



Quarterly India Tax updates

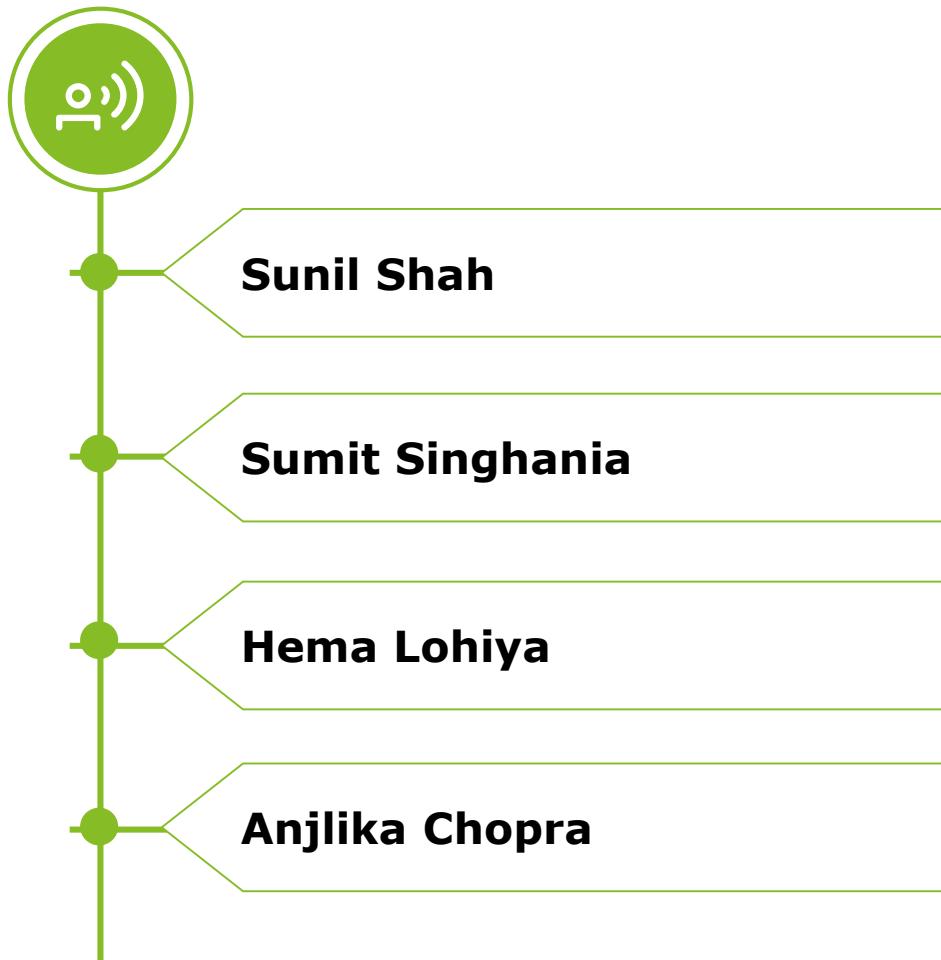
January – March 2019

April 2019

India **TaxHour**

Presenters

Subject matter experts



Agenda

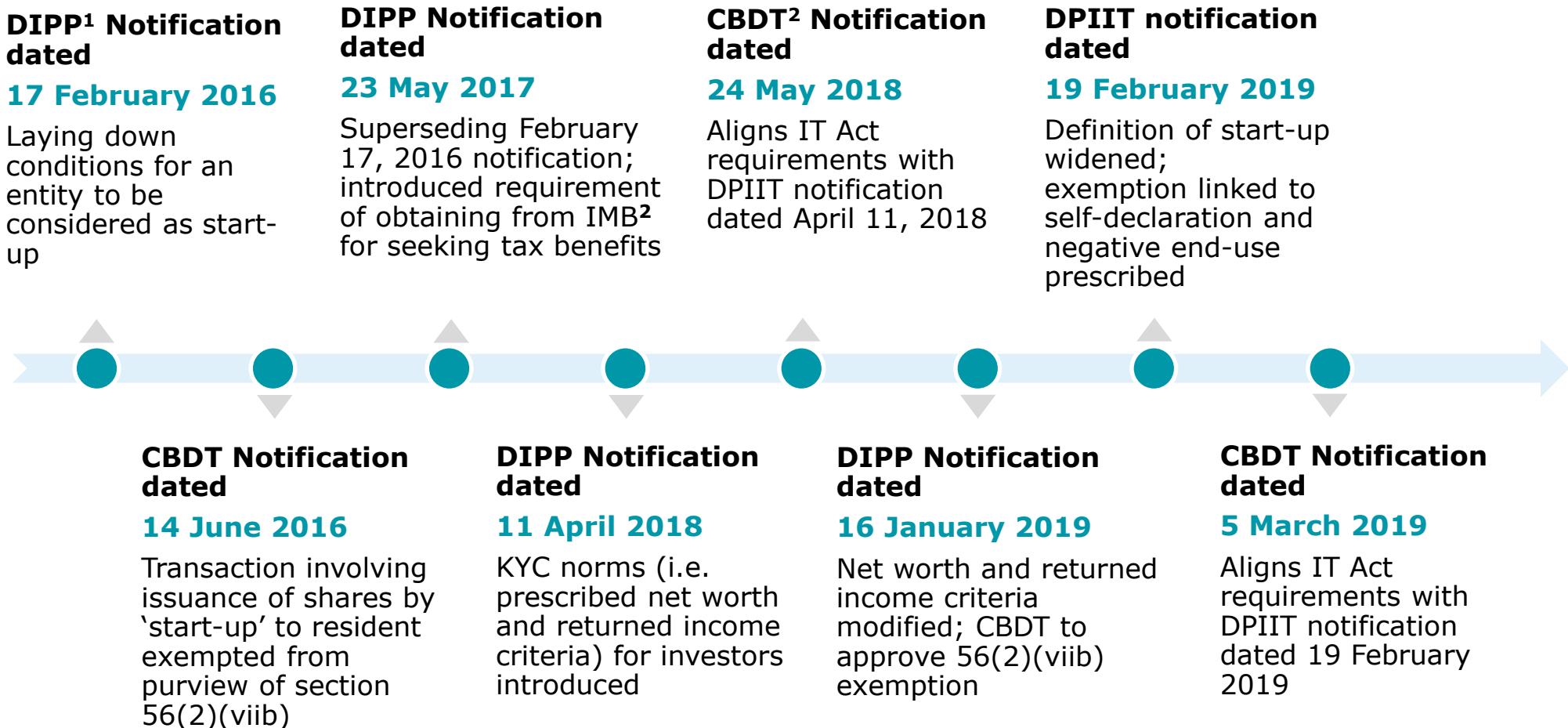
- Recent amendments in law
- Corporate tax: Latest developments and impact
- Indirect taxes: Latest developments and impact
 - GST advance rulings
 - Judicial Pronouncements
 - Update on anti-profiteering cases
- Best of the Rest
- Questions and Answers



Recent amendments in Law

Angel Tax Exemption

Emerging tax and regulatory landscape



1. Department of Industrial Policy & Promotion (**DIPP**). Name of DIPP has been changed to Department for Promotion of Industry and Internal Trade (**DPIIT**)
2. Central Board of Direct Taxes (**CBDT**); Inter-Ministerial Board (**IMB**)

Angel Tax Exemption

DPIIT notification dated 19 February 2019 –key changes

- Definition of eligible start-up widened:
 - Start up recognition period increased to **10 years**
 - Turnover criteria increased from INR 250mn to **INR 1,000mn**
- Requirement for seeking approval from CBDT for seeking angel tax exemption done away with; **self declaration** re compliance with prescribed condition to be filed.
- Other criteria for seeking angel tax exemption modified:
 - Aggregate amount of paid up share capital and premium (post proposed issue) to not exceed INR 250 mn
[Shares issued to NR/ Venture capital company/ Venture capital fund(Category –I AIF)/ Specified company to be excluded for such calculation]
 - Negative end-use restrictions prescribed; prevents investment in shares /securities, loans and advances etc for 7 years
- Notification to apply to all cases irrespective of date of issue, except where addition is made under section 56(2)(viib) in an assessment order prior to this notification.

Key open issues

- Extending angel tax exemption to Category-II Alternate Investment Funds (AIFs)
- Aligning deduction provision (section 80-IAC) under domestic tax with recent notification
- Applicability of Minimum Alternate Tax (MAT) provisions to be rationalized



Attribution of income to permanent establishment in India

Draft Report for public consultation – 16 April 2019

- Attribution of profit to a 'Permanent Establishment' (**PE**) of a non-resident in India has been a subject matter of controversy due to lack of clarity in existing rules.
- Last week, CBDT issued a Report on attribution of income to the PE; currently open for public consultation.

Key proposals

- The Report discusses different approaches to profit attribution – (1) 'FAR approach' and (2) 'demand and supply' approach; rejects FAR approach by underlining India's position to OECD MC.
- Regarding 'demand and supply' approach the Report outlines two methods – 'Formulary apportionment' method and 'Fractional apportionment' method.
 - Formulatory approach requires apportionment of global profits; in absence of such details, the same may not be practically feasible.
 - Fractional apportionment may be consequently followed; equal weightage to be given to three factors, i.e., sales, employees and assets.
 - In respect of digital models, a fourth factor being 'users' to be considered.
 - The above weights to be applied to 'profits derived from Indian operations', which will be higher of **a)** Revenue derived from India* Global operational profit margin (i.e. EBITDA margin), or **b)** 2% of the revenue derived from India.
 - Any compensation paid to local enterprise (which has been taxed in India) to be deducted – in line with Supreme Court ruling in Morgan Stanley.

Impact of MLI adopted by Singapore on Indian tax treaty

Background

Singapore deposited its instrument of ratification on 21 December 2018 and the MLI for Singapore will enter into force on 1 April 2019.

Key provisions adopted by Singapore under the MLI

- Singapore has adopted Principal Purpose Test (PPT), a general anti-abuse rule under MLI [Article 7(1)].
- Anti-abuse provisions on permanent establishments (such as broadening the scope of agency PE, anti-fragmentation rule) have **not** been adopted by Singapore [Articles 12 and 13].

India's Position

- India has opted for PPT and Simplified LOB [Article 7(6)].
- India has adopted the anti-abuse provisions on permanent establishments (such as broadening the scope of agency PE, anti-fragmentation rule) [Articles 12 and 13].
- India has not submitted ratification instrument yet.

Impact

- Once India ratifies MLI, the above could impact treaty benefits claimed by the taxpayer.

Clarification on various doubts related to treatment of sales promotion schemes under GST

Schemes	Description
Free Samples and gifts	<ul style="list-style-type: none">Not to constitute 'supply' due to absence of consideration; thus, outside the scope of GST, except if covered as related party transactionNo Input tax credit (ITC) would be available where these are not considered as supply
Buy one get one free offer	<ul style="list-style-type: none">To be treated as case of two or more individual supplies where a single price is being charged for multiple suppliesTaxability to be dependent upon whether the supply is composite or mixedITC would be available in respect of such supplies
Discounts including 'Buy more, save more' offers (staggered discounts, volume discounts)	<ul style="list-style-type: none">To be excluded from the value of supply (provided discounts are established in terms of an agreement), though not shown on the invoiceRecipient would be required to reverse ITC as attributable to the discounts extended
Secondary Discounts (discounts not known at the time of supply or offered after supply is over)	<ul style="list-style-type: none">Secondary discounts that are not known at the time of supply can be adjusted through commercial credit notes (and not GST credit notes under Section 34 of CGST Act)No adjustment to be done in taxable value in respect of such discountsNo impact on ITC for supplier

Increase in threshold limit for registration and composition scheme

Notification No.	Particulars
Regular GST Registration (Notification No. 10/2019- Central Tax dated 7 March 2019)	Increase in threshold limit for registration for suppliers engaged exclusively in supply of goods to INR 40 lakhs
Composition Scheme (Notification No. 14/2019- Central Tax dated 7 March 2019)	<ul style="list-style-type: none">• Increase in the threshold limit of aggregate turnover for availing composition scheme to INR 1.5 crores• For Special Category States, threshold limit increased to INR 75 lakhs
Composition Scheme for Service providers [Notification No. 2/2019- Central Tax (Rate) dated 7 March 2019]	<ul style="list-style-type: none">• Composition Scheme extended to Service Providers• GST Rate 6%• Threshold limit of INR 50 lakhs

Amendments in GST law – w.e.f. 1 February 2019

Multiple registration for each place of business



- Separate registration for each place of business in the same State or Union Territory
- Place of business may include a warehouse, a godown, an agency, etc.

Transfer of credit on obtaining separate registration for multiple place/s of business within a State or UT



- ITC to be transferred to newly registered locations
- Procedure prescribed from transfer of ITC
- Transferor to provide details on the common portal within 30 days from the date of new registrations
- ITC to be transferred once the details are accepted by the transferee

Bill-to-Ship-to transactions in case of services



- Extended to Service sector as well
- Could be beneficial to works contract suppliers

Amendments in GST law – w.e.f. 1 February 2019

Procedure for cancellation of registration



- Provision for temporary suspension of registration while cancellation is under process has been prescribed
- Registration shall be deemed to be suspended from the date of submission of the application or the date from which the cancellation is sought, whichever is later
- Suspension shall be deemed to be revoked upon completion of the cancellation proceedings, effective from the date on which the suspension had come into effect

Order of utilization of credit



- The entire balance of IGST would have to be exhausted against output IGST, CGST and SGST in the given sequence
- Only after exhausting IGST, credit of CGST and SGST shall be utilized

Customs Circular

Circular No. 3/2019-Customs dated 31 January 2019 (Amending Circular 38/2018-Customs dated 18 October 2018)

- The Central Board of Indirect taxes and Customs (CBIC) has allowed labelling/ fixing RSP etc. in the Customs Bonded Warehouses in order to fulfill statutory compliance requirements in all Customs Bonded Warehouses.
- No requirement for obtaining permission from the authorities in this regard.

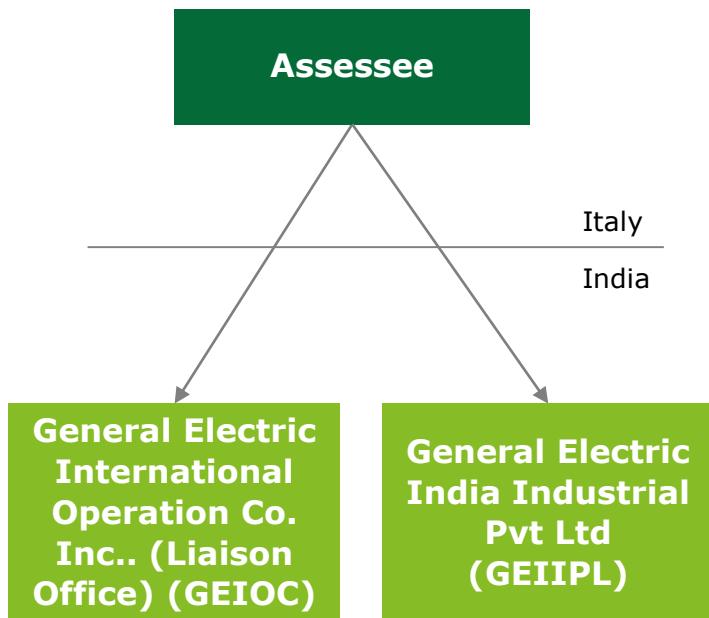


Corporate tax

Latest developments and impact

GE Nuovo Pignone SPA (2019) vs DCIT

PE – Activities of Liaison office and subsidiary in India

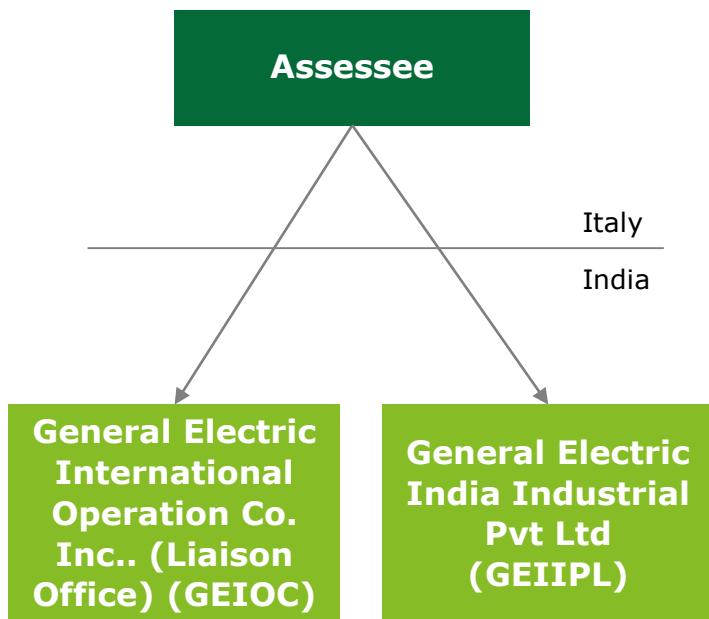


Facts

- During the AY 2009-10, the tax payer had supplied spare parts or equipment to various customers in India.
- However, in the tax return, income only from onshore services as being in nature of royalty and FTS was offered.
- In the year 2007, a survey was carried out at the office premise of India LO (GEIOC) during which various documents/evidences were gathered and statements of various persons were recorded.
- Basis the aforesaid findings, the reassessment proceedings were carried out in which it was held as under:-
 - GEIOC was Fixed Place PE of taxpayer in India as it was engaged in activities much more than of auxiliary and preparatory nature.
 - GEIIPL was an Agency PE of taxpayer in India, as it was engaged in negotiating the contracts for the offshore supply of spare parts undertaken by the tax payer.
 - Attributed 3.5% of the total sales value of spare parts as taxable in hands of PE in India.
- On appeal, the DRP upheld the attribution of income held by AO.

GE Nuovo Pignone SPA (2019) vs DCIT

PE – Activities of Liaison office and subsidiary in India



Issue

- Whether initiation of reassessment proceedings was justified?
- Whether GEIOC and GEI IPL constituted PE in India. If so, attribution of profits to the PE.



Findings

- Based on various documents/evidences gathered from survey, reassessment proceedings was justified.
- Expats were negotiating and finalizing the terms and conditions of MOU/Agreements with Indian customers.
- The employees of GEI IPL were actively involved in determining marketing strategies, decision making process and acted as a team for sales carried in India.
- Expats of GEIOC and employees of GEI IPL would negotiate and took strategic decisions for sales in India.
- GEIOC was held as fixed place PE and GEI IPL was held as Agency PE of tax payer in India.
- Attributed 2.6% of total sales value of spare parts as taxable in hands of PE in India.

Also relied on GE Energy Parts Inc. [2017] 78 taxmann.com 2 (Delhi - Trib.)



Indirect taxes

Latest developments and impact

GST Advance Rulings

Export of Marketing Services

As the relationship between the parties is that of independent contractors i.e. the agreement does not intend to create relationship of principal and agent, the Applicant is not a person who arranged/facilitated supply of services between two or more persons.

Thus, the service provided under the 'Marketing Services Agreement' would not be classified as 'intermediary service'. The service provided under the 'Marketing Services Agreement' would qualify as an export of taxable service covered under "Zero rated supply".

NES Global Specialist Engineering Services Private Limited
GST-ARA-52/2018-19/B/160
dated 19 December 2018

Inclusion of Post Supply Discount in Supply Value

ITC should be available only to the extent of the invoice value less the discounts. Hence, where post supply discounts (which are not pre-agreed) are provided, ITC needs to be reversed by recipient of supply.

As per proviso to Section 16, the recipient is entitled to avail the credit of input tax on the payment made by such person alone and if any amount is not paid as per the value of supply and the recipient has availed full ITC, the same would be added to the output tax liability.

MRF Limited
TN/05/AAR/2019
dated 22 January 2019

GST Appellate Advance Ruling

Credit eligibility for inputs and input services received towards maintenance of township, guest house, etc.

- Since the perquisites are outside the scope of GST, ITC is restricted in respect of tax paid on goods and services procured for management, repair, renovation, alteration or maintenance services (including watch and ward services, security services, plantation/ gardening/ landscaping services, etc.), pertaining to residential accommodation for employees in township/ colony
- ITC is restricted in respect of tax paid on inward supply of goods and services in connection with the guest house services provided to employees as well as non-employees because the same cannot be treated as an activity in the course or furtherance of business. Though the provision of guest house may not be treated as a perquisite, yet, it cannot be treated as an activity integrally related to the business
- ITC was allowed for tax paid on services availed in relation to plantation and gardening within the plant area including mining area and the premises of other business establishments treating the same as activities in course or furtherance of business
- Cost of an input service forming part of the cost of final product alone cannot be a condition to allow the benefit of ITC

National Aluminium Company Limited

Order No. 02-03/Odisha-AAAR/2018-19

dated 21 January 2019

Judicial Pronouncements

Jamna Auto Industries Ltd. vs. Commissioner of C.Ex., Indore (Supreme Court)

- The Tribunal decided on the issue whether non-compete fee is liable to Service Tax under the category of 'Business Support Service'. The Appellate Tribunal held that, entering into a non-compete agreement amounts to support services of business or commerce and is chargeable to tax.
- The Tribunal sustained the claim of the department to uphold the taxability. In appeal, the Supreme Court has also not stayed the Tribunal's Order confirming the demand.
- The judgment of the Supreme Court in this matter may be relevant under the existing GST law, since, Schedule II of the CGST Act treats "agreeing to the obligation to refrain from an act, or to tolerate an act or situation, or to do an act" as supply of service.

Torrent Power Ltd vs. Union of India (Gujarat High Court)

- Circular No. 34/8/2018-GST dated 1 March 2018 has been challenged. The Circular had clarified that rental charged for meters, testing fee, etc. charged by electricity distribution company from consumers is distinct from activity of transmission and distribution of electricity. Accordingly, such charges are not exempt from GST.
- The High Court has held that, these activities are only ancillary in nature and the activity of distribution of electricity is the principal supply. Together they constitute a composite supply and therefore, exemption to the principal supply (i.e. to distribution of electricity) will also extend to these additional activities.

GST Rulings by National Anti-Profiteering Authority

Excel Rasayan Pvt Ltd (Order dated 16 January 2019)

- The benefit arising due to reduction in GST rate cannot be denied to the consumers just because immediately after introduction of GST, MRPs were not changed to extend some additional benefit to the consumers.
- Maintaining a constant selling price before and after reduction in rate, is not a justification for not passing on the benefit.
- As the base prices had been increased after the reduction in rate of GST, to maintain the same selling prices which were existing before the reduction in the rate of tax, the commensurate benefit had been denied to the customers.

Conclusion:

The **Respondent had profiteered** because the base prices had not been reduced to pass on the benefit of reduced rate to the customers. The fact that, the taxpayer did not increase sales price to nullify the increase in tax cost post introduction of GST does not allow the taxpayer to increase the base price (maintaining the same sale price) when tax rates were reduced.

GST Rulings by National Anti-Profiteering Authority

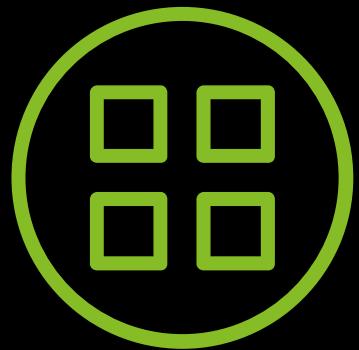
Cloutail India P. Ltd. (Order dated 7 March 2019)

Held:

- Even where it was the manufacturer who fixed the MRP, Cloutail was a registered entity and hence, liable to pass benefits of reduction in tax rate to its customers.
- Further, the computation was based on the increase in base price of the product post GST rate reduction w.e.f. 15 November 2017, from INR 705.90 (average base price for the sales made during the period 1 October 2017 to 14 November 2017) to INR 887.90 (average base price for the sales made during the period 15 November 2017 to 31 July 2018). Accordingly, the base price had been increased post reduction in the rate of GST.
- It was held that, the nearest available pre-rate reduction prices had been compared to the post-rate reduction price to evaluate the applicability of anti-profiteering.
- As the Respondent had not only increased the base price but had also collected GST on the increased base price, the cum-tax prices had been correctly adopted while computing the profiteered amount.

Conclusion:

Thus, it was held that, the **Respondent had profiteered** by not reducing the base price on account of reduction in the rate of GST.



Best of the rest

Best of the rest

Innoviti Payment Solutions (P.) Ltd. [2019]
175 ITD 10 (Bang ITAT)

Where share premium collected by the assessee was sought to be taxed under section 56(2)(viib), as assessee could not establish that projections were made by the management on a scientific basis, matter was restored to the Assessing Officer to scrutinize and adopt own valuation if required without changing the method adopted by the assessee viz. Discounted Cash Flow method.

Reliance Industries Limited [2019]
102 taxmann.com 52 (SC)

If interest free funds are available, presumption would arise that investments in subsidiaries are made from such funds and accordingly, interest under section 36(1)(iii) should be allowed as a deduction.

Compaq Electric Limited [2019]
101 taxmann.com 400 (SC)

SLP dismissed against High Court ruling that waiver of repayment of certain amount in respect of which there was no deduction claimed by assessee during previous year amounted to capital receipt not liable to tax under section 41(1).

Polyplex Corporation Ltd. [2019]
103 taxmann.com 71 (Del ITAT)

Where Indian company received dividend from Thai subsidiary, though assessee was not liable to pay any tax in Thailand by virtue of exemption granted as per Investment Promotion Act of Thailand, in view of fact that dividend so received was taxable under Thailand Revenue Code at rate of 10%, assessee would be entitled to credit of such taxes deemed to have been payable in Thailand

Bhojison Infrastructure (P.) Limited [2018]
99 taxmann.com 26 (Ahd. ITAT)

Right to sue is a right in personam which cannot be transferred and amount received as compensation in lieu of said right is not chargeable to tax under section 45.



Q&A

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More details to follow, shortly.



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