IT Act.
- After going through the MoU and the deed of covenant, the Hon'ble HC agreed that the deed of covenant could not be read as a separate document and was not a non-compete fee at all. Further, the Hon'ble HC went on to state that the said sum could not be brought to tax under Section 28(ii)(a), but would have to be treated as a taxable capital gain, being part of the full value of the sale consideration paid for transfer of shares.
- Aggrieved by the order passed by the Hon'ble HC, the taxpayer filed an appeal before the Hon'ble SC.

JUDGMENT

- The Hon'ble SC upheld the finding of the Hon'ble HC that non-compete fee was paid only to the taxpayer as the taxpayer had acquired considerable knowledge, skill, expertise and specialization in the business of CDBL Ltd. Further, the Hon'ble SC held that the restrictive covenant resulted in payment of consideration so that the taxpayer does not start or engage himself, directly or indirectly, in relation to the business of CDBL Ltd.
- The Hon'ble SC upheld the reasons given by the lower appellate authorities that the TO has no business to second guess commercial or business expediency of what parties at arms-length decide for each other.

- The Hon'ble SC placed reliance on the decision of ***Guffic Chem (P.) Ltd. v. CIT (4 SCC 254)*** wherein it was held that compensation received for the loss of agency is a revenue receipt whereas the compensation attributable to a negative/restrictive covenant is a capital receipt. .
- The Hon'ble SC also highlighted that the payment received as non-competition fee under a negative covenant was always treated as a capital receipt till Assessment Year (**AY**) 2003-2004. The Hon'ble SC observed that only vide Finance Act, 2002 the capital receipt was made taxable. Further, it was well settled that a liability cannot be created retrospectively.
- In view of the above, the Hon'ble SC held that compensation received under the non-competition agreement became taxable only as a capital receipt and not as a revenue receipt.

Shree Choudhary Transport Company v ITO (Civil Appeal no. 7865 of 2009) (Supreme Court)

Upholds Section 40(a)(ia) disallowance on amounts 'paid', follows Palam Gas ruling

FACTS OF THE CASE

- The taxpayer, a partnership firm, is engaged in transporting cement for M/s. Aditya Cement Ltd (**AC Ltd**). The taxpayer received transportation charges from Grasim Industries Ltd (**Grasim**), a cement marketing division of AC Ltd after due deduction of tax at source (**TDS**) by Grasim.
- The taxpayer filed its ROI for AY 2005-06 declaring income from the business of 'transport contract'. The case was selected for scrutiny. Pursuant to the examination of various documents furnished by the taxpayer, the TO observed that while making payment to the truck operators/owners, the taxpayer had not deducted tax at source, even if the net payment exceeded INR 20,000.
- The taxpayer contended that the trucks hired belonged to different operators/owners who were not the sub-contractors or contractors; it had no liability to deduct TDS because it had not made payments exceeding INR 20,000 in a single transaction; and that the provisions of Section 40(a)(ia) were not applicable.
- The TO observed that the taxpayer paid freight charges to the truck operators/owners from the income so earned; and the remaining amount was shown as commission. Further, the TO held that even if truck operators/owners in the case at hand were not to be considered as contractors, they were undoubtedly the sub- contractors of the taxpayer; merely by showing payment of one challan in two parts, the taxpayer cannot absolve itself of the provisions of the Section 40(a)(ia); since the taxpayer was responsible for making payment to the truck owners operators, it was mandatory on the part of the assessee to deduct tax at source while making such payment.
- The TO thus held that the taxpayer was responsible for deducting TDS while making payments to truck operators/owners thereby rejecting the taxpayer's contention that no payments were made in excess of INR 20,000 and hence provisions of Sec.40(a)(ia) were inapplicable.
- The Hon'ble HC, ITAT as well as CIT(A) upheld the order of the TO and the matter went before the Hon'ble SC.

JUDGMENT

- Placing reliance on the Hon'ble SC judgment in case of ***Palam Gas Service v CIT (394 ITR 300)***, the Hon'ble SC held that whether the taxpayer had specific and identified trucks on its rolls or had been picking them up on a freelance basis, the legal effect on the status of parties had been the same. This being, once a particular truck was engaged by the taxpayer on hire charges for carrying out the part of work undertaken by it (i.e., transportation of the goods of the company), the operator/owner of that truck became the sub-contractor and all the requirements of Section 194C came into operation.
- While answering whether disallowance under Section 40(a)(ia) of the IT Act is confined to the amount 'payable' and not to the amount 'already paid', the Hon'ble SC stated that this aspect of interpretation did not require much dilation in view of the Hon'ble SC decision in the case of Palam Gas Service (*supra*).

- The Hon'ble SC [Palam Gas Service (*supra*)] held that '*As a fortiori, it follows that section 40(a)(ia) covers not only those cases where the amount is payable but also when it is paid*'. It also held that when the entire scheme of obligation to deduct the tax at source and paying it over to the Central Government is read holistically, it cannot be held that the word 'payable' occurring in Section 40(a)(ia) refers to only those cases where the amount is yet to be paid and does not cover the cases where the amount is actually paid.
- The Hon'ble SC rejected the taxpayer's contention that the decision of Palam Gas Service (*supra)* requires reconsideration for the reason that certain aspects of law have not been considered therein and the correct principles of interpretation have not been applied. Further, with regard to the taxpayer's argument that scope cannot be decided on the basis of Section 194C, the Hon'ble SC stated that '*when the obligation of Section 194C of the Act is the foundation of the consequence provided by Section 40(a)(ia) of the Act, reference to the former is inevitable in interpretation of the latter'*.
- With regard to the taxpayers contention that Section 40(a)(ia) would apply only from Financial Year (**FY**) 2005-06 by placing reliance on the decision of ***PIU Ghosh v. DCIT (386 ITR 322)*** the Hon'ble SC held that the provision in question, having come into effect from 1 April 2005, would apply from and for the AY 2005-2006 and would be applicable for the assessment in question.
- Supplemental submission that in any case, disallowance cannot be applied to the payments already made prior to 10 September 2004, the date on which the Finance (No.2) Act, 2004 received the assent of the President of India, was treated as baseless. The Hon'ble SC stated that even assuming that the said contention was accepted, the taxpayer could have taken all the requisite steps to make deductions or, in any case, to make payment of the TDS amount to the TO during the same FY or even in the subsequent year, as per the relaxation available in the proviso to Section 40(a)(ia) of the IT Act. The taxpayer, however, simply avoided its obligation and attempted to suggest that it had no liability to deduct the tax at source at all.
- Yet another alternative attempt that disallowance under Section 40(a)(ia) is restricted to 30% of the sum payable and the said amendment deserves to be held retrospective in operation. The Hon'ble SC held the submission so made not only is baseless but is bereft of any logic. Neither the amendment made by the Finance (No.2) Act, 2014 could be stretched anterior to the date of its substitution so as to reach the AY 2005-2006 nor the said decision in ***CIT v Calcutta Export Company (404 ITR 654)*** has any correlation with the case at hand or with the amendment made by the Finance (No.2) Act of 2014.
- The Hon'ble SC remarked that "*Having defaulted at every stage, the attempt on the part of taxpayer to seek some succor in the amendment of Section 40(a)(ia) of the Act by the Finance (No.2) Act, 2014 could only be rejected as entirely baseless, rather preposterous*".
- Summary:
  - Section 194C was indeed applicable and the taxpayer was under an obligation to deduct tax at source in relation to the payments made by it for hiring the vehicles for the purpose of its business of transportation of goods;
  - Disallowance under Section 40(a)(ia) of the IT Act is not limited only to the amounts outstanding and this provision equally applies in relation to the expenses that had already been incurred and paid by the taxpayer;
  - Disallowance under Section 40(a)(ia) is applicable with effect from 1 April 2005 i.e. AY 2005-2006; and that the benefit of amendment made in the year 2014 is not available for the year under consideration.

Deputy Director of Income tax v Yum! Restaurant (Asia) (P) Ltd (ITA no. 6018/Del/2012) (Delhi Tribunal)

Deputation of Vice President is neither taxable as 'Fees for Technical Services' (FTS) not constitutes PE in India; Distinguishes Delhi High Court ruling in case of Centrica India Offshore Pvt. Ltd

FACTS OF THE CASE

- The taxpayer, a Singapore based Company was engaged in business of franchising restaurant outlets for KFC, Pizza Hut etc. in the Asia Pacific region including India. The taxpayer entered into a Technology License Agreement (**TLA**) for license of 'Technology' and 'System' with an Indian Company (**YRIPL**), for the operation of the restaurant outlets.
- In order to carry out the business operations efficiently, the taxpayer deputed one of its employees i.e. Mr. Vinod Mahboobani (**deputed employee**) to YRIPL. The taxpayer was responsible for payment of salary, which was later reimbursed by YRIPL, including direct costs. The TO opined that furnishing of services by a deputed employee was technical in nature, and thus, salary reimbursed to the taxpayer was taxable in India as FTS under Article 12 of the DTAA.
- In order to run its business, YRIPL had franchised different outlets and was also running its own stores. Yum! Restaurants Marketing Pvt Ltd. (**YRMPL**) was set up for undertaking AMP activities on behalf of YRIPL and its franchisees. The taxpayer was not a party to this Agreement which was exclusively between the YRIPL and its marketing company. The TO held that alleged marketing activities undertaken by YRIPL on behalf of the taxpayer constitutes Deemed Agency PE (**DAPE**) in India.
- The Commissioner of Income tax (Appeals) (**CIT(A)**) after going through various clauses of the Deputation Agreement held that the deputed employee was under the control of YRIPL and was working for the company. The CIT(A) also held that the deputed employee was not an employee of the taxpayer and hence there was no right/lien over his employment and hence, there was no service PE.

JUDGMENT

- The only question which required adjudication was whether the deputed employee was working for the taxpayer or YRIPL, who had the right or lien over his employment.

Service PE

- The ITAT observed various clauses of the deputation agreement and reviewed the letter of Deputation and other evidences certifying the role of deputed employees in the day-to-day functioning of YRIPL.
- ITAT also observed that theses evidences were put before the CIT(A), and their findings in this respect were:
  - Deputed employee was under the direct control and superintendence of YRIPL;
  - The taxpayer had discharged the employee from all obligations and rights whatsoever, including lien on employment;
  - The deputed employee was permanently moved to the payroll of YRIPL to continue his employment with YRIPL;
  - Facts and circumstance of the case and clauses of deputation agreement indicate that Mr. Vinod Mahboobani was an employee of YRIPL, and the taxpayer had simply acted as a conduit to pay salary to him in Singapore as his family was based in Singapore.
- Since, the TO failed to controvert the finding of the CIT(A), the ITAT held that the taxpayer did not constitute a service PE in India.

Fixed PE

- The taxpayer had not undertaken any business activity in India hence the taxpayer does not constitute a fixed place PE in India.

FTS

- In the absence of fulfilment of 'make available' clause, it is not possible to hold that there is taxability of FTS under Article 12 of the DTAA.
- In absence of income element embedded in reimbursement of salary cost, such income is not taxable. In any case, , the deputed employee had already paid taxes in India on the aforesaid salary income, the same cannot be taxed again as FTS in the hands of the taxpayer. This would amount to double taxation.

Attribution of profits to the alleged PE

- The marketing activities undertaken by YRMPL were on behalf of YRIPL and its franchisees and in the absence of any link whatsoever with the business of the taxpayer, there is no merit in attribution of contribution made by the Independent third-party franchisees, to constitute PE of the taxpayer in India.

Distinguish Hon'ble Delhi HC judgment

- The ITAT held that the decision of Hon'ble Delhi HC in case of ***Centrica India Offshore Pvt Ltd (364 ITR 336)*** cannot apply to the facts of the present case. Since, in case of Centrica India, Centrica UK was providing services to Centrica India through its seconded employees to ensure quality control and management of their vendors of the outsourced activities, with the intention to provide staff with appropriate expertise and knowledge about process and practices implemented. Thus, reimbursement of salary cost was taxable as FTS.

Savita Kapila [TS-343-HC-2020(DEL)] v ACIT

Re-assessment proceedings in the name of legal heirs of deceased-assessee quashed in the absence of issuance of notice on the legal heirs

FACTS OF THE CASE

- Information was received by the TO that during FY 2011-12, the taxpayer Shri Mohinder Paul Kapila had cash deposits and time deposits in his bank account as per Form No. 26AS. The taxpayer had not filed its ROI and the source of the aforesaid deposits remained unexplained. Accordingly, the case of Shri Mohinder Paul Kapila was selected under Section 147 and Section 148 of the IT Act on 28 March 2019 as income had escaped assessment. However, late Shri Mohinder Paul Kapila (**deceased-assessee**) had already expired in December 2018.
- The TO issued a notice dated March 31, 2019 under Section 148 of the IT Act in the name of the deceased-assessee.
- The proceedings were transferred to one of the legal heirs of the deceased-assessee viz. the taxpayer and the assessment order was passed wherein addition was made in relation to cash and time deposits.
- Aggrieved by the order, the taxpayer filed a writ petition before the Hon'ble Delhi HC challenging the reassessment proceedings.

JUDGMENT

- The taxpayer relying on the decision of ***Braham Prakash v. ITO [(9) TMI 49 (Delhi)]*** argued that since the notice under Section 148 of the IT Act was issued subsequent to the death of the deceased-assessee, the statutory requirement of service of notice under Section 148 of the IT Act had not been fulfilled i.e. the notice under Section 148 was not issued to the taxpayer or any other legal representative of the deceased-assessee.Only the proceedings were simply transferred to the taxpayer's permanent account number (**PAN**).
- However, the revenue emphasized that the factum of the death of deceased-assessee was communicated to the revenue only after the expiry of the limitation period and therefore, there was no way that the revenue could have known about the death of the deceased-assessee.
- The Hon'ble HC held that issuance of a notice under Section 148 of the IT Act is the foundation for reopening of an assessment. Consequently, the Hon'ble HC reiterated that the requirement of issuing notice to a correct person

and not to a dead person is not merely a procedural requirement but is a condition precedent to the impugned notice being valid in law.

- The Hon'ble HC also observed that no notice under Section 148 of the IT Act was ever issued to the taxpayer during the period of limitation and the proceedings were simply transferred to the PAN of the taxpayer. Accordingly, the HC held that the proceedings against the taxpayer are barred by limitation in accordance with Section 149(1)(b) of the IT Act.
- The Hon'ble HC also held that the provisions of Section 159 of the IT Act apply to a situation where proceedings are initiated/pending against the deceased-assessee when he is alive.After his death the legal representative steps into the shoes of the deceased-assessee. Since that was not the case in the current scenario, the Hon'ble HC dismissed the application of Section 159 of the IT Act. Further, the Hon'ble HC also stated that the legal heirs are under no statutory obligation to intimate the death of the deceased-assessee to the revenue.
- In view of the above, the Hon'ble HC allowed the writ petition and quashed the notice and all consequential orders/proceedings passed/initiated thereto.

IMS AG v DCIT (ITA no. 6445/Mum/2012) (Mumbai Tribunal)

Consideration towards database access, not 'royalty' under India-Swiss DTAA

FACTS OF THE CASE

- The taxpayer is a company incorporated, and fiscally domiciled, in Switzerland. The taxpayer is engaged in providing a market research report on the pharmaceutical sector to its customers across the world at a predetermined subscription price.
- Subscription fee received was towards granting license to access non-exclusive and non-transferable right to the database and IMS reports. The TO held that consideration received is covered within the definition of royalty under Section 9(1)(vi) of the IT Act read with Article 12(3) of India- Switzerland DTAA. Relying on the Hon'ble Karnataka HC's judgment in the case of ***CIT v Wipro Ltd (203 Taxman 621)*** and various other judgments, the order was upheld by CIT(A).

JUDGMENT

- The ITAT relying on Authority for Advance Ruling (**AAR**) ruling, which stands approved by the Hon'ble Bombay HC decision in the case of ***DIT v Dun and Bradstreet Information Services India (P) Ltd (20 taxmann.695),*** rendered in the context of India-Spain DTAA wherein under similar facts, it was held that the consideration was towards supply of publicly available information, which could not be treated as royalty or FTS.
- ITAT opined that the conclusions arrived by AAR which now stand approved by the Hon'ble Bombay HC, are equally applicable in the context of Indo Swiss DTAA. It is pertinent to note that Article 12(3) of Indo Swiss DTAA is exactly the same as Article 13(3) of India Spain DTAA.
- It is only elementary that when the taxpayer is not taxable under the provisions of the respective DTAA, there is no occasion to examine the taxability under the IT Act, since the provisions of IT Act apply only when these provisions are more favorable to the taxpayer vis-a-vis the provisions of the applicable DTAA.
- ITAT stated that once the Hon'ble Bombay HC has expressed a view, it is not open to be swayed by a contrary view expressed by any other HC. Further, no decision, contrary to the decision relied by the ITAT was brought to the notice by the TO. Accordingly, it was held that consideration so received is not taxable as royalty.

Genpact India Pvt Ltd v DCIT (ITA no. 583 /Del /2020) (Delhi Tribunal)

Assessment on Genpact 'void ab initio'; Deletes INR . 2600 crore share-buyback addition

FACTS OF THE CASE

- The taxpayer is engaged in IT enabled services such as Data Entry and conversion/processing business support and billing services.
- The taxpayer e-filed its ROI for AY 2014-15 declaring a total income of INR 602 crores. A revised ROI was thereafter filed declaring a total income of INR 599 crores.
- A scheme of amalgamation was approved by the Hon'ble HC of Telangana, Andhra Pradesh and Delhi HC, and thereafter Genpact India was merged into another company to form 'Genpact India Private Limited' i.e taxpayer.
- The assessment was completed under Section 143(3) of the IT Act in the name of erstwhile Company i.e. Genpact India. The TO assessed total income at INR 714 crores under the normal provisions of the IT Act and distributed income was taxed at the rate of 20% under Section 115QA of the IT Act. CIT(A) upheld the Order of TO.

JUDGMENT

- It was contented by the taxpayer that the assessment Order framed in the name of erstwhile company i.e. Genpact India is *void-ab-initio*. To support its contention the taxpayer placed reliance on Hon'ble SC judgment in case of ***PCIT v Maruti Suzuki India Limited (416 ITR 613)*** and various other judicial precedents.
- ITAT relied on the judgment of the aforesaid Hon'ble SC and held that even in the present case, the amalgamating company i.e. Genpact India was not in existence at the time of conducting assessment proceedings as well as on the date of passing of the assessment Order.
- Once it is found that assessment is framed in the name of a non-existing entity, it does not remain a procedural irregularity of the nature which could be cured by invoking the provisions of Section 292B of the IT Act. Hence, the assessment proceedings as well as the assessment Order itself are void ab initio.

ESM Sys Pvt. Ltd v ITO [TS-347-ITAT-2020(Ahd)]

Web-hosting charges not Fees for Included Services (FIS) under India-USA DTAA in absence of make-available. Reliance placed on Pinstorm and Right Florist rulings

FACTS OF THE CASE

- The taxpayer was engaged in the business of web designing services, social media management, bulk SMS, email management, website advertising, online video management, mobile application designing etc.
- The taxpayer has made a payment to ESM-SYS LLC, USA towards services including data promotion, social media management and general consulting i.e. data storage, data security, bandwidth provision space monitoring etc. The taxpayer explained that ESM-SYS LLC was managing and overseeing various on page and off page activities which drive traffic to a specific website.
- The TO was of the view that payments made by the taxpayer were payment for technical or management services or execution of contract which were liable to withholding under Section 195 of the IT Act.
- The contention of the taxpayer was that the services availed were not in the nature of technical services or royalty but business profit and since ESM-SYS LLC, USA had no PE in India, the same was not taxable in India.
- However, the TO held that the payment made by the taxpayer may fall within the ambit of Section 9(1)(vi) [i.e. royalty] as well as Section 9(1)(vii) [i.e. FTS]. Since the taxpayer did not withhold any taxes, the TO treated the taxpayer as an assessee in default and disallowed the said expenses under Section 40(a)(ia) of the IT Act.
- The CIT(A) dismissed the appeal of the taxpayer holding that the payment is FTS and squarely covered under Section 9(1)(vii) of the IT Act.

- Aggrieved by the order of the CIT(A), the taxpayer preferred an appeal before the ITAT.

JUDGMENT

- The taxpayer submitted that the equipment/servers used for providing such services were located outside India and were not owned by ESM-SYS LLC. Further, it was submitted that the said payment is not covered by the definition of FTS as ESM-SYS LLC has not made available any technology or know-how to the taxpayer.
- The ITAT noted that the entire transaction had taken place on the internet through virtual servers which were located outside India and not under the control of the taxpayer.
- The ITAT observed that for the payment to qualify as FTS under Article 12 of the India-USA DTAA, the following conditions should be fulfilled:
  - Services are ancillary and subsidiary to the application of right for which royalty is paid; or
  - Services make available :
    - technical knowledge, experience, skill, know-how, or processes etc.
    - if it consists of development and transfer of any technical plan or technical design.
- The ITAT placed reliance on the ruling of ***Pinstorm Technologies (P.) Ltd. vs. ITO (24 taxman.com 345)***, wherein it was held that the payment made for uploading and display of banner advertisement on its portal, in absence of any PE of non-resident in India would not be chargeable to tax in India. Further, the ITAT placed reliance on the ruling of ***ITO vs. Right Florist (32 taxman.com 99)***, wherein it was held that fees for online advertisement could not be considered as FTS in view of the provision of the India-USA DTAA.
- In the light of the above, the ITAT noted that there was no sharing of knowledge or know-how or any technology to the taxpayer, accordingly, the same may not fall within the ambit of FTS under the India-USA DTAA and hence, the taxpayer was not required to withhold tax under Section 195 of the IT Act.

NOTIFICATIONS/ CIRCULARS

Central Board of Direct tax (CBDT) specifies procedure for notification of Sovereign Wealth Funds (SWF) for claiming exemption of 'infrastructure' income under Section 10(23FE)

- The Finance Act, 2020 inserted Section 10(23FE) which provides for exemption of certain income of notified SWF or Pension Fund arising from investment in Indian 'infrastructure'. Recently, CBDT issued a notification widening the scope of 'infrastructure' for the purpose of exemption under the said section.
- In order to facilitate the process of notification of the SWF, CBDT specifies that the SWF shall file an application in Form I. The Form I shall be filed with the Member (Legislation), CBDT, Department of Revenue, Ministry of Finance, North Block, New Delhi during the FY 2020-21 and thereafter to the Member, CBDT having supervision and control over the work of Foreign Tax and Tax Research Division.
- Further, specified are other conditions including filing of ROI along with audit report & quarterly statements in Form II in respect of each investment made during the quarter.

CBDT Amends Rules 31AA- Statement of collection of tax at source (TCS)

- CBDT has notified TCS rules for newly introduced TCS on sale of goods under Section 206C(1H) and TCS on transactions covered under the Liberalised Remittance Scheme (**LRS**) and overseas tour program package under Section 206(1G) vide Finance Act, 2020. It has also notified consequential amendments in TCS return Form 27EQ. The amended Rule shall come into force with effect from October 1, 2020.

New Form 26AS - Handholding of taxpayers, facilitates voluntary compliance, ease of e-filing returns

- The new Form 26AS is the (faceless) handholding for the taxpayers to e-file their ROI quickly and correctly. From this AY, taxpayers will see an improved Form 26AS which would carry some additional details on taxpayer financial transactions as specified in the Statement of Financial Transactions (**SFTs**) in various categories.
- Information received by the Income Tax Department from the filers of these specified SFTs is now being shown in Part E of Form 26AS to facilitate voluntary compliance, tax accountability and ease of e-filing of returns.

CBDT: Amends Forms for purposes of Section 115UB granting 'pass-through' status to investment funds

- CBDT amends Rule 12CB with respect to statement to be filed under Section 115UB(7).
- As per the amended rules, the statement in Form 64D, consisting of details of income paid/ credited by investment fund, shall be furnished electronically (generated & downloaded from the web portal) to the Principal CIT or CIT, within whose jurisdiction the Principal office of the investment fund is situated "by 15th day of June of the FY following the previous year during which the income is paid or credited," (as against the due date of Nov 30 earlier);
- Amended Form 64C requires additional information w.r.t details of deemed loss as on March 31 2019 in terms of the newly inserted sub-section (2A) of section 115UB. It also requires bifurcation of LTCG/STCG income as per the chargeable rates under Section 112A/111A as the case may be.
- Further, amended Form 64D now seeks PAN/Aadhar details of Directors/ Trustees/ Partners of the Investment fund. It also includes a table seeking break-up of total income of Investment Fund.

Other Notifications

- CBDT further extends belated /revised return filing due date for AY 2019-20 till September 30, 2020.
- CBDT has amended Rule 37BC to provide that Section 206AA of the IT Act will not be applicable where specified payment being made to a non-resident is in the nature of dividend.
- CBDT has amended Rule 37-I (Credit for tax collected at source for the purposes of sub-section (4) of section 206C) to insert a new sub-rule 2A which states that "*Notwithstanding anything contained in sub-rule (2), for the purposes*

of sub- section (1F) or, sub-section (1G) or, sub-section (1H) of section 206C, credit for tax collected at source shall be given to the person from whose account tax is collected and paid to the Central Government account for the AY relevant to the previous year in which such tax collection is made".

NEWS

- **CBDT & Ministry of Ministry of Micro, Small and Medium Enterprises (MSME) sign MoU for sharing ROI related information**- CBDT signs a formal MoU with the MSME, marking the beginning of a new era of cooperation and synergy between Ministry of MSME and CBDT. The MoU will facilitate seamless sharing of certain ROI related information by the Income Tax Department, enabling MSME ministry to check and classify enterprises in MSME categories as per the notified criteria.
- **After Securities and Exchange Board of India (SEBI), Ministry of MSME, CBDT signs MoU with Central Board of Indirect Taxes and Customs (CBIC) for data sharing**- CBDT signs formal MoU with CBIC for data exchange between the two organizations. This supersedes the MoU signed between CBDT and the erstwhile Central Board of Excise and Customs (CBEC) in 2015. The MoU will facilitate sharing of data and information between CBDT and CBIC on an automatic and regular basis, states that 'In addition to regular exchange of data, CBDT and CBIC will also exchange with each other, on request and spontaneous basis, any information available in their respective databases which may have utility for the other organization'.

INDIRECT TAXATION

RECENT CASE LAWS

M/s VKC Footsteps India Pvt. Ltd. v. UOI & Others [2020-VIL-340-GUJ]

Explanation (a) to Rule 89(5) which denies the refund of unutilized input tax paid on input services as part of ITC accumulated on account of inverted duty structure is ultra vires Section 54(3) of the CGST Act.

FACTS OF THE CASE

- The Petitioner is engaged in the business of supply of footwear which attracts GST at the rate of 5%. It procures various inputs and input services, chargeable at 12% or 18%, and avails ITC thereon. Considering that the GST rate on inputs is higher than output, there is accumulation of unutilized ITC in electronic credit ledger of the Petitioner.
- Section 54(3) of the CGST Act provides for refund of 'any unutilized ITC' in such situations, also referred to as Inverted duty structure. The term ITC has been defined under Section 2(63) as credit of input tax, which is defined under Section 2(62) as tax charged on goods or services or both. Hence, the Petitioner has contended that Section 54(3) provides for refund of credit availed on input services as well as inputs.
- Rule 89(5) of the CGST Rules provides a formula for determining the refund of unutilized ITC on account of inverted duty structure, which is proportionate to the turnover of inverted rated supply of goods vis-a-vis total turnover of the assessee for that period. Vide Notification No. 21/2018-CT dated April 18, 2018 a revised formula was prescribed, which inter-alia excluded input services from the scope of 'net ITC' for computation of the refund amount. This amendment was made retrospective w.e.f. July 1, 2017. Consequently, the refund on the ITC availed on input services was denied and refund of ITC availed on inputs alone was allowed. Thereafter, Circular No. 79/53/2018-GST dated December 31,2018 was issued, which clarified that refund of tax paid on input services and capital goods as part of refund of ITC accumulated due to inverted duty structure was not admissible.
- The Petitioner has challenged the vires of amended Rule 89(5) of the CGST Rules to the extent it denies refund of unutilized ITC relatable to input services.

JUDGMENT

- The Hon'ble High Court observed that the formula prescribed in Rule 89(5) of the CGST Rules to exclude refund of tax paid on **input service** as part of the refund of unutilized ITC, is contrary to the provisions of Section 54(3) of the CGST Act, which provides for claim of refund of **any unutilized ITC**. The word **ITC** is defined in Section 2(63) to mean the credit of input tax. The term **input tax** as per Section 2(62) means the tax charged on any supply of goods or services or both made to any registered person. Thus, both **input** and **input service** are part of the **input tax** and **ITC**. Therefore, as per Section 54(3) of the CGST Act, a registered person may claim refund of **any unutilized ITC**. Hence, by virtue of Rule 89(5), such claim of the refund cannot be restricted only to **inputs**, excluding the **input services** from the purview of ITC. Moreover, clause (ii) of proviso to Section 54(3) also refers to both supply of goods or services and not only supply of goods as per amended Rule 89(5) of CGST Rules.
- Accordingly, in view of the provisions of the Act and Rules and keeping in mind scheme and object of the CGST Act, the Hon'ble High Court held that the intent of the Government by framing the Rule restricting the statutory provision cannot be the intent of law as interpreted in the Circular No.79/53/2018- GST dated December 31, 2018.
- Consequently, it was held that the Explanation (a) to Rule 89(5), denying the refund of unutilized ITC on **input services** as part of accumulated ITC due to inverted duty structure is ultra vires Section 54(3) of the CGST Act. Thereby, the High Court read down the Explanation (a) to Rule 89(5) and held that the **Net ITC** as defined therein

should mean ITC availed on **inputs** and **input services** as defined under the Act. The Petition was allowed & the respondents were directed to allow the refund accordingly.

M/s P. R. Mani Electronics Vs. Union of India & Ors. [2020-VIL-308-MAD]

Retrospective amendment specifying a time limit to submit Form GST TRAN-1 is not ultra vires the CGST Act

FACTS OF THE CASE

- The Petitioner failed to carry forward unutilized Transitional ITC to GST [as per Section 140 of the CGST Act read with Rule 117 of the CGST Rules by December 27, 2017] as its consultant could not enter the common portal and upload the Form GST TRAN-1. The evidence thereof cannot be adduced. Thereafter, the Petitioner submitted a hard copy thereof on December 29, 2017. However, the entitlement to such Transitional ITC was not affirmed.
- Section 140 of the CGST Act stipulates that the registered person is required to submit a return, within such time, and in such manner as may be prescribed for purposes of availing Transitional ITC. The words **within such time** were not originally a part of Section 140(1) of the CGST Act and were introduced by the Finance Act, 2020 under Notification No.43/2020 dated May 16, 2020 with retrospective effect from July 1, 2017. Rule 117 of the CGST Rules, prescribes the procedure and time limit of availing Transitional ITC [by December 27, 2017 except in case of extension granted by the Commissioner on account of technical glitch].
- The Petitioner has challenged the vires of Rule 117 of the CGST Rules on the grounds that the time limit prescribed therein is ultra vires Section 140 of the CGST Act & infringes Articles 14 and 300A of the Constitution, and also seeks permission to file Form GST TRAN- 1 either electronically/manually to claim the Transitional ITC.

JUDGMENT

- The Hon'ble High Court observed that Section 164 of CGST Act empowers the Government to make rules and to provide retrospective effect to rules (not earlier than date of effect of CGST Act). Consequently, by the amendment vide the Finance Act of 2020, the words **within such time** were introduced in Section 140, with retrospective effect from July 1, 2020, thereby conferring expressly the power to prescribe time limits in Section 140. Hence, Rule 117 of the CGST Rules is intra vires Section 140 of the CGST Act and not ultra vires.
- While arriving at its conclusion, the Hon'ble Court referred to the judgment of *Brand Equity Treaties v. UOI 2020-VIL-196-DEL* [pending before the Hon'ble Apex Court], wherein the Petitioners have been permitted to file TRAN-1 on or before June 30, 2020. However, considering that the said judgment was decided prior to the amendment to Section 140 of the CGST Act, the principle laid down was held to be not applicable.
- The Hon'ble High Court also referred to the judgment of the Delhi High Court in *SKH Sheet Metals Components v. Union of India 2020-VIL-255-DEL*, which though decided after the amendment to Section 140 of the CGST Act, held that the amendment grants the power to frame rules fixing the time limit for filing the declaration but does not fix a time limit for transitioning credit. However, given the fact that the power to prescribe a time limit was expressly incorporated in Section 140, which deals with Transitional ITC, and Rule 117 fixes such a time limit, the said view of the Delhi High Court was dissented by this Hon'ble High Court.
- Accordingly, relying on the judgment of the Hon'ble Supreme Court in *Jayam and Company [2016-VIL-45-SC],* ITC has been construed as a concession and the time limit for transitioning credit has been held to be mandatory and not directory. Consequently, the Petition was dismissed, and the Petitioner was not permitted to file Form GST TRAN-1 and claim the transitional credit, except for any dispensation granted by the authorities themselves.

ELP Comments:

The Hon'ble High Court of Madras has dissented with the views taken by the Delhi High Court in SKH Sheet Metals Components & Brand Equity Treaties and has essentially held that transitional credit cannot be availed disregarding the time-limit prescribed under Section 140 of the CGST Act read with Rule 117 of CGST Rules.

State of Kerala Vs. M/s Metso Minerals India (P) Ltd. [2020-VIL-311-KER]

Determination of situs of transfer of goods in the execution of works contract and its taxability under VAT

FACTS OF THE CASE

- The assessee entered into a contract with M/s. KMC Construction Ltd. for delivery and erection of plant in the State of Kerala. The materials for the plant were sourced from Singapore and Calcutta and the same were brought into the State of Kerala in a knocked-down condition and erected at the site of M/s. KMC Construction Ltd.
- The authorities found that the transaction was in the nature of works contract and the transfer of goods occurred within the State of Kerala on accretion of the goods in the work. Therefore, VAT was demanded on the same by the authorities.
- Aggrieved by this, the assessee filed an appeal before the First Appellate Authority and the same was rejected. At the second appellate level, the Tribunal reversed the order of the First Appellate Authority, finding the transaction to be an inter-State works contract. Aggrieved by this, the authorities filed an appeal before the Hon'ble High Court of Kerala.

JUDGMENT

- The Hon'ble High Court of Kerala referred its own decision of a *Division Bench in Siemens Ltd. v. State of Kerala and Another [(2001) 122 STC 1, 2001-VIL-22-KER]*. The Division Bench examined the provisions in the Kerala General Sales Tax Act, 1963, which made taxable, the transfer of goods as goods or in any other form involved in the execution of a works contract taking place within the State; if the goods are within the State at the time of such transfer, irrespective of the place where the agreement was executed.
- In the present case, the Kerala High Court observed that all the goods were sourced by the assessee from outside the State of Kerala and suffered tax on its inter-State movement, where the purchases were made from Calcutta. For those materials imported from Singapore and cleared from the port, the same are exempted from tax. Therefore, the transaction is an inter-State works contract and hence, not exigible to tax within the State of Kerala.
- Further, merely for the reason that the plant was erected within the State of Kerala, tax on the transfer of goods in the works cannot be levied in the State of Kerala; when the goods were sourced from abroad and another state, the latter of which was taxed in the State from which the purchase was made.

Commissioner of Service Tax, Chennai Vs. M/s Repco Home Finance Ltd. [2020-VIL-309-CESTAT-CHE-ST]

Service tax cannot be levied on foreclosure charges levied by banks and NBFCs on premature termination of loans

FACTS OF THE CASE

- Banks and Non-banking financial companies (**NBFCs**) provide lending services to borrowers for an agreed period at an agreed rate of interest subject to the terms and conditions contained in the agreement. In a situation, where a borrower decides to close the loan before the stipulated period, the banks and NBFCs collect foreclosure charges, determined as a percentage of the outstanding principal amount, the rate of which may vary on the nature and period of loan cut short.

- The dispute in this case involves levy of Service tax on such foreclosure charges levied by the banks and NBFCs during October 2004 to June 2007 under the head **banking and other financial services (BoFS)**. The issue cropped up in the context of an amendment made to the definition of BoFS on September 10, 2004 whereby the meaning of banking and other financial services was expanded to include 'other services, namely, lending…' vide addition of clause (ix) to the Section 65(12)(a) of the Finance Act.
- Due to the conflicting decisions of the Tribunal in *Small Industries Dev. Bank of India vs. Commissioner (I) [2011 (23) STR 392 (Tri.-Delhi)]* wherein it was held that Service Tax would not be leviable on such charges, followed by *HUDCO vs. Commissioner 2012 (26) STR 531 (Tri.-Ahmd*.) wherein it was held that Service tax would be leviable and again in M/s Magma Fincorp Limited. vs. Commissioner 2016-VIL-231-CESTAT-KOL-ST, wherein it was held that Service tax would not be leviable, the matter was referred to Larger bench (LB) of the CESTAT, constituted herein.

JUDGEMENT

- The Hon'ble CESTAT (**LB**) has held that foreclosure charges for pre-mature termination of loan taken from a bank or NBFC would not be liable to Service tax.
- While arriving at this conclusion, the LB observed that Service Tax is chargeable on a taxable service based on its value determined under Section 67 of the Finance Act, requiring a 'consideration' for the provision of a service. Such **consideration** must flow from the service recipient to the service provider and should accrue to the benefit of the service provider and has to necessarily be a consideration for the taxable service provided.
- Distinguishing between '**condition of a contract**' and **consideration for the contract**, the LB also held that the foreclosure charges are recovered as **compensation** for loss in interest income or **expectations interest** arising out of disruption of service by the lender and do not represent **consideration**. This results in a unilateral act of the borrower in repudiating the contract and consequently breach of one of the essential terms of the agreement.
- The LB further held that the phrase **in relation to lending** cannot be so stretched to bring within its ambit even activities which terminate the activity. The foreclosure charges received are **damages** that the banks are entitled to when the contract is breached and are consequently, not liable to Service Tax.

ELP Comments:

The ruling has elaborately stated the principle that merely because the clause relating to damage is featuring in a contract, it cannot be concluded that the party has been given an option to violate the contract. Thus, it is crucial to note that the event of foreclosure cannot be treated as an optional performance of a service. The principle enunciated vide the judgment may also be useful for the subsequent period covering declared services in the nature of liquidated damages.

M/s. Microtrack Business Systems Pvt Ltd Vs. Comm. of Customs [2020-VIL-321-CESTAT-MUM-CU]

Section 4A of the CE Act cannot be made applicable for goods sold in retail / unpackaged condition

FACTS OF THE CASE

- The assessee was engaged in the business of sugar confectionary of various types such as soft chocolates, candies and other confectionary items. The assessee had imported cartons of 3 Kg to 6 Kg. of loose candies and sugar confectionary items, which were sent to its own franchise viz. M/s Toros Confectionary (India) Pvt Ltd, where they were put in the bins and sold in loose form to the ultimate consumers.
- The authorities alleged that impugned goods were imported in packaged form for retail sale and attracted the provisions of Section 4A of the Central Excise Act, 1944 (**CE Act**) read with the provisions of Standards of Weights and Measures Act, 1976 (**SWM Act**) and the Standards of Weights and Measures (Packaged Commodities) Rules, 1977 (**SWM Rules**). Basis this, CVD was calculated by the authorities in terms of proviso to Section 3(2) of the Customs Tariff Act, 1975 and differential CVD was demanded along with interest and penalty. Being aggrieved by this demand, the appeal was filed by the assessee before the CESTAT.

JUDGEMENT

- The Hon'ble CESTAT observed that valuation provisions with reference to retail sale price are contained in Section 4A of the CE Act. The said statutory provisions mandate that in case of sale of the excisable goods in packaged form, where the packages are required to be mentioned with the price thereof under the SWM Act, SWM Rules or any other law, the valuation would be determined on the basis of the retail sale price of such goods declared in the packages. On a careful reading of the statutory provisions, it would be manifestly clear that in order to fall under the provisions of Section 4A of the CE Act, the sale of excisable goods should be in a packaged form and there should be a requirement in the SWM Act and the rules framed there under for displaying the MRP on such retail package.
- In the present case, the candies/chocolates of different variety are displayed by the retail outlets in the tubs and bins, wherefrom according to the choice, the buyer picks up the chocolates in loose form and mixed up with other kinds of chocolates. Thereafter, the chocolates picked up by the buyer are sold without any packages, on the basis of weight only. Since the goods in the present case were not sold in packaged form to the ultimate buyers, there was no statutory requirement on the part of the assessee to declare the retail sale price of loose chocolates for determination of the value as per Section 4A of the CE Act.
- The CESTAT also referred the judgement by the Hon'ble Apex Court in the case of *Jayanti Food Processing Pvt. Ltd. Vs CCEX, Rajasthan [2007 (215) ELT 327 (SC)],* wherein it has been held that Section 4A of the CE Act would not be applicable in cases where the goods are sold in retail, in loose or unpackaged condition.
- In view of the aforesaid discussions, the appeal was allowed in favor of the assessee by setting aside the demand.

In re: M/s. Stone India [2020-VIL-25-GSTAA]

Refund claim rejected due to incorrect details shown in the GSTR-3B Return were not rectified in subsequent returns

FACTS OF THE CASE

- The Appellant had filed application for refund claim of INR 22,27,497/- for the period of October to December-2017 under Section 54 of the CGST Act on account of unutilized ITC on export of Goods and Services without payment of Integrated tax. The refund claim was rejected by the adjudicating authority on the ground that **As per GSTR-3B Outward Zero-rated supplies are Zero**.
- Being aggrieved by the order of the adjudicating authority, an appeal was preferred before the Appellate Authority on the ground that that dispute was only arising due to the fact that the Appellant had shown export sales in column 3.1 (c) **Other Outward Supplies (Nil rated, exempted)** instead of column 3.1 (b) **Outward taxable supplies (Zero Rated)**. The details in GSTR-1 had been filed correctly.

JUDGMENT

- The Appellate Authority relied upon the Circular No. 7/7/2017-GST, dated September 1, 2017 , which has clarified that error committed while filing FORM GSTR-3B may be rectified while filing FORM GSTR-1 and FORM GSTR-2 of the same month. In the present case, the Appellant has committed an error in GSTR 3B by not furnishing the export value/sale figure in proper column and did not file any corrected/modified GSTR-1 return of subsequent month for which the Appellant was required to do.
- If the Appellant has committed an error while submitting FORM GSTR 3B, the steps should have been taken to rectify the same. The corresponding column in the table thereto provides the step to be followed by the Appellant to rectify this error.
- In view thereof and the legal provisions, the Appellate Authority held that since the Appellant was required to rectify such omission or incorrect particulars in the subsequent return to be furnished for the month or quarter during which such omission has occurred and the same was not performed by the Appellant, the refund of the said amount is inadmissible.

RECENT ADVANCE RULINGS

In re: M/s Jabalpur Hotels Private Limited [2020-VIL-220-AAR]

ITC on purchase and installation of lift in the hotel building is not available

FACTS OF THE CASE

- The Applicant Company was established to construct a hotel in Jabalpur. It started construction of the hotel and completed a major part of its work. The hotel was supposed to be multi-storied having approx. 100 rooms and other facilities such as gym, spa, swimming pool, restaurant, banquet hall, marriage lawn and garden etc. As the hotel was to multi storied, in order to provide facility to guests, a lift would be required in the hotel premises. The room tariff of some of the rooms is proposed to be more than INR 7500/- and therefore the restaurant would be paying GST @18% and availing ITC on goods and services used in course or for furtherance of business.
- As per the Applicant, the lift constitutes a **Plant and Machinery**, the cost of which is proposed to be capitalized in the books of the Company and depreciation as per the provisions of Income Tax Act would be charged on the cost of lift less eligible credit of GST. Hence no depreciation would be claimed on the GST portion, ITC of which is eligible in accordance with the provisions of section 16 of CGST Act.
- The issue for consideration before the authority was whether ITC on Purchase of Lift used in the course or for the furtherance of business would be available to the Applicant.

JUDGMENT

- The AAR relied upon Section 17(5) of the CGST Act and observed that the intent of the legislature is to restrict ITC on any goods or services which are used or intended to be used in construction of an immovable property, even when such goods or services or both are used in the course of furtherance of business. Hence, it was observed that hotel building being an immovable property, any inputs or input services going into its construction shall not be available for availment of ITC.
- The authority further emphasized that the lift becomes part of the building and is not a separate thing per se. A lift does not have an identity when removed from the building. Therefore, the lift cannot be said to be separate from a building. Also, a lift is not an item that is purchased and sold. It is a customized mechanism for transportation, designed to suit a specific building. Upon piece by piece installation, it becomes an integral part of the building.
- As per the explanation relating to plant and machinery, beneath sub-section (6) of Section 17, while providing the meaning of the term plant and machinery, it has been clearly stated that Buildings and Civil Structures shall not be covered under the term **Plant**.
- Consequently, the authority held that in the facts of the present case, the lift has become part of the building and thus falls under the exclusion from plant and machinery. Hence, ITC of tax paid on Lifts procured and installed in hotel building shall not be available to the applicant in terms of Section 17(5)(d) of the CGST Act.

ELP Comments:

The principle laid down vide this ruling is in consonance with the position adopted by the ruling of the Authority for Advance Ruling, Karnataka in the matter of M/s. Tarun Realtors Pvt. Ltd., Bengaluru [2019-VIL-383-AAR], wherein in a similar matter, the ITC on lifts was denied as it is blocked under Section 17(5) of the CGST Act. The said order was upheld by the Appellate Authority for Advance Ruling, Karnataka [2020-VIL-17-AAAR].

In re: M/s. Macro Media Digital Imaging Private Limited

Supply of printed advertisement material using design provided by recipient is supply of goods

FACTS OF THE CASE

- The applicant is engaged in the business of printing of trade advertising material. The applicant procures the required raw materials such as poly vinyl, flex, paper, cloth printing inks etc. itself. The activity of printing is based on specification provided by the clients in terms of design, size, material specification etc. which is provided by the customers via pen-drive or CD etc. The applicant states that this activity of printing on poly vinyl material with trade monograms of the customers constitutes 'manufacture' in terms of CGST Act, and such products are supplied by the applicant to its customers premises.
- The designing and graphics of the advertisements are not done by the applicant. The applicant is provided with the designed trade advertisements by the customers. The applicant merely sources the desired PVC material (blank) from the independent supplier and undertakes the activity of printing on the material. While raising the invoice on the customer, the applicant specifies charges on two accounts i.e. **printing** and **supply**, wherein the former represents the service activity of printing carried out by the applicant and the latter represents the physical supply of printed trade advertisements on the PVC material.
- The issue for consideration before the authority was with respect to-
  - Whether the transaction of printing of content provided by the customer, on poly vinyl chloride banners and supply of such printed trade advertisement material is supply of goods?
  - What is the classification of such trade advertisement material if the transaction is a supply of goods?

JUDGMENT

- The AAR observed that the applicant in the instant case takes up the supply of trade advertising material by procuring the required raw materials such as poly vinyl, flex, paper, cloth printing inks etc., all by themselves based on specification provided by the client in terms of design, size and material. In-fact, the applicant transfers the title in the goods i.e., printed material on flex to the customer.
- The authority emphasized on Section 7 of CGST Act read with Schedule - II Sl.No. 1(a) thereof and observed that in the facts of the present case, the applicant is **transferring the title in goods** to his customers in the form of trade advertising material and it constitutes supply of **goods**. Reliance was also placed by the authority on the clarification provided vide the Circular No.11/11/2017-GST dated October 20, 2017. Vide the circular it has been clarified that in case of supply of printed envelops, wall paper etc. printed with design, logo etc. which is supplied by the recipient of goods but made using physical inputs including paper belonging to the printer- the predominant supply is that of goods and the supply of printing of the content [supplied by the recipient of supply] is ancillary to the principal supply of goods, therefore such supplies would constitute supply of goods.
- In view of the above, the authority held that the supply of printed trade advertisement material is classified under Goods only as per Section 7 of CGST Act read with Schedule -II SI.No.1 (a) of CGST Act. Such supply is classifiable vide Notification No. 1/2017 - Central Tax (Rate) dated June 28, 2017 under Sl.No.132 Chapter /Heading/ Sub-Heading/ Tariff item 4911 and attracts tax rate of 12%.

In re: M/s Sundharams Private Ltd. [2020-VIL-224-AAR]

ITC on purchase of Paver Blocks laid down on the land is not eligible

FACTS OF THE CASE

- The Applicant is engaged in providing warehousing, storage and support services to the Original Equipment Manufacturers (**OEMs**) of automobile industry and transporting cars/tractors using its fleet of car carrier vehicles. During the course of the provision of such services, the cars are stored in the Applicant's stock yard.
- The Applicant purchased tax paid Paver Blocks which were laid in the parking area of the land. The purpose of laying such blocks was to ensure efficient and safe parking of automobiles of OEMs during the contract period. If the cars were placed on the ordinary surface, it would be subject to quicker wear & tear due to accumulation of water, dust etc. in the wheels of such automobiles.
- The Applicant sought an advance ruling on - *whether applicant is entitled to avail Input tax credit in respect of taxes paid on its purchase of Paver Blocks laid on the land.*
- As per the Applicant, such Paver Blocks are not to be permanently embedded on earth and are capable of being removed as such without causing damage to them for reuse elsewhere and therefore, the same would not be covered within the restriction contained in Section 17(5)(d) of the CGST Act. In view of this, purchase of such Paver Blocks is eligible for input tax credit.

JUDGMENT

- The AAR observed that the Paver Blocks brought to the site would not serve any purpose unless the same are placed on land on their own weight, fitted by way of interlocking, and made working. The site would be an immovable property such as vacant land. The impugned activity does not involve supply of Paver Blocks as a chattel. The removal would always involve a total dismantling which cannot be without loss or damage. Such systems have a longevity of existence in terms of the aspect that these are not set up and removed frequently. Therefore, the activity in the present case could be said to be one as resulting in an immovable property.
- The AAR referred the judgements in case of *T.T.G. Industries Ltd. v. CCE [(2004) 4 SCC, 2004-VIL-55-SC-CE]* and *Municipal Corpn. of Greater Bombay v. Indian Oil Corpn. Ltd. [1990-VIL-10-SC]* wherein the test was laid down by the Supreme Court that if the chattel is movable to another place as such for use, it is movable but if it has to be dismantled and reassembled or re-erected at another place for such use, such chattel would be immovable.
- In the preset case, it was observed by the AAR that it requires substantial work of interlocking of the Paver Blocks using support from the boundary walls of the said land. Once this is done, it obtains state of permanency. It is not the case that Paver Blocks can be easily removed from the existing place and put into place at some other location. It is also not the case that there is an intention to put it into some other place. Further, the goods cannot be re-erected as in the previous place since the requirement of each place is different.
- In view of the above discussions, the AAR ruled that the Paver Blocks, laid on land, would qualify as immovable property and therefore, the Applicant cannot avail Input tax credit in terms of provisions of Section 17(5)(d) of the CGST Act.

In re: M/s Atriwal Amusement Park [2020-VIL-218-AAR]

ITC in respect of Water Slides & its support structure is available whereas ITC in respect of construction of Swimming Pool is not available

FACTS OF THE CASE

- The Applicant is engaged in construction of Water Parks, for which various components and services are used.
- In respect of the proposed activity of construction of Water Park, the Applicant raised the question of eligibility of Input tax credit in respect of following items before the AAR:
  - Purchase of Water Slides;
  - Purchase of goods and services used in construction of the support structure for Water Slides;
  - Purchase of goods and services used for area development and preparation of land on which water slides are erected;
  - Purchase of goods and services used for construction of Swimming Pool / Wave Pool.
- The Applicant submitted that Water Slides are covered within the definition of Plant & Machinery and; purchase of goods & services for construction of the support structure and for area development would be treated as used for construction of foundation and structural support for Plant & Machinery. Further, Swimming pool is an integral part of Water Slides and should be considered as single unit. In view of this, the aforesaid items would qualify as **Plant & Machinery** and the same is excluded from the list of blocked credits as per Section 17(5)(c) & (d) of the CGST Act and therefore, eligible for Input tax credit.

JUDGMENT

- The AAR referred to the various dictionary meanings and various judicial precedents, and observed that **Plant** would include any article or object fixed or movable, live or dead, used by businessman for carrying on his business and it is not necessarily confined to an apparatus which is used for mechanical operations or processes or is employed in mechanical or industrial business.
- Further, in the Explanation to Section 17 of the CGST Act, while providing the meaning of the term plant and machinery, it has been clearly stated that Buildings and Civil Structures shall not be covered under the term 'plant'. However, while so clarifying, it has been accepted and understood that plant and machinery, many a times, requires support structure and/or foundation for installation and cannot work otherwise. Thus, the civil structures and foundation as supporting structure for fastening of plant and machinery to earth has been included as part of plant and machinery.
- Basis the above, the AAR ruled that:
  - The Water Slides would fall within the term 'Plant & Machinery' and Input tax credit in respect of the same shall be eligible;
  - The support structure (to which slides are fastened) would also fall within the term **Plant & Machinery** and therefore, goods and services used for construction of support structure are eligible for Input tax credit;
  - Regarding the Input tax credit of goods and services used for area development and preparation of land on which water slides are placed, area development and expenditure on preparation of land like site formation services are part of the cost of the land and thus, are interminably hound with land. These expenses are liable to be capitalized under the head **Land**. Therefore, on account of the specific exclusion of Land from the

meaning of **Plant and Machinery**, input tax credit related to land development, subject to it capitalization as per accounting principles, shall not be available;

- The Swimming Pools/Wave Pools are not support structures or foundation for a plant but are independent civil structures and the same are excluded from the definition of **Plant & Machinery**. Therefore, Input tax credit in respect of construction of Swimming Pool shall not be available.

In re: M/s DKV Enterprises Pvt Ltd [2020-VIL-192-AAR]

Facilitating the supply of goods in India would qualify as intermediary service

FACTS OF THE CASE

- The Applicant is an authorized non-exclusive consultant for M/s. Grace Products (Singapore) Pte. Limited, located in Singapore, (**Grace**) for the sale of Fluid Cracking Catalysts and Additives to the HPCL Visakha Refinery, the CPCL Chennai Refinery and the IOCL Barauni Refinery.
- In the capacity of consultant, the Applicant promotes the sale of products and solicits orders for such products from the aforesaid customers in accordance with the marketing plans and objectives of Grace. The Applicant has no power to bind Grace and the Applicant negotiates the orders of the products to be transmitted to Grace, only at the prices and in accordance with the terms, conditions, policies and instructions specified by Grace. For this service, the Applicant earns the commission computed on the basis of sale of the products to aforesaid customers.
- The Appellant sought an advance ruling in respect of question of - *whether the present set of services would be treated as Export of services.*
- As per the Applicant, only marketing consultancy service is being provided by them in India on behalf of foreign company and their billing is directly done to foreign company in foreign currency and paid by inward remittance. Moreover, it was argued that they are neither giving any service to Indian client nor having any agreement or payment to them.

JUDGMENT

- The AAR referred to the definition of **export of services** as per Section 2(6) and definition of **intermediary** as per Section 2(13) of the IGST Act in the context of present set of facts. Basis this, it was observed by the AAR that the Applicant, by providing marketing and consultancy services, facilitates the supply of goods i.e. fluid cracking catalysts and its additives from Grace to the customers in India. Besides, the condition that transaction not being done on its own account, makes the Applicant rightly fit into the definition of intermediary in the instant case.
- Basis this and as per the place of supply provisions for intermediary (in terms of Section 13(8) of the IGST Act), it was concluded that the place of supply would be location of supplier. Therefore, the supply of the present set of services would be treated as inter-State supplies and would be liable to IGST.
- AAR observed that the service provided by the Expat employees to the project office fall under the category of "Services by an employee to the employer in the course of or in relation to his employment". Accordingly, no GST is leviable on the salary paid to the expat employees and reflected in the books of account of the project office.

NOTIFICATIONS/CIRCULARS

S. No.	Notification	Particulars
1.	**Central Tax Notification No. 57/ 2020 – Central Tax dated June 30, 2020**	▪ The late fees for delay in furnishing returns in FORM GSTR-3B has been reduced or waived off as under, subject to the condition that the payment and filing of returns is undertaken by September 30, 2020: – No tax liability – **NIL** late fee; – Any tax liability – Upper cap of INR 500 per return, which was earlier INR 10,000. ▪ It is important to note that if the return is furnished after September 30, 2020 then, the late fees would be payable as per the regular provisions. ▪ This amendment has been made for the following categories of taxpayers: – Taxpayers having aggregate turnover of up to INR 5 crores, who furnish the return in FORM GSTR-3B for the tax periods from February, 2020 to July, 2020. – Taxpayers having an aggregate turnover of more than INR 5 Crores, who furnish the return in FORM GSTR-3B for the tax periods from May, 2020 to July, 2020. ▪ The amendment is deemed to be effective from June 25, 2020. **Note:** This notification amends the principal Notification No. 76/2018- Central Tax dated December 31, 2018, as was last amended by Notification No. 52/2020-Central Tax dated June 24, 2020.
2.	**Trade Notice No. 28/2020-21 dated July 13, 2020**	▪ Upon Merger of Union Territories of Dadra and Nagar Haveli and Daman and Diu w.e.f. 26.01.2020, there arises a need to declare single State Code for persons registered under Goods and Service Tax Laws in the Union Territories. ▪ It was decided by the GST Council to give **26 as State Code to the merged Union Territory of Dadra and Nagar Haveli and Daman and Diu w.e.f. 01.08.2020**. Therefore, all the registered persons in the erstwhile Union Territory of Daman and Diu having GSTIN starting with State Code 25 will be switched over to New State Code of 26 w.e.f. 01.08.2020. Due to the change in State Code, all existing active taxpayers having **GSTIN with UT code 25** will be given **new GSTIN with UT Code 26 along with log in Credentials** (Login ID & Password) at their email of primary Authorized Signatory**.**
3.	**Notification No. 20/2020- Customs**	Central Government imposed provisional anti-dumping duty on imports of **Aniline or Aniline oil,** falling under tariff item 2921 41 10 of the First Schedule

S. No.	Notification	Particulars
	(ADD) dated July 29, 2020	to the Customs Tariff Act, 1975 (51 of 1975), originating in or exported from China PR for a period of six months.
4.	**Notification No. 21/2020- Customs (ADD) dated July 29, 2020**	▪ Central Government imposed definitive Anti-Dumping Duty on import of **Digital Offset Printing Plates,** falling under sub-headings 8442 50 and tariff items 3701 30 00, 3704 00 90, 3705 00 00, 7606 11 90, 7606 91 90, 7606 92 90 of the First Schedule to the Customs Tariff Act, 1975 (51 of 1975), originating in, or exported from People's Republic of China, Japan, Korea RP, Taiwan and Vietnam. The anti-dumping duty imposed under this notification shall be effective for a period of five years (unless revoked, superseded or amended earlier) from the date of imposition of the provisional anti-dumping duty, (i.e January 30th, 2020) and shall be payable in Indian currency.
5.	**Notification No. 02/2020- Customs (SG) dated July 29, 2020**	▪ Ministry of Finance (Department of Revenue) sought to continue the levy of Safeguard duty on imports of **Solar Cells whether or not assembled in modules or panels**, falling under tariff items 8541 40 11 or 8541 40 12 of the First Schedule to the Customs Tariff Act, 1975 (51 of 1975)**,** for a period of one year. ▪ The safeguard duty has been imposed at following rate, namely: – fourteen point nine per cent. ad valorem minus anti-dumping duty payable, if any, when imported during the period from July 30th, 2020 to January 29th, 2021 (both days inclusive); and – fourteen point five per cent. ad valorem minus anti-dumping duty payable, if any, when imported during the period from January 30th, 2021 to July 29th, 2021 (both days inclusive).
6.	**Notification No. 21/2015-2020 dated July 28, 2020**	▪ DGFT further amended the export policy of Personal Protection Equipment/Masks. It **Restricts** the export of 2/3 Ply Surgical masks, Medical Goggles which were earlier **Prohibited**, whereas made export of Face Shields **Free**. ▪ A monthly export quota of 4 crore units per month and 20 lakhs units per month of 2/3 Ply Surgical masks and Medical Goggles respectively has been fixed for issuance of export licenses to the eligible applicants as per the criteria to be separately issued in a Trade Notice.
7.	**Instruction No. 15/2020- Customs dated July 24, 2020**	▪ In continuation to the Notification No. TEC/01/2017-TC dated 04.07.2019, it has been notified that testing and certification for the following Telecommunications equipment under Phase-II of Mandatory Testing and Certification of Telecommunications Equipment (**MTCTE**) regime as provisioned in Indian Telegraph (Amendment) Rules 2017, shall be

S. No.	Notification	Particulars
		mandatory w.e.f. **October 1st, 2020**: – Transmission Terminal Equipment (SDH Equipment, Multiplexing Equipment) – PON family of Broadband Equipment (PON ONT, PON ONU and PON OLT) – Feedback Device ▪ Applications for testing and certification of telecommunications equipment under Phase-II of MTCTE shall be acceptable on MTCTE portal w.e.f. **June 25th, 2020.** ▪ However, for sale, import or use of the aforesaid telecom equipment in India, such certification shall become mandatory w.e.f**. October 1st 2020.** ▪ It has been clarified that the schedule for mandatory testing and certification of remaining equipment shall be notified subsequently.
8.	**Notification No. 20/2015-2020 dated July 21, 2020**	▪ DGFT notified amendment to the export policy of Personal Protection Equipment/Masks (**PPE**) as (part of kits or as individual items) as **Prohibited**, thereby modifying Notification no. 14 dated 22.06.2020. ▪ It was clarified that only surgical drapes, Isolation aprons, surgical wraps and X-Ray gowns are removed from prohibition under the medical coveralls of all classes and categories. It is pertinent to note that rest all other types of medical coveralls of all classes and categories shall remain prohibited.
9.	**Trade Notice No. 19/2020-2021 dated July 21, 2020**	▪ On receipt of several representations from the exporters seeking permission to send samples outside India for testing purpose/potential buyers etc., DGFT has decided to allow exporters to apply for export license to send samples of PPE medical coveralls for COVID-19. ▪ The procedure for issuance of export license for sending samples of PPE Medical Coveralls for COVID- 19 as stated in the Trade Notice is outlined below for reference: I. Export of quantity up to 50 units of 'PPE medical coveralls for Covid-19' samples per IEC per country will be allowed. II. Exporters may anytime apply online through DGFT's ECOM system for Export authorizations (Non-SCOMET Restricted items) – (Refer Trade Notice No. 50 dated 18.03.2019). III. The item description in the application must specify "PPE medical coveralls for COVID-19 Samples". IV. Validity of the export license will be for 3 months only. V. The following documents may be submitted at the time of application: a) A Copy of IEC of the firm. b) Documentary proof of manufacturing of textile/medical textiles

S. No.	Notification	Particulars
		products or medical devices by the firm. c) All the documents must be duly self-attested by the authorized person of the firm. ▪ Incomplete applications will not be considered for export license. Any application received through email will not be considered.
10.	**Public Notice No. 14/2015-2020 dated July 21, 2020**	The quantity of 10000 MT sugar (raw and/or white sugar) to be exported to EU under CXL Quota from 01.10.2020 to 30.09.2021 has been notified.
11.	**Instruction No. 14/2020-Customs dated July 21, 2020**	▪ Attention is invited to the Budget 2020-21 Speech of the Hon'ble Finance Minister wherein it was proposed to crowd source suggestions for review of Customs duty exemption notifications. It was also announced that suggestions would be invited in respect of the Customs laws and procedures for aligning them with the needs of changing times and ease of doing business. ▪ Accordingly, An initiative has been taken to institute a facility at MyGov Innovate Portal (https://innovate.mygov.in/suggestions-for-review-of-existing-customs/) for all the stakeholders/public at large to provide their suggestions online. The last date to submit the suggestions is **August 21st, 2020**.
12.	**Trade Notice No. 18/2020-2021 dated July 20, 2020**	▪ The application procedure and criteria for export of PPE Medical Coveralls for COVID-19 has been revised and exporters are invited to file fresh online applications for export of PPE medical Coveralls for COVID-19 as outlined below: I. Export of only 50 Lakh units of 'PPE medical coveralls for Covid-19' will be allowed every month. II. Exporters may apply online through DGFT's ECOM system for Export authorizations (Non-SCOMLT Restricted items) (Refer Trade Notice No. 50 dated 18.03.2019). III. There is no need to send any hard copy of the application via mail or post. IV. For the month of July, 2020, online applications for export of **PPE medical coveralls for Covid-19** as per revised criteria filed from 22nd to 24th July will be considered. V. For August onwards, applications for export of **PPE medical coveralls for Covid-19** filed from 1st to 3rd day of each month will be considered for the quota of that month. VI. All the applications will be examined as per the Para 2.72 of

S. No.	Notification	Particulars
		Handbook of procedures. VII. Validity of the export license will be for 3 months only. ▪ An eligibility criterion that shall be applicable for issuance of Export licenses has also been prescribed.
13.	**Public Notice 13/ (2015-2020) dated July 15, 2020**	▪ In exercise of powers conferred under Paragraph 1.03 of the Foreign Trade Policy, 2015-2020 read with Paragraph 2.04 of the Foreign Trade Policy, 2015-2020, the DGFT has notified the procedure to implement the restriction imposed on **import of Power Tillers (HS code 8432 8020 and 8432 9090)** as per Notification No. 19/2015-2020 dated 15.07.2020 ▪ It has been further stated that the conditions and modalities for issuance of authorizations for import as follows: a. The cumulative value of authorization issued to any firm/all firms in a year would not be exceeding 10% of the value of power tillers imported during the past year i.e. 2019-20 by that firm/firms. The cap of 10% would also be applicable for components of power tillers. b. The applicant should have been in the business for at least three years and should have sold a minimum of one hundred power tillers in the past three years. c. The applicant should have the valid Type (ICT) /batch test report from FMTTI as well as emission test approval and CMVR of the power tiller sought to be imported. d. The applicant should have satisfactory and proven infrastructure for training, post sales service and spare parts. e. Only manufacturers are eligible for applying for an import authorization for import of Power Tiller or its components. ▪ The Power Tiller which will be imported should meet all the specifications as notified from time to time under IS: 13539 or higher than these specifications.

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