

Transfer Pricing

LD/68 /179, [ITAT Bangalore: ITA 1915/Bang/2017], Toyota Kirloskar Auto Parts Private Limited Vs. Dy. Commissioner of Income Tax, LTU, 13/03/2020

Revenue applied Profit split method to benchmark royalty paid by assessee for using AE's technology, as against Transactional Net Margin method (TNMM) used by assessee. TPO has observed that economic life of the technology had an impact on the most appropriate method and that the concerned technology was to be used by start-ups, and since the assessee was using the technology for a fairly long period of more than 5 years, it would not be proper to adopt the TNMM. ITAT held that passage of time cannot be the basis to discard TNMM. ITAT held that conditions for use of Profit Split method were not satisfied and also affirmed assessee's reliance on by OECD's Revised Guidance on application of transactional Profit split method.

LD/68/180, [ITAT Mumbai: ITA 7371/Mum/2017], Essar Shipping Limited Vs. Asst. Commissioner of Income Tax, Mumbai, 06/03/2020

Assessee had provided negative lien to bank which had advanced loan to assessee's ultimate parent entity. As a part of this arrangement, assessee had agreed not to sell 49% of its stake in its wholly owned subsidiary without prior consent from the bank during pendency of the loan. ITAT stated that this arrangement is not equal to guarantee given to Bank and directed AO to make TP-adjustment by applying 0.25% to the said transaction instead of 0.5%. Separately, TP-adjustment in respect of purchase of 2 qualifying ships under Bare Boat Charter cum Demise (BBCD) agreement from Essar Shipping and Logistics Limited, Cyprus, was deleted by ITAT by relying on coordinate bench which had held that TP-regulations will not be applicable to income covered under tonnage tax scheme under Chapter XII-G.



GST

LD/68/181, [Bharti Airtel Ltd Vs. UOI 2020-TIOL-901-HC-DEL-GST], 05/05/2020

The High Court read down para 4 of Circular No. 26/26/2017-GST dated 29.12.2017 to the extent that it restricts the rectification of Form GSTR-3B in subsequent tax periods and not in the period in which the error has occurred. Having regard to the scheme of the GST Act, there is nothing that prohibits the assessee from rectifying the returns, and the petitioner is entitled to rectify the same in the same month to which the error relates and not necessarily only in the subsequent period returns.

LD/68/182, [2020 - TIOL - 924 - HC - RAJ - GST], M/s Shree Motors Vs. Union of India, 18/03/2020

Once the provisions of Rule 117 of the CGST Rules, which prescribe limitation within which the claim should be made has been upheld, the plea raised pertaining to the denial of vested right on account of petitioners failing to submit/file Form GST Tran-1 within the prescribed time cannot be entertained. The High Court also denied relief to the petitioner on the ground that no evidence is furnished to suggest that the failure to furnish TRAN-1 forms within the prescribed period was due to the technical glitches.

LD/68/183, [2020-TIOL-640-HC- Chattisgarh-GST], K P Sugandh Ltd. Vs. State of Chhattisgarh, 16/03/2020

Undervaluation of the goods in the invoice cannot be a ground for the detention of the goods and vehicle for a proceeding to be drawn under Section 129 of the Central Goods and Service Tax Act, 2017 read with Rule 138 of the Central Goods and Service Tax Rules, 2017.

SERVICE TAX

LD/68/184, [CESTAT Delhi: STA 52970 of 2015], Nitco Logistics Private Limited Vs. Commissioner of Service Tax, 04/03/2020

Assessee, claimed exemption under Notification dated December 3, 2004 and submitted a CA certificate in support of reconciliation between receipt and accrual of payments & containing details of exempted bookings. CA certificate was not considered by the Commissioner and also no information was sought regarding the exemption claim from the assessee. Matter remanded for de-novo adjudication by CESTAT. Referring to CBEC Circular dated 11/06/2007, CESTAT observed that assessee was not bound to provide vehicle numbers for small consignment.

LD/68/185, [2020-TIOL-811-CESTAT-BANG] United Telecoms Ltd. Vs. Commissioner of Service Tax, 26/02/2020

Setting up of computerised facilities in their Road Transport office for issue of Smart Car Driving Licence and also paper learning licences is a part of outsourced activities for carrying out statutory function and hence cannot be regarded as business auxiliary services liable to service tax.

LD/68/186, [CESTAT Mumbai: STA 87214 of 2018], Indian Pharmaceutical Association Vs. Commissioner of Central GST and Central Excise 11/11/2019

Service tax demand was raised on assessee on receipts from members under 'club or association service' and 'convention service'. CESTAT observed that assessee does not offer 'convention services' but gets events organised by professionals and, by collecting fees which are transmitted to such organisers, enables its members to participate in them. Assessee did not retain any part of fees charged by Convention organizers and was only an agent for recovery of the costs charged by convention organisers. CESTAT held that the

activity is beyond the purview of taxability under section 65 (105) (zc) of Finance Act, 1994

EXCISE

LD/68/187, [Supreme Court: Civil Appeal Nos. 302/303 Of 2009], Commissioner of Central Excise Vs. Uni Products India Limited, 01/05/ 2020

CESTAT classified car matting/carpets under Chapter 57 of First Schedule to Central Excise Tariff Act under the heading of 'Carpets and Other textile Floor Coverings'. Supreme Court stated that once the subject goods are found to come within the ambit of chapter heading 570390.90, for the sole reason that they are exclusively made for cars and not for "home use" (in broad terms), those goods cannot be transplanted to the residual entry against the heading 8708. HSN Explanatory Notes specifically exclude "tufted textile carpets, identifiable for use in motor cars" from 87.08 and place them under heading 57.03. The common parlance test, marketability test, popular meaning test, are to be used for interpretation only if a particular tariff entry is capable of being classified in more than one heads.

LD/68/188, [Bombay High Court: Central Excise Appeal 196 of 2019]

The Principal Commissioner of Central GST Vs. Patodia Filaments Private Limited, 25/02/2020

Assessee is not required to reverse entire credit balance lying on the date of opting Exemption Notification No.30/2004-CE dated July 09, 2004. Rule 11(3)(i) of CENVAT Credit Rules, 2004 (CCR), does not envisage lapsing of CENVAT for the assessee. Stipulation of lapsing is included in Clause (ii) and not in Clause (i). In Rule 11(3) (i) it is the option given to the manufacturer or producer for obtaining exemption whereas in category (ii) there is no such option. Two categories being distinct, the placement of stipulation cannot be considered as a mere draftsman error, as per High Court.

Disciplinary Case



Issuance of capital expenditure certificate and thereafter certification of Balance sheet by the same Respondent with different figures of capital expenditure incurred -- Figures certified in certificate do not match with the figures appearing in Schedule V of the Balance sheet -- Plea of Respondent that Balance sheet and certificate were signed on different dates -- Respondent is guilty of Professional misconduct falling within the meaning of Clause (7) & (8) of Part I of Second Schedule to the Chartered Accountants Act, 1949.

Held:

The Disciplinary Committee noted that at the time of issuing capital expenditure certificate,

the Company had issued two cheques of ₹ 25 crores and ₹ 7 Crores as Advances for purchase of machineries. The Respondent had issued capital expenditure certificate relying upon entries as appearing in the books of accounts of the Company, and wrongly included the amount of advance as expenditure incurred on Plant & Machinery without verifying details of encashment of cheques. Committee further noted that Respondent was required to show the advance separately in his certificate so as to enable its user to take note of the same for a logical decision but he failed to do so. Further, being aware of cancellation of cheques, the Respondent should have included a reference of the same in his audit report. In light of the above the Committee is of the view that the Respondent did not exercise due diligence while certifying certificate in respect of capital expenditure by including a subjective disclosure and did not take care to adequately qualify the same in the audit report. Hence in the opinion of Committee, the Respondent was guilty of professional misconduct falling within the meaning of Clauses (7) & (8) of Part I of Second Schedule to the Chartered Accountants Act, 1949. (Indian Bank, Pune Vs. Jayant Vasantrao Kolapkar [PR-133/2010-DD/148/2010/DC/275/2013])

Classifieds

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Circulars/Notifications

Given below are summarised important Circulars and Notifications issued by the CBDT, CBIC-GST and issued since the publication of the last issue of the journal, for information and use of members. Readers are requested to use the citation/website or weblink to access the full text of desired circular/notification. Suggestions on this column can be submitted at eboard@icai.in



I. NOTIFICATIONS

1. Protocol amending the convention between India and Austria for the avoidance of double taxation and the prevention of fiscal evasion w.r.t. taxes on income – Notification No. 22/2020, dated 24-04-2020

The Central Government has notified that all the provisions of the amending protocol as annexed to this notification shall be given effect to in the Union of India w.e.f. 01.05.2020.

2. Substitution of Rule 44G and Form No. 34F vide the Income-tax (8th Amendment) Rules, 2020 - Amendment of Mutual Agreement Procedure (MAP) procedure - Notification No. 23/2020, dated 06-05-2020

Vide this notification, Rule 44G (Application for giving effect to the terms of any agreement u/s 295(2)(h)) and Form No. 34F (Form of application for an assessee, resident in India, seeking to invoke mutual agreement procedure provided for in agreements with other countries or specified territories) have been substituted w.e.f. 06.05.2020. Further, Rule 44H relating to action by the Competent Authority of India and procedure for giving effect to the decision under the agreement has been omitted.

The detailed Notification can be downloaded from the link below:

https://incometaxindia.gov.in/communications/notification/notification23_2020.pdf

II. CIRCULARS

1. Clarifications on provisions of the Direct Tax Vivad se Vishwas Act, 2020 - Circular No. 09/2020, dated 22-04-2020

55 questions contained in Circular No. 7/2020 dated 04.03.2020 are reissued under this circular with modifications specified therein.

2. Order u/s 119 regarding reporting requirement under clause 30C and clause 44 of the Form 3CD - Circular No. 10/2020, dated 24-04-2020

CBDT has decided that the reporting under clause 30C and clause 44 of the Tax Audit Report shall be kept in abeyance till 31.03.2021.

3. Clarification in respect of residency under section 6 of the Income-tax Act, 1961 - Circular No. 11/2020, dated 08-05-2020

The CBDT has provided relief in certain specified situations for the purpose of determining the residential status under section 6 of the Act during the previous year 2019-20 in respect of an individual who has come to India on a visit before 22.03.2020.

III. PRESS RELEASES/INSTRUCTIONS/ OFFICE MEMORANDUM/ORDER

1. New procedure for registration, approval, etc. of certain entities deferred to 01.10.2020 – Press Release, dated 09-05-2020

In view of the unprecedented humanitarian and economic crisis, the CBDT has decided that the implementation of new procedure for approval/registration/notification of certain entities shall be deferred to 01.10.2020.

2. Reduction in rate of Tax Deduction at Source (TDS) & Tax Collection at Source (TCS) – Press Release, dated 13-05-2020

In order to provide more funds at the disposal of the taxpayers for dealing with the economic situation arising out of COVID-19 pandemic, the rates of TDS for the specified non-salaried payments made to residents has been reduced by 25% for the period from 14.05.2020 to 31.03.2021.



1. GST

FORM GST PMT-09 effective from 21st April, 2020

CBIC vide Notification No. 37/2020-Central Tax dated 28-04-2020 notified 21st April, 2020 as the effective date to give effect to the provisions of rule 87 (13) and FORM GST PMT-09 of the CGST Rules, 2017.

¹(Matter on Direct and Indirect Taxes, is contributed by Direct Taxes Committee and GST & Indirect Taxes Committee of ICAI respectively. FEMA updates by CA. Manoj Shah, CA Hinesh Doshi and CA. Sudha G. Bhushan)

Amendment in CGST Rules to allow filing of Nil Return (GSTR-3B) through SMS

CBIC vide Notification No. 38/2020-Central Tax dated 05-05-2020 has inserted Rule 67A (Manner of furnishing of return by short messaging service facility) with effect from a date to be notified later in the CGST Rules, 2017 to allow the registered person to furnish a Nil return in FORM GSTR-3B for a tax period, through a short messaging service (SMS).

Amendments to special procedure for corporate debtors undergoing the corporate insolvency resolution process under the Insolvency and Bankruptcy Code, 2016

CBIC vide Notification No. 39/2020-Central Tax dated 05-05-2020 has made the following amendments:-

- The corporate debtors who have furnished GSTR-1 & GSTR-3B for all the tax periods prior to the appointment of IRP/RP have been excluded from following the special procedures as specified in the earlier notification.
- Those corporate debtor who are to be treated as distinct person & liable to take a new registration in each of the States or Union territories where the corporate debtor was registered earlier, shall be liable to take new registration within:-
 - thirty days of the appointment of the IRP/RP
 - or by 30th June, 2020, whichever is later”.

Extension of FORM GSTR 9/9C for FY 2018-19 till 30th September, 2020

CBIC vide Notification No. 41/2020-Central Tax dated 05-05-2020 seeks to extend the due date for furnishing of FORM GSTR 9/9C for FY 2018-19 till 30th September, 2020.

Extension of due date for furnishing FORM GSTR-3B for the taxpayers registered in Ladakh and Jammu and Kashmir

CBIC vide Notification No. 42/2020-Central Tax dated 05-05-2020 has further provided/extended the due dates of furnishing of FORM GSTR-3B, Nov-March, 2020 returns for registered persons whose principal place of business is in the Union territory of the Union territory of Ladakh and the due dates of furnishing of FORM GSTR-3B, Nov-Feb, 2020 returns for registered persons whose principal place of business is in the Union territory of the Jammu and Kashmir.

Section 128 of Finance Act, 2020 notified with effect from 1st July, 2017

CBIC vide Notification No. 43/2020-Central Tax dated 16-05-2020 seeks to bring into force Section 128 of Finance Act, 2020 in order to bring amendment in Section 140 of CGST Act w.e.f. 01.07.2017.

Clarification in respect of certain challenges faced in implementation of provisions of GST Laws

CBIC vide Circular No. 138/08/2020-GST dated 06-05-2020 has issued clarifications in respect of certain challenges that are being faced by taxpayers in adhering to the compliance requirements under various provisions of the CGST Act.

2. CUSTOMS

Electronic Sealing-Deposit in and removal of goods from Customs Bonded Warehouses

CBIC vide Circular No. 20/2020 dated 21st April, 2020 has deferred the implementation of Circular No. 10/2020 dated 07th February-, 2020 till 30th June, 2020 and therefore the new date of implementation of such circular is 01st July, 2020.

IGST refunds on exports-extension in SB005 alternate mechanism

CBIC vide Circular No. 22/2020 dated 21st April, 2020 extended the facility of SB005 of error correction in the Customs EDI system for Shipping Bills with date upto 31.12.2019.

Review of ‘Measures to facilitate trade during the lockdown period - section 143AA of the Customs Act, 1962

CBIC vide Circular No. 23/2020 dated 11th May, 2020 extended the facility of acceptance of an undertaking in lieu of a bond required during customs clearance, subject to conditions as underlined in the circular. Consequently, the date for submission of proper bond in lieu of which the undertaking is being temporarily accepted is extended till 15.06.2020

Implementation of PGA e-SANCHIT– Paperless Processing under SWIFT-Uploading of Licenses / Permits / Certificates / Other Authorizations (LPCOs) by PGAs

Circular No. 24/2020 dated 14th May, 2020

Provisional Clearance of Goods under India’s Trade Agreements

CBIC vide Instruction No. 04/2020 – Customs dated 4th May,2020 has issued instructions that where original hard copy of Certificate of Origin (CoO) has not been submitted or only digitally signed copy or unsigned copy of CoO is submitted, same may be treated at par with category as listed at serial no. 5(c) of the Circular 38/2016-Customs, provided that the matter is not covered under 5(a), wherein there is reasonable belief that the it involves mis-declaration of origin/value addition.

Guidelines for conduct of personal hearings in virtual mode under Customs Act, 1962

CBIC vide Instruction No. F. No. 390/Misc/3/2019-JC, dated 27th April, 2020 has issued guidelines & decided that personal hearing, in respect of any proceeding under Customs Act 1962, given by various authorities, such as Commissioner (Appeals), original adjudicating authorities and Compounding authority, may be conducted through video conferencing facility.



FEMA

Amendments to Non Debt Instrument Rules 2019 for curbing opportunistic takeovers/acquisitions of Indian Companies due to current COVID 19 pandemic

Notification Dated 22nd April 2020 issued by Ministry of Finance

In order to curb opportunistic takeovers and acquisitions of Indian companies due to COVID 19 pandemic, government has amended provisos to Rule 6(a) of Non Debt Instruments Rules, 2019 as under:

Provided that an entity of a country, which shares land border with India or the beneficial owner of an investment into India is situated in or is a citizen of any such country, shall invest only under Government Approval Route.

Provided further a citizen of Pakistan or an entity incorporated in Pakistan shall invest only under the Government route in sectors/activities other than defence, space, atomic energy and sectors/activities prohibited for foreign investment.

Provided also that in the event of transfer of ownership of any existing or future FDI in an entity in India, directly or indirectly, resulting in the beneficial ownership falling within the restriction/purview of above provisos such subsequent change in beneficial ownership will also require Government approval.

Comments: Previously foreign investment by an entity of Bangladesh and Pakistan or citizen of Bangladesh and Pakistan was under government approval route. However, with outbreak of COVID 19 pandemic to protect opportunistic takeovers/acquisitions of Indian Companies government has brought this change in FDI Policy. Accordingly, it has been decided that any foreign investment by an entity or citizen of any country connected through land border with India or beneficial owner of investment is situated in any country connected with land border to India will require prior government approval.

Amendments to Non Debt Instrument Rules 2019 – Acquisition after renunciation of rights

Notification Dated 27th April 2020 issued by Ministry of Finance

As per existing provisions [Rule 7 of Non Debt

Instrument Rules 2019 (NDI Rules)] existing foreign investors are allowed to acquire shares through rights issue subject to conditions prescribed therein the rule. Further, explanation to the rule clarified that conditions of Rule 7 would even apply to foreign investor who acquires securities pursuant to renunciation of rights. Therefore, in case when foreign investor, not even being an existing shareholder, could acquire securities of Indian Company on account of renunciation of rights at the applicable rights price.

The Ministry of Finance vide Notification dated 27th April 2020, amended the Rule 7 and omitted the explanation to Rule 7 of NDI Rules and added new Rule 7A. Rule 7A states that –

‘a person resident outside India who has acquired a right from a person resident in India who has renounced it may acquire equity instruments (other than share warrants) against the said rights as per pricing guidelines specified under rule 21 of these rules’

Accordingly, all transactions where shares are acquired by foreign investor due to renunciation of rights will have to comply with pricing guidelines prescribed in Rule 21 of NDI Rules.

Comments: The amendment to Rule thus prohibits acquisition of shares by non existing foreign investor based on existing rights price which was allowed earlier. Now in wake of Rule 7A if shares are acquired on account of renunciation of rights pricing guidelines would be required to be complied.

Amendments to foreign investment in Insurance Sector – NDI Rules 2019

Notification Dated 27th April 2020

Government also made amendment to foreign investment in Insurance Sector and sector specific conditions there to. It has added few areas in Insurance Sector where 100% investment can be made under automatic route.

As per amendment, 100% foreign investment in Intermediaries or Insurance Intermediaries including Insurance Brokers, re-insurance brokers, insurance consultants, corporate agents, third party administrator, surveyors and Loss Assessors and such other entities, as may be notified by the Insurance Regulatory and Development Authority of Indian from time to time is allowed under automatic route.

For updated sector specific conditions refer notification at –

<http://egazette.nic.in WriteReadData/2020/219200.pdf>