# India Tax Konnect

December 2017

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# Editorial

In order to review the Income-tax Act, 1961 (the Act) and to draft a new direct tax law in consonance with economic needs of the country, the government has constituted a Task Force comprising of various members. The Task Force is to draft an appropriate direct tax legislation keeping in view the direct tax system prevalent in various countries, the international best practices, the economic needs of the country and any other matter connected thereto. The Task Force shall submit its report to the government within six months.

The Prime Minister has directed Ministry of Consumer Affairs to have a 'special focus' on complaints from consumers regarding the Goods and Services Tax (GST) and overcharging by retail outlets. Two retired government officials-cum-experts have now been hired by the Ministry of Consumer Affairs to man its National Consumer Helpline regarding complaints relating to GST, address the queries relating to GST rates on various items, and to liaison and refer many such complaints to the Central Bureau of Excise and Customs (CBEC), which is the nodal authority for GST rollout.

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The Supreme Court in the case of E-Funds IT Solution Inc. held that the taxpayer did not have fixed place Permanent Establishment (PE) in India. It was observed that to constitute PE there must exist a fixed place of business in India, which is at the disposal of the foreign companies, through which the business has been carried on. There was no fixed place of business at the disposal of the taxpayer. No part of the main business and revenue earning activity of the taxpayer is carried on through a fixed business place in India which has been put at its disposal. Indian company only renders support services which enable the taxpayer in turn to render services to its clients abroad. This outsourcing of work to India would not give rise to a fixed place PE in India. The Supreme Court also held that the taxpayer did not have Service PE in India.

The Bangalore Tribunal in the case of Google India Private Limited dealt with the issue whether payment by the taxpayer to Google Ireland Ltd. under 'Adwords Program' Distribution agreement is royalty. The Tribunal held that the said payment is taxable as royalty under the provisions of the Act as well as under the India-Ireland tax treaty. The Tribunal observed that it is not merely an agreement to provide the advertisement space but is an agreement for facilitating the display and publishing of an advertisement to the targeted customer with the help of various patented tools and software. The taxpayer is having the access to various data and it uses the information for the purposes of selecting the ad campaign and for maximising the impression and conversion of the customers to the ads of the advertisers.

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.

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# International tax

## Decisions

### Indian subsidiary of a foreign company providing back office support services does not constitute a PE in India under India-USA tax treaty

The taxpayer is a resident of USA. E-Fund Corp is the ultimate holding company of E-Fund India as well as the taxpayer. The taxpayer group is engaged in the business of electronic payments, ATM management service, decision support and risk management and professional services. E-Fund India has been performing back office operations in respect of above mentioned services.

The Tribunal while upholding Commissioner of Income-tax (Appeals)'s [CIT(A)] order held that the taxpayer has a fixed place PE and service PE under Article 5 of the India-USA tax treaty. The Tribunal did not deal with the agency PE as that was not argued by the tax department before the Tribunal. However, the Tribunal observed that the Indian company was paid at Arm's Length Price (ALP) and arrived at a nil income for all the relevant assessment years. However, the Delhi High Court held in favour of taxpayer and observed that the taxpayer does not have PE in India.

The Supreme Court relied on its own decision in case of Formula One World Championship Ltd. v. CIT (Civil Appeal No. 3849 of 2017) and observed that there must exist a fixed place of business in India, which is at the disposal of the foreign companies, through which the business has been carried on. The appellate authorities did not give any findings with respect to availability of fixed place of business at the disposal of the taxpayer. No part of the main business and revenue earning activity of the taxpayer is carried on through a fixed business place in India which has been put at its disposal. Indian company only renders support services which enable the taxpayer in turn to render services to its clients abroad. This outsourcing of work to India would not give rise to a fixed place PE in India.

With respect to service PE, the Supreme Court observed that the requirement of Article 5(2)(l) of the tax treaty is that an enterprise must furnish services 'within India' through employees or other personnel. None of the customers of the taxpayer are located in India or have received any services in India. All its customers receive services only in locations outside India. Only auxiliary operations that facilitate such services are carried out in India. The first condition provided under Article 5(2)(l) is not satisfied. Therefore, the taxpayer does not have Service PE in India.

The Supreme Court relied on its earlier decision in the case of Morgan Stanley[1] and observed that the arm's length principle has been satisfied in the present case, and therefore, no further profits would be attributable even if there exists a PE in India.

With respect to findings of Mutual Agreement Procedure (MAP) in earlier years, the High Court had held that the MAP procedure and agreement is relevant but cannot be the primary basis to decide whether the taxpayer had PE in India. Whether or not PE exists is a matter of law and fact, and there has to be determination of the said issue on merits. The Supreme Court held that MAP cannot be considered as a precedent for subsequent years, and the High Court's conclusion on this aspect is correct.

*ADIT v. E-Funds IT Solution Inc. [Civil Appeal No. 6082 of 2015] (SC) – Taxsutra.com*

### Payment for granting distribution right of 'Adwords program' is taxable as 'royalty' under the Act as well as India-Ireland tax treaty

The taxpayer company, is the wholly owned subsidiary of Google International LLC, US. Google India is appointed as a non-exclusive authorised distributor of 'Adwords programs' to the advertisers in India by GIL. Under the Google Adwords Program Distribution agreement, Google India was granted the marketing and distribution rights of Adwords program. The taxpayer made payment to GIL for granting distribution right of 'Adwords programme' without deducting tax at source. Hence, Assessing Officer (AO) made disallowance under Section 40(a)(i) of the Act, which was further confirmed by CIT(A). The AO treated the amount as royalty under the Act as well as under the India-Ireland tax treaty. According to the AO, the 'distribution rights' are 'Intellectual Property rights' covered by 'similar property' [under the ambit of royalty definition under Explanation 2 to Section 9(1)(vi)] and the distribution fee payable is in relation to transfer of distribution rights.

The Bangalore Tribunal observed that GIL is allowing Google India access to all intellectual property and confidential information which is used by the Google India for activities related to distribution agreement. Google India is also having right, title and interest over the intellectual property right of Google. With the help of I.P. address, Google search engine is having the access to various information and data pertaining to the user of the website in the form of name, sex, city, state, country, phone number, religion, etc. Besides the above basic information, the Google is also having the access of the history of the users as well as to the behavior of the persons searching Google search engine. The agreement between the taxpayer and the GIL does not merely work by providing the space in the Google search engine, but it works only with the help of various patented tools and software. It is not merely an agreement to provide the advertisement space but is an agreement for facilitating the display and publishing of an advertisement to the targeted customer. IP of Google vests in the search engine technology, associated software and other features, and hence use of these tools for performing various activities, including accepting advertisements, providing before or after sale services, clearly fall within the ambit of royalty.

Further the Tribunal held that the taxpayer cannot claim that the royalty is chargeable to tax in the hands of the non-resident on receipt basis. In the present case, though it is not the concern of the taxpayer as to which method is being following by the GIL yet, noting that GIL is following

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1 DIT v. Morgan Stanley and Co. Inc. [2007] 292 ITR 416 (SC)

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the mercantile method of accounting, the chargeability of tax would be in the year when it is accrued and not in the year when it was received. It is not within the scope of the tax treaty to provide when (i.e. year of accrual or receipt), the income is required to be charged.

With respect to proceeding under Section 201 of the Act, the Tribunal observed that in absence of any direct jurisdictional High Court decision and taking note of various contrary decisions post amendment under Section 201, the period of limitation for initiation of proceedings for resident as well as non-resident under Section 201 should be 6 years from the end of the financial year. The Tribunal relying on the non-discrimination clause under the tax treaty observed that it cannot be said that a non-resident would be given special and beneficial treatment in comparison to the resident or treated unequally by providing unlimited time to initiate proceedings under section 201 of the Act. If the law requires initiation of proceedings within 6 years from the end of financial year for the resident, the same treatment is required to be given to the non-resident.

*Google India Private Ltd. v. ACIT [IT(TP) A.1511 to 1518/Bang/2013] – Taxsutra.com*

### Consortium is not taxable as AOP. Income from offshore supplies and provision of offshore services are not taxable in India.

The taxpayer is a non-resident foreign company, incorporated under the law of Czech Republic and engaged in the business of steel production and supply of heavy machinery. In September 2007, the taxpayer participated in a tender with Beekay Egineering Corporation (BEC) for installation of cooling beds, pliers and other equipment for Steel Authority of India Ltd. (SAIL). The taxpayer and BEC were awarded the contract and the taxpayer received income from the business flowing from the MoU entered into with SAIL. During relevant AY 2011-12, the AO held that contract between consortium of taxpayer, BEC and SAIL was a composite contract artificially divided into parts so as to avoid taxability. The AO held that the consortium should be taxed as an AOP. Income from offshore supplies and provision of offshore services were taxable in India.

The Mumbai Tribunal observed that there was a clear demarcation in the work and cost between the consortium members. The taxpayer was responsible for design, engineering, supply, commissioning, guarantees, supervision services of all the main and critical of equipments. BEC was responsible for supply of all indigenous equipment and auxiliaries, education of site, civil and erection work and providing assistance during commissioning and performance tests that site. Each member was incurring expenditure only in its specified area of work. Both the members of consortium had to provide bank guarantee to steel authority of India Ltd in the same currency or currencies for a period of twelve months from the date of release of the payment against commissioning Charges.

With regard to offshore supply of design and engineering and offshore supply of plant and equipment, the Tribunal observed that the equipment and material was manufactured and procured outside India and therefore the income attributable to the supply thereof could only be brought to tax if it was found that the said income therefrom arose through or from a business connection in India.

The contract entered into by the consortium with the SAIL provided for consideration to be paid member wise as well as component wise. The segregation of the contract revenue between the members of the consortium and into offshore and onshore activities was made an agreed-upon between the taxpayer, BEC and SAIL at the stays of awarding the contract and not after awarding the contract. Therefore, in our opinion the contract was clearly divisible.

The Tribunal relied on Supreme Court decision in the case of Ishikawajima Harima Heavy Industries and upheld the DRP's order where it has been held that consortium was not taxable as AOP. Further since there was no business connection in India, offshore supplies were not taxable in India.

*DCIT v. Vitkovice Machinery A. S. (ITA/1673/Mum/2015)*

## Notifications/Circulars/Press Releases

### CBDT clarifies that indirect transfer provisions shall not apply to a non-resident on account of redemption or buy-back of its share or interest held indirectly in specified funds

Central Board of Direct Taxes (CBDT) has issued a Circular clarifying that the provisions of indirect transfer (provided under Section 9(1)(i) of the Act read with Explanation 5) shall not apply in respect of income accruing or arising to a non-resident on account of redemption or buy-back of its share or interest held indirectly (i.e. through upstream entities registered or incorporated outside India) in the specified funds if such income accrues or arises from or in consequence of transfer of shares or securities held in India by the specified funds and such income is chargeable to tax in India. However, such benefit shall be applicable only in those cases where the proceeds of redemption or buyback arising to the non-resident do not exceed the pro-rata share of the non-resident in the total consideration realised by the specified funds from the said transfer of shares or securities in India. It is further clarified that a non-resident investing directly in the specified funds shall continue to be taxed as per the extant provisions of the Act.

*CBDT Circular No. 28/2017, dated 7 November 2017*

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# Corporate tax

## Decisions

### Bonus shares acquire character of original shares and hence concessional tax rate under Section 115E of the Act is applicable

The taxpayer, a non-resident Indian (NRI) had declared Long-term Capital Gains (LTCG) on sale of shares for AY 2012-13. The taxpayer claimed that tax was payable on LTCG at 10 per cent under Section 115E of the Act instead of normal rate of 20 per cent as the shares were acquired using convertible foreign exchange. The company in which the taxpayer purchased shares was an Indian company whose promoters were taxpayer and his father. During the assessment, AO rejected taxpayer's claim and taxed LTCG at 20 per cent. The AO observed that the taxpayer had been allotted bonus shares against the original shares bought by him and some other shares were given to him by overseas investors without any payment from him. The AO held that the shares sold by the taxpayer were bonus shares and shares received by the taxpayer from another investor free of cost. Thus, benefit under Section 115E of the Act was not applicable and it was available only with respect to shares bought using convertible foreign exchange i.e. original shares bought by the taxpayer. On appeal, the CIT(A) confirmed AO's order.

The Hyderabad Tribunal observed that the taxpayer could not have acquired bonus shares unless he owned the original shares and fulfilled conditions for allotment of bonus shares. Further, the original shares definitely had a cost of acquisition in foreign exchange. The Tribunal relied on the decision of CIT v. Dalmiya Investment Co. Ltd 52 ITR 567 (SC) and held that where the original shares are purchased in foreign exchange, then the same shall also be attributed to the bonus shares which have been allotted subsequently. The bonus shares acquire the nature of the original shares, though the cost of acquisition shall be 'nil' under Section 55(2)(aa) of the Act. With respect to the original and the bonus shares transferred to the taxpayer by overseas investors without any cost, the Tribunal observed that, the given shares were purchased and allotted by way of inward remittances of foreign exchange. Since the AO had accepted the assets as LTCG in view of the period of holding of the overseas investors, it was not open to the AO to treat the said asset as acquired without any cost by the taxpayer. Thus, the Tribunal held that, as the taxpayer received the asset without any cost, the same was to be treated as gift and cost of acquisition of the previous owner shall be the cost of acquisition to the taxpayer. The original shares acquired by the taxpayer from the overseas investors were also foreign exchange assets under Section 115E of the Act. Further, regarding bonus shares received on shares so acquired from foreign investors, the Tribunal held that they would have the same character as the original shares and thus would be entitled to tax rate under Section 115E of the Act.

*Sri Shashi Parvatha Reddy v. DCIT (ITA No.392/Hyd/2017) – Taxsutra.com*

### Joint venture arrangement is not a sham transaction. Payment to joint venture partners for purchasing land interest is a deductible expenditure

The taxpayer is engaged in construction and development of residential and commercial projects, was joint venture partner with OM Metals Ltd (OM) and Wellwisher Construction and Finance Pvt. Ltd (WW). The taxpayer was developing an Information Technology (IT) Special Economic Zone (SEZ) at Navi Mumbai and had applied for allotment of 100 acres of land at Navi Mumbai to Maharashtra Industrial Development Corporation (MIDC). MIDC allotted 50 acres land to these three partners for consideration of INR50.58 crores. After allotment, the taxpayer bought the interest of OM and WW in the said land in equal proportion for INR100.80 crores, with the previous sanction and permission of MIDC. The said payment was made by the taxpayer partly out of own funds and partly out of borrowed funds. The taxpayer showed the compensation payable to these companies as the outstanding amount and increased the inventory by INR100.80 crores. The AO accepted the transaction and passed the assessment order under Section 143(3) of the Act. Subsequently, based on the assessment order of OM, the AO re-opened the assessment of the taxpayer under Section 147 after 4 years. The AO treated the joint venture arrangement as sham and non-genuine. Accordingly, he reduced INR100.80 crores from the inventories and also disallowed the interest on money borrowed to make payment to the above parties for relinquishment of their interest in the said piece of land. The AO held that where the entire cost of the plot of land itself was only INR50 crores, the payment by the taxpayer amounting to INR100.80 crores to the joint venture partners only for lending their names for a period of three days was a colourable device employed by the taxpayer with a view to avoid payment of taxes. Aggrieved, the taxpayer appealed before Tribunal.

The Tribunal held that when the amounts paid by the taxpayer to OM and WW were taxed in their hands as genuine transaction by the tax authorities, the same transaction cannot be non-genuine and sham in the hands of the taxpayer. The Tribunal observed that the application for allotment of land was made in the joint names of the taxpayer, OM and WW and the land was also allotted by MIDC. Thereafter, MIDC on an application made by the JV partners, approved the relinquishment of interest in the said land by OM and WW in favour of the taxpayer on payment of specified premium. Therefore, the records of MIDC proved that the taxpayer, OM and WW were the joint owners of the plot of land till the relinquishment of rights by OM and WW was approved by MIDC and it showed the transaction was genuine and out of business

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consideration. Therefore, a business decision was taken to purchase the interest from two JV partners. Further, since all the three parties were unrelated parties and there was involvement of multiple agencies including government authorities, the Tribunal held that the transaction cannot be said to be non-genuine and sham. The Tribunal held that mere irregularities in the documents as pointed by the tax department cannot be the basis to draw conclusion as to genuineness of the transaction. Further, the Tribunal observed that since the valuation by the registered valuer and the DVO were largely same, the reasonableness of the transaction could not be doubted.

With regards to disallowance of interest paid on the borrowed funds, the Tribunal held that since the transaction is not treated as sham, interest which the taxpayer has incurred on the money borrowed has to be allowed to the taxpayer.

*Gigaplex Estate Pvt Ltd v. DCIT (ITA NO.1132, 1133/Mum/2016) – Taxsutra.com*

### Management charges reimbursed to holding company are liable for TDS

The taxpayer had incurred and paid management charges to holding company Bharat Yatra Nigam Limited for AY 2006-07. The AO disallowed the management expenditure on the ground that tax was not deducted under Section 194J of the Act. The CIT(A) deleted the addition made by the AO on the ground that management charges paid by the taxpayer were in the nature of reimbursement of expenditure incurred by the holding company on behalf of the taxpayer and no tax at source was required to be deducted.

The Bangalore Tribunal observed that even if the said payment was on account of reimbursement of expenditure incurred by the holding company, the provisions of Section 194J of the Act could not be circumvented by modus operandi of payment routing through the holding company. The Tribunal held that once the nature of payment is clearly attracting the provisions of Section 194J of the Act, the modes of payment will not change the obligation of the taxpayer to deduct the tax at source. Further, the Tribunal held that if this modus operandi was allowed, then, in each and every case, the provisions of Section 194 as well as Section 40(a)(ia) of the Act could be circumvented by making the payment through an intermediary and not directly to the party. Accordingly, the Tribunal upheld the order of AO making disallowance under Section 40(a)(ia) of the Act.

*ACIT v. Tungabhadra Steel Products Ltd (I.T. A. No.984/Bang/2017) – Taxsutra.com*

## Notifications/Circulars/Press Releases

### CBDT issues direction for disposal of cases having tax effect of INR 50 crore or more

As per the Central Action Plan issued for the Financial Year 2017-18, all pending appeals before CIT(A) having tax effect of INR50 crore or more are to be dispose of up to 31 December 2017 as mentioned at Para (i) of Action Plan of chapter III of the Central Action Plan.

On 12 October 2017, the CBDT has issued a directive to tax officers stating that due to some typographical mistake, the date of disposal of all pending appeals having tax effect of INR50 crore or more was wrongly written as March 2018 in place of 31 December 2017. Accordingly, it is directed to dispose of all pending appeals having tax effect more than INR 50 crore upto 31 December 2017.

*CBDT Order No. 683/CIT/(AS)/2015, dated 12 October 2017*

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# Indirect tax

## Central Excise

### Decisions

#### Education Cess & Secondary Education Cess paid held refundable when basic duty is nil

The tax payer was engaged in the manufacture and clearance of malted milk food and had set up its factory in the state of Assam. As per the special package for the north eastern regions, new industrial units were entitled to 100 per cent excise duty exemption for a period of 10 years from the date of commencement of commercial production.

Pursuant to the said industrial policy, the Central Government issued Notification No. 20/2007-Ex. dated 25 April, 2007. The methodology which was adopted and prescribed in the said notification was that the manufacturer was initially supposed to pay the excise duty leviable on such goods at the time of clearance as per the Tariff Act and thereafter claim the refund.

Further, vide Finance Act, 2004, the Education Cess (EC) and Secondary Higher Education Cess (SEC) was imposed, which are surcharge on the excise duty. These EC & SEC was levied and collected from the manufacturers who had set up their units in the aforesaid areas, along with the excise duty. However, while refunding the excise duty paid by these manufacturers, the EC & SEC that was paid by the manufacturers along therewith was not refunded.

As the taxpayers were denied refund of the EC & SEC, they challenged the order of the AO by filing appeal before the Commissioner (A). However, these appeals was dismissed by the Commissioner and the order of the Commissioner was upheld by the CESTAT. The Tribunal relying on the judgment in case of Jindal Drugs Ltd. 2009-TIOL-2562-CESTAT-DEL held that the Excise department was under no obligation to refund the EC & SEC as the notification exempted only the excise duty and, therefore, it was the excise duty which was to be refunded.

In this background, the Supreme Court noted to take cognizance of the department view regarding EC & SEC which was payable as surcharge on the excise duty, once the excise duty was exempted. Also extracting the circular dated 10 August, 2004 which clarifies that EC is part of excise and circular dated 8 April, 2011 issued by the CBEC on the subject "EC & SEC - reg.". Accordingly, the Supreme Court observed that the Government itself has taken the position that where whole of excise duty or service tax is exempted, even the EC as well as SEC would not be payable. These circulars are binding on the department.

Further, EC was on excise duty. It means that assessee's who are required to pay excise duty will have to shell out EC as well. It can, therefore, be clearly inferred that when there was no excise duty payable, as it was exempted, there would not be any EC as well. Accordingly, there cannot be any surcharge when basic duty itself is Nil. Therefore, EC and SEC paid by the tax payer was held refundable.

*SRD Nutrients Pvt Ltd v. CCE [2017-TIOL-416-SC-CX]*

#### CENVAT credit in respect of service tax paid on group health insurance for the family members of employees held eligible

The issue involved in the said case was that whether the tax payer being manufacturer was entitled for CENVAT credit in respect of service tax paid on group health insurance for the family members of the employees.

Commissioner of Central Excise (CE) filed the said application for rectification of mistake (ROM) in the Tribunal's order on the ground that all the judgments relied on by the tax payer was related to the insurance for the employees of the Company and not for the family members of the employees. Therefore there was a mistake in the Tribunal's order.

After considering the above grounds the CESTAT held that, CENVAT credit availed in accordance with rule 2(l) of Cenvat Credit Rules, 2004 on the group health insurance for the family of the employees was admissible. It further made clear that the family members are covered by the insurance scheme because that insurance not only cover the employees risk but also the family members of the employees.

In the findings of Tribunal order, it is clearly stated that the decision cited by learned Counsel has already decided the issue in hand. Therefore the issue is no longer res integra. Accordingly, the ROM application of Commissioner of CE is not maintainable and the same was dismissed and Cenvat claimed by the tax payer was held to be eligible.

*Mercedes Benz India Private Ltd, 2017-TIOL-4005-CESTAT-Mum*

#### CENVAT credit availed on rent-a-cab services and hotel charges held eligible

The tax payer appealed against the denial of Cenvat Credit availed in accordance with rule 2(l) of CCR, 2004 on rent-a-cab services and hotel charges paid to the service provider.

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The appellants were engaged in manufacturing of machineries for making paper. For the purpose of sales promotion and market research, samples were required to transfer to various places and to meet buyers. During the said processes services like rent-a-cab and hotels services were availed. The tax payer argued that these services are used in or in relation to the manufacture of goods, in so far as they were specifically related to sale promotion and relied on the judgement in the case of Sarita Handa Exports (P) Ltd. – 2016 (44) STR 654 (Tri-Chan) to assert that these services constitute input services.

The Commissioner of CE held that, the services availed for the purpose of exploration of market were not covered under the definition and only the services where orders are obtained were covered in this definition.

In this background the CESTAT held that, the appellants were manufacturers of machinery and had claimed that for the purpose of sales promotion. For the purpose of the said services like, rent-a-cab and hotel services are utilized and therefore, they are qualified as input service. Further the impugned order does not give any specific reason for denial Cenvat Credit. The sales promotion does not necessarily means obtaining orders. It also includes the market research and exploration. In view of the above, the said credit availed by the tax payer was held to be admissible.

*Parason Machinery India Pvt Ltd, 2017-TIOL-4003-CESTAT-Mum*

## Customs
## Notifications/Circulars/Press Releases

### Refunds of IGST paid on export of goods under Rule 96 of CGST Rules, 2017

In cases where the exporter has filed GSTR 3B and the information furnished by the exporters in the GSTR 1 and GSTR 3B is matching with the details filed by them in Shipping bills, the refunds have already been disbursed. But there are many cases where the refund of IGST could not be done due to errors in the EGM /GSTR 1 return/Shipping Bill.

The analysis of the common errors that are hindering the disbursal of IGST refund, and decisions taken to address such errors which are as follows:

*Export General Manifest (EGM)*

- Filing of correct EGM is a must for treating shipping bill or bill of export as a refund claim.

*Details of export supplies in Table 6A of GSTR-1*

- The details of zero rated supplies declared in Table 6A of return in Form GSTR-1 are matched electronically with the corresponding details available in Customs Systems as per details provided in shipping bills/ bill of export. Thus exporters must file their GSTR-1 very carefully to ensure that all relevant details match.

*Valid return in Form GSTR-3 or Form GSTR-3B*

- Filing of valid return in GSTR-3 or GSTR-3B is another pre-condition for considering shipping bill/Bill of export as claim for refund.

*Bank account details*

- As per Rule 96 of CGST Rules 2017 refund is to be credited in the bank account of the applicant mentioned in his registration particulars. Exporters have been declaring details of bank account to Customs for the purpose of drawback etc. There is a possibility that bank account details available with Customs do not match with those declared in the GST registration form. Accordingly, exporters may either change the bank account declared to Customs to align it with their GST registration particulars or add the account declared with Customs in their GST registration details.

*Instruction No.15/2017 Customs dated 9 October 2017*

## DGFT Public Notice

### Onetime condonation of time period in respect of obtaining block wise extension in Export

**Obligation period under EPCG Scheme**

As a onetime measure, it has been decided that the Regional Authority (RAs) concerned may consider the requests for block-wise Export Obligation period extension for the requests already submitted but submitted beyond the time on payment of additional composition fee of INR 5,000/- in addition to payment of regular composition fee as applicable , subject to the following:

- The capital goods have been installed within the period of 18 months from the date of imports but the installation certificate has been submitted to RA beyond 18 months from the date of import.
- The authorization holder submits to RA bonafide reasons for delay in submission of installation certificate.
- The installation certificate is submitted to RA on or before 31 March 2018.
- The EPCG authorization is not under investigation / adjudicated by RA / customs authority / any other investigating agency.

The RAs may also consider the requests that may be received up to 31 March 2018 under this facility. This shall be subject to the condition that the case is otherwise in order and submission of installation certificate for the capital goods imported to the RA concerned. This facility is for EPCG authorizations issued from 1 September, 2004.

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The EOP extension would be granted as per the relevant provisions of Hand Book of Procedure (HBP) applicable on the date of issue of authorization in continuation of the original / extended expiry period, and would be subject to fulfillment of all other relevant conditions of the Foreign Trade Policy (FTP) and HBP.

*Public Notice No. 35, 36 & 37 /2015-2020 dated 25 October, 2017*

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### Input credit disallowance to bona-fide purchaser due to non-deposit of tax by seller is unconstitutional

In the present case, various writ petitions have been disposed of by a common judgment passed by the Delhi High Court. The AO completed the assessment and issued unfavorable orders disallowing Input Tax Credit (ITC) under section 9(2)(g) of Delhi Value Added Tax Act, 2004 (DVAT Act). The said section states that, 'no tax credit shall be allowed to the dealers or class of dealers unless the tax paid by the purchasing dealer has actually been deposited by the selling dealer with the Government or has been lawfully adjusted against output tax liability and correctly reflected in the return filed for the respective tax period.'

The petitioners preferred appeals to various appellate authorities against such orders, however, the same were dismissed. Against such orders of appellate authorities, the petitioners filed writ petition before the High Court challenging constitutional validity of Section 9(2)(g) of the DVAT Act as being violative of Article 14 and 19(1)(g) of the Constitution of India .

The learned councils on behalf of petitioners contended that the said section treats both the 'guilty purchasers' and the 'innocent purchasers' at par, whereas they constitute two different classes. Hence, by treating the unequals equally, the said legislation is violative of Article 14 of the Constitution of India.

In response to the above, the learned council on behalf of department submitted that, arbitrariness of the said section is not a valid ground for challenging the statute as being violative of Article 14 of the Constitution of India.

The High Court examined the submissions made by both the parties, relevant provisions of DVAT Act and various judicial pronouncements announced by different courts. Basis this, the HC highlighted that purchaser is to pay the price to the seller, including VAT component. In order to eligible for ITC, the purchaser has to ensure that the seller has valid registration and issued tax invoice under the DVAT Act, invoice should contain the TIN number of seller and purchasing dealer should check the details of seller at website of department to ensure that such dealer is not a fictitious person. However, purchaser cannot be expected to keep a track of whether seller has discharged the amount of tax to the Government or lawfully adjusted the same against the output liability. Further, it was highlighted that the provisions of DVAT Act empowers the department to collect tax in arrears from selling dealer who has not deposited the tax after collection of such tax from purchaser. The HC emphasized on wordings 'dealer or class of dealers' mentioned in the said section and held that, it could include either the purchasing dealer or the selling dealer. Thus, basis the situation envisaged under said section, the selling dealer is said to be defaulting party if he has collected the tax from purchaser and failed to deposit the same with Government. However, the denial of ITC to the purchaser could be justified in the situation where the purchasing dealer has acted without due diligence. Given this, High Court has held that legislature has failed to make distinction between bona fide purchasers, who have transacted with seller after taking all necessary precautions as may be required under DVAT Act and those who have not. The High Court concluded that, in the present case, the purchasing dealer is being asked to do the impossible act i.e. to anticipate the seller who will not deposit the tax with Government.

In the view of above, the High Court concluded that expression 'dealer or class of dealers' occurring in the said section should be interpreted as not including a bona fide purchaser. Thus, department is precluded from invoking such section to deny ITC to a bona fide purchaser. In this case, the remedy for the department would be to proceed against the default seller to recover such tax and not deny ITC to the bona fide purchaser.

Accordingly, the High Court has set aside the default assessment orders of tax, interest and penalty and the orders of various appellate authorities, invoking the said section for the default of the selling dealer and allowed the writ petitions filed by the various petitioners.

*Arise India Limited v. Commissioner of Trade and Taxes, Delhi and Ors*

# VAT

## Notifications/Circulars/Press Release/Order

**Delhi**

Vide below mentioned notification, Delhi VAT department has extended the time limit up to 15 December 2017 (as against earlier time limit up to 15 November 2017), for submission of details of closing stock as held by the registered dealers on 31 March 2017 and 30 June 2017, at online portal of department.

*Notification No. F.2 (12)/Policy/2017/1066-1073 dated 15 November 2017*

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## Goods and Service Tax

### Notifications/Circulars/Press Releases

The time period for filing GSTR-1, GSTR 4, GSTR-5, GSTR 5A, GSTR 6 & ITC-04 has been extended as per table given below:-

| Form | Applicable to | Period | Extended date |
|---|---|---|---|
| GSTR -1 | persons having aggregate turnover of more than 1.5 crore rupees in the preceding financial year or the current financial year | July, August, September & October, 2017 | 31 December 2017 |
| | | November 2017 | 10 January 2018 |
| | | December 2017 | 10 February 2018 |
| | | January 2018 | 10 March 2018 |
| | | February 2018 | 10 April 2018 |
| | | March 2018 | 10 May 2018 |
| | persons having aggregate turnover of up to 1.5 crore rupees in the preceding financial year or the current financial year | For the quarter July to September-2017 | 31 December 2017 |
| | | For the quarter October to December-2017 | 15 February 2018 |
| | | For the quarter January to March- 2018 | 30 April 2018 |
| GSTR -4 | composition supplier | For the quarter July to September-2017 | 24 December 2017 |

| Form | Applicable to | Period | Extended date |
|---|---|---|---|
| GSTR-5A | person supplying online information and database access or retrieval services | July, August, September & October, 2017 | 15 December 2017 |
| GSTR-5 | non-resident taxable person | | 11 December 2017 |
| GSTR-6 | input service distributor | July 2017 | 31 December 2017 |
| ITC-04 | where movement of goods, to or from job worker | For the quarter July to September-2017 | 31st December 2017 |

Due date for GSTR-2 & GSTR-3 for the months July 2017 to March 2018 will be notified subsequently.

*Notification No. 57, 58, 59, 60, 61, 62 & 63/2017 – Central Tax New Delhi, 15 November 2017*

Late fees payable for delay in filing of return for the month of August & September 2017 waived.

*Notification No. 50/2017 – Central Tax New Delhi, 24 October 2017*

Late fees payable for delay in filing of return for October 2017 onwards reduced to fifty rupees (twenty five each for CGST and SGST). And in case of nil return, the late fees reduced to twenty rupees (ten each for CGST and SGST).

*Notification No. 64/2017 – Central Tax New Delhi, 15 November 2017*

Amendments made to CGST Rules as under:

- For the purpose of reversal of input tax credit under Rule 42 and 43, supply of services made to Nepal and Bhutan against payment in Indian rupees will not be considered as exempted supply.
- Electronic filing of an application, intimation, reply etc. shall also include manual application, intimation, reply etc. (Rule-97A & Rule-107A inserted).

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- Rule 109A has been inserted which deals with appeals and revision, to appoint authority with whom a further appeal can be filed by a person aggrieved by the decision or order of the adjudicating authority.
- Form GST RFD-01 has been provided for manual application for refund in specified cases

*Notification No. 55/2017 – Central Tax New Delhi, 15 November 2017*

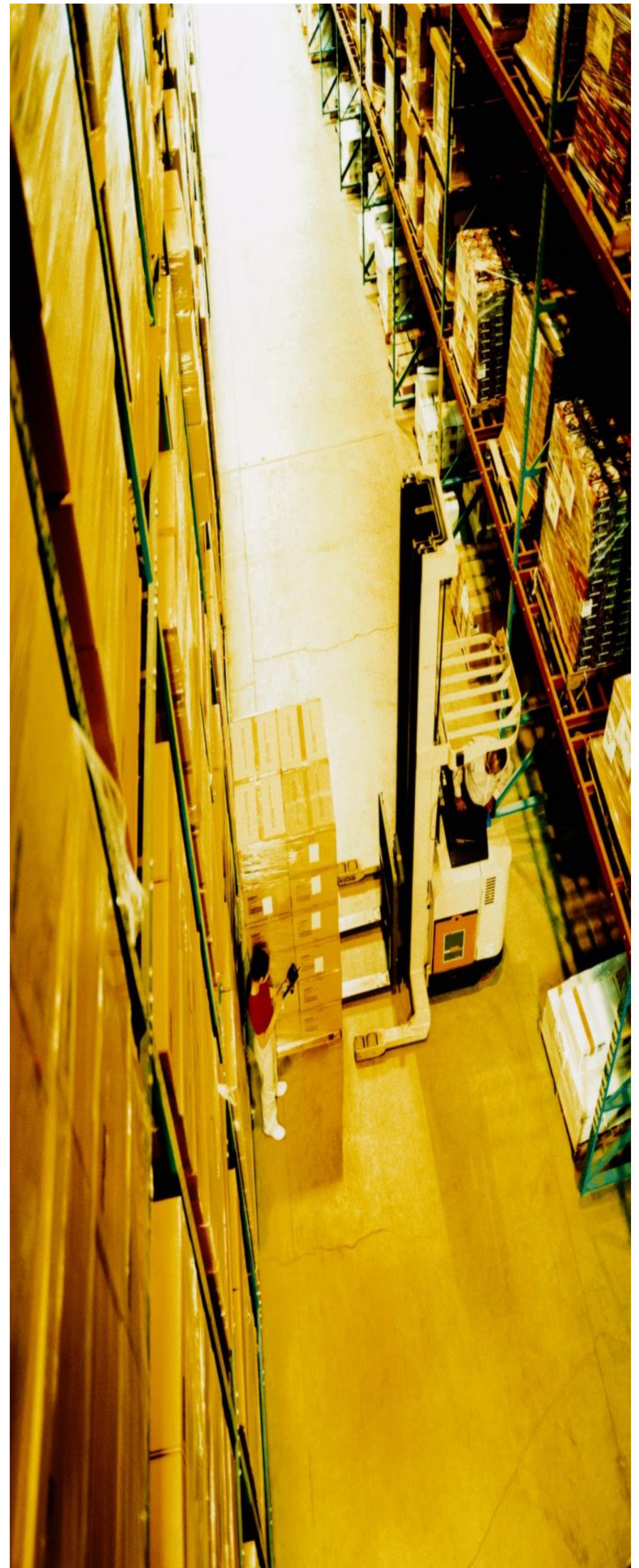
January, February & March 2018 specified as months for which return in form-GSRT-3B to be filed by 20th of subsequent month.

*Notification No. 56/2017 – Central Tax New Delhi, 15 November 2017*

Exempt from payment of taxes on advances in case of supply of goods, by specifying date of invoice as time of supply in case of goods.

*Notification No. 66/2017 – Central Tax New Delhi, 15 November 2017*

The Commissioner (GST), on the recommendations of the Council, extended time limit for filing declaration in FORM GST TRAN-1 and one time revision of it, till 27th December 2017.
*Order No. 09 & 10/2017-GST, New Delhi, 21 September, 2017*



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# Personal tax

## Notifications/Circulars/Press Releases

### Employees' Provident Fund Organisation issues FAQs on its Inspection Policy

In June 2014, the Employees' Provident Fund Organisation (EPFO) issued a circular[2] with regard to its inspection scheme. In order to simplify business regulations, a transparent inspection policy with relevant norms and criteria was formulated for ensuring accountability, transparency and for minimising frequent inspections of the same unit.

The circular laid down the objectives of the inspection scheme which also included the criteria of inspections and methodology to be followed in this regard. In the above context, EPFO has now issued Frequently Asked Questions (FAQs) on its inspection policy.

#### Highlights of the circular

The FAQs on the inspection policy released by the EPFO addresses following issues:

- The establishments would be inspected as per the inspection policy of the EPFO which was circulated vide circular dated 26 June 2014.
- For the first year of setting up of the Start-ups, such establishments may not be inspected under the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 (EPF Act).
- Start-ups may be asked to submit an online self-declaration instead. From the second year onwards, up to five years from the setting up of the unit, such start-ups may be taken up for inspection only when very credible and verifiable complaints of violation is filed in writing and the approval has been obtained from the Central Analysis and Intelligence Unit (CAIU).
- The different types of inspection under the policy formulated by EPFO are as follows:
  - Mandatory inspection
  - Inspection can be conducted in cases forwarded through CAIU of EPFO
  - Optional inspection

2 EPFO Circular - http://www.epfindia.com/site_docs/PDFs/Circulars/Y2014-2015/MIS_WebPortal.pdf

- The different criteria under which establishments can be selected for inspection:

  Mandatory inspection

  - All establishments registered on Electronic Challan Cum Return (ECR) portal which are not marked as closed and not complying
  - Establishments reported for closure

  Optional inspection

  In the following cases, the inspections would be generated through computer taking into account the drop in remittance/ membership as compared to last quarter as per following parameters:

  - Remittance drop in excess of INR10,000 and 15 per cent (weightage of 1:1) (40 per cent)
  - Membership drop in excess of 50 members and 15 per cent (weightage of 1:1) (40 per cent)
  - All other units (20 per cent)

  Further, it is mentioned that normally an establishment may be selected for inspection only once in a year.

- The FAQs also state that the inspection report will not be available on the website. However, the inspection report can be provided on demand of the complainant subject to the exclusion as prescribed under the Right to Information Act, 2005 (RTI Act).
- In case any establishment which is found to have been violating the rules and regulations under the EPF Act, suitable action as prescribed under the EPF Act and the Schemes framed thereunder may be taken against such establishment.

*EPFO Circular – http://www.epfindia.com/site_docs/PDFs/Circulars/Y2017-2018/CAIU_FAQ- InspectionPolicy _13502.pdf*

### Employees' Provident Fund Organisation has issued guidelines for monitoring the Provident Fund Trusts of exempted establishments

In 1952, the Government of India introduced a mandatory savings scheme, for non-government employees, known as the Employees' Provident Funds Scheme, 1952 (EPFS). In this scheme, both the employee and the employer are required to make a contribution to the Employees' Provident Fund (EPF).

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The government also permitted employers to establish and manage their own in-house PF trusts, subject to the conditions prescribed under the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 (EPF Act) and the Income Tax Act, 1961 (IT Act). Such establishments are known as exempted establishments under the EPF Act.

In the above context, the Employees' Provident Fund Organisation (EPFO) has issued two circulars with regard to monitoring of the management of the trusts of the exempted establishments.

### Key highlights of the circulars

- All the exempted establishments/ employers are required to file the statutory online returns in time i.e.by 25th of the month following that to which it relates.
- It has been noticed that some of the Provident Fund (PF) exempted establishments are still not filing the statutory online returns.
- The Regional Provident Fund Commissioner (RPFC)/ Officer in- charges of field offices have been directed to initiate action against such defaulting establishments including process for cancellation of exemption as per the EPF Act.
- The circular has also laid down the procedure for online performance evaluation of the exempted establishments on the basis of following six parameters:

a) Transfer of fund before due date

b) Investment

c) Remittance to the trust

d) Interest declared

e) Claims settlement

f) Audit of accounts

- On the basis of the above parameters, a ranking of PF exempted establishments will be prepared for the preceding month and it shall be published on the EPFO website on the first day of the succeeding month.
- Further, the field officers have been directed to also monitor other performance parameters of the exempted establishments during compliance audit or otherwise and issue show cause notice to all the defaulting establishments which have not filed the online return on or before 5 October 2017.
- The EPFO has directed that every trust of exempted establishments will communicate to their members through SMS on mobile phones, emails or mobile e-passbook about the receipt of contribution in the account of the member every month, within two days of receipt of remittance from the exempted establishment.
- Some trusts are not able to declare the rate of interest at par with EPFO. As per the EPF Scheme, any deficiency in the interest declared by the Board of Trustees is to be made good by the employer to bring it up to the statutory limit.

*EPFO Circular - http://www.epfindia.com/site_docs/PDFs/Circulars/Y2017-2018/Exem_OnlineReturn_ExEstt_10735.pdf and EPFO Circular - http://www.epfindia.com/site_docs/PDFs/ Circulars/Y2017-2018/Exem_RTMS_ExemEstt_13587.pdf*

## Pension Fund Regulatory and Development Authority increases the maximum age of joining National Pension System (NPS) from 60 years to 65 years, under NPS all citizen model and corporate sector model

### Background[3]

The Pension Fund Regulatory and Development Authority (PFRDA) Act was passed by the Parliament in September, 2013 and the same was notified on 1 February, 2014. The PFRDA regulates National Pension System (NPS) which is subscribed by employees of Government of India, State Governments and by employees of private sector and unorganised sectors.

The government also permitted all Indian citizens who are between the age of 18 to 60 years to join NPS voluntarily in the year 2009. The corporate sector model of NPS was launched in December 2011.

In the above context, the Pension Fund Regulatory and Development Authority (PFRDA) has issued a circular with regard to increasing the maximum age of joining NPS under the private sector model.

3 http://pfrda.org.in/index1.cshtml?lsid=4

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### Key highlights of the circular[4]

Any Indian Citizen, resident or non-resident, between the age of 60 to 65 years, can also join NPS and may continue to contribute upto the age of 70 years in NPS. With this increase of joining age, the subscribers who are willing to join NPS at a later stage of life will be able to avail the benefits of NPS.

- The subscriber joining NPS beyond the age of 60 years will have the same choice of the Pension Fund as well as the investment choice as is available under the NPS for subscribers joining NPS before the age of 60 years.

- If such subscribers exit after completion of 3 years in NPS, it will be considered as normal exit and in this case, subscriber will be required to annuitise at least 40 percent of corpus for purchase of annuity and remaining corpus can be withdrawn in lump sum.

- If such subscribers wish to exit from NPS before completion of 3 years in the NPS, they will be allowed to do so, but in such cases, the subscriber will have to utilise at-least 80 percent of the corpus for purchase of annuity and the remaining can be withdrawn in lumpsum.

- In case of death of the subscriber the entire corpus will be paid to the nominee of the subscriber.

- The new change is effective from 1 November, 2017.

*PFRDA Circular - http://pfrda.org.in*

4 PFRDA Circular - http://pfrda.org.in/WriteReadData/Links/Circular-Increase%20in%20joining%20age%20under%20NPS24991e86-8d6d-41ab-bedd-74fbf3b62fd3.pdf (Circular no-PFRDA/2017/35/PD/1)

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