



**India tax update:
Latest developments and impact**

The Dbriefs India Spotlight series

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19 March 2019

Agenda

- Recent amendments in law
- Corporate tax: latest developments and impact
- Indirect taxes: latest developments and impact
 - Update on anti-profiteering cases
 - Significant GST advance rulings
 - Key Court judgments
- Questions and answers

Recent amendments in law

Interim budget 2019

Individual taxation

- Tax rebate of INR 12,500 for total income of up to INR 500,000 for resident individuals
- Increase in standard deduction for salaried individuals from INR 40,000 to INR 50,000 per annum
- One time exemption on LTCG from sale of residential house even if reinvested in two residential houses in India (subject to cap of LTCG of INR 20 million)

Key Tax proposals

Corporate tax

- Sunset clause for 100% deduction available to developers for qualified affordable housing projects to be extended by one year up to 31 March 2020
- Notional rent not taxable up to two years on unsold inventory of land and building

Amendment to Indian Stamp Act, 1899 for levy of stamp duty on securities market instruments at one place through one agency viz., through stock exchanges or its clearing corporation or depositories, and for sharing the same with respective States based on domicile of the ultimate buying client

Recent GST amendments

Amendment in GST Acts and corresponding changes in GST rules

Particulars	Amendment
Definition of “supply”	<ul style="list-style-type: none">• High seas sale, drop shipments, sale from bonded warehouses excluded from the definition of supply• Import of services by any person from its related person or from any other establishment outside India shall be treated as supply, even if the transaction is without a consideration
Value of exempt supply	<ul style="list-style-type: none">• Value of exempt supply shall not include the value of activities or transactions specified in Schedule III (high sea sales, drop shipments, and sale from bonded warehouse)
Registration	<ul style="list-style-type: none">• The requirement for compulsory registration for e-commerce sector mandated only for those operators who are required to collect tax at source (TCS)• Separate registration for multiple place of business within a state now permitted

Recent GST amendments

Amendment in GST Acts and corresponding changes in GST rules

Particulars	Amendment
Transition of cess to GST regime	<ul style="list-style-type: none">• Retrospective amendment made in transition provisions to exclude education cess, secondary education cess, Krishi Kalyan Cess (KKC), and Swachh Bharat Cess (SBC) from eligible duties for the purpose of transition
GST on procurements from unregistered vendors	<ul style="list-style-type: none">• Provision regarding reverse charge on procurements from unregistered suppliers to be applicable only to specified class of registered persons and for supplies of specified goods or services
Issue of debit note/credit note	<ul style="list-style-type: none">• Changes have been made in Section 34 of Central Goods and Services Tax Act, 2017 to allow issue of single debit notes/credit notes against one invoice or more invoices
Order for utilization of Input Tax Credit (ITC)	<ul style="list-style-type: none">• Rationalization in order of set-off of ITC<ul style="list-style-type: none">– First, balance of ITC of IGST, if any, has to be utilized fully to set-off liability in IGST, CGST, and SGST or UTGST head– After this, in case of any further liability in CGST or SGST/UTGST head, the respective CGST and SGST, or UTGST balance may be used for discharge of CGST or SGST/UTGST liability respectively

Recent GST amendments

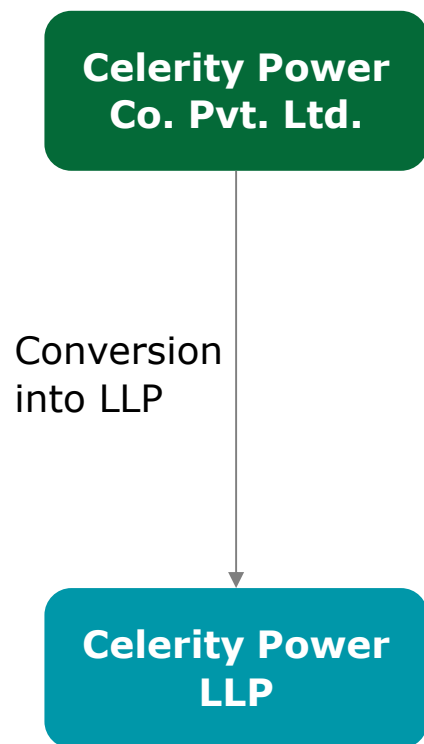
Amendment in GST Acts and corresponding changes in GST rules

Particulars	Amendment
Amendments in Input Tax Credit (ITC) provisions	<ul style="list-style-type: none">• Restriction of ITC on motor vehicles is only on those vehicles having approved seating capacity up to 13 persons (including driver)• ITC in respect of general insurance, servicing, repair, and maintenance of motor vehicles shall not be available unless used for specified purposes• ITC on food, beverages, health care, insurance, renting of motor vehicle, etc., shall be available if mandated by any law in force for an employer or if such services are used for making outward supplies of same category or as part of composite or mixed supply• ITC on services shall be available to a registered person even if the services are provided by the supplier to any other person on the direction of the registered person

Corporate tax: latest developments and impact

ACIT v. Celerity Power LLP

[2018] 100 taxmann.com 129 (Mum)

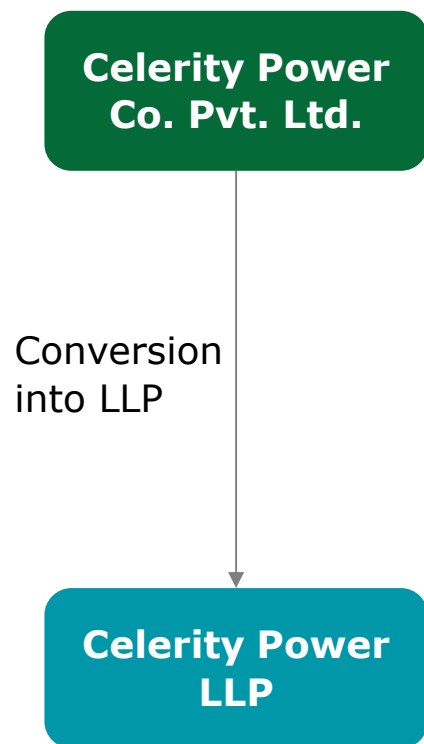


Facts

- Celerity Power LLP was earlier a company which converted into an LLP in September 2010
- Entire business, assets, and liabilities of company were transferred to LLP
- LLP claimed that the conversion into LLP did not involve any "transfer" of property/assets
 - Alternative claim was that capital gains, if any, could only be brought to tax in the hands of erstwhile company
- LLP also claimed set-off of brought forward losses of the company

ACIT v. Celerity Power LLP

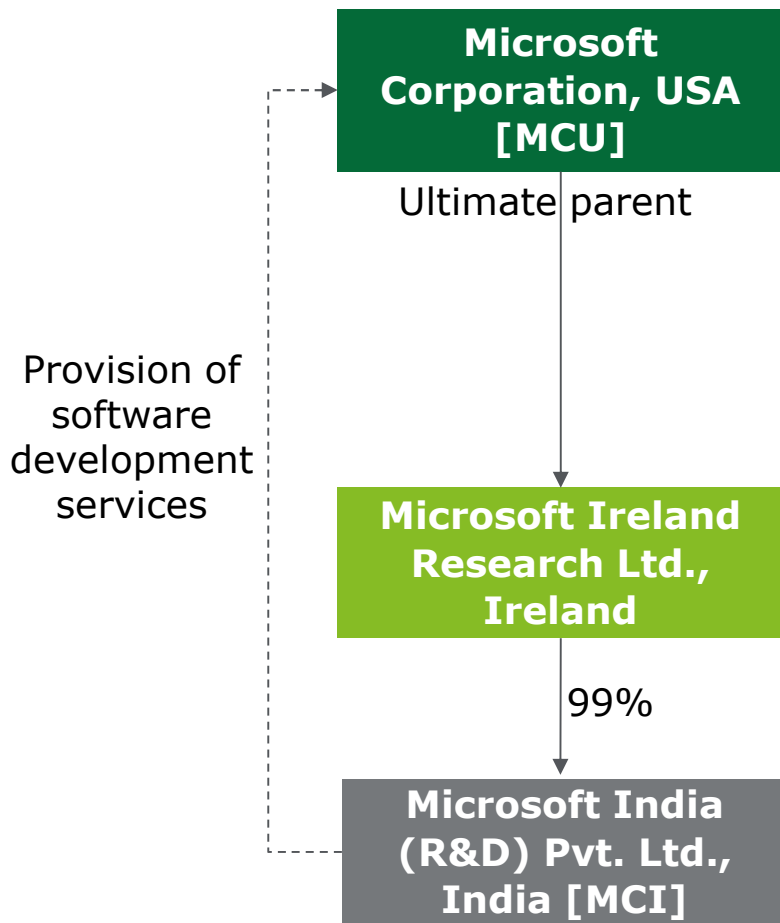
[2018] 100 taxmann.com 129 (Mum)



Ruling of tribunal

- Conversion of company into an LLP involves transfer of property
 - Taxable in hands of LLP as successor
- Assets and liabilities vested in LLP at book value, which could be regarded as consideration for computation
 - Difference between consideration and cost was nil, so machinery provisions unworkable
- Carry forward and set-off of losses of the company not allowed in the hands of LLP

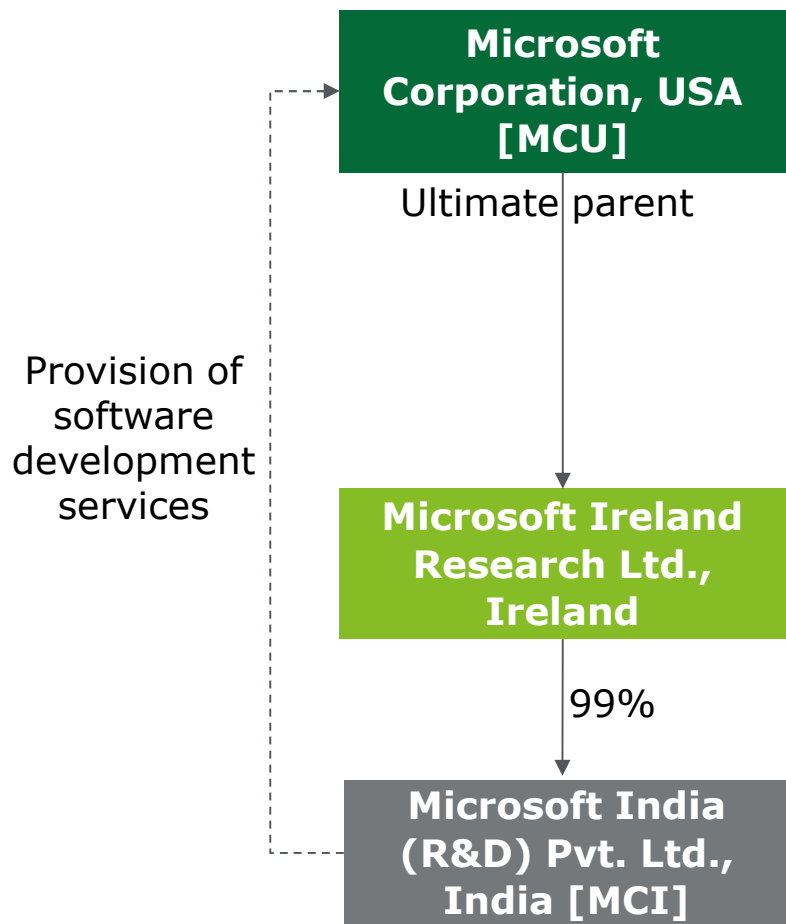
Microsoft India (R&D) Pvt. Ltd. v. DCIT [2018] 97 taxmann.com 360 (Del)



Facts

- MCI was engaged in rendering software services to MCU, and was remunerated at cost **plus** 15% mark-up
- Transfer pricing officer took a position that MCI was rendering high quality software engineering services
 - Position taken by officer that cost **plus** 15% mark-up is not at arm's length

Microsoft India (R&D) Pvt. Ltd. v. DCIT [2018] 97 taxmann.com 360 (Del)

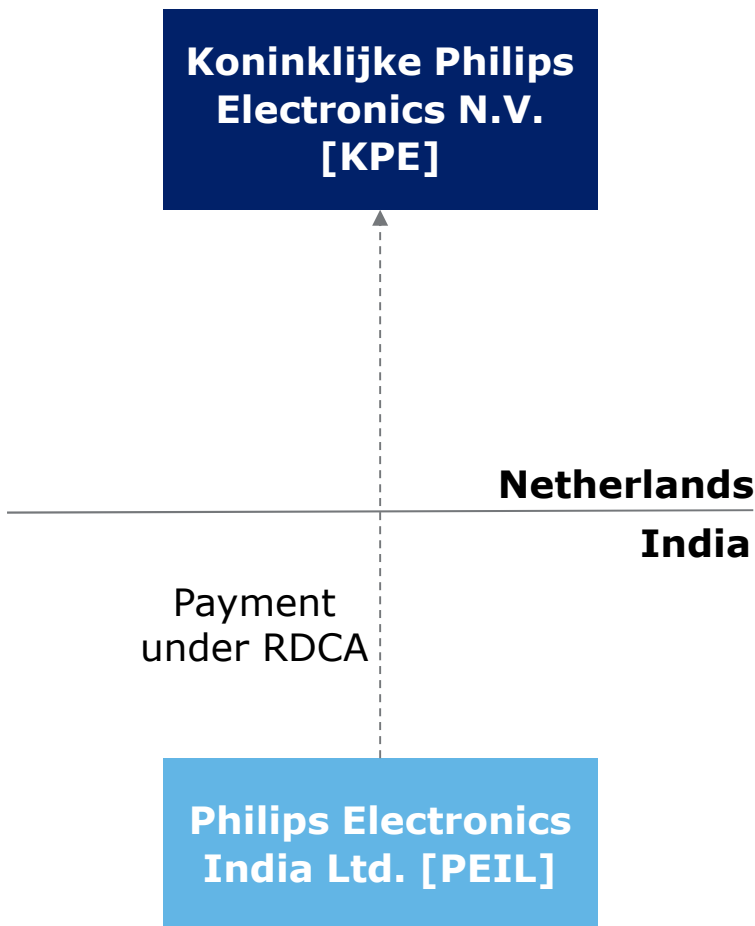


Ruling of tribunal

- Key observations based on agreement and other facts on record
 - MCI was doing R&D work and scope was not restricted to developing/testing codes, but “complete project”
 - IPR of R&D work will be owned by MCU
 - R&D work was for part of overall product, but still R&D was done by MCI
- R&D work done by MCI substantiated by 113 patents registered in relation to Indian work
- MCI engaged in providing R&D software services to MCU, and cannot be regarded as routine software developer

Koninklijke Philips Electronics N.V. v. DCIT

[2018] 99 taxmann.com 23 (Kol)



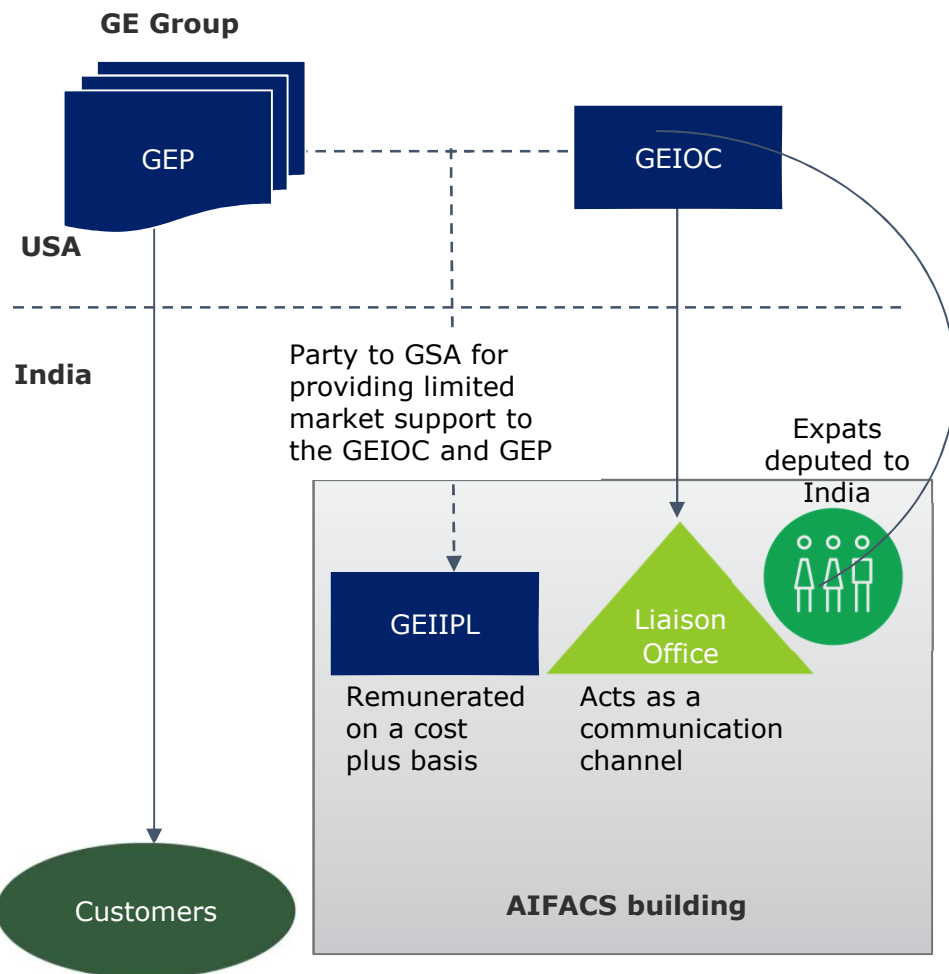
Facts

- KPE entered into Research and Development Cooperation Agreement (RDCA) with PEIL

Ruling of tribunal

- R&D services were essential for functioning of PEIL and included
 - Access to benefits and information
 - Non-exclusive, non-transferable, and indivisible license to apply them
- Cost of R&D activities was reimbursed by PEIL to KPE; RDCA was a cost sharing agreement
- Receipt by KPE not taxable as royalties

GE Energy Parts Inc v CIT(IT) [2019] 101 taxmann.com 142 (Delhi)



Sale of equipments (relating to oil and gas business, energy business, transportation business, and aviation)

Facts

- GE Energy parts Inc (GEP), part of the GE Group, supplies equipment to the customers in India relating to oil and gas, energy, transportation business, etc.
- Sale to the Indian customer is made on a principal to principal basis and the title of the goods passes to the Indian customer outside India
- General Electric international operations Company Inc. (GEIOC) has a Liaison Office (LO) at AIFACS building in India
- GEIOC had about 50 employees, of which most were designated as head India operations and deputed to India to support various businesses of the GE Group
- GE India Industrial Pvt Ltd (GEIPL), provides marketing support services to GE Group including to GEP
- GEIPL is located in the space leased by GEIOC for its LO in the AIFACS building

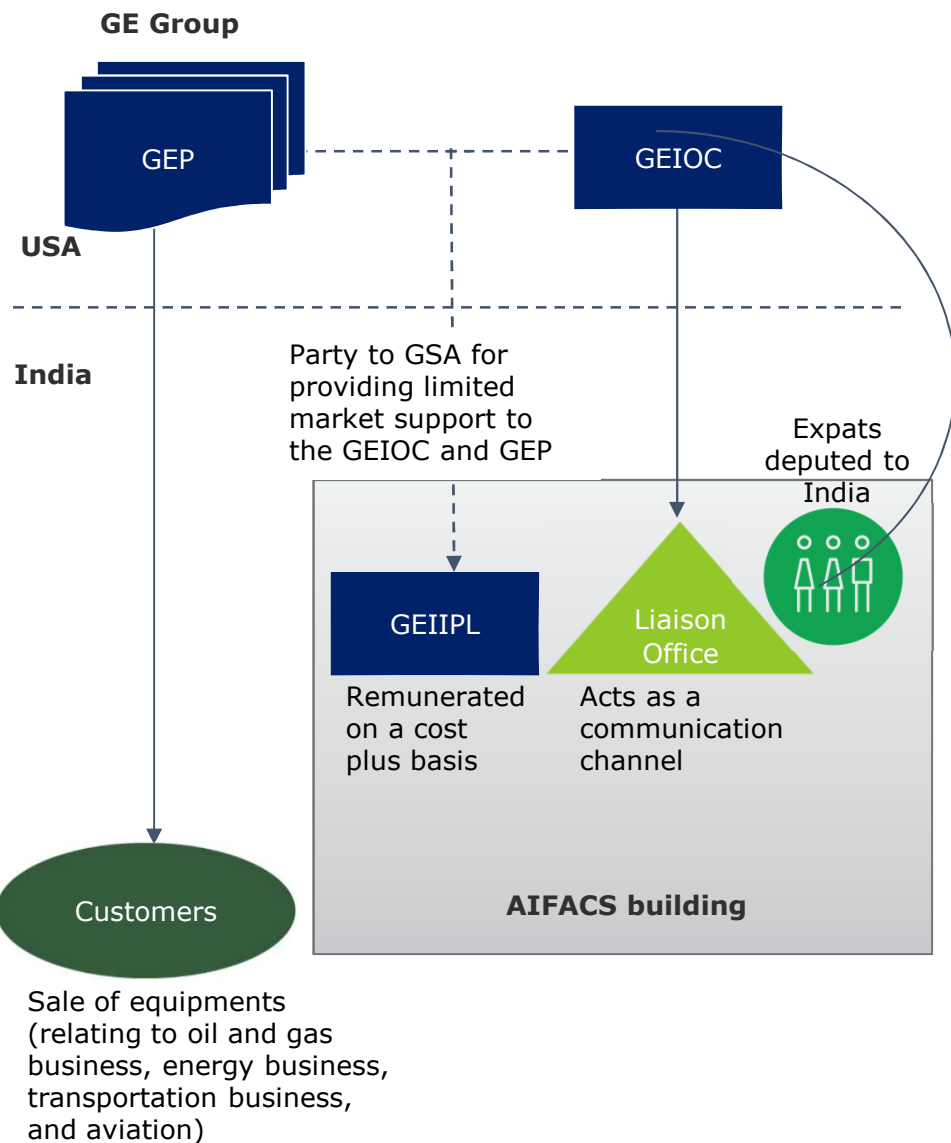
Issue

- Whether fixed place PE and DAPE is created in India under the present arrangement?

Taxpayer's position

- LO is only collecting information from potential customers
- Mere participation in negotiation does not result in a PE unless all terms of the contract are negotiated and finalized by such employees
- GEIPL is an independent entity serving various customers

GE Energy Parts Inc v CIT(IT) [2019] 101 taxmann.com 142 (Delhi)

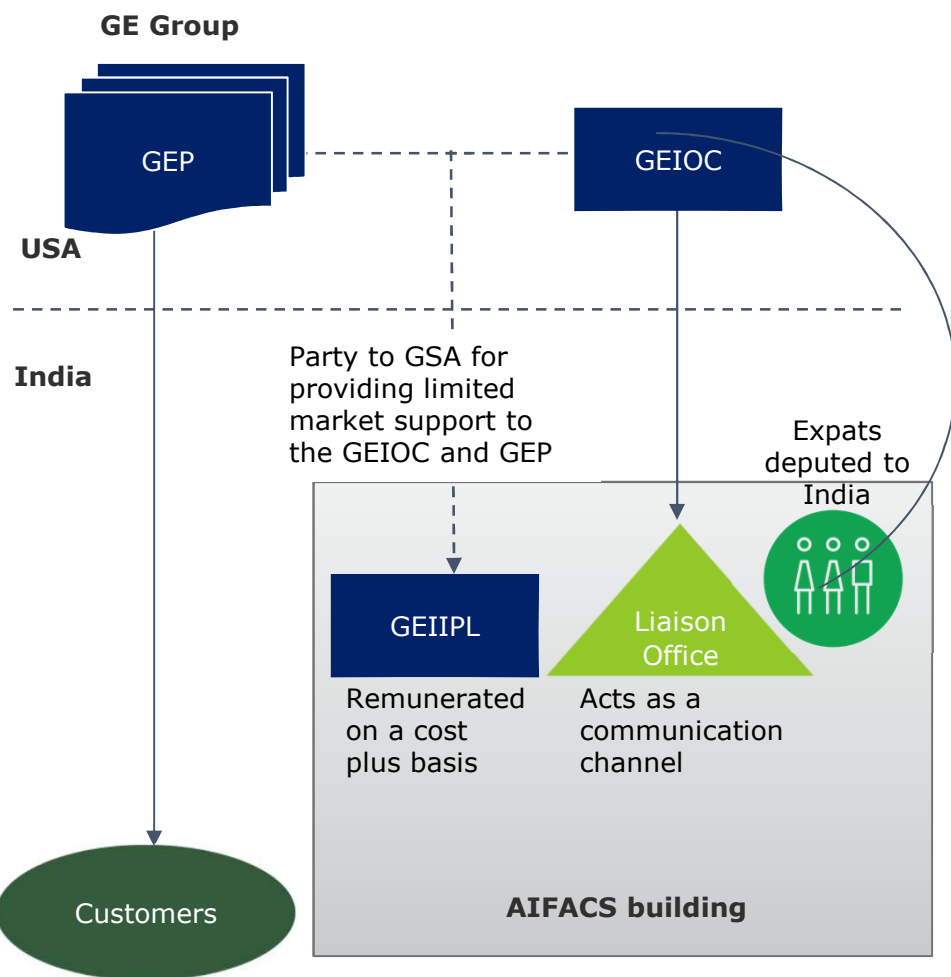


Ruling of Delhi High Court

Fixed place PE

- Concurred with the ITAT's findings that the core of the sales activity was done from the AIFACS building
- Relied on the SC decision in case of **Formula One World Championship Ltd** and noted that GE India was located in the space leased by GEIOC in AIFACS building which was at its constant disposal
- Email communications and chain mails with clients, showed the important role of GE India employees in the negotiating process
- Core activity of developing a customer, approaching that customer, communicating the available options, discussing financial and technical terms of the agreement, even price negotiations was a collaborative effort between the clients in India and the expats and GEIPL employees
- Though in the later stages of contract negotiations, India was not involved, even then India was not a mute data collection entity
- Vital responsibilities of finalizing the commercial terms of the contract and prominent role in contract finalization process, clearly indicate LO i.e., AIFACS building as fixed place PE in India for GEP

GE Energy Parts Inc v CIT(IT) [2019] 101 taxmann.com 142 (Delhi)



Sale of equipments (relating to oil and gas business, energy business, transportation business, and aviation)

DAPE

- Participation of representatives or employees of a resident company in a phase of the conclusion of a contract may fall within the concept of authority to conclude contracts in the name of the foreign company
- The intricate nature of activities clearly show that the taxpayer carries out through the PE, business in India
- Technical officials having varying degree of authority involve themselves – along with local managerial and technical employees
 - In contract negotiation, often into core or "key" areas
 - Modification of technical specifications and the negotiations for it, to fulfill local needs
 - The complexities of price negotiation, etc.
- It is evident that these agencies work solely for the overseas companies, in their core activities

Attribution of profits

- The HC upheld the profit attribution i.e.,
 - (i) Estimating income at 10% of sales and
 - (ii) Attributing 26% of such profit to the marketing activity carried out by PE in India

Indirect taxes: latest developments and impact

Update on anti-profiteering cases

Update on anti-profiteering cases

Dominant principles emerging from anti-profiteering jurisprudence

Methodology

No fixed methodology can be prescribed as the practices vary industry-wise and product-wise. As a result, the methodology adopted by NAA will vary with every case

Universal application

The tax payer cannot choose the products/category of products on which he intends to pass the benefits. GST benefit cannot be withheld on the ground that they shall be passed on at the entity level, state level, locational level or SKU level

Increase in base price

Mere charging of GST at reduced rate does not amount to passing on the benefit of reduction if base price has been increased

Discount to be specific

Any discount offered during the time of sale, unless specifically provided as being in lieu of GST accrual, would be treated as discount allowed in course of regular business

Volume based benefit

Passing benefit by increasing quantity may be allowed in some instances

Transitional benefit

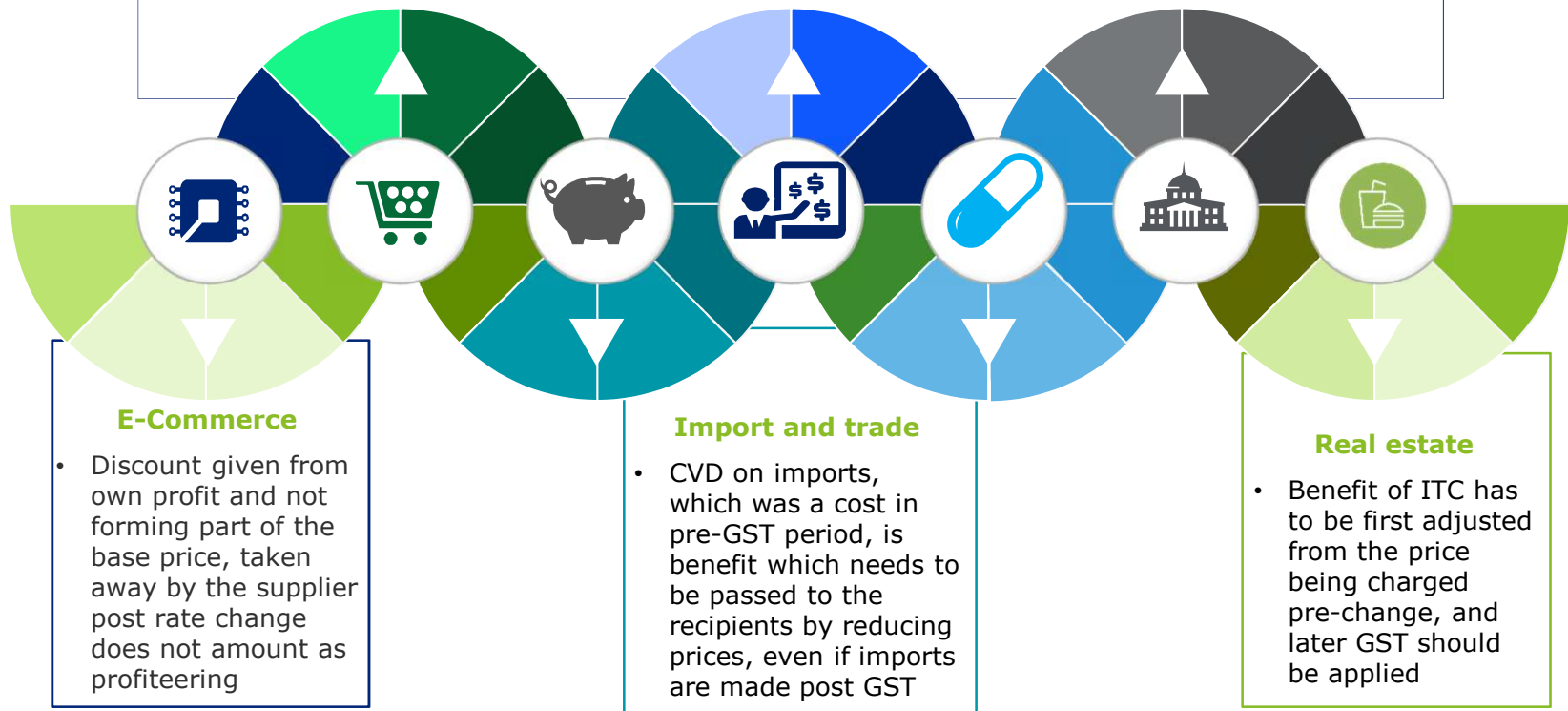
TRAN-2 credit is considered as ITC under GST and hence, tax payer has to pass the TRAN-2 credit under Section 171

Update on anti-profiteering cases

Industry-wise relevant principles in anti-profiteering

FMCG sector

- Distributors are obligated to pass benefits to their retailers irrespective of whether the supplier has passed the benefits to them or not
- Supplier may increase price of goods provided he can prove price rise on account of increase in cost of factors other than GST
- Increase in base price commensurate with the increase in cost of product due to denial of ITC does not amount to profiteering



Significant GST advance rulings

Significant advance rulings

Intermediary services

The qualification as intermediary services were considered in the following rulings of the Advance Ruling Authority

Scope of agreement

- Procuring purchase orders from the parties desirous of purchasing laboratory equipment

Grounds and discussion

- The appellant agreed that they facilitated the sale of goods for their foreign customers
- But, qualification as an “intermediary services” with respect to services for sale of goods was argued to be invalid
- Consequently, classification as export of services was sought. Further, in the event of GST levy, the nature of levy is questioned

Decision of ARA

- The definition of intermediary can be a broker or an agent with respect to supply of goods and/or service. Thus, the applicant qualifies as an intermediary and there is no export
- Supply would be treated as interstate supply, **i.e., IGST transaction and not CGST + SGST**

Micro Instruments



Scope of agreement

- Marketing and promotion of the goods belonging to overseas customers in India along with provision of after sale support and related market research

Grounds and discussion

- The services were rendered on a principal-to-principal basis
- As in case of Re: GoDaddy, the Applicant would not qualify as an “intermediary” and the supply would qualify as exports
- Further, the qualification as a composite supply was questioned

Decision of ARA

- The agreement depicts that the price is negotiated by the Applicant as an agent. Thus, he acted as an “intermediary”
- After sales services were held to be capable of being provided independently and thus, not a composite supply

Toshniwal Brothers
(SR) Private Limited



Scope of agreements

- Sales promotion agreement – market research, liaising and conducting of market surveys
- Market services agreement – market surveys, sales promotion, liaising and providing customer feedback, monitoring regulatory development, etc.

Grounds and discussion

- The services were rendered on a principal-to-principal basis
- The supplies are made by the applicant as an independent contractor which did not create the relationship of principal and agent

Decision of ARA

- In case of both the agreements, the applicant was found not to have engaged in the “arranging or facilitation” of supply between two or more persons
- Hence intermediary relationship not established and the supply qualifies as export of services as per Section 2(6) of the IGST Act

Asahi Kasei India
Private Limited



Significant advance rulings

GST Registration for liaison office and credit availment

Takko Holding GmbH

Liaison office operating with prior permission of the RBI carrying of specified operation without receipt of any consideration

Manner of operation

- The liaison office only acts as a communication channel between Indian companies and foreign parent companies
- No consideration is received for the same
- Inward remittances were receivable from parent company to meet expenses

Decision of ARA

- It was held that liaison office and parent company are not related parties as per Schedule II. Nor are they distinct persons as per Section 25 of the CGST Act
- Thus, there was no supply and no requirement to take registration under GST or pay GST taxes

YKK India Private Limited

Nature of inward supplies

- Factory located in remote location and therefore the applicant has arranged for transportation services (buses and cars) to ensure that the employee reach the factory destination
- Eligibility of credit of taxes paid on such transportation services under Section 17(5) of the CGST Act with respect to rent-a-cab

Decision of ARA

- As the term "rent-a-cab" has not been defined under GST, its meaning was construed based on commercial or trade understanding
- Based on the same, it was held that any motor vehicle designed to carry passengers for rent would be qualify as "rent-a-cab" and thus, credit in its respect would be restricted under Section 17(5)
- The above position may vary following the recent amendment pertaining to credit eligibility with respect to motor vehicles

Key Court judgments

Key Court judgements

Supreme Court decision

- The Supreme Court rendered an important decision in context of customs valuation of raw material/spare parts/final goods imported from the foreign related parties by rejecting the Appeal filed against the CESTAT order in the case of **Georgio Armani India**
- The CESTAT in the case of **Georgio Armani India** had taken following view in relation to the following charges

Annual franchisee fee

- Annual franchise fee is a condition for sale of goods by the foreign supplier. Such amount must be added in the assessable value of imported goods

Institutional advertising and promotional campaign

- This is nothing but sharing of the cost of the worldwide advertisement of the foreign supplier. Unless such amounts are paid, the Company will not be entitled to import goods from the foreign principal. Hence, such payments are includible in the assessable value

Advertising expenditure

- Such advertisement is carried out in India for promotion of "Giorgio Armani" brands, which are incurred after import of the goods. Even though, the appellant is required to incur such expenditure as per the agreement, it cannot be said that such expenditure has been incurred to satisfy the obligation of the foreign principal. Such charges are not includible in the assessable value

This judgment could have significant impact for those companies which are also engaged in income tax disputes in relation to **Transfer Pricing adjustments on account of AMP** (advertising, marketing, and promotion) expenses

Key Court judgements

High Court decisions

MakemyTrip India

Laid down important principles in relation to prosecution and arrest by departmental officers during the course of investigation.

Key holdings of Delhi HC

- The DGCEI is not permitted to by-pass the procedure as set out in the Finance Act, 1994 (FA) before going ahead with the arrest of a person
- Without commencement of the process of adjudication of penalty, another agency like the DGCEI cannot without an SCN or enquiry straightway go ahead to make an arrest merely on the suspicion of evasion of service tax or failure to deposit service tax that has been collected
- The decision to arrest a person must not be taken on whimsical grounds; it must be based on "credible material"
- A possible **exception** could be where a person is shown to be a **habitual evader of service tax**

Vodafone Mobile Services Limited

The appellants are cellular telecom operators and passive infrastructure providers.

Key holdings of Delhi HC

- The towers cannot be considered as permanently attached to the earth, and therefore, immovable property
- The towers, shelters, etc., qualify as capital goods, as a part/component or alternatively, as accessories to the transmission apparatus
- Further, they also qualify as inputs, as they are used for providing services
- The entitlement of CENVAT credit is to be determined at the time of receipt of goods and the fact that towers are later fixed to the earth for use would not make them non-excisable commodities
- The emergence of an immovable structure at an intermediate stage is of no consequence and the credit can be claimed even in such cases

Questions and answers

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Join us 26 March at 2:00 PM HKT
(GMT+8) as our China Spotlight series
presents:

Destination China: Updates of Individual Income Tax (IIT) reform

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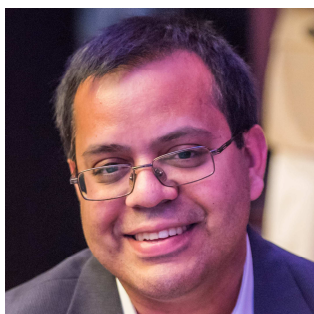
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