KPMG

India Tax Konnect

August 2017

Contents

International tax	2
Corporate tax	4
Transfer pricing	6
Indirect tax	7
Personal tax	10

Editorial

As per Reuters, India is expected to reclaim its position as the fastest growing major global economy this year, partly propelled by benefits from Goods and Service Tax (GST) and strengthened by interest rate cut by central bank. The median forecast from the poll of over 35 economists showed India's economy is expected to expand 7.3 per cent in the fiscal year ending March 2018, after slowing sharply at the start of 2017 following government's move to scrap high-value banknotes.

The GST Council at its next meeting is likely to finalise a mechanism to operationalise the anti-profiteering clause which seeks to protect consumers interest. The Central Board of Excise and Customs (CBEC) Chairperson also said the department is keeping track of revenue trends post the GST rollout from 1 July, but actual positions will be known after returns are filed in September.

The Union Cabinet has approved signing of Memorandum of Cooperation (MoC) in respect of tax matters between BRICS countries. The MoC aims to promote cooperation among the BRICS Revenue administrations in international tax arena and in the area of capacity building and knowledge sharing. It will also accord confidentiality and protection to information exchanged under the MoC. The MoC could stimulate effective cooperation in tax matters. The collective stand of BRICS countries can prove to be beneficial not only to these countries but also to other developing countries in the long run in tax matters being steered by the G20. It envisages regular interaction amongst the heads of Revenue administration of BRICS countries to continue discussion on common areas of interest and strive towards convergence of views and meeting of the experts on tax matters to discuss the contemporary issues in the areas of international tax.

The Central Board of Direct Taxes (CBDT) issued Circular clarifying that wherever in terms of the agreement or contract between the payer and the payee, the component of 'GST on services' comprised in the amount payable to a resident is indicated separately, tax shall be deducted at source under Chapter XVII-B of the Income-tax Act, 1961 on the amount paid or payable without including such 'GST on services' component. GST for these purposes shall include Integrated GST, Central GST, State GST and Union Territory GST.

The Andhra Pradesh and Telangana High Court in the case of Venenberg Facilities BV held that capital gains arising out of the sale of shares by the taxpayer of its Indian subsidiary deriving its value from the immovable property are not taxable in India under the India-Netherlands tax treaty. The High Court observed that Assessing Officer (AO) and Commissioner of Income-tax (Appeals) [CIT(A)] are incorrect in applying Article 13(1) of the tax treaty by equating alienation of a company’s shares to alienation of its immovable property. The High Court concurred with Tribunal’s decision that alienation of shares by the taxpayer does not fall under Article 13(1) of the tax treaty and by virtue of a residuary clause in Article 13(5) of the tax treaty, gains will be exempt from tax in India.

We at KPMG in India would like to keep you informed of the developments on the tax and regulatory front and its implications on the way you do business in India. We would be delighted to receive your suggestions on ways to make this Konnect more relevant.

© 2017 KPMG, an Indian Registered Partnership and a member firm of the KPMG network of independent member firms affiliated with KPMG International Cooperative (“KPMG International”), a Swiss entity. All rights reserved.

International tax

No capital gains arising to Netherlands entity on sale of shares of its Indian subsidiary deriving its value from immovable property

The taxpayer is a resident of Netherlands and was holding equity share capital of its wholly owned Indian subsidiary company. The taxpayer sold all its shares in Indian company to Singapore Company in terms of the share purchase agreement. The taxpayer claimed that the capital gains was not taxable in India under the tax treaty. The tax officer observed that the value of the transferred shares comprised mainly value of immovable property located in India, therefore, specific clause of the capital gains article of the tax treaty dealing with transfer of shares having underlying value from immovable properties would not be applicable. Further, the residuary clause would be applicable only if the capital gains were not taxable under any other paragraph of capital gains article of the tax treaty. Since shares of Indian company partake the character of immovable property under the Act, the capital gains arising from alienation of such shares are chargeable to tax in India under specific clause of capital gain article dealing with transfer of immovable property.

The CIT(A) upheld the order of the tax officer. However, the Tribunal held in favour of the taxpayer. The matter went to the High Court where it was observed as follows:

- The lower authorities failed to note the difference between alienation of the company's immovable property and alienation of the company's shares by a shareholder. The legal distinction between the concept of a 'share sale' as opposed to an 'asset sale', succinctly summed up by the Supreme Court in Vodafone International Holdings B.V.[1], was completely ignored by the tax officer and the CIT(A).
- Before the High Court, the tax department fairly concedes that the clause of the capital gains article dealing with transfer of immovable property was wrongly applied by the lower authorities and contended that clause of the capital gains article dealing with transfer of shares having underlying value from immovable properties is applicable. However, this issue was never raised by the tax department before the Tribunal.
- Thereafter, it was open to the tax department to raise the issue before the Tribunal by filing cross-objections. However, at that stage also, the tax department did not raise such issues. It is only before this High Court that issue was raised.
- Without a factual finding as to whether the immovable property of Indian company was property in which its business was carried on, the question of applying one or the other parts of clause of the capital gains article dealing with transfer of shares having underlying value from immovable properties at this stage would not arise. Thus, the appeal would have to be restricted to the finding of the Tribunal that the clause of the capital gains article dealing with transfer of immovable property had no application to the transaction and the residuary clause would have application.
- The High Court confirmed the finding of the Tribunal that the capital gains earned by the taxpayer from the said transaction are covered by the exemption provided under residuary clause of capital gains article and hence it would not be taxable in India.

DDIT v. Venenberg Facilities BV (ITTA Nos. 55 and 71 of 2014 and Writ Petition No. 41469 of 2015)

A foreign company constitute Service PE in India under the India-UAE tax treaty. Services provided in the form of sharing or permitting to use the special knowledge or expertise falls within the term 'royalty' under the tax treaty

The taxpayer is UAE based entity engaged in the business of providing regional service activities for the benefit of ABB legal entities in India, Middle East and Africa. In pursuance of the regional headquarter service agreement between the taxpayer and ABB Limited, the taxpayer rendered services to ABB Limited during Financial Year (FY) 2009-10 and 2010-11. In terms of the agreement, the taxpayer has received payment from its associate concern. The taxpayer claimed that the above amounts is not taxable in India under the tax treaty, as the tax treaty does not have a clause for Fees for Technical Services (FTS) and since this clause has been specifically excluded from the treaty, the taxability would fall under Article 22 of the tax treaty. As per Article 22 of the tax treaty the amount would be taxable in India only if the entity has a Permanent Establishment (PE) in India and in the instant case since there is no PE in India, the sum is not liable to be taxed in India.

The AO held that the services rendered by the taxpayer would be treated as FTS both under the Income-tax Act, 1961 (the Act) and under the tax treaty as prescribed under Explanation 2 to Section 9(1)(vii) of the Act. In an alternative argument, the AO held that most of the services rendered by the taxpayer were covered under the definition of 'royalty' as per the Explanation 2(ii), 2(iv) and 2(vi) under Section 9(1)(vi) of the Act, as well as under Article 12(3) of the tax treaty. The Dispute Resolution Panel (DRP) confirmed the order of the AO.

1. Vodafone International Holdings B.V. v. UOI [2012] 341 ITR 1 (SC)

© 2017 KPMG, an Indian Registered Partnership and a member firm of the KPMG network of independent member firms affiliated with KPMG International Cooperative ("KPMG International"), a Swiss entity. All rights reserved.

The Bengaluru Tribunal held that the taxpayer was having Service PE in India since the taxpayer has been furnishing services to the Indian company even without any physical presence of its employees in India. In the present age of technology the services, information, consultancy, management, etc. can be provided with various virtual modes like email, internet, video conference, remote monitoring, remote access to desktop, etc., through various software. Service PE is not dependent upon the fixed place of business as it is only dependent upon the continuation of the activity.

The Tribunal also held that the services provided by the taxpayer were in the form of sharing or permitting to use the special knowledge, expertise and experience of the taxpayer and it falls under the term 'royalty', under Article 12(3) India-UAE tax treaty. The visits of the officials of the taxpayer was only for the purposes of providing access for using the information pertaining to industrial/commercial/scientific experience and to help to commercially exploiting it. The dominant character of agreement between the taxpayer and Indian company was for sharing secret, confidential and Intellectual Property Rights (IPRs) information made available. The Tribunal observed that tax treaty clearly uses the word for the 'use of' or 'right to use of', commercial, scientific equipment and has not used the word either 'imparting' or 'alienation' of knowhow. The language used in the tax treaty is plain and unambiguous and therefore reading of words 'alienation' or 'imparting' of know-how in the tax treaty would not be permissible.

ABB FZ-LLC v. DCIT [ITA(TP) No. 1103/Bang/2013] – Taxsutra.com

© 2017 KPMG, an Indian Registered Partnership and a member firm of the KPMG network of independent member firms affiliated with KPMG International Cooperative ("KPMG International"), a Swiss entity. All rights reserved.

Corporate tax

Decisions

Payment for the use of space allotted at the airport for operating the lounge premises is 'rent' under Section 194-I of the Income-tax Act

The taxpayer was awarded the contract for running an executive lounge at the Indira Gandhi International Airport, New Delhi (IGI) by the Airports Authority of India (AAI). The award of the contract was preceded by a bidding process which commenced with a tender being floated by the AAI. The successful bidder had to quote the royalty amount to operate the executive lounge. The AAI was to fix the license fee for the space to be provided to the successful bidder for operating the lounge. The licensee will pay every month in advance by way of royalty for the first year of the contract, with the provision that the said royalty shall be subject to 10 per cent annual compound escalation. In addition to the said royalty, the licensee shall pay fee for space allotted for operating the lounge premises at the rates as may be fixed from time to time. The taxpayer did not deduct tax at source under Section 194-I of the Act from the payments made to AAI. The taxpayer claimed that the payment of fee was not in the nature of rent but in the nature of royalty. However, the AO held that rent payments made to the AAI are liable for Tax Deduction at Source (TDS) under Section 194-I of the Act. The CIT(A) upheld the order of the AO. However, the Tribunal held the decision in favour of the taxpayer.

High Court's decision

The license agreement indicates that the payment made by the taxpayer to the AAI for the operation of the executive lounge at IGI Airport is split into two distinct parts viz. royalty and the fees for the space. It is in effect a payment for the use of the lounge for the purposes of operating it. If there is a default in payment either of the components of the licence fee, the inevitable consequence is that the taxpayer loses the right to operate the executive lounge. The Supreme Court in Japan Airlines Co. Limited v. CIT [2013] 377 ITR 372 (SC) observed that in each case the agreement in question has to be examined to ascertain if the payment is predominantly for the use of space. In the present case, the taxpayer is permitted to operate an executive lounge. The question of being able to operate the lounge without the actual use of the space simply does not arise. The payment for the use of space is inseparable from the payment of royalty for the right to operate the lounge. Therefore, applying the ratio of the decision of the Supreme Court in the case of Japan Airlines Co. Limited, it was held that the payment of the sum by the taxpayer to the AAI under the license agreement falls within the expanded definition of 'rent' under Section 194-I of the Act. The certificate issued by the AAI stating that the payment of licence fee for the space is different from the payment of royalty will not make a difference to the legal position as regards Section 194-I of the Act.

CIT v. ITC Limited (ITA No. 73/2005, dated 4 July 2017) – Taxsutra.com

Sales tax subsidy is a revenue receipt in the absence of capital utilisation condition

The taxpayer claimed that in terms of Notification[2] issued by the government in exercise of powers under the UP Sales-tax Act read with Rule 25 of the UP Sales Tax Rules, certain exemption from sales-tax was granted to the industries set up in the specified backward area. The taxpayer's manufacturing unit started production in January 1994, the eligibility certificate in respect of this unit was issued by the Industries Department with effect from January, 1994. The exemption in terms of the Notification dated 27 July 1991, in respect of the galvanising unit was available up to a period of eight years based in fixed capital investment. In its revised income-tax returns for AY 1995-96, the taxpayer claimed the sales tax amount collected as capital subsidy. However, AO denied such claim and added the subsidy amount in its income. On appeal, both CIT(A) and the Tribunal allowed taxpayer's appeals. Aggrieved, the tax department filed an appeal before the Delhi High Court. The tax department relied on the Supreme Court's decision in the case of Sahney Steel and Press Works Ltd. [1997] 228 ITR 253 (SC), and contended that the source of the funds, manner of collection from the public and retention is immaterial for determination as to whether in the hands of the taxpayer, it is a capital or revenue receipt.

High Court decision

The Delhi High Court relied on the Supreme Court's decision of Sahney Steel and Press Works Ltd. v. CIT [1997] 228 ITR 253 (SC) and CIT v. Ponni Sugars & Chemicals [2008] 306 ITR 392 (SC). The High Court observed that the object of providing subsidy by way of permission to not deposit amounts collected (as sales tax liability) which meant that the customer or servicer user concerned had to pay sales tax, but at the same time, the collector could retain the amount so collected, undoubtedly was to achieve the larger goal of industrialisation. The High Court observed that the amounts retained could be spent for any purpose, not necessarily capital and that the subsidy operated only after expansion, i.e. after the capital expenditure was incurred and capacity expanded. If the taxpayer had set up its units under the 'capital subsidy scheme' of 1990, undoubtedly it contained specific provisions that enabled capital subsidies. However, the taxpayer claimed subsidy under the supplementary scheme of the main scheme, wherein the specific provision for capital subsidy were absent. Accordingly, the High Court held that the lack of such a capital subsidy in the supplementary scheme meant that the recipient, i.e. the taxpayer had the flexibility of using it for any purpose.

2. Notification No. STs.T.2- 1093/11-7(42)/86-UP-Act-XV-48 Order-91, dated 27 July 1991

© 2017 KPMG, an Indian Registered Partnership and a member firm of the KPMG network of independent member firms affiliated with KPMG International Cooperative ("KPMG International"), a Swiss entity. All rights reserved.

The High Court observed that the taxpayer in the factual matrix, was concerned with the sales tax amounts it was permitted to retain, under the amended scheme of 1991, which allowed the facility of such retention, after the unit was already set up. The High Court observed that the subsidy scheme had no strings attached. It merely stated that the collection could be retained to the extent of 100 per cent of capital expenditure. Whilst it might be tempting to read the linkage with capital expenditure as not only applying to the limit, but also implying an underlying intention that the capital expenditure would thereby be recouped, the absence of any such condition should restrain the court from so concluding. Accordingly, the High Court dismissed taxpayer's contention that since the quantitative limit of subsidy was linked to capital expenditure, the subsidy was capital in nature as it meant replenishing the capital expenditure and called it unjustified.

CIT v. Bhushan Steel and Strips Ltd (ITA Nos. 315/2003, 316/2003, 317/2003 & 349/2003) (Delhi High Court) – Taxsutra.com

Fees levied for default in furnishing the TDS/TCS statement under Section 234E is constitutionally valid

The taxpayer is a proprietor of one SaiBaba Textiles which is engaged in the manufacturing and trading of ladies garments. In the course of business, the taxpayer would make payments to individuals and agencies, many of which would require TDS. The provisions under the Act would further require the taxpayer to file periodic statements of such tax deducted at source and depositing the tax in the government within the time prescribed. With effect from 1 July 2012, Section 234E of the Act was introduced in the Act for levying fee for default in furnishing the statement of tax deducted or collected at source. As per Rule 31A of the Rules, the person responsible for deduction of tax in terms Section 200(3) would have to file quarterly statements in prescribed form. Rule 31A(2) prescribed dates by which such statements would have to be filed. The taxpayer challenged constitutional validity of provisions of Section 234E before Gujarat High Court.

The Gujarat High Court observed that prior to 1 July 2012 there was a single provision to provide for penalty for default in filing statements under Section 200 or 206C within specified time. However, with effect from 1 June 2012, Section 234E of the Act was introduced for the first time as fee for failure to furnish the statements. Further, Section 271H of the Act was introduced for the first time to levy penalty for failure to furnish the statements to be filed under Section 200(3) or proviso to Section 206C(3) of the Act. No penalty would be imposed if the tax is deposited with fee and interest and the statement is filed within one year of the due date.

The High Court observed that post 1 June 2015 Section 200A included reference for adjustment of fee payable under Section 234E. Section 200A is a machinery provision for making prima-facie adjustments, while Section 234E of the Act is a charging provision for levying fee for certain defaults in filing the statements, thus the machinery provision cannot override charging provision. Thus, rejecting the taxpayer's contention that Section 200A creates a charge, the High Court held when Section 234E has already created a charge for levying fee that would thereafter not been necessary to have yet another provision creating the same charge. Without a regulatory provision being found for Section 200A for computation of fee, the fee prescribed under Section 234E cannot be levied. Any such view would amount to a charging section yielding to the machinery provision. If at all, the recasted Section 200A(1)(c) would be in nature of clarificatory amendment. The High Court observed that Section 200A is not a source of substantive power. Substantive power to levy fee can be traced to Section 234E of the Act. Further the fee under Section 234E of the Act is not in lieu of the penalty of section 271H of the Act. Both are independent levies. The High Court also distinguished taxpayer's reliance on Supreme Court ruling in CIT v. B C Srinivasa Setty [1981] 128 ITR 294 (SC) where it was held that in absence of machinery provisions, the levy itself would fail. The High Court held that the decision was rendered in entirely different background and cannot apply in the present case. Thus, dismissing taxpayer's petition, the High Court ruled in favour of the tax department.

Rajesh Kourani v. Union of India (Special Civil Application No. 302 of 2014, 20 June 2017)

Notification/Circulars/Press Releases

CBDT clarifies that tax shall not to be deducted on GST component of services

The CBDT issued a Circular No. 23 clarifying that wherever in terms of the agreement or contract between the payer and the payee, the component of GST on services comprised in the amount payable to a resident is indicated separately, tax shall be deducted at source under Chapter XVII-B of the Act on the amount paid or payable without including such 'GST on services' component. GST for these purposes shall include Integrated GST, Central GST, State GST and Union Territory GST.

Circular No. 23/2017, dated 19 July 2017

CBDT prescribed the procedure for intimating Aadhaar number to the tax department by PAN holder under the provisions of Section 139AA of the Income-tax Act

The CBDT issued a notification prescribing the procedure for intimating Aadhaar number to the tax department by Permanent Account Number (PAN) holders. The notification prescribes multiple options for intimating Aadhaar number by existing PAN holders and also provides operational guidelines for quoting Aadhaar number by the new PAN holders.

The notification prescribes that Aadhaar shall be linked to PAN after due authentication of Aadhaar from Unique Identification Authority of India (UIDAI) through available authentication modes i.e. demographic, bio-metric, OTP, e-KYC or multi-factor or as specified by the UIDAI. Aadhaar shall also be matched with PAN/PAN application data before authentication. PAN applications or request for linking of Aadhaar with PAN may be rejected if mismatches in Aadhaar and PAN data observed.

Notification No. 7/2017, dated 29 June 2017

© 2017 KPMG, an Indian Registered Partnership and a member firm of the KPMG network of independent member firms affiliated with KPMG International Cooperative ("KPMG International"), a Swiss entity. All rights reserved.

Transfer pricing

Decisions

'De Facto' or 'De Jure' participation in the management, capital or control by itself is not relevant in establishing associated enterprise relationship in terms of Section 92A of the Income-tax Act

- The taxpayer, is a partnership firm, wherein the partners were three brothers (say Mr. A, Mr. B and Mr. C) along with their respective wife and children. Taxpayer had entered into certain international transactions with a Belgian entity which was owned and controlled by another brother (say, Mr. D), along with his family (brother of Mr. A, Mr. B and Mr. C).
- The AO contended that since the Belgian entity is controlled by another brother i.e. Mr. D (along with his family), it falls under the definition of an Associated Enterprise (AE) in terms of Section 92A(2)(j) of the Act and accordingly, made a reference to the Transfer Pricing Officer, who made an adjustment.
- CIT(A), without discussing the primary issue of existence of an AE relationship in terms of Section 92A of the Act, proceeded to examine the correctness of arm's length price and deleted the adjustment.
- The Tribunal ruled in favour of the taxpayer holding that the taxpayer and the Belgian entity are not AEs. Aggrieved, the revenue authorities appealed before the High Court.

High Court's ruling

- The High Court agreed with the Tribunal's observation that none of the provisions of Clauses j, k and l of sub-section 2 of Section 92A(2) of the Act are applicable in the present case and therefore, the taxpayer and Blue Gems BVBA are not AEs. The High Court observed as under:
  - Clause (i) would apply in a case where goods or articles are manufactured or transferred by one enterprise and in the present case, Blue Gems BVBA does not either manufacture or process any articles. It merely purchases rough diamonds from the international markets and supplies it to the taxpayer.
  - Clause (j) would apply when an enterprise is controlled by an individual. In the present case, both the enterprises are partnership firms and hence it can be said that they are not controlled by any individual.
  - Clause (l) would apply in a case where the enterprise is a partnership firm. However, for the applicability of the said clause, there has to be an enterprise in the nature of a firm and another enterprise who holds not less than 10 per cent interest in such firm, which is not applicable in the present case.
- In view of the above, the High Court held that the Tribunal has committed no error in holding that the taxpayer and Blue Gems BVBA are not AEs and hence the question of applying transfer pricing formula would not arise.

Pr. CIT vs Veer Gems (ITA No. 338 of 2017)

Notifications/Circulars/Press Releases

India inks Unilateral APA in ITES dealing with severance compensation

Marking a significant development in the Indian Advance Pricing Agreement (APA) space, the CBDT entered into a unilateral APA in the Information Technology Enabled Services (ITES) space involving contentious issues dealing with severance compensation for employees.

Captive service providers at times have to rationalise the size of operations in India or in certain circumstances completely stop Indian captive activities, leading to shut down costs, employee severance compensation, etc. Mark-up on such severance cost is a much debated issue and the determination of the arm's length treatment of such expenditure may not follow a straight-jacketed approach. The APA authorities emphasised on the Function, Assets and Risk analysis undertaken by the taxpayer in the overall supply chain and the authorities were practical and fair in their fact finding approach.

www.taxsutra.com, dated 28 June 2017

© 2017 KPMG, an Indian Registered Partnership and a member firm of the KPMG network of independent member firms affiliated with KPMG International Cooperative ("KPMG International"), a Swiss entity. All rights reserved.

Indirect tax

Service tax

Decisions

Exchange of secondhand cars constitutes 'sale' and not a 'service'

The issue dealt by the Kerala High Court was whether the transaction of second-hand sale of cars constitutes a 'service' as an intermediary, agent or broker or is it a transaction of 'sale'. While the Revenue authorities contended that the sale takes place only between a registered owner and end purchaser (since Respondent was obtaining blank sale letters signed by the owners), the High Court held that the transaction constituted a 'sale' on the basis of the following rationale –

- The owner of the vehicle delivered the property and received sale price from the dealer and the activity of refurbishing, repairing the vehicle carried out by the dealer as its owner was not a service rendered to any other person;
- Non-registration of the vehicle by the dealer in his name or having the transfer of entry in the road transport registers was not relevant for the purpose of determining the nature of the transaction; and
- The Sale of Goods Act, 1930, insists on the contracting parties' intention rather than the price payment or physical delivery of possession, which were also completed between the used-vehicle owners.

Commissioner of Central Excise vs. Sai Service Station Ltd & Anr. TS-180-HC-2017(Ker)-ST

Central Excise

Decisions

CENVAT credit in respect of the duty paid goods is eligible, even though the activity of repacking and relabeling of the duty paid goods does not amount to manufacture

The issue involved was, when the activity of repacking and relabeling of the duty paid goods does not amount to manufacture, whether the taxpayer is entitled for the Central Value Added Tax (CENVAT) credit in respect of the duty paid goods received by them.

The Revenue authorities submitted that since the activity of relabeling and repacking does not amount to manufacture, the taxpayer is not entitled for the cenvat credit, for the reason that only manufacturer is entitled to CENVAT credit, person other than manufacturer cannot avail cenvat credit.

In this background, the Customs, Excise and Service Tax Appellate Tribunal (CESTAT) has held that, as per Rule 16 of Central Excise Rules, 2002, even if the activity does not amount to manufacture, the taxpayer is entitled to CENVAT credit of the duty paid goods received by them and cleared on payment of duty which is equal to the CENVAT Credit. Accordingly, as per the provision of Rule 16, the taxpayer's availment of CENVAT credit is correct and the same cannot be denied. Accordingly, the impugned order was set aside and appeal allowed.

SA Pharmchem Pvt. Ltd. vs CCE (2017-TIOL-2550-CESTAT-MUM)

CENVAT credit of service tax paid on group health insurance for family members of employees is admissible

The issue involved in the present case was whether CENVAT credit of Service Tax paid on group health insurance for the family members of the employees is admissible or otherwise.

The CESTAT held that the group insurance is mandatory under the statute for the employees and their family. The taxpayer has no option but to give this facility to employees, which is mandatory. The expenses incurred on account of group health insurance is borne by the taxpayer and the same is one of the expenditure for overall manufacturing activity.

Accordingly, the impugned order was set aside and appeal was allowed.

Mercedes Benz India Pvt Ltd vs CCE (2017-TIOL-2175-CESTAT-MUM)

Customs

Notifications/Circulars/Press Releases/Instructions

Exemption from payment of Secondary and Higher Education Cess in respect of goods imported into imports

Subsequent to introduction of GST, the Central government has exempted all goods falling within the First Schedule to the Customs Tariff Act, 1975 imported into India, from the whole of Secondary and Higher Education Cess.

Notification no. 55/2017 – Customs dated 30 June 2017

Exemption from payment of IGST in respect of imports into SEZ for authorized operations

The Central government has exempted all goods imported by a unit or a developer in the Special Economic Zone (SEZ) for authorised operations, from the whole of IGST leviable thereon on import of goods.

Notification no. 64/2017 – Customs dated 5 July 2017

© 2017 KPMG, an Indian Registered Partnership and a member firm of the KPMG network of independent member firms affiliated with KPMG International Cooperative ("KPMG International"), a Swiss entity. All rights reserved.

Clarification on requirement to quote GSTIN for imports and exports

Importers and exporters engaged exclusively in the imports and exports of goods that are either not liable to tax or are wholly exempt from tax are not required to obtain registration under GST as provided under Section 23 of the CGST Act.. In such case, the PAN which is authorised as Importer Exporter Code (IEC) by the Directorate General of Foreign Trade (DGFT) shall serve the requirement. Importers, exporters and customs brokers are required to quote PAN in the bills of entry or shipping bills for such clearances.

Instruction no. 10/2017 – Customs dated 6 July 2017

Clarification on operational issues faced by EOUs in the context of implementation of GST

Export Oriented Units (EOUs) were allowed duty free import of goods under Notification no. 52/2003-Custom dated 31 March 2003. However, in view of GST, the said notification has been consequently amended by Notification No. 59/2017-Customs dated 30 June 2017.

Following key issues have been addressed:

- The issue of the requirement to execute a continuity bond, in view of Rule 5 of the Customs [Import of Goods at Concessional Rate of Duty] Rules 2017 despite of having executed B-17, a general purpose bond has been addressed. It was clarified that the B-17 general purpose bond will serve the requirement of continuity bond to be submitted,
- With regard to requirement of submission of information about estimated quantity and value of goods to be imported for a period of one year, in view of Rule of the Customs (IGCR) Rules, 2017, it was clarified that units may submit the requirements for a period shorter than a year and then give requirements for the subsequent period. Further, the information given may be amended/modified from time to time.
- It was clarified that for the transitional period upto 31 July 2017, the EOUs would have an option to use procurement certificates under customs circular no. 35/2016-custom dated 29 July 2016 for transfer of goods from one EOU to another.
- It was further clarified that inter unit transfer would be on payment of applicable GST. However, such transfer would be without payment of custom duty. Also, the circular no. 35/2016–Custom dated 29-7-2016 would stand amended to the extent that no procurement certificates would be required for inter-unit transfer.

Circular 29/2017 – Customs dated 17 July 2017

DGFT- Trade notice

Changes in FTP provisions with the implementation of GST

With the implementation of GST, Foreign Trade Provisions (FTP) have been amended as follows:

- The duty credit scrips (issued under chapter 3 of the FTP) cannot be used for payment of IGST and GST compensation cess in case of imports and CGST, SGST, IGST and GST compensation cess for domestic procurement.
- No exemption from payment of IGST and compensation cess would be available for imports under Advance Authorisation (AA) scheme. However, imports under AA would continue to be exempted from payment of Basic Custom Duty (BCD), Additional customs duty u/s 3(1).3(3) and 3(5) of the Customs Tariff Act, Anti-dumping duty, Safeguard duty and Transition product specific safeguard duty, wherever applicable.
- Importers would need to pay IGST on imports and avail ITC as per applicable GST rules.
- Imports by EOU for their authorised operations would be exempted from whole of BCD, Countervailing Duty (CVD) and Special Additional Duty (SAD) but such goods would attract IGST and compensation cess.
- For indigenous procurement of goods, the EOU will not get ab-initio exemptions. Such supplies would be on payment of applicable GST.
- On clearances of finished goods to Domestic Tariff Area (DTA), the EOU would be required to pay applicable GST and also pay back the whole of duty of Customs claimed as exemption, on inputs used in the manufacture of such finished goods.
- Applicable GST would be payable on transfer/supply of goods from one unit of EOU/EHTP/STP/BTP to another.
- Deemed export duty drawback as provided in chapter 7 would be limited to the refund of BCD only. In respect of eligible items covered under Schedule 4 of Central Excise Act, 1944 refund would also be covered under the drawback provided the item is eligible for such supply.

Trade Notice 11/2017, dated 30 June 2017

© 2017 KPMG, an Indian Registered Partnership and a member firm of the KPMG network of independent member firms affiliated with KPMG International Cooperative ("KPMG International"), a Swiss entity. All rights reserved.

VAT
Decisions

Cell phone charger is a composite part of the cell phone, hence, VAT shall be levied at the rate applicable to cell phones and not at residuary rate

In the present case, taxpayer engaged in the business of trading of cell phones at a pre-packed retail package for a fixed Maximum Retail Price (MRP) which consists of the cell phone, charger, ear phones, battery, leather cover, etc. The taxpayer discharged VAT liability on sale of mobile cell phones @ 5 per cent as per Entry No. 57 of Part-II-A of Schedule A of the Himachal Pradesh VAT Act.

The Deputy Excise and Taxation Commissioner (DETC) passed an order on the grounds that mobile cell phones sold by the taxpayer in packages along with a charger were taxed at 5 per cent, whereas tax on the chargers shall be levied at 13.75 per cent. The DETC demanded tax along-with interest for the period 1 March 2013 to 30 November 2014, at differential rate of 8.75 per cent, considering INR100 as notional value per charger.

The taxpayer appealed against the said order before the Excise and Taxation Commissioner (ETC) and argued that it intended to sell the mobile phones only and charger, head phone, ear phone, leather cover, etc. are not assigned a separate value and these items are included in the MRP of the mobile phone. However, the contention of the taxpayer was not accepted and the order of DECT was upheld by the ECT.

In further appeal to the Tribunal the appellant argued that ECT has solely relied upon the decision of Apex Court in the case of State of Punjab v/s Nokia India Pvt Ltd. wherein it was held that 'Cell phone charger is an accessory to the cell phone and is not part of the cell phone. Further, the battery charger cannot be held to be a composite part of the cell phone but is an independent product', however, the said decision is in relation to Punjab VAT Act, 2005 and is not aimed to interpret the provisions of HP VAT Act. It was highlighted that Entry 60 in the Schedule-B of Punjab VAT Act charging VAT at 5 per cent states 'Telephone, teleprinter, wireless equipment and parts thereof, digital video disc …..', whereas, Entry 57 of Part II-A of Schedule A of the HP VAT Act charging VAT at 5 per cent states 'IT products including computers, telephone (including mobile handsets, Digital Video Disc (DVD) and Compact Disc (CD) and parts thereof, teleprinter and wireless equipments and parts thereof) and other products as notified vide notification no. EXN-F(5)-8/2005 dated 29.05.2009. Telephones, cell phones, tele-printer, wireless equipment and parts thereof, DVD and Compact Disc and Information Technology (IT) products, that is to say…..'

Given the above, it was argued that Schedule of Punjab VAT Act is clearly very restrictive whereas, Schedule of HP VAT Act cannot be interpreted in such restricted manner, since it will be contrary to the principal or the main clause of the entry and render the words parts thereof redundant.

Further, it was argued that the battery charger can be used only for a specific brand/model and by necessary implication are not sold separately but as a part of cell phones. No separate value can be attributed to the charger for the reason that these are not two separate products which can be used independently and the packaged MRP on the cell phone includes all prices of the product and other items such as charger, headphone, battery, etc. Further, determination of notional value of charger at INR100 per piece by the DETC, amounts to taxing the same product twice.

It was further submitted that, as per Rule 3(a) of the General Rules for the Interpretation of Import Tariff, where goods are classifiable under two or more headings, then the heading which provides a specific description is to be preferred. It was contended that the mobile phone and the battery charger constitute a telephone set, even assuming without admitting, that the charger is to be classified separately, there is no specific entry for the battery charger and therefore it shall be classified under specific entry of telephone set. Further, even if it is assumed that classification cannot be done under Rule 3(a), Rule 3(b) of the said Rules provides that composite goods consisting of different components, shall be classified as if they consisted of material or component which gives them their essential character, which in the present case is mobile phone.

The aforesaid arguments made by the taxpayer were supported by various High Court and Supreme Court decisions.

The Department contended that the taxpayer was paying VAT at 13.75 per cent on cell phone chargers sold separately but on the chargers which were sold along-with the cell phone in single package, VAT was paid at 5 per cent. Therefore, the DETC has righty passed the order demanding tax at differential rate of 8.75 per cent and decision of the ETC should be upheld, which is based on the Supreme Court's decision in the case of Punjab.

The Tribunal, without delving into the issue of a charger being a 'part thereof' or a separate accessory (in view of the Supreme Court's findings), placed reliance on the specific entry 57 of the H.P. VAT Act, General Rules for the Interpretation of Harmonised System Nomenclature (HSN) as per the Custom Tariff Act and various judicial pronouncements on the common parlance test and essential characteristic test of composite goods. The Tribunal held that the mobile cell phone is sold in a pre-packed form at a fixed MRP and if the Revenue wants to levy different rate of VAT on the cell phone charger then all the components of the pre-packed mobile cell phone shall be separated and be subject to separate rate of VAT, which is not conducive to a healthy tax environment.

In view of the above, it was held that charger ought to be levied a tax equivalent to the rate of tax as levied on the cell phone and the orders of DETC and ETC were set aside.

M/s Nokia India Sales Pvt. Ltd. v. Excise and Taxation Commissioner (Himachal Pradesh) Deputy Excise and Taxation Commissioner (Parwanoo)

© 2017 KPMG, an Indian Registered Partnership and a member firm of the KPMG network of independent member firms affiliated with KPMG International Cooperative ("KPMG International"), a Swiss entity. All rights reserved.

Notifications/Circulars/Press Releases

Employees' Provident Fund Organisation issues clarification on definition of Indian International Workers

Government of India (GOI) made fundamental changes in the Employees' Provident Funds Scheme, 1952 (EPFS) and Employees' Pension Scheme, 1995 (EPS) in October 2008 by bringing International Workers (IWs) under the purview of the Indian social security regime.

The definition of IWs under EPFS includes two categories:

a) an Indian employee having worked or going to work in a foreign country with which India has entered into a Social Security Agreement (SSA) and being eligible to avail the benefits under a social security programme of that country, by virtue of the eligibility gained or going to gain, under the said agreement;

b) an employee other than an Indian employee, holding other than an Indian passport, working for an establishment in India to which the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 (EPF Act) applies.

In context of the above background, Employees' Provident Fund Organisation (EPFO) has issued a circular with regard to clarification on the definition of IW for Indian IWs.

Key clarifications provided in the circular

The circular emphasises the definition of an Indian IW as:

"An Indian employee having worked or going to work in a foreign country with which India has entered into a social security agreement and being eligible to avail the benefits under a social security programme of that country, by virtue of the eligibility gained or going to gain, under the said agreement".

Further, EPFO has clarified that an Indian employee who, having been an International Worker as per the above definition and who returns to work in India will not be an IW.

EPFO Circular
http://www.epfindia.com/site_docs/PDFs/Circulars/Y2017-2018/IWU_Definition_ InternationalWorker_5041.pdf

Employees' Provident Fund Organisation issues revised Certificate of Coverage application for Indian workers

The Government of India (GOI) has made fundamental changes in the Employees' Provident Funds Scheme, 1952 (EPFS) and Employees' Pension Scheme, 1995 (EPS) in October 2008 by bringing International Workers (IWs) under the purview of the Indian social security regime.

India has signed several SSAs with other countries with a view to obtain an exemption from contribution towards social security in the host countries for outbound employees, provided that they contribute to social security in India. To obtain this exemption, an outbound employee requires a Certificate of Coverage (COC) from the designated agency, the EPFO, which serves as a proof of social security contribution in India.

The EPFO had revised the COC application earlier in March and April 2014 via circulars[3].

Recently, EPFO has issued a circular[4] with regards to the revised COC application for Indian workers (holding an Indian passport) going to work in countries with which India has an SSA.

Highlights of the circular

- The COC application has been revised into a single form keeping in view the new COC application software which is being developed by EPFO.
- The revised COC application has introduced the following details to be furnished in the application:
  - Universal Account Number (UAN) of the employee
  - Aadhaar number of the employee
  - Contact details of the employee and the employer in India and abroad
- Further, the undertakings mentioned in the earlier COC application format has been replaced with one consolidated undertaking which is as under:

  "The employer shall continue to contribute in respect of this employee in India during the period of posting abroad; during which time the employer- employee relationship shall be maintained. The employer shall inform EPFO about any change in the employment status/ secondment of the posted employee during the currency of this certificate. The employee shall inform EPFO, about any loss/ theft of this Certificate. The employee and employer shall be jointly and separately responsible for the misuse of any kind, of the Certificate of Coverage, if any."

  As per the application instructions appended along with circular, the revised COC application form is required to be scanned, uploaded and digitally signed by the employer.

EPFO Circular
http://www.epfindia.com/site_docs/PDFs/Circulars/Y2017-2018/ IWU Application COC_6057. pdf

---

3. EPFO Circular http://www.epfindia.com/site_docs/PDFs/Circulars/Y2013-2014/IWU_COC_Revised_27300.pdf
   EPFO Circular http://www.epfindia.com/site_docs/PDFs/Circulars/Y2014-2015/IWU_COC_Form_1311.pdf
4. EPFO Circular http://www.epfindia.com/site_docs/PDFs/Circulars/Y2017-2018/IWU_Application_COC_6057.pdf

© 2017 KPMG, an Indian Registered Partnership and a member firm of the KPMG network of independent member firms affiliated with KPMG International Cooperative ("KPMG International"), a Swiss entity. All rights reserved.

KPMG in India

Ahmedabad
Commerce House V, 9th Floor,
902 & 903, Near Vodafone House,
Corporate Road, Prahlad Nagar,
Ahmedabad – 380 051
Tel: +91 79 4040 2200
Fax: +91 79 4040 2244

Bengaluru
Maruthi Info-Tech Centre
11-12/1, Inner Ring Road
Koramangala,
Bengaluru – 560 071
Tel: +91 80 3980 6000
Fax: +91 80 3980 6999

Chandigarh
SCO 22-23 (Ist Floor)
Sector 8C, Madhya Marg
Chandigarh – 160 009
Tel: +91 172 393 5777/781
Fax: +91 172 393 5780

Chennai
No.10, Mahatma Gandhi Road
Nungambakkam
Chennai – 600 034
Tel: +91 44 3914 5000
Fax: +91 44 3914 5999

Gurugram
Building No.10, 8th Floor
DLF Cyber City, Phase II
Gurugram, Haryana – 122 002
Tel: +91 124 307 4000
Fax: +91 124 254 9101

Hyderabad
Reliance Humsafar, 4th Floor
8-2-618/2, Road No.11,
Banjara Hills
Hyderabad – 500 034
Tel: +91 40 3046 5000
Fax: +91 40 3046 5299

Jaipur
Regus Radiant Centres Pvt Ltd.,
Level 6, Jaipur Centre Mall,
B2 By pass Tonk Road
Jaipur, Rajasthan – 302018.
Tel: +91 141 - 7103224

Kochi
Syama Business Center
3rd Floor, NH By Pass Road,
Vytilla, Kochi – 682019
Tel: +91 484 302 7000
Fax: +91 484 302 7001

Kolkata
Unit No. 603 – 604,
6th Floor, Tower – 1,
Godrej Waterside,
Sector – V, Salt Lake,
Kolkata – 700 091
Tel: +91 33 4403 4000
Fax: +91 33 4403 4199

Mumbai
Lodha Excelus, Apollo Mills
N. M. Joshi Marg
Mahalaxmi, Mumbai – 400 011
Tel: +91 22 3989 6000
Fax: +91 22 3983 6000

Noida
Unit No. 501, 5th Floor,
Advant Navis Business park
Tower-B, Plot# 7, Sector 142,
Expressway Noida, Gautam Budh Nagar,
Noida – 201305
Tel: +91 0120 386 8000
Fax: +91 0120 386 8999

Pune
9th floor, Business Plaza,
Westin Hotel Campus, 36/3-B,
Koregaon Park Annex, Mundhwa Road,
Ghorpadi, Pune – 411001
Tel: +91 20 6747 7000
Fax: +91 20 6747 7100

Vadodara
iPlex India Private Limited,
1st floor office space, No. 1004,
Vadodara Hyper, Dr. V S Marg
Alkapuri, Vadodara – 390 007
Tel: +91 0265 235 1085/232 2607/232 2672

KPMG in India contact

Girish Vanvari
Partner and Head
Tax
T: +91 (22) 3090 1910
E: gvanvari@kpmg.com

Follow us on
kpmg.com/in/socialmedia

The information contained herein is of a general nature and is not intended to address the circumstances of any particular individual or entity. Although we endeavor to provide accurate and timely information, there can be no guarantee that such information is accurate as of the date it is received or that it will continue to be accurate in the future. No one should act on such information without appropriate professional advice after a thorough examination of the particular situation.

© 2017 KPMG, an Indian Registered Partnership and a member firm of the KPMG network of independent member firms affiliated with KPMG International Cooperative ("KPMG International"), a Swiss entity. All rights reserved.

The KPMG name and logo are registered trademarks or trademarks of KPMG International.

This document is meant for e-communications only. (020_NEW0817)