Monthly Tax Updates

September – October 2022

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This update covers:

1 Direct Tax

This update covers key judicial and regulatory developments in the months of September and October 2022 relating to direct tax, goods and services tax, customs, central excise and promissory estoppel against state.

1.1 Supreme Court settles judicial conflict on the due date for payment of employees' contributions to statutory funds

On 12 October 2022, the Supreme Court, in a batch of appeals led by *Checkmate Services P. Ltd. v CIT,* held that *employees' contributions* towards employees' provident fund (**EPF**), state insurance (**ESI**) and other similar funds must be deposited by the employer on or before the due dates specified under the statutes governing such funds (**Statutory Due Dates**). Otherwise, such employees' contributions would constitute taxable income for the employer for the subject year.

Under the scheme of the (Indian) Income Tax Act (**ITA**), *employees' contributions* towards statutory funds received by an employer-taxpayer are treated as its business income, if such sums are not deposited with the concerned authorities before the Statutory Due Dates prescribed under the applicable labour welfare laws. On the other hand, under Section 43B of the ITA, *employer's contributions* towards these funds for a particular financial year may be claimed as tax deductible expenditure for such year even if such contributions by the employer are paid beyond the Statutory Due Dates, *so long as the deposits are made before the due date for filing the annual tax return* of the employer-taxpayer.

The ITA did not explicitly provide this extended timeline (i.e., up to the due date for filing the annual tax return) in respect of *employees' contributions* towards such funds. However, in several cases, High Courts have held that employees' contributions paid beyond the Statutory Due Dates prescribed under the applicable labour welfare laws but before the due date for filing the annual tax return should not be considered as the taxable income of the employer-taxpayer. In doing so, the High Courts have generally relied on an earlier ruling of the Supreme Court in the case of *Alom Extrusions (2009).*

In the present appeals as well, the employer-taxpayers had deposited employees' contributions towards EPF and ESI after the Statutory Due Dates but before the due date for filing the annual tax return. The tax authorities treated such contributions as the taxable income of the employer-taxpayers. Therefore, the key issue under consideration was whether the employer must deposit employees' contributions towards statutory funds before the Statutory Due Dates prescribed under the applicable labour welfare laws, or if it would suffice to deposit such amounts before the due date for filing the annual tax return.

The Supreme Court, while observing the division of opinion between various High Courts on this issue (i.e., *with the High Courts of Bombay, Himachal Pradesh, Calcutta, Guwahati and Delhi favouring the interpretation of the employer-taxpayers, and the High Courts of Gujarat and Kerala holding in favour of the tax authorities*), finally ruled in favour of the tax authorities and upheld the minority view.

In its ruling, the Supreme Court held that there is a marked distinction between the nature of employees' contributions towards statutory funds, and employer's contributions. There is a specific provision (Section 36(1)(va)) dealing with employees' contributions that are deducted from the employees' salaries and deposited with the relevant authority by the employer. These contributions are the employees' funds that are held in trust by the employer till they are deposited with the relevant authority. Such contributions are *per se* not part of the employer-taxpayer's income but are only *deemed* to be so, to ensure that they are paid within the Statutory Due Dates prescribed in the relevant labour enactments. On the other hand, there is a separate provision (Section 36(1)(iv)) dealing with the employer's contributions towards statutory funds. Employer's contributions are over and above the employees' contributions and are deposited directly by the employer.

Owing to this difference and the manner in which Section 43B is phrased, the Court held that the extended timeline (i.e., up to the due date for filing the annual tax return) provided under Section 43B of the ITA applies only to the employer's contributions towards such funds, and not to employees' contributions (which must be deposited by the Statutory Due Dates prescribed in the relevant labour enactments, so as to not constitute taxable income of the employer).

The key observations of the Supreme Court are:

a. While introducing Section 36(1)(va), the legislature was aware of the distinction between the two types of contributions. Unlike Section 36(1)(va), Section 36(1)(iv) specifically pertains to sums contributed by the taxpayer *as an employer* to various statutory funds. Importantly, the condition for the deposit of amounts on or before the Statutory Due Dates has not been made applicable to the employer's contributions in Section 36(1)(iv), but only applies to employees' contributions in Section 36(1)(va).

b. The coordinate bench ruling in *Alom Extrusions (2009)* is distinguishable as it did not consider Section 36(1)(va) and the separate provisions under the ITA for employer's and employees' contributions.

c. The legislature's endeavour in introducing the extended timeline in Section 43B was to ensure that certain deductions that were claimed by taxpayers on mercantile basis (but were not actually paid out), were only available at the time of payment. When Section 43B was introduced, only provisions dealing with the employer's contributions to statutory funds were in the statute book. The subsequent enactment of provisions dealing with employees' contributions and the marked distinction between the two types of contributions must be borne in mind while applying the extended timeline provided in Section 43B.

d. Given this, Section 43B cannot be interpreted to override Section 36(1)(va). The leeway to deposit employer's contributions beyond the Statutory Due Dates cannot be deemed to apply to employees' contributions held in trust by the employer.

e. The Supreme Court reiterated the important principles underlying the interpretation of tax statutes – i.e., a taxing statute must be construed strictly – one must look at what is said in the relevant provision. If a deduction or exemption is available on complying with certain conditions, the conditions must be strictly complied with. There is no room for equitable considerations.

An amendment was made to the ITA by the Finance Act, 2021 which clarified that employees' contributions towards statutory funds must be deposited with the authorities concerned before the Statutory Due Dates so as not to constitute taxable income of the employers. However, the way the amendment was worded led to some ambiguity about its retrospective applicability. While the Indian tax authorities have sought to argue that the amendment applies retrospectively (i.e., *it applies to employees' contributions received by the taxpayers before 1 April 2021 as well*), certain courts have held that the amendment applies prospectively (i.e., *only to employees' contributions received by a taxpayer on or after 1 April 2021*).

Given the disputes on this issue, the Supreme Court's ruling finally settles the position on the meaning of *'due date'* for the deposit of employees' contributions by the employer for the pre-amendment period.

1.2 ITAT holds that slump sale between two Indian associated enterprises is not an international transaction under the transfer pricing regulations

In a recent ruling in the case of *MWH India Pvt. Ltd. v DCIT*, the Mumbai Bench of the Income Tax Appellate Tribunal (**ITAT**) held that a slump sale transaction between two Indian associated enterprises (**AEs**), both held by a common overseas holding company, is not an *'international transaction'* under the Indian transfer pricing regulations.

Section 92B(1) of the ITA defines an *'international transaction'* to include a transaction between *two or more AEs, either or both of whom are non-residents*. Therefore, for a transaction to qualify as an international transaction under Section 92B(1), at least one of the transacting parties must be a non-resident and the transacting parties must be AEs.

On the other hand, under Section 92B(2), a transaction between an enterprise and a *person other than an AE* (**unrelated counterparty**) is also deemed to be an international transaction between two AEs, if the terms of the relevant transaction are determined in substance between the unrelated counterparty and the AE of the transacting enterprise. Under this provision, *the transacting enterprise as well as the unrelated counterparty may be Indian entities* so long as the *AE of the transacting enterprise is a non-resident*.

In the present case, the taxpayer (an Indian company) had entered into an asset purchase agreement with its AE, another Indian company. The assessing officer and the dispute resolution panel held that the transaction between the two AEs was an *'international transaction'* as the terms of the transaction were controlled by the foreign holding company of the two entities. While the ruling is not very clear in this respect, it is possible that the tax authorities applied the principles underlying Section 92B(2) of the ITA, where a transaction between two domestic entities is also treated as an international transaction if the terms are substantially settled by the non-resident AE of one of the domestic transacting parties. However, the tax authorities appear to have disregarded the fact that for Section 92B(2) to apply, the transacting parties must be unrelated.

In the proceedings before the ITAT, the taxpayer contended that for a transaction between two AEs to qualify as an international transaction (under Section 92B(1)), at least one of the transacting parties must be a non-resident. Accordingly, the slump sale in this case would not qualify as an international transaction, and the transfer pricing regulations would not apply.

On the other hand, the tax authorities contended that the slump sale would qualify as an international transaction since both the transacting entities were held by a common overseas holding company. Further, the transaction was undertaken for restructuring the Indian business of the holding company, which had also influenced the entire decision-making process.

The ITAT ruled in favour of the taxpayer and held that for a transaction between two AEs to qualify as an international transaction, at least one of the transacting parties must be a non-resident. Since both the AEs were Indian residents, the transaction would not qualify as an international transaction. While the decision does not explicitly lay down any principles for the interpretation of Section 92B, this is a welcome ruling since the ITAT has excluded transactions between domestic related entities from the applicability of the Indian transfer pricing provisions.

1.3 Delhi High Court holds that no tax withholding is required on reimbursement of salary costs to the overseas seconding entity

On 11 October 2022, the High Court of Delhi, in the case of *PCIT v M/s Boeing India Pvt. Ltd.,* affirmed the ITAT's decision that in a secondment arrangement, no tax withholding under Section 195 of the ITA is required on the reimbursement of salary costs to the seconding entity, once tax has been withheld under Section 192 from the salaries of the seconded personnel in India.

In the present case, the employees of an overseas AE of the taxpayer-company were deputed to work under the control and supervision of the taxpayer-company in India. The salaries of the seconded individuals continued to be paid overseas by the seconding AE, and the taxpayer-company reimbursed such salary costs to the AE. Since the individuals effectively functioned as the employees of the taxpayer-company and worked solely under its control and supervision, the taxpayer-company withheld and deposited income tax under Section 192 of the ITA on the salaries of the seconded individuals. Section 192 obligates an employer to withhold income tax on salary payments made to its employees. The taxpayer company did not withhold any additional income tax while reimbursing the salary costs to the AE. In its view, such payments were pure reimbursements and not in the nature of *'fees for technical services'*, since the AE provided no technical services to the taxpayer company.

On the other hand, the tax authorities held that the overseas AE had provided technical services to the taxpayer company through the secondment of its employees. Consequently, the payments by the taxpayer company to the overseas AE was in the nature of *'fees for technical services'*, on which tax was deductible under Section 195 of the ITA. Section 195 requires payors to withhold income tax from the *taxable income* paid to non-residents. Payments in the nature of reimbursements are not exigible to tax withholding under Section 195, since such reimbursements are not in the nature of taxable income.

After examining the salary reimbursement agreement, the ITAT held that the employees worked under the supervision, control and management of the taxpayer-company and the AE only facilitated the payment of salaries in the employees' home country on behalf of the taxpayer-company. The taxpayer-company only reimbursed the AE for the salary cost borne by it. The ITAT concluded that the real and economic employer of the expatriate employees was the taxpayer-company. Therefore, tax had been correctly withheld under Section 192 on the salaries paid to the expatriate employees.

In its ruling, the High Court affirmed the ITAT's decision and held that Section 195 would not apply to pure reimbursements of salary. This ruling reiterates the settled principle that Section 195 is not applicable to cost reimbursements.

1.4 Additional guidelines on tax withholding on benefits/perquisites arising from business or profession

Section 194R of the ITA, which was introduced through the Finance Act, 2022 and came into effect on 1 July 2022, provides that any person responsible for providing to a resident, any benefit or perquisite, arising from business or the exercise of a profession by such resident, must ensure that tax has been deducted at the rate of 10% of the value of such benefit or perquisite. The benefit or perquisite may or may not be convertible into money.

On 16 June 2022, the Central Board of Direct Taxes (**CBDT**) had notified guidelines (**June Guidelines**) to clarify certain ambiguities surrounding this provision. Subsequently, on 13 September 2022, the CBDT issued additional guidelines (**September Guidelines**) to remove difficulties in implementing the provision. (To refer to our detailed update on the June Guidelines, click here.)

Some of the important clarifications are analysed below:

a. **Non-applicability to loan settlement/waiver by certain institutions:** The September Guidelines note that subjecting a waiver or settlement of loan by a bank to tax withholding under Section 194R would result in extra cost for the bank as this would require the bank to pay tax (in addition to taking a haircut on the loan). Accordingly, the guidelines clarify that one-time settlement of loans with borrowers or waiver of loans by certain institutions (including scheduled banks, cooperative banks, public financial institutions, state financial corporations, state industrial investment corporations, non-banking financial companies, asset reconstruction companies, housing finance companies, etc.) would be outside the purview of tax withholding under Section 194R. However, the non-applicability of tax withholding would not impact the taxability in the hands of the recipient, which would be assessed independently.

b. **Implications for bonus and rights issues:** Tax withholding under Section 194R would not apply to bonus or rights issuances by companies in which the public are substantially interested, so long as issuance is made to all the shareholders of the company. It is interesting to note that although the principle of accrual of income must be uniformly applied (whether in case of widely-held companies or closely-held companies), the clarification only relates to widely-held companies. This may lead to further litigation and disputes.

c. **Applicability to reimbursement of out-of-pocket expenses:** Further to the June Guidelines, the September Guidelines also discuss the applicability of tax withholding under Section 194R on reimbursement of out-of-pocket expenses incurred by a service provider. The guidelines reiterate that an expenditure that is the liability of a person carrying out business or profession (i.e., the service provider), if met by another person (i.e., the service recipient), is a benefit/perquisite provided to the service provider in the course of its business/profession, requiring tax withholding under Section 194R. Essentially, if in substance the expense is the liability of the service provider (i.e., the bill for the expense is in the name of the service provider), the reimbursement of such expense by the service recipient would qualify as a benefit/perquisite requiring tax withholding under Section 194R.

However, the September Guidelines carve out an exception for reimbursement of expenses incurred by a '*pure agent*' under the goods and services tax (**GST**) laws from withholding tax under Section 194R. The guidelines note that as per the GST laws, if a service provider incurs an expense as a *'pure agent'*, then GST input tax credit (**ITC**) is allowed to the service recipient (and not to the service provider). Broadly speaking, a pure agent is one who while making a supply to the recipient, also receives and incurs expenditure on some other supply on behalf of the recipient and claims reimbursement (on actual basis, without adding such amount to the value of its own supply) for such supplies from the recipient. While the relationship between the service provider and the service recipient in respect of the main service is on a principal-to-principal basis, the relationship between them in respect of other ancillary services is that of a pure agent.

The guidelines note that the GST Valuation Rules, 2017 (**GST Valuation Rules**) provide that any expenditure incurred as a pure agent will be excluded from the value of supply as well as from the aggregate turnover of the supplier. However, such exclusion of expenditure incurred as a pure agent is possible only if all the conditions to qualify as a pure agent (as specified in the GST Valuation Rules) are fulfilled.

Given the above, the September Guidelines have excluded reimbursement of out-of-pocket expenses incurred by a service provider as a pure agent, provided the conditions specified in the GST Valuation Rules are fulfilled.

However, if the expense is incurred by the service provider on a principal-to-principal basis, tax withholding would be required under Section 194R.

Separately, the September Guidelines clarify that if reimbursements are already part of the billed amount on which tax has been deducted under the relevant provisions of the ITA (such as Sections 194C or 194J), tax need not be withheld again under Section 194R.

1.5 Concessional tax rate of 5% applies to interest earned from rupee-denominated non-convertible debentures by specified non-resident investors

On 26 September 2022, the Delhi bench of the ITAT, in the case of *Heidelberg Cement AG vs ACIT,* held that in the absence of any specific definition of *'bonds'* under the ITA, the term *'bonds'* as used in Section 194LD should be considered as including non-convertible debentures (**NCDs**) as well. Accordingly, the concessional tax rate of 5%, as provided under Section 194LD should be allowed on interest income from NCDs, so long as the other conditions in the Section are fulfilled.

Briefly, Section 194LD provides that certain kinds of interest income arising to a foreign institutional investor or a qualified foreign investor would be subject to tax at a concessional rate of 5% (plus applicable surcharge and cess). Such interest income must arise from specified securities/instruments, including *'rupee denominated bonds'*. In the present case, the assessee, a non-resident taxpayer, had invested in rupee-denominated NCDs of certain Indian companies and earned interest income. The assessee contended that rupee-denominated bonds include NCDs, and the rate of 5% should apply in its case. However, the assessing officer rejected the claim of the assessee, on the basis that the rate of 5% applies only to rupee denominated bonds, and not to NCDs.

The ITAT relied upon an earlier decision of the jurisdictional High Court in the case of *Shree Visheshwar Nath Memorial Public Ch. Trust* and allowed the claim of the assessee. In the ruling, the High Court had held that in the absence of the definition of the term *'debenture'* in the ITA, the Companies Act, 1956 could be referred to which provides that the term *'debenture'* includes *'bonds'*.

The ruling of the ITAT also reiterates the general principle of interpretation that in the absence of any definition given to a particular term in the statute, the term must be interpreted keeping in view the common parlance meaning.

1.6 ITAT holds that it does not have the inherent power to grant unconditional stay of demand when the statute itself stipulates certain pre-conditions

In its recent ruling in the case of *Hindustan Lever Limited vs DCIT*, the Mumbai Bench of the ITAT held that it does not have the inherent power to grant an unconditional stay of demand by waiving the condition requiring deposit of 20% of the tax demand as stipulated in the proviso to Section 254(2A) of the ITA.

In this case, the assessee company had sought complete stay of the income tax demand for a particular year on the basis that a majority of the issues under consideration had been decided in its favour in earlier years. The assessee company relied on the landmark judgement of the Supreme Court in *MK Mohd Kunhi (1969)* which had categorically held that the ITAT has inherent powers of granting stay on collection/recovery of disputed tax in fit and deserving cases, and that these powers are ancillary and incidental to the powers of disposing of an appeal. The assessee company also contended that this is an inherent power of the ITAT that is also enshrined in Section 254(1) of the ITA, which cannot be curtailed, diluted or otherwise narrowed down by the proviso to Section 254(2A).

The ITAT rejected the claim of the assessee company and granted a conditional stay subject to the assessee company providing security for at least 20% of the tax demand. The ITAT held that it is bound by the statutory provision requiring deposit of at least 20% of the disputed demand as a pre-condition to grant of stay.

The ITAT also observed that the provisions of the law are to be read so as to make them workable, rather than making them redundant. Further, the ITAT itself being a creature of the statute, cannot question the reasonableness of statutory provisions.

2 Goods and Services Tax

2.1 Supreme Court holds that the state is not under public duty to indicate HSN code and applicable GST rate in the tender floated by it as a purchaser

The Supreme Court, in *Union of India & Others v Bharat Forge Ltd. & Another,* held that the state is not under a public duty to provide the correct Harmonised System of Nomenclature (**HSN**) Code or applicable rate of GST for the goods intended to be procured by it under a tender.

The respondent had submitted a bid in response to the global tender floated by Diesel Locomotive Work (**DLW**) for procurement of turbo wheel impeller balance assembly. In its bid, the respondent had quoted the applicable rate of GST payable as 18% while other bidders, including the lowest bidder, had quoted it as 5% making the bid by the Respondent less competitive. Aggrieved by the same, the respondent approached the Allahabad High Court seeking a writ of mandamus directing DLW to indicate the HSN Code and applicable rate of GST in its tender to ensure a level playing field for all bidders. The High Court allowed the petition and held that DLW is required to mention the correct HSN Code of the relevant goods in its tender document.

The government as well as DLW preferred an appeal before the Supreme Court against this decision. The Supreme Court held that a writ petition against the terms of a tender document or the contract awarded in furtherance of the same should not be entertained unless such actions are found to be clearly arbitrary, illegal, *malafide* or contrary to any statute.

On the issue of whether the state or its instrumentalities are obligated to mention the correct HSN Code and applicable rate of GST in any tender floated by it, the Supreme Court held that there is no public duty on the state to do so as the scheme of the Central Goods and Services Tax Act, 2017 (**CGST Act**) requires the supplier of goods and services to ascertain and pay the applicable GST on the supplies made by it. Further, in order to protect the interest of the public exchequer, the Supreme Court has directed the state to:

a. indicate in its tender documents that the bidders shall provide the details of their jurisdictional tax officers, and

b. forward a copy of the document by which the contract is awarded, containing all material details, to the concerned jurisdictional officer once the tender is awarded to a particular bidder.

This decision has made it clear that the obligation to ascertain the applicable tax rate for goods supplied under a contract awarded by the state is that of the suppliers and there is no obligation on the state to ascertain or mention the applicable HSN Code or GST Rate in its tender documents. Taxpayers would have to devise their strategy accordingly while placing a bid in response to a tender floated by the state or any of its instrumentalities.

2.2 Gujarat High Court holds that the date of filing a refund application on the common GST portal is to be treated as the date of filing a claim for refund

The Gujarat High Court, in *Chromotolab and Biotech Solutions v Union of India*, held that the date on which an applicant files its refund application on the common portal must be considered as the date of filing of the refund claim under Section 54 of the CGST Act read with Rule 89 of the Central Goods and Services Tax Rules, 2017 (**CGST Rules**).

On 28 December 2018, the petitioner filed a refund claim of the unutilised ITC on the common portal in FORM GST RFD-01A under Section 54 of the CGST Act for the supply of goods made to pharmaceutical companies located in Special Economic Zones (**SEZs**). The Application Reference Number (**ARN**) was also generated on the same day. The petitioner filed a physical copy of the refund application and relevant documents with the jurisdictional proper officer on 17 October 2019.

The refund claim filed by the petitioner was rejected by the adjudicating authority on the ground of being barred by limitation. The adjudicating authority relied on the Central Board of Indirect Taxes and Customs (**Board**) circular dated 15 November 2017. The circular stipulates that printouts of the FORM GST RFD 01A and necessary documentary evidence, as applicable, must be submitted by every applicant before the jurisdictional proper officer within the time stipulated for filing such refund under the CGST Act. Aggrieved by this order, the petitioner approached the High Court.

The Gujarat High Court analysed the relevant provisions for refund of unutilised ITC. It held that the circular cannot have an overriding operation to the detriment of an assessee who filed the refund application on the GST portal and for which ARN was also generated. It held that the date on which the application was filed on the common portal by an assessee is to be treated as the date of filing a claim for refund and to be considered for computing the limitation contemplated under Section 54 of the CGST Act.

This decision upholds the principle that a circular issued by the Board cannot alter the statutory provisions to the detriment of the assessee. This decision would aid the taxpayers pursuing litigation in respect of refund claims filed by them which have been denied based on the procedure prescribed under the circular of 15 November 2017.

2.3 Calcutta High Court holds that there is no requirement for the electronic credit ledger to contain sufficient balance for blocking of credit

The Calcutta High Court, in *Basanta Kumar Shaw v Assistant Commissioner of Revenue,* held that it is open to the appropriate authority to block the Electronic Credit Ledger (**ErCL**) of a taxpayer in the exercise of power under Rule 86A of the CGST Rules, even when the balance in the ErCL is nil. Rule 86A provides that if the Commissioner or the officer authorised by him has reasons to believe that the ITC available in the ErCL has been fraudulently availed or is ineligible in terms of the conditions mentioned in sub-rule (1) of Rule 86A, such officer may not allow debit of an equivalent amount from ErCL for discharge of GST liability or for claim of any refund of any unutilised amount.

In this case, proceedings had been initiated against the appellant for mismatch between the appellant's GST return for inward supplies and the details of outward supplies furnished by the appellant's suppliers in their GST returns. Subsequently, by way of an order, the appellant was disallowed the debit of GST from its ErCL in terms of Rule 86A.

The appellant contended that Rule 86A provides for blocking of credit in the ErCL only to the extent that the actual credit is available in the ErCL and cannot be invoked when credit is not available therein. The appellant further contended that he has been restricted from utilising the ITC which is a vested right.

At the outset, the High Court rejected the appellant's averment that the availment of ITC is a vested right. It held that the right conferred on the appellant to avail ITC is regulated by the provisions of the CGST Act and is a concession granted under the statute. Unless the appellant complies with all the conditions scrupulously, it would not be entitled to avail the ITC.

The High Court also analysed the word *'available'* employed in Rule 86A and held that it cannot be read in isolation. The word has to be read along with the other words accompanying it i.e., "*in the electronic credit ledger has been fraudulently availed or is ineligible*" and "*has been fraudulently availed*". It held that such a conjoint reading would undoubtedly denote a situation where ITC may have been availed in the past. Therefore, interpreting Rule 86A of CGST Rules in such a way that it can be invoked only if there is a balance available in the ErCL would tantamount to making the rule redundant and defeating the very purpose of enacting such a rule. It further held that if the statute does not use the expression *'negative balance'*, such theory cannot be imported to justify the contention that there should be a positive balance to invoke Rule 86A.

Accordingly, the High Court held that Rule 86A (1), read in its entirety, clearly shows that there is no requirement for the ErCL to contain sufficient balance to block the credit by invoking the rule.

This decision of the Calcutta High Court is in direct contradiction of the decision of the Gujarat High Court in *Samay Alloys India Pvt. Ltd. v State of Gujarat*, where it was held that the plain language of Rule 86A does not permit its exercise in the absence of balance in the ErCL and there can be no action based on the supposed intendment of the provision. As the powers conferred on the GST officers under Rule 86A are far reaching and can have severe financial implications for the assessee, divergent views from two different high courts will only add to the prevailing uncertainty.

2.4 Bombay High Court holds that the amount available in the Electronic Credit Ledger can be utilised to make the pre-deposit for filing an appeal under the Maharashtra Goods and Services Tax Act, 2017

The Bombay High Court, in *Oasis Reality v Union of India*, held that the amount of credit available in the Electronic Credit Ledger (**ErCrL**) of the petitioner could be utilised to comply with the requirement of paying pre-deposit amount (10% of the amount of tax in dispute) for filing an appeal under Section 107 of the Maharashtra Goods and Services Tax Act, 2017 (**MGST Act**).

The High Court, while analysing the relevant provisions of the MGST Act and the rules framed under it, noted that Section 49(4) of the MGST Act provides that the amount available in the ErCrL may be used for making any payment towards output tax under the MGST Act. *'Output tax'* has been defined as the tax chargeable on taxable supply of goods or services or both but excludes tax payable on reverse charge mechanism. Further, while analysing Section 107(6), the Court held that the said section, as a precondition for filing an appeal, mandates the appellant to pay 10% of the *'tax'* in dispute. The Court was of the view that the word *'tax'* be understood to include integrated tax, central tax and state tax.

On a combined reading of these provisions, the High Court held that any payment towards output tax, whether self-assessed in the return or payable as a consequence of any proceeding instituted under the MGST Act, can be made by utilisation of the amount available in the ErCrL. The High Court relied on a circular dated 6 July

2022 issued by the Board, which clarifies that the amount of credit in ErCrL can be utilised to pay the tax as a consequence of any proceedings instituted under GST Law.

This is a welcome decision for taxpayers who may pay the pre-deposit amount for filing an appeal by debiting the ErCL. However, this decision is in sharp contrast to an earlier decision of the Orissa High Court in *Jyoti Construction* where it was held that the ErCrL balance cannot be debited for payment of 10% of the amount of tax in dispute for filing an appeal. It will be interesting to see how this issue is judicially interpreted in case it is considered by other high courts or the Supreme Court.

2.5 Amendments to the Central Goods and Services Tax Act, 2017 notified

The central government has notified 1 October 2022 as the effective date for the various amendments made to the CGST Act through the Finance Act, 2022. Some notable changes are:

a. *Auto-generated statement for availing ITC replaces the matching/reconciliation process*

From 1 October 2022, only the supplier will be required to file the details of outward supply while the requirement of furnishing details of inward supplies by the recipient has been done away with. An auto-generated statement will be provided to the recipient which will consist of: (i) ITC that may be available to the recipient and (ii) ITC not available to the recipient.

b. *Additional restriction on availing of ITC*

If the auto-generated statement specifies that the ITC on goods and services is restricted, then the recipient cannot avail such ITC.

c. *Concept of provisional claim of ITC removed*

The process of claiming ITC on a provisional basis by the recipient has been done away with. Previously, the recipient could provisionally claim ITC until matching/reconciliation of the details of outward supply and inward supply were furnished by the supplier and the recipient, respectively. Going forward, availment of ITC will depend on details furnished by suppliers which dilutes the original return filing and matching process.

d. *Extension of timelines*

New time limit for (i) availing ITC against invoice and debit notes, (ii) issuing credit notes, (iii) rectifying an error in outward supply/GSTR 3B return, etc., will be up to 30 November of the subsequent financial year or filing of the annual return, whichever is earlier.

3 Customs

3.1 Supreme Court holds that Customs Duty is to be determined solely as per the provisions of the Customs Act, 1962; Memorandum of Agreement between parties cannot be a determinant

The Supreme Court, in *Commissioner of Customs (Preventive) v Mustan Taherbhai,* has held that the terms of the Memorandum of Agreement (**MoA**) between the respondent and the Shipping Corporation of India (**SCI**) cannot determine whether the respondent or any other person would qualify as an importer liable to pay Customs Duty. To clarify further, the Court held that Customs Duty can only be determined based on the provisions of the Customs Act, 1962 (**Customs Act**).

SCI had entered into a MoA with the respondent for the sale of a vessel for scrapping. Accordingly, SCI took permission from the Director General of Shipping (**DGS**) for breaking the vessel at their plot. Further, as per the MOA, the liability to pay Customs Duty was that of the respondent. On the date of delivery of the vessel to the respondent, the tax department insisted that the respondent file a Bill of Entry (**BoE**) in respect of the vessel deemed to be imported into India. This BoE was then assessed by the tax department and duty liability in respect of the vessel was fastened on the respondent as the importer of the vessel.

Aggrieved, the respondent filed an appeal before the appellate authority and subsequently before the Customs, Excise and Service Tax Appellate Tribunal (**Tribunal**). The Tribunal allowed the appeal of the respondent and held that the respondent cannot be said to be an importer in respect of the vessel and was therefore not liable to pay the Customs Duty. The decision of the Tribunal was affirmed by the Gujarat High Court. The tax department appealed against the decision of the High Court before the Supreme Court.

The Supreme Court relied upon its earlier decision in the case of *M/s. Jalyan Udyog* where it had held that the person in whose favour the permission is granted by the DGS for the purpose of breaking can be said to be the '*deemed importer*'. The Court accordingly held that since the permission in this case was granted to SCI, it would be the deemed importer liable to pay Customs Duty in respect of the vessel. The tax department cannot recover the duty from the respondent merely on the basis of the terms of the MoA existing between the two parties.

This decision of the Supreme Court upholds the settled principle that tax liability in respect of any given transaction cannot be determined on the basis of an arrangement or contract between two private entities. It can only be determined in terms of the provisions of the applicable statute.

3.2 Draft Customs (Assistance in Value Declaration of Identified Imported Goods) Rules, 2022 released for public consultation

The Board released the Draft Customs (Assistance in Value Declaration of Identified Imported Goods) Rules, 2022 (**Draft Rules**), inviting suggestions from the public by 14 October 2022. The Draft Rules deal with the undervaluation of import of certain goods in line with the recent amendment made to Section 14 of the Customs Act, 1962, by Section 89 of the Finance Act, 2022. Section 14, pertaining to the valuation of goods, was amended to empower the Board to prescribe additional obligations on importers where the Board has reason to believe that the value of imported goods has not been declared truthfully or accurately.

Key features of the Draft Rules are:

a. ***Declaration of imported goods as identified goods***

The Board has been empowered to declare any class of imported goods as *'identified goods'* where it has reason to believe that the trend is such that the value of the goods is not being declared accurately/truthfully. As per Rules 5 and 6, the Board can forward a case to the Screening Committee for examination, if a written reference has been made for undervaluation of any imported goods by:

i. any person having reason to believe that the value of any class of imported goods or subset thereof may not be declared truthfully or accurately;

ii. an officer of customs or any other government department.

b. ***Preliminary examination of identified goods by Screening Committee***

Upon receiving refence from the Board for examination of some of the identified goods, the Screening Committee, comprising the Director Generals of various tax departments such as Valuation, Revenue Intelligence, and Analytics and Risk Management; as well as representatives from the National Assessment Centre (formed by the Board), will conduct a preliminary examination in respect of such identified goods. In cases where the Screening Committee deems the situation fit for a detailed probe, it will forward its report based on the preliminary examination to the Evaluation Committee.

c. ***Detailed examination of identified goods by Evaluation Committee***

The Evaluation Committee, comprising the Additional Director Generals of various tax departments such as Valuation, Revenue Intelligence, and Analytics and Risk Management; as well as representatives from the National Assessment Centre (formed by the Board), will conduct a detailed examination, where required, and submit its report back to the Screening Committee.

Basis this report, the Screening Committee will provide its recommendations to the Board.

d. ***Notification of identified goods and subsequent review***

Pursuant to the report of the Evaluation Committee and recommendations of the Screening Committee, the Board, if satisfied, can notify certain goods as identified goods and state the obligations and disclosures required to be fulfilled by the importers in accordance with Rules 10 and 11. The Screening Committee will also conduct a periodic review at specified intervals to assess if the obligations in respect of identified goods need to be extended or de-notified.

The Draft Rules also specify eleven categories of imports, such as project imports, imports not involving duty, imports by government or public sector undertakings, etc., in respect of which these rules will not apply.

4 Central Excise

4.1 Supreme Court holds that the question of whether Central Excise is payable is not a dispute related to the rate of duty and/or valuation and therefore ought to be entertained by High Courts

The Supreme Court, in *Commissioner of Central Excise, Hyderabad v Shriram Refrigeration Industries*, held that the question of whether a person qualifies to be a manufacturer does not pertain to either the rate of Customs Duty or valuation and therefore, must be decided by the High Courts under Section 35G of the Central Excise Act, 1944 (**Excise Act**).

The tax department had approached the Supreme Court against an order of the High Court in which it was held that the appeal before the High Court was not maintainable under Section 35L of the Excise Act, which concerns appeals to the Supreme Court.

The Supreme Court noted that the question that needed to be answered in this case was whether the respondent can be held to be a manufacturer and consequently be liable to pay the Central Excise Duty. The Court held that this dispute cannot be said to be related to the rate of duty and/or valuation.

The Supreme Court, while relying upon its earlier decision in the case of *Motorola India Limited*, held that appeals would lie before the Supreme Court in only those cases that involve the determination of any question relating to the rate of Customs Duty or to the value of goods for the purposes of assessment. The Court further held that the question of whether Central Excise Duty was payable in a given case does not pertain to either the rate of Customs Duty or valuation. It thus remanded the matter back to the High Court for fresh consideration.

This decision of the Supreme Court would ensure uniformity in how various High Courts decide the maintainability of statutory appeals filed before them. It would also enforce the right of taxpayers to approach the High Court for determination of the taxability of a given transaction before ultimately approaching the Supreme Court, if required.

4.2 Clarification on payment of pre-deposits of Central Excise and Service Tax

The Board, through Instruction No. CBIC-240137/14/2022-Service Tax Section-CBEC dated 28 October 2022, clarified that payment of pre-deposit for cases under the Excise Act and the Finance Act, 1994, will not be considered valid if made through DRC-03 (voluntary tax payment form) prescribed for the payment of tax, interest, penalty or any other payment in accordance with the provisions of the CGST Act. Further, mandatory pre-deposit of certain percentage of duty demanded/penalty imposed for filing an appeal under Section 35F of the Excise Act and any pre-deposit under Section 83 of the Finance Act, 1994 should only be made through the CBIC-GST Integrated portal.

It also clarified that any arrear of tax from the previous regime would be recovered under the new regime in accordance with Section 142 of the CGST Act, but pre-deposit, not being an arrear of tax, should be paid only through the CBIC-GST Integrated portal.

5 Miscellaneous

5.1 Supreme Court holds that the doctrine of promissory estoppel would not apply against the exercise of legislative powers by the state

The Supreme Court of India, in *M/s. Hero Motocorp Ltd. v Union of India & Ors*., held that the state cannot be compelled to provide 100% exemption to taxpayers without any statutory duty cast upon it in this regard.

In 2003, the Government of India issued an Offering Memorandum (**O.M.**) which provided that new and existing industrial units (on their substantial expansion) in the states of Uttaranchal and Himachal Pradesh would be entitled to exemption of 100% Excise Duty for ten years from the date of commencement of commercial production. Pursuant to the O.M. and corresponding notifications issued under the Excise Act, various taxpayers, including the appellant, set up new industrial units and started availing of the said exemption.

However, this exemption ceased from 1 July 2017 onward with the advent of GST. After that, on the recommendation of the GST Council, the central government notified the Scheme of Budgetary Support which provides for reimbursement of the central government's share of CGST and Integrated Goods and Services Tax (**IGST**) collected from eligible units located in specified states for the residual period. The central government's share is restricted to 58% of CGST and 29% of IGST.

In this backdrop, the appellant filed a writ petition before the Delhi High Court praying that it must be granted 100% tax exemption as promised by the central government in the O.M. This petition was dismissed by the High Court. Aggrieved by the dismissal, the appellant approached the Supreme Court.

The Supreme Court, after analysing several judgements in this regard, held that there can be no *estoppel* against the legislature in the exercise of its legislative functions. The Court further held that the proviso to

Section 174(2)(c) of the CGST Act clearly and specifically provides that any tax exemption granted as an incentive for investment through a notification prior to the enactment of the CGST Act shall not continue as a privilege, if the said notification has been rescinded on or after 1 July 2017.

Further, the Supreme Court held that it cannot interfere in policy matters of the government unless the policy is found to be palpably arbitrary and irrational. Moreover, in the absence of any statutory duty cast on the government to refund 100% of the GST paid by the eligible units, a writ of mandamus, as sought by the appellant, cannot be issued. However, the Supreme Court recognised the substance in the plea of the appellant on the ground of legitimate expectation. The Court permitted the appellant, and other taxpayers by extension, to make representations to the respective state governments as well as the GST Council for their consideration. It further noted that it would be appropriate for the GST Council to make suitable recommendations to the states.

This decision has settled the controversy regarding the continuity of area-based exemptions provided in the erstwhile regime.
