

JAN  
2022

EDITION 17

A TREASURY OF  
KEY TAX &  
REGULATORY  
DEVELOPMENTS!

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## Vision 360: Beginning '22...

**H**ope is the one thing that can help us get through the darkest of times. We've seen 2020 and thought, worst is behind us and then 2021 happened. The second wave of COVID was devastating beyond anyone's anticipation. Yet, here we are! As we usher into 2022, our memories may hurdle our resolve, but be that as it may, the show must go on.

Benjamin Franklin once famously quoted, "In this world, nothing is certain except death, taxes" and it couldn't be any more truer. While the Country has witnessed biggest ever vaccination drive in the history of mankind, it also calls for tax burden. And it is only one of many other reasons why governments across the world have turned even more vigilant for collection of revenue. Despite this, India has managed to keep its growth trajectory fairly upwards.

Unicorns certainly dominated the headlines this past year and it also continued to keep India at third position in the global leader board for Unicorns. Hon'ble Finance Minister Nirmala Sitharaman recognised this aspect and said, "Startups that find solutions to longterm problems in various sectors are leading India from the front in resetting the economy in the post-pandemic world." Truth be told. Who'd have thought a ridesharing aggregator of an IIT alumnus would become one of the biggest e-scooter manufacturers across the globe! No brownie points in guessing - OLA. All of this while competing the global giant UBER trying to establish in Indian markets aggressively.

The retail investment sector too saw some significant change in patterns. Since the dip in country's stock exchanges in early 2020 due to withdrawal of FII, to its resurrection to record highs, the retail investor are

more and more vowed by equity markets. A slurry of IPO's is feeding on them. Some become 'Paytm' some raise the bar by becoming Nykaa and Zomato, if you know what we mean!

The judiciary in India too remained active despite pandemic-induced work from home and continued to deliver some landmark decisions and also taking suo moto cognizance to address the concerns of many. The legislative though must be conceded with most eventful decisions. Be it Union Budget 2021-22 that introduced amendments qua depreciation on Goodwill, capital gains for partnership firms, rationalisation of MAT and slump sale provisions, reform of reassessment regime, abolition of AAR and Settlement Commission and introduced Faceless Tribunal.

This streak of tax reforms has only continued as we enter into 2022. The Customs Tariff has been amended to align with changes in the Harmonised System of Nomenclature issued by World Customs Organisation. The GST also saw significant changes in Tax Credit mechanism as well as Tax recovery proceedings. One of the most significant changes are that ITC can only be availed if the suppliers report their transaction in their returns and the same are reported in Recipients returns. The system that initially allowed a 20% of ITC towards un-declared supplies, was gradually reduced to 10% and then 5% and is now done away with. The Recipients now have to be all the more vigilant about their supply chain and the vendors they rely on. Although this system is in contradiction with the very idea to eliminate cascading system, and have resulted in many Petitions, this system seems to stay

here for long.

On international front OECD releases Model Global Anti Base Erosion Rules under Pillar Two. These rules seek to implement 15% global minimum tax from 2023. OECD also released updated Transfer Pricing profiles for 21 countries, including 3 new first-time participants. The 3 new countries to join hands in sharing TP profiles include Albania, Kenya and the Maldives taking the tally of participating countries who have shared TP profiles to 63 from 60 since the last update in August, 2021.

Despite a hard blow, year 2021 has ended on high octane note and with the threat of third wave rising rapidly, we have yet another set of experiences and learning to tackle the same.

As we all embark on this new year with new challenges in true sense, the entire team of **TIOL**, in association with **Taxcraft Advisors LLP**, **GST Legal Services LLP** and **VMG & Associates**, wish you all a very happy new year and all the best for a fresh start! Our team is glad to publish the 17th edition of its exclusive monthly magazine '**VISION 360**'. We hope that, as always, you will find it an informative and interesting read. We look forward to receiving your inputs, thoughts and feedback, in order to help us improve and serve you better!

Happy Reading!

*P.S.: This document is designed to begin with couple of articles peeking into recent tax/regulatory issues allowed by stimulating perspective of leading industry professionals. It then goes on to bring to you latest key developments, judicial and legislative, from Direct tax, Indirect tax and Regulatory space. Don't forget to check out our international desk for some global trivia.*

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## Apex Court's dissenting views on Service tax applicability on Credit Card interchange fees

**B**ackground

During the beginning of the 21st Century, the concept of a credit card had begun to attain some popularity among the Indians.

While majority of the Indian population still remained sceptical about using such a card facility, certain classes of people, who were aware about its success in the West had begun availing the facility.

The Credit Card facility being a service, had been made exigible to Service tax. Historically, Service tax had been levied on services rendered to the customer (i.e., the card holder) under the heading Banking and Other Financial Services. However, by virtue of an amendment in the Service Tax Act, the credit card services were deleted from the Banking and Other Financial Services category and a separate service category was introduced whereby several other transactions were included in the scope of taxable services w.e.f. 01 May 2006.

Namely, the newly introduced Section 65(33a) of the Service Tax Act inter alia provided that services by any person, including an Issuing Bank and an Acquiring Bank, to any other person in relation to settlement of any amount transacted through such card to be exigible to ST. Basis the said amendment, the Revenue authorities had demanded CITI Bank NA to pay Service tax on the interchange fees along with the applicable interest and penalty for the period prior to the Negative List regime.

At this juncture, it would be pertinent to understand the concept of Interchange Fees. In this regard, it shall be noted that typically, Credit Card transactions involve two banks viz. an Issuing Bank and an Acquiring Bank. The Issuing Bank issues credit cards to its customers and that Acquiring Banks contract merchant establishments to accept credit card payment for the goods or services sold

to the customers. The Credit Card customers use a Point of Sale for making the payments through credit cards. The Acquiring Banks make payments to the merchant establishments/service establishments and charge them a pre-contracted rate known as Merchant Discount Rate to facilitate the credit card transaction. The Acquiring Banks submit the transactions settled by Merchant establishments to the Issuing Banks through Card Association and in-turn the Issuing Bank makes payments to the acquiring banks through Card Association.

Coming back to the demand raised by the Revenue, it shall be noted that the Chennai Tribunal in RE: CITI Bank NA [2019-TIOL-659-CESTAT-MAD] following the judgement of Allahabad Tribunal in RE: ABN Amro Bank NV [2018-TIOL-2811-CESTAT-ALL] held that the amount received by the Issuing Bank therein did not qualify as credit card services when Acquiring Bank has discharged Service tax liability on the entire amount. It was also held that no Service tax is payable by the Issuing Bank therein and that the amount offered by the Issuing Bank did not qualify as credit.



Aggrieved, the Revenue had preferred an Appeal before the Apex Court. The moot question which arose before the SC was whether the IB is

liable to discharge Service tax on interchange fees earned as 'Credit card service' u/s. 65(33a), even though such fee is only its share in the MERCHANT DISCOUNT RATE which suffered service tax in the hands of the Acquiring Banks.

### Apex Court's Split verdict

The SC pronounced its judgement in RE: CITI Bank NA [2021-TIOL-262-SC-ST] on 09 December 2021. While Justice Bhat concurred with the view of Chennai Tribunal, Justice Joseph dissented, holding Service tax to be liable on interchange fees. The divergent views of the Division Bench have been tabulated hereunder:

While the Division Bench had dissenting views on the

Sl.No.	Summary	Justice Joseph's view	Justice Bhat's View
1	Unified vis-à-vis Independent Nature	Interchange fee is a consideration for an independent Credit Card Services by the IB	Interchange fee is a consideration for a unified service provided by the Issuing Bank and Acquiring Bank
2	Disclosure in Returns	Being liable to pay the tax under Section 68(1), IB is also liable to file the Return including the amount of interchange fee	Did not comment as held to be not taxable
3	Sufferance of tax	Acknowledging the argument put forth by the Respondent that the entire Service tax is borne by the Acquiring Bank as an industry practice, the matter was ordered to remanded back to the Tribunal for confirmation of this fact	As the entire Service tax liability on MERCHANT DISCOUNT RATE portion is suffered in the hands of the AB, demanding the same from the IB would lead to double taxation

above, it would be pertinent to note that the both the judges did agree on certain aspects of the case. Interestingly, Justice Joseph while remanding the matter back to the Tribunal, agreed with Justice Bhat that once tax is paid on MERCHANT DISCOUNT RATE by the Acquiring Bank, it cannot once again be collected from the Issuing Bank as it would lead to double taxation, which goes against the very objective of the indirect taxation. It was for this precise reason that Justice Joseph saw the matter liable to be remanded back to the Tribunal.

### The Way Ahead

Given the contradictory views of both the judges, the matter will now be placed before the Larger Bench of Supreme Court to attain finality on the issue of Service tax applicability on interchange fees. Accordingly, it would be interesting to see the verdict of the larger bench, whether it will concur with the view of Justice Joseph or Justice Bhat. It shall be borne in mind that even if the larger bench upholds the judgement of Justice Joseph, the only challenge before the assesseees would be to prove that Service tax liability on the entire Merchant Discount Rate has been discharged by the Acquiring Bank. Justice Joseph too has held that the situation should not lead to double taxation.

In the alternative, if the view of Justice Bhat is upheld, it would be a win-win situation for the assesseees as it would become a declared law that the Service tax is not liable on the Merchant Discount Rate portion in the hands of the

Issuing Bank. This may also help the assesseees who had been discharging Service tax on interchange fees to avail refund of Service tax so discharged under protest.

As for the issue under the GST regime, supplies from Merchant Establishment/ Acquiring bank/Issuing bank/ provided to the card holder are not provided as independent activities but are the means for successful provision of the principal supply, namely, the swiping of the card for the purchase of goods or services. Thus, such supplies are considered as a single Composite Supply.

The contention that a single composite supply should not be broken into its components and classified as separate supply is a well-accepted principle. Therefore, as far as GST is concerned, it is a settled position of law that interchange fee earned by the issuing bank forms integral part of supply of service of 'acquiring bank' to the merchant establishment, and therefore should not be taxed again GST.

It would be pertinent to note that an advance ruling had been sought in this matter before the Maharashtra AAR in RE: Mobile Wallet Private Limited [2019-TIOL-66 -AAR-GST], however, the question of law had not been answered, being beyond the purview of GST Advance Rulings. Nonetheless, given that the very objective of GST is to facilitate seamless flow of credit and avoid double taxation, it is contemplated that issue would not be as contentious under GST as it is under Service Tax law.



## HS 2022 – A Step into the Future!

### Background

India, being a signatory to the World Customs Organization ('WCO') is required to follow the Harmonized System of Nomenclature, which is a coding system used globally for identification of goods. It is contemplated that nearly every item in the world can be classified under one or the other heading of the HSN. Even then, given the exponential growth of the trade and industry, coupled with inventions on a daily basis, there remains a constant need to update the said coding system to ensure smooth trade.

Thus, every manufacturer and trader who deals in goods, must be aware about the HS Coding system, at least to the extent of goods dealt by him and the updates thereto. However, the importance of the HSN is not limited to the businesses, the Governments use it to formulate policies, enter FTAs/PTAs etc. Statisticians rely on the HS to gather trade data while policy makers use it to formulate new trade policies.

Ever since the HS came into force in 1988, the WCO has been carrying out reviews of it every five years. Basis such periodic reviews, the WCO makes decisions regarding amendments and updates to the HS so as to ensure uniform interpretation globally, address new trade demands and emerging trends in the international trade arena.

It would be pertinent to note that the current HS 2017 has expired on 31 December 2017 and has been replaced by the new HS 2022, being the 7th Edition. This new HS has come into effect on 01 January 2022. As the new HS is fairly young, it would be imperative to try and analyse the key changes.

### Key Amendments

The HS 2022 features amendments in number of forms and chapters. The new edition creates a number of new product streams. It introduces responses that address changes in environmental and social issues of global concern. It prominently captures worldwide changes in technological advancement in certain sectors. It further addresses the emerging international trade patterns, health and safety matters of worldwide concern, as well as the protection of the societies from various threats to humankind.

A detailed analysis of the World Customs Organization's HS Tracker shows that the HS 2022 edition has brought about a total of 351 amendments covering a broad assortment of goods involved in international trade. The wide range of products whose classification is affected by these amendments fall in the various sectors of the HS and these are disaggregated by selected sectors as tabulated hereunder:

Sr. No.	Sector	Changes introduced by HS 2022
1	Agriculture	77
2	Machinery	63
3	Chemical	58
4	Wood	31
5	Base Metal	27
6	Transport	22
7	Textile	21
8	Others	52
<b>Total</b>		<b>351</b>

Whole majority of the key changes have been made in the agriculture sector, the most impactful is contemplated to be the inclusion of a specific entry for electronic waste (e-waste) and electronic scrap. The new edition introduces a new note under Section

XVI which defines electrical and electronic waste and scrap (e-waste) classifiable under a new heading. In addition to possessing high value of trade, until now, e-waste had been posing considerable policy concerns in international trade and other

conventions.

Similarly, specific tariff classification of drones technically known as Unmanned Aerial Vehicles ('UAVs') have been introduced. The multi-functionality nature of smartphones has led to these products being defined under Chapter 85 in HS 2022. They are now classified under a specific tariff sub-heading.

The new edition also brings about key changes in line with the technological advancement in international trade as well. By simplifying the exact classification of items such as metal forming machinery, glass fibres, etc., collection of trade data or statistics going into the future on these products have been made

considerably plausible.

As part of eliminating delays in the distribution of tools and testing kits for rapid diagnostic of pandemics and other related outbreaks, HS 2022 has simplified their classification under new sub-headings so as to facilitate their clearances across borders. Faster cross-border movement of such products being very critical, especially in times of pandemics such as COVID-19 and its related mutations.

In order to better understand the amendments made vide the 7th Edition HS 2022, the same have been summarised hereunder in a tabular form:

Sector in International trade	HS 2022 Changes
Environmental Impacts	New heading for e-waste and subheadings for the key categories of e-waste have been inserted to offer greater visibility and aid to member countries in the charge of controlling the cross-border movement of hazardous wastes and their disposal
Combatting Terrorism	New subheadings have been inserted for a number of dual-use goods (e.g. radioactive materials, biological safety cabinets) that could be diverted for mass disturbance of international peace and security once successfully cleared
Shifting Trade Patterns	New subheadings have been incorporated for smartphones (including Chapter note), UAVs, novel tobacco and nicotine-based products for ease of simplified classification and statistical reasons
Restricted or Controlled Materials	New subheadings have been streamed so as to distinctively cover certain restricted, controlled or prohibited for certain hazardous chemicals, resilient organic pollutants, including fentanyl-opioid substances and their derivatives
Health and Safety Issues	New provisions have been provided for cell cultures and cells, therapy placebos and clinical trial kits as well as rapid diagnostic kits

### Conclusion

In view of the above, it can be seen that the HS 2022 brings about a number of key changes which had been required for quite some time now! The WCO has heard the woes of the traders and duly catered to their requirements. However, it shall be noted that such changes may also have any impact on the

current FTAs/PTAs, which may either be expanded or restricted. Thus, companies, especially those dealing in multiple products and operating from multiple countries must re-assess their tariff classifications and align the same with the HS 2022.







## Fulesh Bansal

Finance Controller

**Sigma Byte Computers Private Limited**

*Mr. Bansal shares his thoughts and perspective on GST amendments, faceless assessment, budget expectations and threat of Omnicron virus...*

**Government has announced numerous amendments under GST Act from January 1, 2022. What are your views on them and what steps do you think the taxpayers should take to ensure added compliance?**

Well first of all, I would like to wish all the readers a very happy and healthy new year.

Government has announced quite a few changes under GST laws with effect from January 1, 2022. Amongst these, matching of ITC with GSTR 2B, calculation of output liability based on GSTR 1 and amendment regarding seizure/confiscation of goods/conveyance are likely to affect most of the taxpayers. These amendments are not new in a way as Government has always been encouraging and allowing ITC only to the extent appearing in GSTR 2A / 2B with cushion of 20% / 10% / 5%. Now the subject cushion has been removed altogether and ITC shall be allowed only if GSTR 1 is filled by its vendor and the specific invoice appears in GSTR 2B. The taxpayers would now need to ensure that compliance is made by its vendor before releasing payments or added this as a term of PO to avoid loss of ITC.

Regarding calculation of GST liability based on GSTR 1, the taxpayers will have to be more diligent about filing GSTR 1 as their liability will be calculated based on GSTR 1 rather than GSTR 3B. This will remove the scope of correction that taxpayers had by reporting correct tax in GSTR 3B which was missed in GSTR 1 due to any reason.

Also, the provisions of e-way bill and e-invoicing which are relevant for movement of goods and have bearing on GSTR 1 reconciliation will become all the more relevant as the penalty has been increased from 100% to 200% on seizure/confiscation of goods/conveyance. All these provisions show Government's intent to put the additional responsibility of compliance on the taxpayers and ensure compliance at any cost.

**How do you see the faceless move in the current taxation era?**

The Faceless Assessment scheme is likely to impact the industry in positive manner. Introduction of such assessment system is a stepping stone in the right direction, especially during the current pandemic where the 'digitalization' or 'faceless' is the new normal. Being a law-abiding company, we surely hope that this change in law would achieve its objective of eliminating corruption.

Although there might be challenges during the initial phase of implementation. But in long run, it is likely that the scheme will achieve its potential and help in quick resolution. The challenge of representing complex matters before the authorities will persist. Thus, the taxpayers would be required to prepare their submission in a lucid manner to avoid any ambiguity. Also, this may increase the number of appeals at Tribunal level. Further, the new amendment which allows the taxpayer to demand for physical hearing will also be helpful in these cases.

**What are your views on digitization? How will it help businesses in improving compliances?**

Government has been actively working on digitalization from many years now. Like online submission of returns, Income Tax notices being issued directly by the systems, e-invoicing and e-way bill provisions under GST. Digitalization has no doubt helped assessee and department in quick and better resolution of assessments and audits. Further, digitalization has been a major step taken by the Government to curb the tax evasion phenomenon, which is one of the biggest issues faced by the Indian economy.

Further, in order to put a complete check on the tax evasion, it is imperative for the digital system to work seamlessly. In many cases it was seen that instead of

streamlining the processes, there have been numerous technical glitches in the system while implementation of new Income Tax portal, etc. While one can't rule out digitalization, Government should ensure smooth transition and implementation to new systems to reduce the troubles and incorporate trust in the system.

### With the Budget 2022 just round the corner, what are your expectations from the Budget?

Well, given the adverse impact of the pandemic on the entire economy, it is expected that the Government would be rolling out an investor friendly budget. The focus is likely to be on industries aiding long-term growth and generating employment such as infrastructure, domestic manufacturing and service industries. Further, it can also be expected that Government will work more actively towards monetization drive.

The sectors that have borne the brunt of the Covid-19 shock such as MSME's and travel and hospitality may get special measures or relief under this budget.

Considering the impact of Covid-19 on the lower strata, the Government might announce relief to lower-income households. Further, Covid-19 has highlighted the importance of health sector and insurance and it is likely that Government might also announce relief to these sectors in Budget 2022.

With yearlong updates and amendments under GST Law and recommendations from GST council, it is unlikely that any major changes will be announced in Indirect Tax segment. Further, Government might announce measures to ensure compliance and reduce litigation under Direct Tax. However, given the tight pocket, it is unlikely that major relief under Direct Tax could be announced.

Similar to Budget 2021, it is expected that Government will deliver a well-balanced and growth oriented budget.

### Spread of COVID-19 has regained its pace as the rise in cases of new Omicron variant are reported at alarming rate. What are your views on this and how do you think Government will respond to this?

Yes. It is true that COVID-19 virus is spreading too quickly in India as well. However, Government has been very vigilant from the start. They have the experience from past two waves of pandemic where the Government had undertaken different approach each time as complete lockdown was announced way-before the virus had started to spread while during the second wave the state-wise lockdowns announced were only after the situation was grave and lockdown was unavoidable.

The pandemic has vastly impacted everyone with people losing lives due to spread of Covid-19 while lockdowns announced have impacted the livelihood of the others. It is a very delicate balance that Government needs to strike to protect the lives and livelihood of its citizens.

Further, the businesses and people should also accept the fact that after certain point the Government will be forced to take strict actions and they should be prepared beforehand for such actions. Lastly, would like the readers to keep themselves and everyone around them safe and healthy by following Covid-19 protocols.

*Note: The views/opinions expressed in this section are personal views of the Author and do not necessarily reflect the views/opinions of the organization and/or the Publishers.*

## THE SECTORS THAT HAVE BORNE THE BRUNT OF THE COVID-19 SHOCK SUCH AS MSME'S AND TRAVEL AND HOSPITALITY MAY GET SPECIAL MEASURES OR RELIEF UNDER THIS BUDGET.



## ITAT holds penalty under Section 221 at 5% pm on non-remittance of tax deducted 'very exorbitant', reduces penalty to 1% pm

### Deccan Charters [P] Ltd 2021-TIOL-1990-ITAT-BANG

The Assessee was engaged in the business of flying of small chartered aircrafts and was subjected to a survey. During the survey, it was found that the Assessee had defaulted in remitting TDS to the government which caused the AO to start proceedings under Section 201 of the IT Act, 1961.

The Assessee's main arguments before the AO were that, it was facing severe financial hardship and that the same constituted a 'good and sufficient reason' for not levying the penalty.

The AO after considering the appellant's submissions rebutted the same and held that financial hardship was not reflected in the Assessee's books of account and that financial hardship could not be taken as good and sufficient reason for not remitting the TDS. Referring also to the past conduct of the companies under the same management, the AO levied a penalty under Section 221.

Thereafter, the Assessee remitted the tax along with interest but preferred an appeal before CIT(A) who confirmed the levy of penalty causing the Assessee to approach the ITAT.

The ITAT observed that the financial difficulties of the Assessee were not very relevant unless the Assessee also showed that they were not able to pay the payments on which TDS was made and such a case was also suggested that it had not been made out in any stage with facts and figures.

The ITAT noted that the penalty could be warded off if the Assessee could show that the default was for good and sufficient reasons as there was no doubt that a mere default was not sufficient for levy of penalty. However, the lower authorities pointed out that the Assessee had been using the deducted TDS amount for meeting various business commitments and continuously defaulting on the payment of TDS to the government account, and the offence was very serious in nature.

However, ITAT further noted that the Revenue levied penalty at very exorbitant rate of 5% pm which was devoid of legal sanction whereas the Revenue granted interest at 6% pa on tax refunds. Thus, ITAT held that it was only reasonable and fair to levy penalty at 1% pm i.e. 12% pa instead of 5% pm levied by the Revenue, and thereby, allowed the Assessee's appeal.



## ITAT holds Information in Form 10CCB not sacrosanct, requires verification for to allow the deduction under Section 80-IB of the IT Act

### Purvankara Projects Ltd ITA Nos.347 & 348/Bang/2021

The Assessee had claimed INR 80.75 Crores as deduction under Section 80-IB of the IT Act in the original return of income filed for AY 2010-11, after setting off losses from some of the eligible projects to the tune of INR 19.61 Crores from the net profit of INR 100.20 Crores derived from all the eligible projects. However, in the revised return

the Assessee claimed deduction under Section 80-IB of the IT Act without setting off such losses.

Noting that the Assessee did not maintain separate accounts for various projects and failed to show absence of interlacing or interdependence between various units for

their categorisation as separate undertaking, the AO recomputed the income after setting off the loss from eligible projects.

Aggrieved, the Assessee approached the CIT(A) who held that the Assessee had submitted project-wise Form 10CCB, P&L Account, and the books of account and that the audit of project-wise P&L account was not necessary, especially, when entire accounts were audited and thereby, allowed Assessee's appeal.

Aggrieved, the AO approached the ITAT. The ITAT observed that the Revenue had given a categorical finding that the

computation sheets of profitability of each project were neither reliable nor verifiable. Thereby, it was the duty of the Assessee to produce verifiable data to claim deduction under Section 80-IB of the IT Act. It further held that the CIT(A)'s order stating that the data furnished by the Assessee in Form 10CCB for each project need not be verified was improper.

Thus, disposing of Revenue's appeal, the ITAT observed that the data furnished by the Assessee was required to be verified by the Revenue and it could not be considered as sacrosanct without verification. It was not possible to grant deduction under Section 80-IB of the IT Act.



## HC holds Section 50 of SIDBI Act overrides DDT provisions

### Small Industries Development Bank of India Writ Petition No.1994 of 2003

The Assessee, a financial institution established under SIDBI Act transferred INR 54 Crores and paid dividend to IDBI as per Section 29(2) of the SIDBI Act and without prejudice to its rights deposited a sum of approximately INR 27 Crores for 4 financial years and also sought clarification on its liability to pay DDT under Section 115-O of the IT Act in the light of Section 50 of the SIDBI Act.

The Assessee received Revenue's response that any amount declared or distributed or paid by Petitioner by way of dividend was liable for additional income tax under Section 115-O of the IT Act.

Aggrieved, the Assessee preferred a writ petition before the HC. Taking note of Section 50 of SIDBI Act, HC observed that Section 50 of the SIDBI Act contained non-obstante clause giving overriding effect over the provisions of IT Act. However, the same principle could not be applied, ipso facto, when one came across two or more enactments

containing similar non-obstante clauses operating in the same or similar direction.

The HC further observed that the Assessee was eligible for exemption from DDT due to overriding provisions of Section 50 of SIDBI Act and the charge under Section 115-O(1) of the IT Act was on the part of the profits which were declared, distributed or paid by way of dividend and not on income by way of dividend in the shareholders' hands.

Thus, observing that the additional income-tax payable on profits of a domestic company under Section 115-O of the IT Act was not a tax on dividend, the HC, allowing the Assessee's writ petition held that Section 115-O applies where total income was computed under the IT Act whereas for the Assessee, the income was not computed at all under the IT Act due to the overriding effect of Section 50 of the SIDBI Act.





### ITAT holds expenditure on promotion of brand 'Snapdeal' allowable, revenue in nature, rejects Revenue's enduring benefit plea

**Jasper Infotech Pvt. Ltd**  
**ITA. No. 2605/Del/2017**

The Assessee, claimed expenditure incurred on advertisement, publicity and business promotion as business expenditure which was disallowed to the extent of 50% by the AO and was held to be incurred for acquisition of intangible assets i.e., building of marketing network in India which had enduring benefit and capital in nature.

Aggrieved, the Assessee approached the CIT(A) who placing reliance on multiple jurisdictional HC rulings observed that the benefit resulting from the advertisement, publicity and sales promotion was wholly necessitated for business purposes and its advantage, though enduring in the long term, could not be termed as being capital in nature.

The CIT(A) further observed that there was neither any provision in the Act nor any material on record suggestive of the fact that the Assessee could not claim these expenses as revenue expenditure and accordingly, deleted the disallowance made by the AO.

Aggrieved, the AO approached the ITAT which observed that the Assessee was operating in online marketing business as an aggregator, which was a highly competitive consumer market. Accordingly, it had to stay ahead of its competition and thus, engage itself in brand promotional activities and had necessarily to incur these expenses.

The ITAT further noted that the Revenue having accepted the fact that the Assessee could spend 50% of expenditure for activities which are revenue in nature, erred in holding that 50 % of such expenses were capital in nature in absence of any contrary evidence.

In addition to the above, as no evidence was placed on record to show that the Assessee had created any intangible asset, the ITAT observed that the expenditure incurred by the Assessee was purely revenue in nature and could not be considered as capital expenditure.

Thus, dismissing the Revenue's appeal, the ITAT held that the expenditure incurred on promotion/marketing of the brand 'Snapdeal' was allowable as revenue expenditure.



## ITAT treats royalty payment of 4% at ALP, upholds SBI linked benchmarking for CCDs

### Praxair India Private Limited 2021-TII-403-ITAT-BANG-TP

The Assessee was a company engaged in the manufacturing and supply of industrial gas. The international transactions entered by the Assessee with its AEs inter alia included payment of royalty and payment of interest on CCDs.

The Assessee in its TP study had aggregated the transaction of payment of royalty with certain other transactions and benchmarked on the application of TNMM. The Assessee concluded that the international transaction of payment of royalty at 4% as being at arm's length. In respect of the transaction on payment of interest on CCDs at 9%, the Assessee benchmarked the same using independent CCD benchmarking study rate by arriving at average rupee cost and comparing the same with SBI prime lending rate concluding the transaction to be at arm's length.

During the course of assessment proceedings, reference was made to the TPO to determine the ALP of the international transactions undertaken by the Assessee with its AEs. The TPO passed an order determining the TP adjustment in respect of international transactions of payment of royalty and payment of interest of CCDs by rejecting the TNMM applied by Assessee and determined ALP of royalty @ 1% under CUP method and treated the CCDs as ECB.

The AO passed draft assessment order incorporating the

aforesaid TP adjustments made by the TPO.

Aggrieved, the Assessee approached the DRP who was granting partial relief to the Assessee, directed the AO to pass the final assessment order.

Aggrieved by the final assessment order, the Assessee approached the ITAT which observed that in Assessee's own case in previous years, the TPO had accepted royalty payment of 4% to be at ALP after receiving direction from coordinate bench of the ITAT. Basis this, the ITAT observed the payment of royalty at 4% in the year under consideration to be at arm's length.

Further, with regards to the treatment of CCDs as ECBs, the ITAT placing reliance on a plethora of judgments observed that the CCDs were a hybrid instrument that could not be per se treated as ECB / loan. And accordingly, Assessee's TP study to justify the interest rate by arriving at average rupee cost and comparing the same with SBI prime lending rate was correct as the interest rate was to be the market determined interest rate applicable to the currency concerned in which the loan had to be repaid.

Thus, the ITAT held that the royalty payment of 4% to be at ALP and Assessee's treatment of the CCDs to be correct. The matter was remitted back to the file of the AO for fresh consideration.



## ITAT holds Government's promotional subsidy as capital-receipt, cannot form part of operating revenue for margin-computation

### Hyundai Construction Equipment India Pvt Ltd ITA No.1766/PUN/2018

The Assessee was a wholly owned subsidiary of Hyundai Korea and was mainly engaged in manufacturing of

excavators. It had filed its return declaring total income as Nil and had reported certain international transactions in

Form No. 3CEB.

The Assessee had computed its PLI under TNMM at 8.87% by treating, inter alia, the subsidy received from the state government under the Package Scheme of Incentives as part of operating revenue, which was also offered for taxation.

The AO made a reference to the TPO for determining the ALP of international transactions. The TPO opined that the subsidy was in the nature of extraordinary item of income which required exclusion from the operating revenue. Accordingly, the AO computed Assessee's PLI at (-) 4.01% after selecting five companies as comparable with their mean adjusted PLI at 2.25%. Considering the same as benchmark, the TPO made a TP adjustment.

Aggrieved, the Assessee approached the DRP contending that the subsidy received by it should have been considered as operating revenue for the purpose of PLI determination. At the same time, it was also contended by the Assessee that the subsidy should be considered as a capital receipt not liable to tax.

The DRP rejected the Assessee's contention on both the

scores and treated the subsidy as a revenue receipt and also upheld its exclusion from the operating revenue for the purpose of PLI determination.

Giving effect to such directions of the DRP, the AO passed the final assessment order, aggrieved by which the Assessee approached the ITAT.

The ITAT placing reliance on multiple SC rulings observed that the relevant consideration should be the "purpose of subsidy" and not its source or mode of payment. Merely because the subsidy was disbursed in the form of refund of VAT and CST, it would not alter the purpose of granting the subsidy, which was nothing but industrial growth i.e. establishment of new industrial units in less developed areas of the state.

Accordingly, holding the subsidy as a capital receipt not chargeable to tax, the ITAT observed that the subsidy could not form part of operating revenue of the Assessee for the purpose of determining the ALP under the TNMM.

Thus, partly allowing the appeal of the Assessee, the ITAT disposed of the appeal.



## ITAT restores manufacturing and trading segment benchmarking issues, directs OP/OR as PLI for trading

### Yokogawa India Limited IT(TP)A No.3369/Bang/2018

The Assessee was engaged in the manufacturing, trading, installation and servicing of process control systems, industrial automation instruments/equipments and electrical measuring equipments. The activities carried on by the Assessee had been categorized into three segments namely manufacturing, trading of products and engineering services.

The TPO made certain TP adjustments. Aggrieved by which the Assessee approached the DRP who upheld the adjustments made by the TPO.

Aggrieved, the Assessee approached the ITAT contending that in the manufacturing segment:

- The "provision for estimated loss on construction contracts" debited by the Assessee in its profit & loss account and reversal of such provision credited to the Profit and Loss account should be treated as non-operating in nature
- Leverage of 5% be considered
- The TPO had computed margin of M/s Gansons Ltd. as comparable company erroneously.

The Assessee also contended in relation to the trading segment that:

- The TPO had adopted operating profit/operating cost as PLI in the case of trading segment where the correct PLI should have been taken as "Operating profit/Operating revenue".

Assessee in relation to the manufacturing segment to the file of AO/TPO for the examination in accordance with law directed the AO/TPO to adopt OP/OR as PLI and determine the ALP accordingly with regards to the contention of the Assessee in relation to the trading segment.

The ITAT restoring all the contentions made by the



## ITAT restricts TP addition to AE transactions, holds payment for setup and maintenance of IT Infrastructure facility as royalty

### Bekaert Industries Private Limited ITA No.1003/PUN/2017

The Assessee was an Indian company engaged in the business of manufacturing and dealing in steel tyre cord and hose reinforcement wire.

The return of income was filed declaring total loss of INR 46.15 Crores. Certain international transactions were disclosed in Form No.3CEB.

The AO made a reference to the TPO for determining the ALP of international transactions. The TPO observed that the Assessee had declared several sets of international transactions and different methods were deployed by the Assessee for benchmarking the international transactions even under the single set of transaction.

The TPO rejected this approach and required the Assessee to aggregate the transactions in certain convenient segments. The Assessee aggregated the transactions into four major segments, namely, Manufacturing, Trading, Commission and Engineering.

At the instance of the TPO, the Assessee treated itself as a tested party and proceeded to determine the ALP of the Manufacturing segment by computing its own PLI at (-) 5.46%. The TPO made certain amendments to the list of comparables and computed their mean PLI at 4.72%. Treating the same as a benchmark, the TPO worked out the transfer pricing adjustment at INR 31.07 Crores. The AO notified the draft order with such transfer pricing adjustment.

Aggrieved, the Assessee assailed various aspects of the

benchmarking of the Manufacturing segment before the DRP.

On the basis of the directions given by the DRP, the TPO computed the Assessee's PLI at (-)4.06% and the mean PLI of comparables at 1.13%. This caused the AO to arrive at a transfer pricing addition of INR 15,82,40,997/- in the final assessment order.

Aggrieved, the Assessee approached the ITAT contending that the adjustment made by the TPO at entity level should have been restricted to the international transactions only. The Assessee also contended before the ITAT that payments by the Assessee to one of its AEs, NV Bekaert SA, would not be subject to TDS in India.

With regards to the Assessee's contention that the adjustment made by the TPO at entity level should have been restricted to the international transactions only, ITAT observed that in previous years the co-ordinate bench had directed that the transfer pricing addition to be restricted to the transactions with AEs only, Thus, following the said rulings, the ITAT remitted the matter back to the file of AO/TPO with a direction to confine the transfer pricing addition only qua the international transactions under the manufacturing segment.

With regards, to the Assessee's other contention that payments by the Assessee to one of its AEs NV Bekaert SA, would not be subject to TDS in India, ITAT deliberated on what was the nature of services for which the payment was made and whether the payment was a reimbursement, a



cost allocation or royalty/ FTS.

With regards the nature of payment, basis the detailed description provided by the Assessee and a perusal of agreement and invoices entered into with the AE and the pricing mechanism as explained to the TPO, ITAT observed that the alleged services indicated that these were not really the services rendered by N.V Bekaert SA to the Assessee but pertained to setting up, improving and maintaining the equipment of IT Infrastructure set up by its AE, N.V. Bekaert SA.

ITAT further noting that the AE had created and maintained the centralized integrated IT Infrastructure facility which was made available for use to the group entities. Accordingly, the costs were allocated with mark-up based on the usage of each entity (including the

Assessee). ITAT further observed that the Assessee had paid for the use of the IT Infrastructure facility set up by its AE and not for availing any separate IT services.

Accordingly, while deciding on the taxability of such payment for using the IT infrastructure facility set up by its AE - NV Bekaert SA, the ITAT observed that it was vivid that the Assessee paid royalty which was chargeable to tax in the hands of its AE. Thereby, the ITAT held that failure to deduct TDS by the Assessee from the payment made for use of IT infrastructure facility was rightly disallowed under Section 40(a)(ia) of the IT Act.

Thus, restricting the TP addition to AE transactions, the ITAT held payment for setup and maintenance of IT Infrastructure facility was in the nature of royalty.



## CBDT notifies Rule 21AK for exemption of Non Resident's income from transfer of non-deliverable forward contracts under Section 10(4E)

**Notification No. 136/2021  
December 10, 2021**

CBDT notifies Income-tax (33rd Amendment) Rules, 2021 wherein it inserts Rule 21AK ('the Rule') for the purpose of Section 10(4E).

As per the Rule, income accrued or arisen to or received by, a non-resident from transfer of non-deliverable forward contracts shall be exempt if the non-deliverable forward contract is entered into by the non-resident with an offshore banking unit of an International Financial Services

Centre holding a valid certificate of registration granted under International Financial Services Centres Authority (Banking) Regulations, 2020.

Further, it should be ensured that such contract is not entered into by the non-resident through or on behalf of its permanent establishment in India, compliance of which is also required to be ensured by the offshore banking unit.



## CBDT notifies e-Verification Scheme for calling, collecting & authentication of certain information

**Notification No. 137/2021  
December 13, 2021**

CBDT notifies e-Verification Scheme, 2021 ('the Scheme'), made by the Central Government. The scope of which extends to:

- calling for information under Section 133,
- collecting certain information under Section 133B,
- calling for information by the prescribed income-tax authority under Section 133C,
- exercise of power to inspect registers of companies under Section 134, and
- exercise of AO's power under Section 135

Further, CBDT states that the Scheme applies to processing or utilisation of the information in possession of PDGIT (Systems) or DGIT (Systems), or made available to them by DGIT (Intelligence and Criminal Investigation), CIT in charge of CPC (TDS) for processing of statement of tax

deducted at source, or any other authority, body or person.

The Scheme prescribes that CIT (e-Verification) shall collect the specified information as per the procedure laid down by PDGIT (Systems) or DGIT (Systems) and also prescribes for random allocation or transfer of the information as per the process to be devised by PDGIT (Systems) or DGIT (Systems) and to be approved by CBDT.

The Scheme further states that all the communication shall be exclusively in the electronic mode amongst the authorities and to the extent technologically feasible with any person or their authorised representatives and provides for digital authentication of electronic record by CIT (e-Verification) or the Prescribed Authority.

Furthermore, any person or his authorised representative shall also digitally authenticate the electronic record where he is required to digitally sign his return of income and, where not so required, by communicating through his registered e-mail address.

## CBDT notifies Rule 2DD for computation of exempt income u/s 10(23FF)

### Notification No. 138/2021 December 27, 2021

CBDT notifies Rule 2DD and Form Nos. 10-II and 10-IJ by Income-tax (34th Amendment) Rules, 2021.

Rule 2DD prescribes a formula for computation of exempt income of specified fund for the purposes of Section 10(23FF).

The Rule also prescribes the specified fund to:

- furnish a duly verified annual statement of exempt income in Form No.10-II on or before the due date {same as in Explanation 2 to Section 139(1)}
- get a certified annual statement in Form No. 10-IJ from an accountant before the specified date (one month

prior to the due date for Form 10-II)

- furnish separate annual statement of exempt income in Form No. 10-II for each scheme where multiple schemes are floated by the specified fund.

As per the Rule, income in the nature of capital gains, arising or received by a specified fund, which is attributable to units held by non-resident (not being a permanent establishment of a non-resident in India) in such specified fund shall be computed as per the prescribed formula where the specified fund files Form 10-II. The exempt income shall be Nil for the specified fund where it does not file Form 10-II.



## CBDT notifies Faceless Appeal Scheme, 2021

### Notification No. 139/2021 December 28, 2021

CBDT effectuates the Faceless Appeal Scheme 2021 from December 28, 2021. The new scheme has been notified in supersession of the earlier Faceless Appeal Scheme 2020. The Board has brought several changes in the Faceless Appeal Scheme 2021, and some of the key changes are listed below:

#### **(a) Regional Faceless Appeal Centre removed; Cases will be assigned to Commissioner (Appeals)**

The concept of Regional Faceless Appeal Centre has been removed under the new scheme. The National Faceless Appeal Centre shall assign the appeal for disposal to a Commissioner (Appeals) of a specific appeal unit.

#### **(b) Compulsion on CIT(A) to grant personal hearing if requested.**

The new scheme has replaced the word 'may' with 'shall'

with respect to allowing requests for a personal hearing. Thus, it would be mandatory for the Commissioner (Appeals) to grant a personal hearing if requested by the taxpayer during e-proceedings.

#### **(c) No draft appeal order**

In the previous scheme, the appeal unit was required to prepare a draft order. The said draft order was then sent to another Appeal Unit for review. This was done in cases where the aggregate amount of tax, penalty, interest or fee, including surcharge and cess, payable in respect of disputed issues, exceeds the specified amount.

There is no concept of a draft order in the new appeal scheme. Commissioner (Appeals) prepares appeal order and sends to National Faceless Appeal Centre after signing the same digitally. Thereafter, the National Faceless Appeal Centre communicates such order to the appellant.

## CBDT provides one-time relaxation for verification of all ITRs e-filed for AY 2020-21, applicable upto February 28, 2022

**Circular No. 21/2021**  
**December 28, 2021**

CBDT provides a one-time relaxation from submission of verification of ITRs for AY 2020-21 and from regularisation of the ITRs that have remained pending for want of receipt of ITR-V or pending e-Verification and permits verification of such returns either by sending a duly signed physical copy of ITR-V to CPC, Bengaluru through speed post or through EVC/OTP mode by February 28, 2022.

CBDT however states that the relaxation would be inapplicable where during the intervening period. Income-tax Department has already taken recourse to any other measure as specified in the Act for ensuring filing of

tax return by the taxpayer concerned after declaring the return as non-est.

In addition to the above, CBDT relaxes the time-frame for issuing the intimation under second proviso to Section 143(1) and directs that such returns shall be processed by June 30, 2022 and intimation of processing of such returns shall be sent to the taxpayer concerned as per the procedure laid down. For refund cases, CBDT clarifies that Section 244A(2) would apply for determining interest and the relaxation would be applicable to all such returns which are verified during the extended period.





### HC extends benefit of SC's limitation extension order to refund application

**GNC Infra LLP**

**W.P.No.18165 and 18168 of 2021**

The Petitioner had filed a refund application for the period June and August 2018 on 19 April 2021. The said application came to be rejected by the Revenue on the ground that limitation, being filed 2 years beyond the relevant date. Aggrieved, the Petitioner challenged the same before the Madras HC, contending that SC's *Suo Moto* Order in [2021-TIOL-246-SC-MISC-LB] which extended the limitation period for various proceedings.

The Madras HC observed that the benefit of the SC's *Suo Moto* order, extending various limitations due to COVID-19 pandemic and the consequential restrictions, would be available to the Petitioner. Basis the said observation, the HC directed the Revenue to consider the refund application afresh.

#### Authors' Note

It shall be noted that the CBIC vide Circular No. 157/13/2021 – GST dated 20 July 2021 had categorically clarified that proceedings that need to be initiated or compliances that need to be done by the taxpayers would continue to be governed only by the statutory mechanism and time limit provided/ extensions granted under the statute itself. Therefore, the cases of late filing of refund, being a proceeding to be initiated by the taxpayers may not be eligible for the SC's limitation extension order. However, the above judgment has been passed in the favour of the taxpayer which provides a glimmer of hope to the taxpayers in cases where there have been delays due to genuine reasons owing to the outbreak of the pandemic and consequent lockdowns in last couple of years.



### No ITC on lease premium for industrial plot

**JM Chemicals**

**2021-TIOL-276-AAR-GST**

The Applicant had purchased an industrial plot on which GST @18% had been charged by the seller for sale of transferring the rights of the industrial plot. The Applicant had sought an advance ruling before the Gujarat AAR to ascertain the eligibility of ITC of GST paid on input services of Lease Premium paid. The Applicant had submitted that obtaining land on lease cannot be considered to be a service used for construction of immovable property and thus, ITC cannot be disallowed u/s. 17(5)(d) of the CGST Act.

The AAR observed that the expression 'plant and machinery' excludes land. Accordingly, with the expression of Plant and Machinery excluding land, explicitly incorporated in the Blocked Credit provision u/s. 17(5)

CGST Act, the legislature has expressed its intent that ITC shall not be available in respect of services pertaining to land received by a taxable person for construction of an immovable property including when such services are used in the course or furtherance of business. In view of the above, it was held that ITC shall not be available on lease premium.

#### Authors' Note

In terms of Section 17(5) of the CGST Act, only those supplies, having direct nexus with construction activity are ineligible for credit and not any related activity. The industry is of the view that leasing of land, as a separate

transaction, does not have any direct nexus with construction activity and corresponding ITC should be available. However, it is seen that Advance Ruling authorities often take a pro-Revenue approach in such

matters. Similar view had been taken by the Tamil Nadu AAR in *Inox Air Products Private Limited [2021-TIOL-199-AAR-GST]*.



## IGST applicable on supply of goods outside India from Outside India till 31 January 2019

### SPX Flow Technology India Private Limited Order No: 02/11/2021

The Appellant, engaged in the business of supply of pumps, had received a purchase order from Bangladesh. Upon receipt of such purchase order, the parent Company of the Appellant, situated in Poland directly shipped the goods to the customer in Bangladesh. In view of the above, the Appellant had sought an advance ruling before the Gujarat AAR to ascertain whether the Appellant is liable to pay IGST on out and out transactions taking place beyond the Customs frontiers of India. The AAR had held that IGST will be leviable on such transactions prior to 01 February 2019. Aggrieved, the Appellant preferred an Appeal before the Gujarat AAAR.

Bangladesh, which also is non-taxable territory, without the said goods entering into India, the transactions are covered by said Entry 7 of Schedule – III. In view of the above, the AAAR held that no GST is leviable on such type of transactions which have taken place with effect from 01 February 2019 and onwards.

#### Authors' Note

The CGST Act extends to the whole of India only and not beyond it. Therefore, any transaction which takes place beyond the territories of India cannot be made exigible to GST. Accordingly, irrespective of the date of insertion of Entry No. 7 in Schedule III of the CGST Act, GST cannot be levied on such transactions which are beyond its jurisdiction. This view has been upheld by Maharashtra AAR in *RE: INA Bearing India Private Limited [2018-TIOL-286-AAR-GST]*.

The Gujarat AAAR observed that Entry 7 of the Schedule III covers supply of goods from a place in the non-taxable territory to another place in the non-taxable territory without such goods entering into India. The AAR further observed that the supply of goods in the instant case takes place from Poland, which is a non-taxable territory, to



## CNG Dispenser performing as a pump, classifiable under CTH 8413

### Parker Hannifin India Private Limited 2021-TIOL-298-AAR-GST

The Applicant had sought an advance ruling before the Maharashtra AAR to ascertain the tariff classification of CNG Dispensers supplied for use at CNG dispensing stations for vehicles and automobiles. The Applicant submitted that although they had been classifying the

CNG Dispensers under CTH 8413 chargeable to 28% GST, it seemed to be more appropriately classifiable under CTH 9032 chargeable to 18% GST. The Applicant had submitted that the CNG Dispensers manufactured by them does not have any pumping function of CTH 8413 but act as an

automatic control system of CTH 9032.

The Maharashtra AAR observed that the CNG dispenser causes the CNG to flow from the filling station to the CNG tank of the vehicle. Thus, the Dispenser functions as a pump. The AAR further observed CHT 841311 categorically covers 'pump for dispensing, fuel or lubricants of the type used in filling stations or garages'. Accordingly, as the Dispenser is designed to dispense fuel and used in filling

stations and acts as a pump which causes CNG to move from one place to another, the same is classifiable as a pump.

In view of the above, the Maharashtra AAR held that the CNG Dispenser performing the function of a pump of a type used in filling stations to dispense CNG Fuel is classifiable under CTH 8413 chargeable to 28% GST and not under CTH 9032 chargeable to 18% GST.



## MP AAR rules on GST and ITC on various types of services

### Bharat Oman Refineries Limited 2021-TIOL-36-AAAR-GST

The Applicant had filed an application before the MP AAR to ascertain GST applicability and ITC availability on notice pay recovery, premium on group medical insurance of non-dependent parents recovered from employees and retired employees at actuals and canteen services. The AAR ruled that GST shall be applicable on notice pay recovery, premium of Group Medical Insurance Policy recovered by applicant from the non-dependent parents of employees & retired employees, on telephone charges at actuals. Aggrieved, the Applicant preferred an Appeal before the AAAR, who observed and ruled as under:

- a. Para 5(e) of the Schedule II of the CGST Act is similar to the Section 66E(e) of the ST Act applicable during Service Tax regime. It was further observed that Madras HC in RE: GE T & D India Limited [W.P. Nos. 35728 to 35734 of 2016] wherein, it was held that, no service tax is payable on notice pay recovery made by the Employer. In view of the above, it was held that because the merely because employer is being compensated, does not mean that any services have been provided by him or that he has 'tolerated' any act of the employee for premature exit. Accordingly, GST is not applicable on notice pay recovery;
- b. Facilitating medical insurance services in lieu of the Policy to non-dependent parents and retired employees upon recovery of premium amount on actuals and telephone connection to employees upon recovery of usage charges on actuals cannot be

considered as 'supply of service' under CGST Act. Thus, not exigible to GST;

- c. GST is not applicable on the collection by the Appellant, of employees' portion of amount towards food stuff supplied by the Canteen Service Provider and the Appellant is providing the facility to employees, without making any profit and working as mediator and the Employer is mandated to run a canteen under the Factories Act. Further, canteen services provided to employees without charging any amount i.e., free of cost will also fall under Para 1 of Schedule III of CGST Act that shall be treated neither as a supply of goods nor a supply of services and therefore, not be subjected to GST;
- d. ITC on GST paid towards telephone services and policy would not be available in terms of Section 17(1) and Section 17(5) of the CGST Act. Further, ITC in respect of canteen facility would be available as per Section 17(5)(b) of the CGST Act, as being obligatory under the Factories Act.

#### Authors' Note

The tax applicability of GST on canteen facility and its ITC availability has been a contentious issue right from the inception of GST law, with many contradictory rulings. It is generally seen that the 1st Authority of Advance Ruling often rules in favour of the Department and the Applicants

are required to approach the appellate authorities for a more reasoned decision. It shall be noted that in a similar case in RE: Amneal Pharmaceuticals Limited [2021-TIOL-28-AAR-GST] had held that recovery of amount

from employee on account of third-party canteen services provided by the Company, is taxable as a supply under GST, being provided for consideration. However, the said ruling had been subsequently reversed by the AAAR.



## Amount received for Deposit Work was an advance and not deposit chargeable at time of receipt

### Uttar Pradesh Avas Evam Vikas Parishad Order No. 12/AAAR/29/06/2020 dated 29 June 2020

The Appellant receives funds in advance for the Deposits Works with certain pre-fixed conditions such as utilization of funds only in respect of execution of a particular project only. As per the Appellant, such fund received cannot neither be classified as Advance Payments, nor Loans, but can only be classified as a deposit. In view of the above, the Applicant had sought an advance ruling before the UP AAR to ascertain the time and value of supply.

The AAR had ruled that the time of supply in case of 'Deposits Works' being executed by the Appellant will be the time of receipt of funds from the client Government Department and the value shall be the amount of advance received by the Applicant towards the particular work/supply. The Appellant filed an Appeal before the UP AAAR submitting that the AAR's classification of 'Deposit Work' as 'Advance Payment' is misconstrued as the fund received is in nature of 'deposit' for the reason that it is provided entirely by the Government with specific

restrictions to use the funds only for the completion of project, and the fact that the Appellant lacks constructive control over the amount and pays back the interest earned on said amount to the Government.

The AAAR observed that advances are generally given so that the work get completed smoothly without any hindrances and may not get delay due to lack of fund. It was further observed that restrictions regarding use of advance are normally attached so that the amount cannot be diverted for any other project and to avoid any delay in timely completion of project. Accordingly, on the question of whether said advance received for can be treated as 'advance payment' or 'deposit', it was ruled that any condition/restrictions attached with the advance do not alter its character, it remains advance which later gets adjusted in payment once bills/invoices are issued, thus, affirming the decision of the AAR.





## UP AAAR classifies Bellow Ducts for Railways under CTH 8607, basis principal use

### Concord Control System Private Limited Order No. 15/AAAR/20/06/2021 Dated 20 June 2021

The Appellant, engaged in supply of bellow duct for use in AC coaches of Indian Railways had sought an advance ruling before the UP AAR to ascertain the classification and GST rate of the Bellow Ducts supplied for use in Indian Railway. The UP AAR held that bellow ducts are classifiable under CTH 8424 chargeable to 18% GST. Aggrieved, the Appellant preferred an Appeal before the UP AAAR.

The UP AAAR observed that the Appellant manufactures the bellow ducts as per the design and layout issued by the RDSO and Department, Ministry of Railways. It was further

observed that this aspect had not been discussed by the AAR. It was also observed by the AAAR that the Apex Court in RE: Westinghouse Saxby Farmer Limited [2021-TIOL-121-SC-CX-LB] and several other judgements, have held that goods manufactured specifically for the Railways as per the designs and layouts provided by them, are rightly classifiable under CTH 8607.

In view of the above, the UP AAAR reversed the ruling of the UP AAR, holding that the bellow ducts are rightly classifiable under CTH 8607 of the Tariff Act.



## Switch board cabinet used for Railways, classifiable under HSN 8537 @ 18% GST

### Prag Polymers 2021-TIOL-287-AAR-GST

The Applicant, engaged in the manufacture and supply of railway Locomotives parts had sought an advance ruling before the UP AAR to ascertain the classification of Switch Board Cabinet. The Applicant had submitted that the Switch Board Cabinets were manufactured by them specifically on the basis of drawings and designs approved by the Railways. Further, such goods are not viable for use elsewhere. Accordingly, the Applicant opined that such goods were appropriately classifiable under HSN 8607 chargeable to 12% GST.

The AAR observed that HSN 8607 categorically covers parts of railways, tramways, etc. However, the said heading does not cover switch boards. It was further observed that HSN 8537 clearly includes cabinets for electric control and distribution of electricity. It had also been observed that Note 2(f) to Section XVII inter alia provides that parts and parts and accessories of electrical machinery of Chapter 85 do not apply to HSN 8607 whether or not they are identifiable as goods of Section XVII (Railways).

The AAR further observed that the CBIC vide Circular No. 30/4/2018 – GST dated 25 January 2018 had clarified that goods, falling under any chapter other than 86, would attract the general applicable rate of 18% GST even if supplied to the Railways. It was also observed Entry 8607 is

very restrictive entry for the purposes of consideration of goods to be classifiable as parts of railway bogies to avail the benefit of reduced rate of taxes.

Basis the above observations, the AAR held that the switch board cabinet, though to be used in Railway coaches, cannot be called as parts of railway bogies under Chapter Headings 8607 of the Tariff, as a specific HSN is available for the same. Accordingly, it was ruled that switch board cabinets merit classification under HSN 8537 chargeable to 18% GST.

#### Authors' Note

The classification of railway goods has been perpetual issue in respect of tariff classification. The issue which incepted under the Excise Regime has been very well carried forward into the GST regime. While certain judicial authorities have held that articles even though principally used for the Railways would merit classification under respective headings, certain judicial authorities have held otherwise. Recently, the Apex Court in RE: Westinghouse Saxby Farmer Limited [2021-TIOL-121-SC-CX-LB], has held that goods manufactured specifically for the Railways as per the designs and layouts provided by them, are rightly classifiable under CTH 8607.



## ITC available on supply of Machine Foundation

### Vijayneha Polymers Private Limited TSAAR Order No.29/2021 Date: 09 December 2021

The Applicant had constructed a factory building wherein they had hired works contractors for executing the construction in two different ways, as follows:

- Where the Applicant provided materials and the contractor provided construction services;

- Where the contractor provided both materials and construction services.

The construction services included foundation of machinery, rooms for chillers, boilers, generators and transformers, etc. In this regard, the Applicant had sought

an advance ruling before the Telangana AAR to ascertain ITC availability on GST charged by the contractor supplying the afore-mentioned services.

The Telangana AAR observed that the applicant had either purchased goods or services for construction of immovable property on his own account or engaged the works contractor for supply of construction services. Further referring to Section 17 of the CGST Act, it had been

observed that the ITC cannot be availed on works contract services for construction of an immovable property except for erection of plant and machinery. It was further observed that as per the Explanation u/s. 17 of the CGST Act, plant and machinery will include equipment and machinery fixed to earth by foundation or structural support, meaning, machine foundation. In view of the above, the Telangana AAR held that the Applicant is eligible for ITC to the extent of machine foundation only.



## SEZ liable to pay IGST under RCM on receipt of immovable property renting services

### Portescap India Private Limited 2021-TIOL-293-AAR-GST

The Applicant an SEZ unit is inter-alia engaged in exports of manufactured goods and has taken an immovable property from the SEEPZ Special Economic Zone Authority (Local Authority) on lease. In connection thereto, the Applicant has sought an Advance Ruling on applicability to pay tax under reverse charge mechanism on procurement of renting of immovable property services or any other services from the Local Authority in accordance with Notification No. 13/2017 dated 28 June 2017 read with Notification No. 03/2018 - C.T. (Rate) dated 25 January 2018.



In regards to above, the AAR referring to the provision of the sec 7(5)(b) observed that supply of goods or services or both, to or by a Special Economic Zone developer or a Special Economic Zone unit

shall be treated to be a supply of goods or services or both in the course of inter-State trade or commerce. Accordingly, the transaction in the instant matter, will be in the course of inter-State trade or commerce and therefore,

the provisions of the IGST Act, 2017 shall be applicable. It further observed that the sr. no. 6A of the Notification 10/2017- I.T. Rate dated 28 June 2017 as amended have clearly specified the categories of services (renting of immovable property), when procured from Central government, State government, Union territory or local authority, has to discharge GST on the transaction. In the instant case, the applicant has been receiving

renting services from a local authority and thus GST shall be payable under reverse charge mechanism.



## Order imposing penalty on director for non-payment of ST set aside, citing unavoidable circumstances

**Manjeet Kaur Bansal**

**Service Tax Appeal No. 51225 of 2020 (SM)**

The Company, in which the Appellant had been a director, was subjected to an inquiry for demand of Service Tax, alleging non-payment during the period April 2013 to September 2016. Although the Appellant had been appointed as a director in the Company w.e.f. 01 December 2016, penalty had been imposed on her u/s. 78A of the ST Act. Thereafter, the Company had filed an application under the Sabka Vishwas Scheme for disposal of the matter, which had been duly granted. Under the belief that the Sabka Vishwas Discharge Certificate would cover the Appellant's liability as well, a separate application had not been filed. Accordingly, the Respondent had confirmed penalty against the Appellant u/s. 78A of the ST Act.

Aggrieved, the Appellant preferred an Appeal before the Tribunal submitting that she was not in-charge of day-to-day affairs as her husband was battling a chronic medical issue brain tumour who used to be hospitalized

and had undergone repeated surgical interventions. He went into coma and passed away finally in 2017. It was further submitted that substantial amount of the demand was already deposited even before the issuance of the SCN which is sufficient to falsify any mala fide intent allegation.

The New Delhi Tribunal observed the Respondent had miserably failed to distinguish the non-payment of tax for the reasons beyond the control of the Appellant from the situation where the Appellant had failed to deposit tax with the sole intention to not to deposit the same. It was further observed that the Appellant was not fully aware about day-to-day affairs of the company and none of the documents bore the signature of the Appellant. In view of the above, it had been held that the Respondent had erred in imposing penalty upon the Appellant ignoring the unavoidable circumstances. Accordingly, the Tribunal set aside the penalty order against the Appellant.



## Services provided as back-office and IT support to group entities not an Intermediary service

**Macquarie Global Services Private Limited**

**2021-TIOL-790-CESTAT-CHD**

The Appellant is inter alia engaged in providing taxable services in respect to business support services, information technology services and maintenance and repair services. The Appellant had filed for a refund application for refund of unutilized CENVAT credit on input services in terms of Rule 5 of CENVAT Credit Rules. However, the authority rejected the refund on mere ground that service provided were intermediary services wherein Rule 9 of Place of Provision of Rules shall be applicable and the service provided would not qualify as export. In connection thereto, the decision from the Revenue was also not in favour of the Appellant. Aggrieved

by the same, the current Appeal was filed.

In regards to above, the CESTAT observed that the issue for consideration before the Revenue were the refund claims filed and not whether the services provided by them were the intermediary services or not. Further, the original authority misdirected himself, by considering the nature of the output services, to determine the eligibility of the refund claim. Further, referring to the decisions of the Tribunal in case of Orange Business Solutions Private Limited [2019-TIOL-1556-CESTAT-CHD] it observed that for a person to be said to be intermediary, there should be



two distinct services and three persons involved. The intermediary should be the person who is facilitating the provision between the other two persons. However, while considering the issue on the ground of intermediary services, the Revenue at no stage identified the three persons, and have solely relied upon certain analysis, transfer pricing document prepared therein. It further observed that both the authorities had only considered the issue of intermediary service and not the refund claim. Accordingly, the impugned order passed by the Revenue was set aside and appeal was allowed only to the extent of the issue involved of intermediary services, whereas the refund claim issue was remanded back the adjudicating authority.

### Authors' Note

It shall be pertinent to note that the provision of intermediary service has always been an issue for argument for the Revenue as well as the taxpayers.

Accordingly, the subject provision has huge tax implications for the exporters. Further, under the erstwhile ST regime, the New Delhi AAR in the case of GoDaddy India Web Services Private Limited [2016-TIOL-08-ARA-ST] had ruled that Place of Provision of Services Rules, does not include a person who provides main service on his own account. In the instant case, as the applicant itself provides the principal service, i.e., business support services to its group entities, the services provided by it would not be regarded as an 'intermediary services'.

The contentious issue regarding the intermediary services continues to haunt the taxpayers in the GST regime as well. However, in order to bring some clarity in the matter, the CBIC has issued Circular No. 159/15/2021-GST dated 20.09.2021 categorically clarifying the transactions which qualify as an intermediary under the GST law. The said Circular will go a long way in avoiding litigation provided that the Revenue authorities consider the same.

## CESTAT allows right to avail credit of service-tax paid post GST regime

### Circor Flow Technologies India Private Limited 2021-TIOL-828-CESTAT-MAD

The Appellant had entered into agreement involving import of software for which service tax was liable to be paid under reverse charge mechanism. In connection thereto, the Appellant had belatedly paid the duty during GST Regime. The credit for the duty paid were eligible for availment under CENVAT Credit Rules under pre-GST regime. Since, the duty was paid post GST regime, the Appellant couldn't avail the credit and accordingly refund application was filed. However, the application was rejected stating that the tax has been voluntarily paid and that no credit is eligible in the GST regime. Further, upon filing of the Appeal, the aforesaid view was upheld. Thus, the Appellant filed the current Appeal.

In regards to above, CESTAT referring to the provision of sec 174(2) of the GST Act observed that the Act shall not affect any right, privilege, obligation, or liability acquired, accrued or incurred under the amended /repealed Acts. It was further observed that if the Appellant pays service tax

even after the introduction of GST, their right to avail the credit on the same cannot be denied. Further, reference was drawn to the judgement in the matter of Adfert Technologies Private Limited Vs UOI [2019-TIOL-2519-HC-P&H-GST] wherein it was held that transitional credit being a vested right, it cannot be taken away on procedural or technical grounds.

Further, referring to the provisions of the sec 142(3) of the GST Act it held that the claims of refund of service tax of tax and duty / credit under the erstwhile law shall be undertaken under the said provisions and accordingly the Appeal was allowed setting aside the rejection order.

### Authors' Note

It shall be noted that Section 174 under the CGST Act (saving clause) protects the interest of both the Revenue as well as the taxpayers arising out of the pre-GST laws. It



provides that the liability to pay service tax / excise duty would continue even after the introduction of GST and the right accrued under the said Act in the nature of credit would be available under CENVAT Credit Rules. Upon referring to the provisions of the law under the GST regime, it is amply clear that there is settled provision which provides for refunds on the duty paid in respect to the pre-GST regime. Further, CESTAT in the matter of Bharat Heavy Electricals Limited [2019-TIOL-3941-CESTAT-HYD] had passed a decision on similar line as is in the instant matter. Such decision shall be taken as a precedent in respect to the claim of refund of service tax

under the GST regime.

Similar decision has been passed by the New Delhi Tribunal in RE: Flexi Caps and Polymers Private Limited [2021-TIOL-611-CESTAT-DEL], allowing refund of CVD/SAD paid post GST. It shall be noted that even the Commissioner (Appeals) Raigad had allowed such refund in RE: Sudarshan Chemicals Industries Limited [Order-In-Appeal No. MKK/397-398/RGD APP/2018-19 dated 21.12.2018], however, the said matter is now pending before the Mumbai Tribunal.



Notification / Circular	Summary
<p>Press Release dated 31 December 2021</p>	<p><b>46th GST Council Meeting Recommendations</b></p> <p>The GST Council has recommended to defer the decision to change the rates in textiles recommended in the 45th GST Council meeting. Consequently, the existing GST rates in textile sector would continue beyond 01 January 2022</p>
<p>Notification No. 40/2021 – Central Tax (Rate) dated 29 December 2021</p>	<p><b>CGST (10th Amendment) Rules, 2021</b></p> <p><b>Conditions for availing ITC – Rule 36(4)</b></p> <p>Rule 36(4) of the CGST Rules has been amended to provide that the recipient would not be able to take any ITC if the same is not appearing in his GSTR-2B</p> <p><b>Due Date for filing of Annual Return for F.Y. 2020-21</b></p> <p>The due date for furnishing of Annual Return in Form GSTR-9 and Reconciliation Statement in Form GSTR-9C for the F.Y. 2020-21 has been extended to 28 February 2022</p> <p><b>Refund of Tax without UIN on invoice</b></p> <p>Rule 95 of the CGST Rules has been so amended to provide that refund in cases where Unique Identification No. ('UIN') is not mentioned in the invoice in respect of which refund is claimed, shall be available only if the same is duly attested by the authorised representative and submitted along with the refund application. The said amendment has come into effect from 01 April 2021</p> <p><b>Detention / Seizure of Vehicles</b></p> <ul style="list-style-type: none"> <li>• The time limit to pay the tax and penalty determined u/s. 129 of the CGST Act for detention / release of vehicles, post the issuance of Show Cause Notice has been reduced from 14 days to 7 days;</li> <li>• The requirement to pay 100% tax and 100% penalty has been substituted by deeming the entire payment as 200% of the penalty;</li> <li>• It has been further provided that the conveyance shall be released on payment as per the notice issued or Rs. 1,00,000/-, whichever is less</li> </ul> <p><b>Recovery of penalty by sale of goods or conveyance detained or seized in transit</b></p> <p>Rule 144A has been inserted into the CGST Rules which empowers the proper to recover penalty by way of sale or disposal of the goods or conveyance so detained where the owner of the goods has not paid the penalty so determined u/s. 129 of the CGST Act, within 15 days of receipt of the order</p> <p><b>Disposal of proceeds of sale of goods and movable or immovable property</b></p> <p>Rule 154 of the CGST Rules has been so amended to provide appropriation of proceeds of sale of goods or conveyance and movable or immovable property, against the following</p>

Notification / Circular	Summary
	<p>sequentially:</p> <ul style="list-style-type: none"> <li>• the administrative cost of the recovery process;</li> <li>• the amount to be recovered in respect of the payment of the penalty payable u/s. 129(3) in relation to detention of goods or conveyance;</li> <li>• any amount due from the defaulter under the GST Acts or Rules made thereunder;</li> <li>• any balance, to be paid to the defaulter</li> </ul> <p>Thereafter, a sub-rule 2 has been inserted to provide that where it is not possible to pay the balance of sale proceeds to the person concerned within a period of six months, such balance of sale proceeds shall be deposited with the Fund</p> <p><b>Provisional attachment of property</b></p> <p>Rule 159 of the CGST Rules has been amended to inter alia provide that the Commissioner shall send a copy of the order of attachment in FORM GST DRC-22, be sent to the person whose property is being attached under section 83. The said rule has been further amended to prescribe that the objection to the attachment order is to be filed in Form GST DRC-22A.</p>
<p>Notification No. 39/2021 – Central Tax dated 21 December 2021</p>	<p><b>ITC available only if reflected in Form GSTR-2B w.e.f. 01 January 2022</b></p> <p>Notified amendment to Section 16(2) of the CGST Act to inter alia provide that ITC on invoice or debit note can be availed only when details of such invoice/debit note have been furnished by the supplier in his outward supplies in Form GSTR-1 and such details have been communicated to the recipient of such invoice or debit note</p>
<p>Notification No. 38/2021 – Central Tax dated 21 December 2021</p>	<p><b>Alignment of CGST Rules with Aadhar provisions</b></p> <ul style="list-style-type: none"> <li>• Notified Rule 10B of CGST Rules pertaining to Aadhaar authentication for registered person;</li> <li>• Notified amendment to Rule 23(1) of the CGST Rules pertaining to revocation of cancellation of GST Registration being subject to Aadhaar provisions of Rule 10B;</li> <li>• Notified amendment to Rule 89(1) of the CGST Rules pertaining to application for refund of tax, interest, penalty, etc. being subject to Aadhaar provisions of Rule 10B;</li> <li>• Notified amendment to Rule 96(1) of the CGST Rules pertaining to refund of IGST being subject to Aadhaar provisions of Rule 10B</li> </ul>
<p>Circular No. 167/23/2021 – GST dated 17 December 2021</p>	<p><b>Clarification on Restaurant Services through E-Commerce Operators</b></p> <p>The CBIC vide Notification No. 17/2021 – CT (Rate) dated 18 November 2021 had notified restaurant services u/s. 9(5) of the CGST Act. Thus, making E-Commerce Operators ('ECO') liable to pay GST on restaurant services. In this regard, the CBIC has made the following clarifications:</p>

Notification / Circular	Summary
	<ul style="list-style-type: none"> <li>• ECO will not be required to collect TCS and file GSTR-8. Such operators will be required to deduct TCS on other goods supplied by ECO not notified u/s. 9(5) of the CGST Act;</li> <li>• ECO will not be required to take separate registration for payment of tax on restaurant services u/s. 9(5) of the CGST Act;</li> <li>• ECO will be liable to pay GST on any restaurant services supplied through them including by an unregistered supplier. ECO would be required to issue invoices for restaurant services provided through it;</li> <li>• Turnover of restaurant services where ECOs are liable to pay tax will be included in 'aggregate turnover';</li> <li>• Restaurant services shall be exigible to 5% concessional GST rate (subject to non-availment of ITC). ECO will not be liable to reverse ITC for paying concessional GST not being providers of restaurant services;</li> <li>• ECO will need to pay entire GST liability in cash (no ITC can be utilized for payment of GST on restaurant services supplied through them).</li> </ul>



## HC: DRI not 'proper officer' for classification of imported goods

### Unik Traders

#### 2021-TIOL-2270-HC-MAD-CUS

The Petitioner had Imported 'Arecanuts' from Mynamar. The Revenue collected test samples and the Petitioner executed a test bond of the value of consignments. However, before the completion of the assessment, the DRI officers intervened and stalled the further assessment and clearance of consignments. As the Petitioner was incurring demurrage and container detention charges leading to financial difficulties, they preferred a Writ Petition before the Madras HC for release of goods.

Referring to Section 6 of the Customs Act, the HC observed that the Central Government may entrust, either conditionally or unconditionally to any officer of the Central or the State Government or a local authority any functions of the Board or any officer of Customs under the Act. It was further observed that merely because the DRI Officers have powers to investigate by itself will not mean

that they can insist on a 'hands off approach' by competent officers who have been given the powers to assess Bill of Entry filed by an importer.

It was further observed that even if the jurisdictional officer of the DRI Chennai felt that the import was without proper licence and that there was an attempt to import prohibited goods, it is their duty to merely inform the assessing officers who are the 'assessing officers' to make proper assessment to safeguard the interest of the Revenue.

In view of the above observations, the HC held that only when the 'proper officer' is of the prima facie view that the goods are liable for confiscation, seizure order may be issued followed by confiscating the imported goods if they are found to be prohibited. If not, the imported goods shall be allowed to be redeemed.



## HC denies penalty: Old BOE purged/erased in ICEGATE

### Heilsa Meditec LLP

#### 2021-TIOL-2338-HC-MAD-CUS

The Petitioner had filed for an advanced BOE on which Respondent had raised queries. However, before petitioner could respond to the query, due to system issue, the BOE got purged on the website of ICEGATE. Accordingly, the Petitioner filed a second BoE and requested for waiver of late fees on the first BOE since they could not reply to the queries. However, the waiver of late fees was rejected. Aggrieved, the Petitioner preferred a Writ before the Madras HC.

The HC observed that the necessity for filing the second BOE arose only on account of the fact that the earlier BOE got erased in the ICEGATE or the customs system. Consequently, the Petitioner could not comply with the

requirements regarding the query raised. It further observed that entire nation was under lockdown due to second wave of COVID-19 and the Petitioner had not filed a fresh BOE for the first time but has filed the second BOE as the old one got purged and was erased in the ICEGATE. Further, referring to the provisions of the Customs Act and the BOE Regulations 2018, it observed that the provisions does not contemplate purging of BOE. Accordingly, it was held that the question for imposing late fee charges on the Petitioner merely because a 2nd BOE was filed, would not justify such levy. It was also held that the amount demanded was fine amount and not late fee which is contrary to the aforesaid provisions. Accordingly, the writ petition was allowed.





### HC quashes refund rejection based on intra-departmental communication

#### Virbac Animal Health India Private Limited 2021-TIOL-2306-HC-MAD-CUS

The Petitioner imported various marine products considering itself to be falling under the exemption Notification No. 12/2012 dated March 17 2012 wherein the goods imported were partly exempted. The Petitioner had however on receipt of DRI notice, had voluntarily paid the duty under protest and the DRI matter was requested to be concluded thereon. In connection thereto, the Petitioner had filed for refund application for duty paid under protest. However, the said application was rejected by the Revenue contending that payment being made voluntarily and there was no appeal against the BOE against which the refund application was filed. Aggrieved, by the same the current writ was filed.

the DRI and observed that the amount paid in the instant case shall be considered as duty paid under protest and the imports made by the petitioner were long before the amounts were paid. Accordingly, the question of filing an appeal against the respective Bills of Entry cannot be countenanced. Further, for rejecting a refund application a proper communication shall flow from the respondent by issuing proper show cause notice specifying the reasons why refund claim filed by the petitioner should not be rejected. However, in the instant case, the same has not been followed. Accordingly, rejection of the refund claim merely based on intra-departmental communication is not sufficient. Thus, the writ petition was allowed.

In regards to above, HC perused the communications with



Notification/Circular																
<p>Notification No. 48/2015-2020 dated 31 December 2021</p>	<p><b>Due date for submitting scrip-based FTP schemes extended till 31 January 2022</b></p> <p>The DGFT vide Notification No. 48/2015-2020 dated 31 December 2021 has amended Para 3.13A of the FTP to extend the due date of submitting applications for scrip-based schemes under MEIS, SEIS, ROSCTL, ROSL and 2% additional ad hoc incentive, to 31 January 2022</p>															
<p>Trade Notice No. 28/2021-2022 dated 31 December 2021</p>	<p><b>Online Application for EODC/closure under Advance Authorization</b></p> <p>Manual / Physical filing of EODC/closure applications under Advance Authorization Scheme is allowed for AAs issued before 01 December 2020. Exporters can update EODC/Closure status of earlier issued AAs in online system by 31 March 2022</p>															
<p>Public Notice No. 40/2015-20 dated 02 December 2021</p>	<p><b>Fixation of two new SIONs under Chemical and Allied Products Category</b></p> <p>SIONs for export products Sodium Salicylate and Methyl Cobalanim JP (Mecobalanim) under Chemical and Allied Products Category have been notified as follows:</p> <table border="1" data-bbox="392 943 1519 1182"> <thead> <tr> <th>SION No.</th> <th>Export Product</th> <th>Qty.</th> <th>Import Item</th> <th>Qty.</th> </tr> </thead> <tbody> <tr> <td>A-3680</td> <td>Sodium Salicylate</td> <td>1 kg.</td> <td>Salicylate Acid</td> <td>0.80 kg.</td> </tr> <tr> <td>A-3681</td> <td>Methyl Cobalanim JP (Mecobalanim)</td> <td>1 kg.</td> <td>Vitamin B12 (Cyanocobamin)</td> <td>0.95 kg.</td> </tr> </tbody> </table>	SION No.	Export Product	Qty.	Import Item	Qty.	A-3680	Sodium Salicylate	1 kg.	Salicylate Acid	0.80 kg.	A-3681	Methyl Cobalanim JP (Mecobalanim)	1 kg.	Vitamin B12 (Cyanocobamin)	0.95 kg.
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<p>Public Notice No. 43/2015-20 dated 16 December 2021</p>	<p><b>Harmonizing MEIS Schedule in the Appendix 3B with amended ITC (HS) 2017</b></p> <p>The DGFT vide Public Notice No. 43/2015-20 dated 16 December 2021 has made the following amendments to Table 2 Appendix 3B of MEIS as follows:</p> <table border="1" data-bbox="392 1408 1519 1648"> <thead> <tr> <th>MEIS Sr. No.</th> <th>ITC (HS) Code</th> <th>Existing Description</th> <th>Correct Description w.e.f. 27 March 2020</th> </tr> </thead> <tbody> <tr> <td>A-3680</td> <td>85414011</td> <td>Solar Cells whether or not assembled in modules and panels</td> <td>Solar Cells, not assembled</td> </tr> </tbody> </table>	MEIS Sr. No.	ITC (HS) Code	Existing Description	Correct Description w.e.f. 27 March 2020	A-3680	85414011	Solar Cells whether or not assembled in modules and panels	Solar Cells, not assembled							
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<p>Notification No. 46/2015-20 dated 20 December 2021</p>	<p><b>Amendment in Import Policy</b></p> <p>The 'Free' Import Policy of certain oils under HS Code 15119010, 15119020 and 15119090 is extended for a period upto 31 December 2022. However, imports are not permitted through any port in Kerala.</p>															



### NCLAT holds balance sheet signing date as acknowledgement date under Section 18 of the Limitation Act

#### G.S. Buildtech Pvt. Ltd. vs. Ardee Infrastructure Venture Pvt. Ltd. Company Appeal (AT) (Insolvency) No. 388 of 2021

The Appellant disbursed an amount of INR 1,30,00,000 to the Corporate Debtor. Certain repayments were made by the Corporate Debtor on June 11, 2015, June 29, 2015 and lastly on March 15, 2016. Appellant sent communication dated August 9, 2019 and September 20, 2019 to the Corporate Debtor seeking confirmation of accounts between the parties which was not answered by the Corporate Debtor.

Communication dated January 16, 2020 and legal notice dated January 30, 2020 were issued for repayment which also remained unanswered.

An Application under Section 7 of the IBC was filed by the Appellant on March 20, 2020 before the NCLT claiming that the Corporate Debtor owed an amount of debt amounting to INR 39 Lakhs. The Application was rejected by the NCLT on the ground that last repayment having been made on March 15, 2016 and the Application under Section 7 having been filed on March 20, 2020 i.e. beyond three years, and so the Application was barred by time.

Aggrieved, the Appellant approached the NCLAT which noted that the NCLT, after noticing the balance sheet, did not advert to the balance sheet to find out as to whether there is an acknowledgment within the meaning of Section 18 of the Limitation Act or not.

Stating that the Adjudicating Authority committed error in

not considering the balance sheet which was relied by the Appellant, the NCLAT observed that in the interest of justice, the NCLT had to examine the balance sheet.

Further noting that the balance sheet having been signed on September 1, 2017 and the application having been filed on March 20, 2020, the NCLAT placing reliance on a plethora of SC rulings, observed that the application was well within three years period from acknowledgement of debt as claimed by the Appellant.

Thus, setting aside the NCLT order rejecting Appellant's insolvency application on the ground that the application was filed beyond three years, the NCLAT observed that Balance sheet signing date was acknowledgement date under Section 18 of the Limitation Act.

#### Authors' Note

It would be interesting to note that in the instant case, the NCLAT placed reliance among others, on the SC ruling in *Dena Bank vs. C. Shivakumar Reddy and Ors.* [Civil Appeal No. 1650 of 2020] wherein it was held by the SC that Section 18 of the Limitation Act, 1963 was fully applicable to proceedings under IBC and entries in books of accounts and/ or balance sheets of a Corporate Debtor would amount to an acknowledgment under Section 18 of the Limitation Act.



### NCLAT upholds NCLT order rejecting housekeeping-provider's insolvency-application, remarks IBC not for chasing payments

#### Pioneer Engineered Facility Management vs. Medeor Hospital Ltd. Company Appeal (AT) (Insolvency) No. 29 of 2021

The Appellant was a service provider company and was engaged in the business of providing general duty

assessment and housekeeping services in the health and hospitality industry.

The Respondent approached the appellant in the year 2016 (Agreement dated September 1, 2016) to avail their services for their Dwarika Unit and subsequently through an agreement dated October 18, 2016, the Appellant was also given additional job in respect of the Respondent's Qutab Unit.

It was submitted by the Appellant that there was no issue until the year 2018 but they got into problem of clearance of their outstanding dues from October 1, 2018 to May 31, 2019 and had alleged that a total outstanding was of INR 1,44,27,230. The Respondents instead of clearing the dues started alleging deficiency in services and creating dispute on various labour compliances.

Even after repeated requests and reminders to clear outstanding dues for its services there was a lack of compliance by the Respondents. The Respondents were supposed to release 90 percent of payment of the bills value by 6th of every month but they were never releasing within due time. They had deducted TDS but had not released the outstanding bills.

The Appellant sent demand Notice dated May 17, 2019 under the Code which was acknowledged by the Respondent via email dated June 8, 2019 but still the dues were not cleared by the Respondents.

Aggrieved, the Appellant approached the NCLT under Section 9 of the IBC and filed an insolvency application against the Respondent.

The NCLT however rejected the application filed by the Appellant based on emails of the Corporate Debtor that there was preexisting dispute and it was a settled law that where TDS was deducted but payment was not made, a dispute could not be created afterwards.

Aggrieved, the Respondent approached the NCLAT which

perusing the correspondence between parties in the form of e-mail, observed that the same reflected non-submission of documents for compliance of various labour laws as per agreement between them as also supply of shortage of staff and that the Appellant had failed to comply with labour laws leading to labour dispute before the labour commissioner.

Further, relying on the SC judgment in Mobilox Innovations[(2018) 1 SCC 353] wherein it was held that Adjudicating Authority must reject the application if a notice of dispute had been received by operational creditor, the NCLAT observed that once the operational creditor had filed an application, which was otherwise complete, the adjudicating authority was to reject the application under Section 9(5)(2)(d) if notice of dispute had been received by the operational creditor or there was a record of dispute in the information utility.



The NCLAT further placing reliance on the SC ruling in Transmission Corporation of Andhra Pradesh Ltd. [Civil Appeal No. 9597 of 2018] observed that the IBC was not intended to be a substitute to a recovery forum and that whenever there was existence of real dispute, the IBC provisions could not be invoked.

Thus, The NCLAT remarking that the Appellant was "chasing for payments" which was not the object of IBC, found no infirmity in the order passed by the NCLT, and dismissed the appeal challenging the NCLT order for not admitting Appellant's insolvency application under Section 9 of the IBC.

### Authors' Note

In the instant case the NCLAT has rightly remarked that the object of the IBC was not to chase payments, as the primary object of the IBC was to revive the corporate debtor, liquidation being the last resort.



### HC quashes reassessment notice, holds IT Department cannot raise new claim after resolution plan approval

#### **Murli Industries Ltd. vs. Assistant Commissioner of Income Tax & Ors. Writ Petition No. 2948 of 2021**

In the instant case, one M/s. Edelweiss Asset Reconstruction Company Limited filed an application under Section 7 of the IBC to initiate CIRP against the Petitioner. The said Application was admitted by the NCLT and an IRP was appointed by the NCLT who was later appointed as the RP.

The RP made a public announcement in accordance with Regulation 6 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations 2016, calling upon the creditors to submit a proof of their claim. In response, the Deputy Commissioner of Income Tax (TDS), Circle – 1, (Respondent) submitted a claim for INR 50,23,770. The Respondents did not raise any other claim.

Subsequently one Dalmiya Cement (Bharat) Limited submitted a Resolution Plan. The said plan was approved subject to certain modifications by the NCLT.

The Resolution Plan and the orders of the NCLT were upheld by the NCLAT and the Resolution Plan was made effective from August 25, 2020.

The Respondent under Section 148 of the IT Act issued a notice to the Petitioner on March 25, 2021, calling upon it to submit a return in the prescribed form for reopening the assessment for an assessment year falling prior to the date of approval of Resolution Plan under the IBC on the ground that the income chargeable to tax for that year had escaped assessment.

Aggrieved, the Petitioner preferred a writ petition before the HC challenging the legality and validity of the notice issued by the AO seeking to reopen the Petitioner's concluded assessment for its previous year, mainly on the ground that it was contrary to the SC decision in Ghanshyam Mishra [2021(9) SCC 657], inasmuch as the Respondent could not have issued the impugned notice subsequent to the approval of the Resolution Plan.

The Petitioner further contended that as the claims were

not a part of the Resolution Plan, they would not be maintainable against it now, nor could any claims be initiated thereafter, and hence the Respondent was not entitled to initiate any proceedings for recovery of any dues from the Petitioner.

The HC placing reliance on SC's ruling in Ghanshyam Mishra [2021(9) SCC 657] observed that a Successful Resolution Applicant could not suddenly be faced with undecided claims after the Resolution Plan was submitted by it, as it would lead to uncertainty about the amount payable by a Prospective Resolution Applicant who would successfully take over the business of the Corporate Debtor.

The HC further observed that on the date of Resolution Plan approval, all such claims which were not a part of the Resolution Plan, stood extinguished and no person was entitled to initiate any proceedings including the proceedings in the nature of notice issued under Section 148 of the IT Act.

Thereby, noting that the impugned notice was silent on why the authority was precluded from raising claim in the CIRP proceedings, HC quashing the notice issued by the Respondent under Section 148 of the IT Act, remarked that it was unable to gather the reasons for not raising the claim earlier before the Resolution Professional or the NCLT and accordingly held that the Respondent ought to have been diligent to verify the previous year's assessment of the Corporate Debtor as permissible under the law and to raise the claim in the prescribed form within time before the RP and as, the Respondent failed to do so their claim stood extinguished.

#### **Authors' Note**

It would be interesting to note that in Ghanshyam Mishra [2021(9) SCC 657], the SC had held that once a resolution plan was duly approved by NCLT, the claims as provided in the resolution plan stood frozen and would be binding on the Corporate Debtor and its employees, members,



creditors, including the Central Government., any State Government or any local authority, guarantors and other stakeholders. The SC had also observed that on the date of approval of resolution plan by NCLT, all such claims, which

were not a part of resolution plan, stood extinguished and no person was entitled to initiate or continue any proceedings in respect to a claim, which was not part of the resolution plan.



## HC holds Director who resigned prior to dishonored cheques issuance, not vicariously liable under Section 138 and Section 141 of the NI Act

### Sanjeev Kumar Agarwal vs. IFCI Factors Ltd. & Ors CRL.M.C. 280, 281, 282, 283/2021 and CRL.M.A. 1436,1440,1442,1444/2021

The Petitioner was a Director of a company and had executed certain personal guarantee deeds on behalf of the company to the Respondent company and tendered his resignation. The company had issued certain cheques to the Respondent company pursuant to the guarantee deeds issued by the Petitioner all of which were dishonoured and the Respondent company holding the Petitioner to be vicariously liable, instituted complaints under Section 138 and 141 of the NI Act against him before the Metropolitan Magistrate which issued a summoning order against the Petitioner.

Aggrieved, the Petitioner approached the HC, which, noting that he had ceased to be a Director of the accused company prior to the issuance of the cheques in question, held that vicarious liability could not be attributed to the Petitioner for the offence punishable under Sections 138 and Section 141 of the NI Act.

Further, against the Respondent company's submission that the Petitioner had executed a guarantee deed favoring it, thereby undertaking personal liability, HC observed that the execution of guarantee deeds by the

Petitioner at an earlier point in time would not attract vicarious liability under Section 138 and Section 141 of the NI Act, when he had tendered his resignation to the accused company prior to issuance of cheques, as to attract vicarious liability under Section 141 of the NI Act against any person, the accused person should have been in-charge and responsible for the conduct of accused company's business at the time of commission of offence, a person who was not a Director, and/or not in-charge of the affairs of the company, at the time when the offence was committed, could not be held vicariously liable. Therefore, regardless of a guarantee deed being executed as part of the impugned transaction, no criminal liability would be attributable to a Director of the accused company who executed such deed if he resigned therefrom prior to the issuance of the cheques in question. Thus, finding that there was nothing on record to indicate that Petitioner was in-charge of and responsible for the conduct of affairs of accused company at the time of commission of offence, the HC, set aside summoning orders issued by the Metropolitan Magistrate against the Petitioner pursuant to complaints under Section 138 and Section 141 of the NI Act.



### NCLAT holds share application money qualifies as 'financial debt', when shares not allotted

#### Kushan Mitra vs. Amit Goel & Anr

#### Company Appeal (At) (Insolvency) No. 128 of 2021 & I.A. 2340 of 2021 and 2413 of 2021

The Respondent was the Director of the Corporate Debtor since 2003 and had granted an unsecured loan of INR 1.56 Crores to the Corporate Debtor. Later on, it was resolved by the Board members to convert the unsecured loan into equity shares of the Corporate Debtor and as a result, 26,00,566 equity shares of INR 5 each were allotted to the Respondent. After 6 months, the allotment of shares to the Respondent was revoked by a Board Resolution. The Corporate Debtor revoked the allotted shares as well as failed to return the application money (original unsecured loan) to the Respondent.

Aggrieved, the Respondent filed an application to initiate CIRP against the Corporate Debtor and recover its due loan amount of INR 1,89,17,300. (including interest @ 12% p.a.) before the NCLT.

The NCLT admitted the application of the Respondent under Section 7 of the IBC and ruled in favour of the Respondent as it had established the claim it had made to recover its dues from the Corporate Debtor. It further rejected all the contentions of the Corporate Debtor as self-contradictory. The NCLT ordered to initiate CIRP against the Corporate Debtor.

Aggrieved, the Appellant who was a suspended shareholder of the Corporate Debtor approached the NCLAT contending that share application money, in the event of non-allotment of shares, does not fall within the ambit of definition of 'financial debt' as defined under Section 5(8) of the IBC and therefore the NCLT erred in admitting the application of the Respondent under Section 7 of the IBC.

The NCLAT noted that in the instant case, as allotment of equity shares on preferential basis by Private Placement Offer was done and subsequently revoked, the money given by the Respondent fell within the definition of share application money.

The NCLAT further placing reliance on the SC ruling in Anuj

Jain [(2020) 8 SCC 401], observed that consideration for time value of money was an essential element for the amount to fall within the ambit of 'financial debt'. The debt may be of any nature but a part of it was always required to be carrying, or corresponding to, or at least having some traces for disbursement against consideration for time value of money.

Further, the NCLAT observed that as per Section 42 of the Companies Act and Deposit Rules, if the shares were not allotted within 60 days of receiving the share application money, and if the refund did not take place within 15 days from the expiry of 60 days' time limit, then this amount was to be treated as a 'Deposit', advanced to the Company, which had to be returned by the Company at the rate of 12% p.a., and thus the concerned person would get compensation for the time value of money given by him to the Company which changed the nature and character of the money so given, that is to say, although the amount was initially paid towards shares, since the allotment was revoked, the equity did not materialize, and thereafter, the amount statutorily attained the character of loan with interest, which qualified the share application money as 'financial debt'.

In addition to the above, The NCLAT also observed that share application money, in the event of non-allotment of shares, attracted interest under Section 42(6) of the Companies Act, 2013 and therefore fell within the ambit of definition of 'financial debt' as defined under Section 5(8) of the IBC.

Thus, the NCLAT, dismissing the appeal, held that when the Company failed to refund the share application money as stipulated within the time limit of 60 days such balance was to be treated as 'Deposit' under Companies (Acceptance of Deposit) Rules and would fall under the definition of 'financial debt' as financial debt as contemplated under Section 5(8) of the IBC was nothing but outstanding principal due in respect of loan and would also include interest thereon, if any interest were payable

thereon. If there was no interest payable on the loan, only outstanding principal also would have qualified as 'financial debt'.

### Authors' Note:

It would be interesting to note that the key feature of a

financial transaction as contemplated under Section 5(8) of the IBC was 'consideration for time value of money'. In other words, the legislature has included such financial transactions in the definition of 'financial debt' which are usually for sum of money received today to be paid over a period of time in a single or series of payments in the future.



## SC holds NCLT, NCLAT can 'encourage', but not direct settlement by acting as 'courts of equity'

### E.S. Krishnamurthy & Ors. vs. Bharath Hi Tech Builders Pvt. Ltd. 2021-TIOLCORP-43-SC-IBC

On a petition which was instituted by the Appellant under Section 7 of the IBC for initiating the CIRP in respect of the Respondent, the NCLT declined to admit the petition and instead directed the Respondent to settle the claims within three months. The NCLAT found no merit in the appeal against the NCLT's order.

Aggrieved, the Appellant approached the SC which observed that while the Adjudicating Authority and Appellate Authority could encourage settlements, they could not direct them by acting as courts of equity.

The SC further observed that although the ultimate purpose of IBC was to facilitate the continuance and rehabilitation of a corporate debtor, what the Adjudicating Authority and Appellate Authority, however, had proceeded to do was to abdicate their jurisdiction to decide a petition under Section 7 by directing the respondent to settle the remaining claims within three months and leaving it open to the original petitioners, who were aggrieved by the settlement process, to move fresh proceedings in accordance with law. Such a course of action was not contemplated by the IBC.

Further, emphasizing that as per Section 7 of IBC, the Adjudicating Authority was empowered only to verify whether a default had occurred or if a default had not

occurred, based on which it was then to either admit or reject an application respectively, and that these were the only two courses of action which were open to the Adjudicating Authority in accordance with Section 7(5) of the IBC, the SC observed that the Adjudicating Authority had clearly acted outside the terms of its jurisdiction under Section 7(5) of IBC as it could not compel a party to the proceedings before it to settle a dispute.

Thus, setting aside NCLT, NCLAT orders declining to admit Appellant's Section 7 application for initiation of insolvency process against the Corporate Debtor ('Respondent') and directing the Respondent to settle the claims, the SC ruled that the NCLT failed to exercise the jurisdiction which was entrusted to it, accordingly, allowing the appeal and restoring the proceedings back to NCLT for a fresh consideration.

### Authors' Note:

In the instant case, the SC also remarked that the IBC was a complete code in itself. The Adjudicating Authority and the Appellate Authority were creatures of the statute. Their jurisdiction was statutorily conferred and the statute which conferred jurisdiction also structured, channelized and circumscribed the ambit of such jurisdiction.



### Extension of due date for Annual Compliances under Companies Act,2013

MCA vide circular no. 22/2021 dated December 29, 2021 extended the due date for filling of form AOC-4 (Form for filing financial statement and other documents with the Registrar), AOC-4 (CFS) (Form for filing consolidated financial statements and other documents with the Registrar), AOC-4 XBRL (Form for filing XBRL document in

respect of financial statement and other documents with the Registrar), AOC-4 Non-XBRL till February 15, 2022 and upto February 28, 2022 for the filing of e-form MGT-7 (Form for filing annual return by a company)/MGT-7A (Form for filing annual return by OPCs and Small company) for the financial year ended on 31.03.2021.

Particulars	Original Due Date	Extended due date vide Circular No. 17/2021 dated 29th Oct. 2021	Extended due date vide Circular No. 22/2021 dated 29th Dec. 2021
AOC-4/AOC-4(CFS)/AOC-4(XBRL)/AOC-4 (NON XBRL)	30 Days from the date of AGM held	31st December, 2021	15th February, 2021
MGT-7/MGT-7A	60 Days from the date of AGM held	31st December, 2021	28th February, 2021

#### Authors' Note:

This extension was much needed by industry owing to covid pandemic as companies have not been able to complete their compliances on a timely basis.



### Clarification of holding of Annual General Meeting (AGM)

MCA vide circular no. 19/2021 dated December 08, 2021 has decided that due date for conducting Annual General Meeting for the FY ended on 31.03.2021 shall not be extended any further. MCA has also decided to take legal action against companies which have not adhered to the timelines for conducting AGM in terms of the Companies Act, 2013.

provided. MCA has provided this relaxation till 30th June, 2022.

#### Authors' Note:

Allowing Companies to conduct AGM or EGM through video conferencing or other audio – visual means is a significant step towards in wake of sudden spike of Corona cases owing to new variant of Corona virus. Also, the decision to take legal action against companies which are not adhering to the timelines of AGM is a good move taken by MCA as the non-compliant companies would pay more attention towards due dates in future.



### Amendments Applicability from 01st January, 2022

With effect from January 1, 2022, the appointment, re-appointment and removal of independent directors in a listed company will be done through a special resolution of shareholders. In the special resolution, the number of votes in favour of the resolution should be at least three times (at least 75% votes should be in favour) those against the resolution.

For every appointment of an independent director, the nomination and remuneration committee shall evaluate

the balance of skills, knowledge and experience on the board.

#### Authors' Note:

These changes would certainly lead to better quality in composition of Board of Directors. This step would essentially lead to appointment of qualified and competent Independent Directors on the Board of Companies which of course is in the best interest of the subject Companies.

### Extension of due date for KYC in Bank Account

RBI vide Notification No. RBI/2021-22/144 dated 30th December, 2021 has extended the due date for KYC Compliance for Bank A/c till 31st March, 2022. Regulated Entities are also advised that where the customer periodic KYC is pending, no restriction on operation of such

accounts shall be imposed till 31st March, 2022.

This relaxation has been provided keeping in view the uncertainty owing to new variant of COVID-19.

### Introduction of Legal Entity Identifier for Cross-border Transactions

RBI vide Notification No. RBI/2021-22/137 dated 10th December, 2021 has introduced the Legal Entity Identifier (LEI) No. with effect from 01st October, 2022 for the parties involved in financial transactions. In India LEI will be issued by Legal Entity Identifier India Ltd. - which is authorised by RBI to issue LEI. However, AD category – 1 Banks may encourage the entities to furnish LEI voluntarily before 01st October, 2022.

From 01st October, 2022, AD Category – 1 bank should obtain LEI from the resident entities other than individuals which are undertaking capital or current account transaction of INR 50 Cr. or above under the provisions of FEMA, 1999. The threshold of INR 50 Cr. is per transaction. If an entity has obtained LEI, it is mandatory for it to furnish LEI for every transaction even if value of transaction is less than INR 50 Cr.

#### Authors' Note:

LEI will help banks and credit providers in monitoring the exposure of corporate borrowers. It will prevent banks from issuing multiple loans against the same collateral. This step shall essentially help towards achieving transparency and fraud prevention.



### SEBI tightens the IPO Process vide Press Release No. 38/2021 dated 28th Dec, 2021

SEBI has announced tighter rules for companies raising capital from the markets

- **Restriction on Pre-Existing Shareholders for sale of shares through Offer for Sale (OFS):**

- ▶ Shareholders who are holding more than 20% shares before pre issue, cannot sell more than 50% shares individually or with persons acting in concert.
- ▶ Shareholders who are holding less than 20% shares before pre-issue, cannot sell more than 10% shares under offer for sale.

- **Allocation Methodology for Non-Institutional Investors:**

Book Built issues which are opening from or after 01st April, 2022:

- ▶ One third of the portion available to Non-Institutional Investors shall be reserved for applicants with application size of more than two lakh rupees and upto ten lakh rupees.
- ▶ Balance two third portion available to Non-Institutional Investors shall be reserved for applicants with application size of more than ten lakh rupees.

- **Monitoring of Funds raised through an IPO:**

Particulars	Earlier Provisions	Amended Provisions
Monitoring of Funds raised through IPO	The utilisation of fund is monitored by scheduled commercial banks (SCBs) and public financial institutions.	SEBI Board has decided that the utilization of funds raised through IPOs will be monitored by credit rating agencies registered with SEBI.
Percentage limit on utilisation of Funds raised through IPO	SCBs and financial institutions have to monitor until 95% of the funds are utilised raised through IPO.	Monitoring by credit rating agencies shall continue until 100 % of Funds raised through IPO is utilised.
Utilisation Report before Audit Committee	The utilisation report is placed before the audit committee annually.	The utilisation report will be placed before the audit committee every quarter.

- **Monitoring of Funds raised through an IPO:**

Particulars	Earlier Provisions	Amended Provisions
Lock in Period for further sale (for promoters)	<ul style="list-style-type: none"> <li>• <b>Upto 20% Portion</b> The lock in period requirement for post issue paid up share capital is <b>3 Years.</b></li> </ul>	<ul style="list-style-type: none"> <li>• <b>Upto 20% Portion</b> The lock in period requirement for post issue paid up share capital is <b>18 Months.</b></li> </ul>

Particulars	Earlier Provisions	Amended Provisions
Lock in Period for further sale (for non-promoters)	The lock in period requirement for post issue paid up share capital is <b>1 Year.</b>	The lock in period requirement for post issue paid up share capital is <b>6 Months.</b>

### Authors' Note:

Imposition of limit on pre-existing shareholders to sell shares through offer for sale is a good step to protect the general investors as many times promoters sell their shares in listing and when company suffers losses, general investors lose their capital / money.

Review of utilization of funds raised through IPO by Credit Rating Agencies and Monitoring Agencies rather than SCBs will bring more transparency towards effective utilization of funds. This shall also enable Audit Committee to get quarterly utilization reports so that they can take necessary steps on a timely basis.



### Prudential norms on Income Recognition, Asset Classification and provisioning pertaining to Advances

Reserve Bank of India vide circular no. RBI/2021-2022/125 has issued clarifications regarding Prudential norms on Income Recognition, Asset Classification and Provisioning pertaining to advances. Below is the list of clarifications provided in said circular:

#### Specification of Due date/repayment date:

Presently an amount is to be treated as overdue if it is not paid on the due date fixed by the bank, however due dates are not specifically mentioned in many cases in loan agreements. The exact due dates for repayment of a loan, frequency of repayment, breakup between principal and interest, examples of SMA/NPA classification dates, etc. shall be clearly specified in the loan agreement and the borrower shall be apprised of the same at the time of loan sanction and also at the time of subsequent changes, if any, to the sanction terms/loan agreement till full repayment of the loan.

#### Classification as Special Mention Account (SMA) and Non-Performing Asset (NPA)

The classification is applicable for all the loans incl. retail loans. The basis for classification of SMA categories has been provided in said circular. It is further clarified that borrower accounts shall be flagged as overdue by the lending institutions as part of their day-end processes for the due date, irrespective of the time of running such processes. Similarly, classification of borrower accounts as SMA as well as NPA shall be done as part of day-end process for the relevant date.

#### Clarification regarding definition of 'Out of Order'

Cash credit/Overdraft (CC/OD) account is classified as NPA if it is 'out of order'. An account shall be treated as 'out of order' if:

- ▶ The o/s balance in the CC/OD account remain continuously in excess of the sanctioned limit/drawing power for 90 days or
- ▶ The o/s balance in the CC/OC account is less than the sanctioned limit/drawing power but no credits continuously for 90 days or not enough to cover the interest debited during the previous 90 days period.

#### NPA classification in case of interest payments

Earlier an account is classified as NPA only if the interest due and charged during any quarter is not serviced fully within 90 days from the end of the quarter. But the same has been modified and shall be effective from 31st March, 2022 that now classification as NPA if the interest remains overdue for more than 90 days.

#### Upgradation of accounts classified as NPAs

Loan accounts classified as NPAs can be upgraded as 'Standard' asset only if entire arrears of interest and principal amount are paid by the borrower rather than on the basis of only interest and partial overdue payment.

#### Authors' Note:

This is a move with a view to ensuring uniformity in the implementation of IRACP norms across all lending institutions, certain aspects of the extant regulatory guidelines are being clarified and/or harmonized, which will be applicable mutatis mutandis to all lending institutions. This could result in more non-banking finance companies' loans being categorised as NPAs and raise provisioning requirements as classification norms are now on a par with that of banks.



## OECD/G20 Inclusive Framework on BEPS releases Annual Report under Action 5

The fifth annual Peer Review Report has been released by OECD/G20 Inclusive Framework on BEPS which assesses 131 jurisdictions' progress on exchanging information on tax rulings, in accordance with Action 5, for the calendar year 2020.

With a view to further enhance transparency in relation to the issuance of tax rulings, this is the first review taking place under the renewed peer review process which was agreed amongst the member nations last year.

According to the Report, the global reach of the BEPS Action 5 minimum standard on tax rulings continues to increase with 22,000 tax rulings having been identified and 41,000 exchanges between jurisdictions having taken place.

The Report states that 95 jurisdictions are now completely in line with the BEPS Action 5 minimum standard, with the remaining 36 jurisdictions receiving one or more recommendations to improve their legal or operational framework to identify and exchange the tax rulings.

The Report further states that India have met all aspects of the terms of reference for the calendar year 2020, except

for certain delays in exchange of information on future APAs.

Accordingly, OECD recommends India to “continue its efforts to ensure that all information on future APAs is exchanged as soon as possible”, as recommended in 2017, 2018 and 2019 peer review reports. During the year, India has exchanged 148 unilateral APA's and 3 PE rulings.

As regards the timeliness of exchange, the Report states that around 56% (i.e. 83 out of 148 exchanges) of exchanges of future APA rulings occur later than three months of the information on rulings becoming available to the competent authority.

According to the Report, the delay is attributable to India's use of “best efforts approach” to identify potential exchange jurisdictions for APAs filed before June 16, 2017 and also the difficulties arising from COVID-19 pandemic.

### Reference:

[https://www.oecd-ilibrary.org/taxation/harmful-tax-practices-2020-peer-review-reports-on-the-exchange-of-information-on-tax-rulings\\_f376127b-en](https://www.oecd-ilibrary.org/taxation/harmful-tax-practices-2020-peer-review-reports-on-the-exchange-of-information-on-tax-rulings_f376127b-en)



## OECD releases Model Global Anti Base Erosion Rules under Pillar Two

Pillar Two Model Rules for domestic implementation of 15% global minimum tax from 2023 have been published by OECD.

The rules define the scope and set-out the mechanism for the Global Anti-Base Erosion ('GloBE') Rules under Pillar Two. The rules seek to assist countries to bring the GloBE Rules into domestic legislation in 2022 and provide for a co-ordinated system of interlocking rules that:

- Define the MNEs within the scope of the minimum tax;

- Set-out a mechanism for calculating an MNE's effective tax rate on a jurisdictional basis, and for determining the amount of top-up tax payable under the rules; and
- Impose the top-up tax on a member of the MNE group in accordance with an agreed rule order.

The model rules address the treatment of acquisitions and disposals of group members and include specific rules to deal with particular holding structures and tax neutrality regimes.

The model rules also address administrative aspects, including information filing requirements, and provide for transitional rules for MNEs that become subject to the global minimum tax.

### Reference:

<https://www.oecd.org/tax/beps/tax-challenges-arising-from-the-digitalisation-of-the-economy-global-anti-base-erosion-model-rules-pillar-two.htm>



## OECD releases updated Transfer Pricing profiles for 21 countries, including 3 new first-time participants

The OECD releases updated transfer pricing country profiles ('TP profiles') for 21 countries, with three new countries being added to the existing list.

The 3 new countries to join hands in sharing TP profiles include Albania, Kenya and the Maldives taking the tally of participating countries who have shared TP profiles to 63 from 60 since the last update in August, 2021.

Some of the other countries that have shared the updated TP profiles include Austria, Belgium, Bulgaria, France, Georgia, Germany, Indonesia, Ireland, Italy, Kenya, Latvia, Malaysia, Mexico, Peru, Poland, Seychelles, Singapore, South Africa, and Sweden.

The TP profiles provide a bird's eye view of comparative snapshot of the country's transfer pricing legislation on various key transfer pricing principles, including the arm's length principle, transfer pricing methods, comparability analysis, intangible property, intra-group services, cost contribution agreements, transfer pricing documentation, administrative approaches to avoiding and resolving

disputes, safe harbours and other key implementation measures.

The TP profiles have been presented in the form of a questionnaire consisting of 33 questions which solicit individual country's response in terms of prevailing domestic transfer pricing legislation, practices and extent to which the country's transfer pricing rules follow the OECD TP Guidelines.



OECD has been publishing profiles since 2009 with a major update in 2017 to reflect OECD and non-OECD members adoption of the OECD/G20 Base Erosion and Profit Shifting (BEPS) reports on Actions 8-10 and Action 13 relating to transfer pricing.

Further updates to the transfer pricing country profiles are expected in the first half of 2022.

### Reference:

<https://www.oecd.org/tax/beps/oecd-releases-new-transfer-pricing-profiles-for-21-countries.htm>





# GLOSSARY

Abbreviation	Meaning	Abbreviation	Meaning
AAAR	Appellate Authority of Advanced Ruling	ITA	Interactive Tax Assistant
AAR	Authority of Advance Ruling	ITAT	Hon'ble Income Tax Appellate Tribunal
ACIT	Assistant Commissioner of Income Tax	ITC	Input Tax Credit
AE	Associated Enterprise	ITES	Information Technology Enabled Services
ALP	Arm's Length Price	MAT	Minimum Alternate Tax
AMP	Advertisement Marketing and Promotion	MRP	Maximum Retail Price
AO	Assessing Officer	NAA	National Anti-Profiteering Authority
APA	Advance Pricing Agreement	NCLAT	National Company Law Appellate Tribunal
APU	Authorized Public Undertaking	NCLT	National Company Law Tribunal
AY	Assessment Year	OECD	Organization for Economic Co-operation and Development
BEPS	Base Erosion and Profit Shifting		
CASS	Computer aided selection of cases for Scrutiny	PCIT	Principal Commissioner of Income Tax
CBDT	Central Board of Direct Taxes	PLI	Production Linked Incentive
CBEC	Central Board of Excise and Customs	R&D	Research and Development
CBIC	Central Board of Indirect Taxes and Customs	RFCTLARR Act	Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act
CENVAT	Central Value Added Tax		
CESTAT	Custom Excise and Service Tax Appellate Tribunal	RoDTEP	Remission of Duties and Taxes on Export of Products
CGST Act	Central Goods and Services Tax Act, 2017	SC	Hon'ble Supreme Court
CIRP	Corporate Insolvency Resolution Process	SCM	Subsidies and Countervailing Measures
CIT(A)	Commissioner of Income Tax (Appeal)	SCRR	Securities Contracts (Regulation) Rules, 1957
CLU	Changing Land Use	SLP	Special Leave Petition
CSR	Corporate Social Responsibility	TCS	Tax Collected at Source
CWF	Consumer Welfare Fund	TDS	Tax Deducted at Source
DCIT	Deputy Commissioner of Income Tax	The CP Act	The Consumer Protection Act, 2019
DGAP	Directorate General of Anti-Profiting	The IT Act/The Act	The Income-tax Act, 1961
DGFT	Directorate General of Foreign Trade	The IT Rules	The Income-tax Rules, 1962
DRP	Dispute Resolution Panel	TPO	Transfer Pricing Officer
Finance Act	The Finance Act, 1994	UN TP Manual	United Nations Practice Manual on Transfer Pricing
GST	Goods and Services Tax	VAT	Value Added Tax
HC	Hon'ble High Court	VSV	Vivad se Vishwas
IBC	International Business Corporation	NeAC	National e-Assessment Centre
IGST	Integrated Goods and Services Tax	The LT Act	The Limitation Act, 1963
IGST Act	Integrated Goods and Services Tax Act, 2017	CIRP	Corporate Insolvency Resolution Process
IRP	Invoice Registration Portal	MPS	Minimum Public Shareholding



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**RAJAT CHHABRA**  
(Partner)

**KETAN TADSARE**  
(Associate Partner)

**SAURABH LONAWAT**  
(Manager)

**RAGHAV PRASAD**  
(Associate)

**GARGEE PADHI**  
(Associate Trainee)



**GANESH KUMAR**  
(Partner)

**BHAVIK THANAWALA**  
(Associate Partner)

**RUSHABH LUHAR**  
(Associate Manager)

**SAKINA LAXMIDHAR**  
(Associate)

**VIREN NANDA**  
(Tax Executive)



**VISHAL GUPTA**  
(Partner)

**ALOK KAUSHIK**  
(Associate Partner)

**MAMTA VERMA**  
(Assistant Manager)

**PRASHANT SHARMA**  
(Associate)

**ANAY GULATI**  
(Associate)

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# FIRM INTRODUCTION



Taxcraft Advisors LLP ('TCA') is a multidisciplinary advisory, tax and litigation firm having multi-jurisdictional presence. TCA team comprises of professionals with diverse expertise, including chartered accountants, lawyers and company secretaries. TCA offers wide-ranging services across the entire spectrum of transaction and business advisory, litigation, compliance and regulatory requirements in the domain of taxation, corporate & allied laws and financial reporting.

TCA's tax practice offers comprehensive services across both direct taxes (including transfer pricing and international tax) and indirect taxes (including GST, Customs, Trade Laws, Foreign Trade Policy and Central/States Incentive Schemes) covering the whole gamut of transactional, advisory and litigation work. TCA actively works in trade space entailing matters ranging from SCOMET advisory, BIS certifications, FSSAI regulations and the like. TCA (through its Partners) has also successfully represented umpteen industry associations/trade bodies before the Ministry of Finance, Ministry of Commerce and other Governmental bodies on numerous tax and trade policy matters affecting business operations, across sectors.

With a team of experienced and seasoned professionals and multiple offices across India, TCA offers a committed, trusted and long cherished professional relationship through cutting-edge ideas and solutions to its clients, across sectors.



**RAJAT CHHABRA**

**Taxcraft Advisors LLP**

Founding Partner

rajatchhabra@taxcraftadvisors.com

+91 90119 03015



GST Legal Services LLP ('GLS') is a consortium of professionals offering services with seamless cross practice areas and top of the line expertise to its clients/business partners. Instituted in 2011 by eminent professionals from diverse fields, GLS has constantly evolved and adapted itself to the changing dynamics of business and clients requirements to offer comprehensive services across the entire spectrum of advisory, litigation, compliance and government advocacy (representation) requirements in the field of Goods and Service Tax, Customs Act, Foreign Trade, Income Tax, Transfer Pricing and Assurance Services.

Of-late, GLS has expanded its reach with offerings in respect of Product Centric Regulatory Requirements (such as BIS, EPR, WPC), Environmental and Pollution Control laws, Banking and Financial Regulatory laws etc. to be a single point solution provider for any trade and business entity in India.

With a team of dedicated professionals and multiple offices across India, it aspires to develop and nurture long term professional relationship with its clients/business partners by providing the most optimal solutions in practical, qualitative and cost-efficient manner. With extensive client base of national and multinational corporates in diverse sectors, GLS has fortified its place as unique tax and regulatory advisory firm with in-depth domain expertise, immediate availability, transparent approach and geographical reach across India.



**GANESH KUMAR**

**GST Legal Services LLP**

Founding Partner

ganesh.kumar@gstlegal.co.in

+91 90042 52409



VMG & Associates ('VMG') is a multi-disciplinary consulting and tax firm. It brings unique experience amongst consulting firms with its partners having experience of Big 4 environment, big accounting, tax and law firms as coupled with significant industry experience. VMG offers comprehensive services across the entire spectrum of transaction support, business and risk advisory, financial reporting, corporate & allied laws, Direct & Indirect tax and trade related matters.

VMG has worked with a range of companies and have provided services in the field of business advisory such as corporate structuring, contract negotiation and setting up of special purpose vehicles to achieve business objectives. VMG is uniquely positioned to provide end to end solutions to start-ups companies where we offer a blend of services which includes compliances, planning as well as leadership support.

VMG team brings to the table a comprehensive and practical approach which helps clients to implement solutions in most efficient manner. With a team of experienced professionals and multiple offices, we offer long standing professional relationship through value advice and timely solutions to corporate sectors across varied Industry segments.



**VISHAL GUPTA**

**VMG & Associates**

Founding Partner

vishal.gupta@vmgassociates.in

+91 98185 06469



**TAXINDIAONLINE.COM**

**RICHA NIGAM**, Marketing Head, TIOL Pvt. Ltd.

richa@tiol.in | +91 98739 83092

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