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EDITORIAL

Vision 360: Hoping for a safe, brighter and affluent 2021

At the close of 2019, on December 31st, WHO's China Country Office was informed of a 'pneumonia of unknown cause', detected in the city of Wuhan in Hubei province, China. Since then, it has been close to a year and the world has gone through an unprecedented change.

The pandemic has left the world economies struggling with – distorted demand/consumption, reduced capacity utilisation, unemployment, liquidity crisis, etc. and the list goes on. This followed the suit of relief packages by Government's and India only joined the list soon with its 'Atmanirbhar Bharat' which consisted a bouquet of schemes in phases – latest being the most comprehensive, comprising of Rozgar yojana, Production Linked Incentive Scheme, Emergency Credit Line Guarantee Scheme, Pradhan Mantri Aawas Yojana, Infra Debt Financing, and Garib Kalyan Rozgar Yojana, etc.

Although the schemes are yet to be supported by a clear roadmap for its implementation at ground level, these schemes would certainly be a boost, 'IF' they are what the Government says they are to be! The doubt as this raised only given the recent history of Atmanirbhar Bharat Scheme for MSME sector which has been promised with a flora of schemes for liquidity but which remain unimplemented for want of execution framework. One sincerely hopes that the basic framework is put in place in order to reap the desired results.

Giving an indirect impetus to 'Make in India' the authorities have also widened the scope of 'BIS'. While recently it covered within its fold 'Toys', it has recently also included 'Shoes' as well. However, given that international travel 'to' and 'from' India is restricted at present, the Foreign Manufacturers Certification Scheme have also taken a toll – leading a way to extension in implementing of BIS requirements for toys and shoes.

Speaking of overseas trade, the Government had earlier announced that it would discontinue MEIS effective December 31, 2020 and roll out the RoDTEP scheme from January, 2021. However, it has now been indicated that the Government is considering the proposal to extend MEIS by three months till March 31, 2021. Any such extension would allow the Government to complete an exhaustive exercise for rolling out the proposed RoDTEP and would offer more time to exporters to prepare themselves for said transition. Moreover, it makes sense to operationalise the new scheme along with the launch of the next foreign trade policy, which shall remain in effect for five years from April 1, 2021.

From initiation of pandemic outbreak to lockdowns to new normal and now initiating vaccination, the whole world has changed its outlook and has gone through so much in last ten months or so. Now that Governments across the globe are coming to terms with it, the rush as felt in early 2020 seems to be dousing, and that's notwithstanding the looming threat of a 'second wave'. But assessing pandemic of this scale would certainly be half baked if its aftermaths are not accounted for. Although stock markets are generally seen as indicative of economic development's direction, the recent surge, seems unfounded with the existing state of economy which is still grappling with many issues. As a matter of fact, the impact of COVID on economy is much larger than sub-prime crisis on 2008, and yet the stock markets have scaled the unprecedented indices. In this, one can only hope that it rationalises smoothly and no undercurrents are found to hassle the economy.

In all, this irksome year is about to end, and we shouldn't forget to remind ourselves 'when it rains, look for rainbow, when its dark, look for stars!' to introspect positively and prepare ourselves for a fresh start of year 2021. So here's the entire team of Vision 360 wishing you all a very happy new year and all the best for a fresh start!

Yet again, in order to provide you with all key tax and regulatory developments in one place, **TIOL**, in association with **Taxcraft Advisors LLP**, **GST Legal Services LLP** and **VMG & Associates**, is elated to publish the fourth 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 followed 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 and sparkle zone for some global and local trivia.

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Restriction to avail ITC – Vexatious burden on the buyers

Input tax credit runs through the very spine of Goods and Services tax given that this Good and Simple tax was introduced to inter-alia reduce the cascading effect. But until now this agenda seems to be achieved partially, which is apparent from breadth and length of the Writ Petitions that challenge the very constitutionality of many provisions under this system.

One of the most challenged provisions of this framework is Section 16 which provides for various conditions for availing ITC *viz*:

(i) ITC in respect of any supply shall only be available if the tax charged in respect of such supply has been actually paid to the Government;
(ii) Restriction on ITC not availed within due-date of furnishing return u/s 39 of CGST Act, 2017 for the month of September following the end of financial year to which any invoice or debit note pertains or furnishing of annual return, whichever is earlier.

Restriction on recipient's ITC basis failure on part of supplier

The GST Law was to be implemented initially through the return system which would be completely technology based involving return form GSTR 1, GSTR 2 and GSTR 3. It was supposed to provide a mechanism whereby the buyer could communicate any mismatch or upload missing invoices which would be approved by the supplier, thereby enabling real time changes to the GST return filing. Further, any vendor not filing the return would be immediately known to the buyer under the ideal system. However, due to several factors, including lack of readiness of GST Portal, the said mechanism could not be implemented completely. The absence of implanting these systems have completely changed the prospects for a buyer who no longer can track the sufficient compliance by the supplier, yet is pushed to the corner and is denied the credit if the supplier faulters. Such a system is completely arbitrary and is devoid of *causa-causance*.

The system as it exists today merely involves filing of GSTR 1, GSTR 3B and GSTR 2A which only provides list of invoices uploaded by the supplier but unfortunately, it fails to provide a mechanism for buyer to verify whether the supplier has paid the applicable tax by filing form 3B. This will put the buyer at a lot of hardships to manually check with each and every supplier with respect to payment of corresponding taxes. Such a system is neither good nor simple for any taxpayer!

This expectation of the Government seems to lead from pre-GST regime, where under VAT law in several states, ITC was denied when tax was not paid by supplier and needless to say such provisions were challenged umpteen times. However, noteworthy are some of those decision which prevailed in taxpayers favour and created a precedent such as Hon'ble Madras High Court in case of Sri Ranganathar Valves (P.) Ltd. vs Assistant Commissioner (CT) **[2020-TIOL-1611-HC-MAD-VAT]** when it relied upon its own judgment and held that Input Tax Credit cannot be disallowed on the ground that the supplier has not paid tax to the Government, when the purchaser is able to prove that the supplier has collected tax and issued invoices to the purchaser. As such, restriction of the amount of Input Tax Credit on this ground, cannot be sustained.

Likewise, Hon'ble Delhi High Court in case of Arise India Ltd. vs. Commissioner of Trade & Taxes **[2018-TIOL-11-SC-VAT]** held that disallowance of ITC to the purchaser due to default of selling dealer in depositing tax, as violative of Articles 14 and 19(1)(g) of the Constitution of India. The catena of decisions was further followed in M/s Onyx Designs vs. Assistant Commissioner of Commercial Taxes **[2019-TIOL-1315-HC-KAR-VAT]** wherein it has been held that in case of genuine transaction as well as bona fide claim and in the absence of any other allegations made against the purchasing dealer in the assessment orders, merely for the reason that selling dealers have not deposited the collected tax amount or some of the selling dealers have been subsequently deregistered cannot be a ground to deny the input tax credit.

Pursuant to above, the constitutional validity of the provisions of Section 16(2)(c) of the CGST Act, being similar to provisions under VAT law, are now being challenged in High Court of Calcutta in case of LGW Industries Limited vs. UOI [W.P. NO. (W) OF 2019] contending that denying ITC to a buyer of goods and services would tantamount to treating both the 'guilty purchasers' and the 'innocent purchasers' at par whereas they constitute two different classes. The petition further stated that denying ITC to a

buyer of goods or services for default of the supplier of goods or services would tantamount to shifting the incidence of tax from the supplier to the buyer, over whom it has no control whatsoever and therefore such provisions are arbitrary, irrational and therefore violative of the Article 14, Article 19(1)(g) and Article 300A of the Constitution of India. It could further be argued that denial of ITC on such grounds also clearly frustrate the underlying objective of removal of cascading effect of tax as stated in the Statement of object and reasons of the Constitution (One Hundred and Twenty-Second Amendment) Bill, 2014.

On referring to the above judicial precedents under the State VAT Acts, it is amply clear that judiciary has called for a distinction to be made between the genuine buyer and fraudulent buyer and has allowed the ITC to such genuine buyer, even in case the tax has not been deposited by the supplier. The buyer avails credit basis the tax invoice or the debit note issued by the supplier, under bonafide belief that the said supplier would pay the tax collected to the Government. In the absence of any mechanism to track and identify if the supplier is making such tax payments, denial to credit on such grounds seems to be highly controversial and apparently violative of the constitutional rights of the taxpayer. Further, as the Courts have ruled out, such denial puts the genuine taxpayers on the same pedestal as the fraudulent taxpayers, which can never be the intention of the equitable tax law.

It is expected from the Government to provide other measures and means to identify the defaulting tax payers and to relax the condition of Section 16(2)(c). The recent measure of introduction of E-invoicing may to some extent will assist in prevention of evasion of tax.

Restriction of ITC basis limitation of time

Section 16(4) seeks to deny ITC if the credit is not taken in the return to be filed under Section 39 on or before the due date of filing of such return for the month of September of the succeeding financial year to which the invoice or debit note pertains. It has been time and again argued that availing ITC is a right of an assessee and therefore ITC has to be allowed to the assessee without any restriction. In this regard it would be pertinent to note that there are contradictory judgments wherein in some cases it has been held that the ITC is a right of the assessee and in some judgments it has been held that ITC is just a concession available to the assessee and certain restriction can be put on availment of such concession.

It would be pertinent to note that the taxpayers have also approached High courts challenging the denial of ITC under Section 16(4). It has been argued that the restriction provided under Section 16(4) is ultra-virus the provisions of Section 16(2) of the CGST Act and would render the 'non-obstante clause' in Section 16(2) as otiose. It has been also argued that ITC is not taken through return but instead it is taken through the books of accounts immediately on receipt of goods or services in terms of the provisions of Section 16(2) of the CGST Act and therefore the restriction placed under Section 16(4) of the CGST Act should not apply.

Further, it was also argued that Section 16(4) is arbitrary and unreasonable as they are violative of Article 14, in addition it is violative of Article 19 (1)(g) and Article 300A of the Constitution and denial of ITC would defeat the object of 122nd Constitutional Amendment Bill, 2017, i.e. avoid the cascading effect of taxes.

Denial of ITC has been challenged challenged in the courts, some of which are referred as below:

- Calcutta HC in case of Latika Ghosh **[TS-998-HC-2020(CAL)-NT]**; and
- Section 16(4) is also challenged in case of Bagmane Developers **[2020-TIOL-1792-HC-KAR-GST]** and

Balachandra Yallappa Salabhavi **[TS-840-HC-2020(KAR)-NT]**.

The Government also carried out changes in CGST Rules vide Notification No. 49/2019-CT dated October 09, 2019. It would be pertinent to note that Rule 61 was amended retrospectively with effect from July 1, 2017 to notify that return furnished in Form GSTR-3B would be considered as a return specified in Section 39(1) of the CGST Act. Therefore, the assessee would not be required to file Form GSTR-3 where returns have been filed in Form GSTR-3B.

The above retrospective amendment to Rule 61 was brought in specifically to nullify the judgment of Gujarat HC in case of AAP and Co. vs. Union of India **[2019-TIOL-2004-HC-AHM-GST]** wherein it was observed that return u/s 39(1) of CGST Act is Form GSTR-3, and not Form GSTR-3B. Further, it was held the Press Release dated October 18, 2018, clarifying that the last date for availing ITC relating to invoices issued during July 2017 to March 2018 would be the last date for filing return in Form GSTR-3B for the month of September 2018 as invalid. The Hon'ble HC observed that Form GSTR-3B is an interim arrangement, which did not tantamount to a monthly return under Section 39 of the CGST Act, being Form GSTR-3. The operation of said judgment has been stayed by the Hon'ble Apex Court **[2019-TIOL-543-SC-GST]** on December 06, 2019 in the SLP preferred by Revenue.

In view of the above, it has to be noted that the department will not allow availment of ITC beyond the time limit as prescribed under the provisions of law. Therefore, in order to get relief from the restrictions placed under Section 16 of the CGST Act, one has to wait for the outcome of the final judgment of the HCs. It has been observed that in many cases due to lack of understanding of the GST law and due to number of amendments during the initial period of the implementation GST law, many taxpayers have failed to avail the ITC and it stands lapsed. Therefore, in such cases it is expected from the Government to provide certain relaxation to the taxpayers qua restriction to avail ITC as provided under Section 16(2)(c) and Section 16(4) of the CGST Act.

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MSME Sector: Whether the Government is doing enough?

Micro, Small and Medium Enterprises also more famously known as MSMEs has always been a centre of discussion whenever we talk about domestic industry and household enterprises. The impression which one gets by the name is that these are small manufacturers and service enterprises with very low capital investment and revenues. However, the changes made in definition of late by Government of India indicates otherwise. As per current definition, an entity with an investment of up to INR 50 crores and with an annual turnover of INR 250 crores can be categorized as medium enterprises and interestingly same definition applies to both manufacturing as well as service sectors. Therefore, any service company barring large corporates would practically fall in so called MSME definition. Historically Government wanted to support MSME industry by protecting them from big businesses by institutionalizing laws so that MSME enterprises are able to recover its money on a timely basis.

MSMEs play a significant role in the economic growth of the country owing to their contribution to production, exports and employment. The sector contributes closer to 8 per cent to the country's GDP, 45 per cent to the manufactured output and 40 per cent to the country's exports. MSME sector is the backbone for any developing country as it drives the spirit of entrepreneurship and generates ample employment opportunities. Currently more than 11 lacs MSMEs are registered in India and said number is increasing by the day especially post revised definition of MSMEs.

Despite the significant contributions of the MSME sector, it continues to face certain constraints *inter-alia* availability of adequate and timely credit, requirement to place collateral security, access to equity capital and support for rehabilitation of sick enterprises etc. Based on various reports, it clearly emerges that the biggest issue faced by MSMEs is access to timely and affordable credit. The

Government has been planning umpteen schemes and actions to support MSMEs over the last few years and of late various schemes are being announced or are being given fresh emphasis. Some of these schemes are CGTMSE for providing credit without collaterals, equity support scheme for investment in equity up to 15% or INR 75 lacs, whichever is lower, supporting MSMEs by restricting global tenders up to INR 200 crores only to domestic industries, so on and so forth. The Government has also introduced platforms such as TReDS which facilitates bill discounting facilities to MSMEs.

While there is a thrust from Government to support MSMEs and it has taken numerous steps to address said issues, however on ground implementation of said schemes and guidelines does not seems to auger well. In the hindsight, banks are still reluctant to lend money to MSMEs without collateral security and are applying their comprehensive checks and balances. For loans more than INR 5 crores, banks are even asking for credit ratings and other related compliances. While banks and financial institutions have for long snubbed the MSMEs, the option of limited institutional funding is also available only to well structured MSMEs.

Knocking on the doors of the informal lending sector does not offer much respite either. While the MSMEs may get loans from traditional money-lenders, the same is not really accounted for by any governing body. As a consequence, the micro, small or medium level enterprises may have to suffer owing to inflated rates of interest, which sometimes is as high as 30%.

The macro question which remains to be answered is which entities shall rightly be classified as MSMEs and what scheme shall be applicable to a particular size of business and industry. If there are few select MSMEs which are profiteering from such schemes then the whole purpose of Government schemes and underlying initiative goes in vain. One of the viable mechanisms can be that benefits ought to be accorded in a graded form depending upon sector and size of the business. While our policy makers have to put in lot more efforts to roll-out an effective and constructive plan for development of MSMEs, currently our country's MSMEs continue to operate in this unstructured policy environment.

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Rohit Haldia

Director Finance & Accounts,
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(A Wabtec Group Company)

Mr. Haldia shares his thoughts and perspective on umpteen key tax and regulatory issues affecting the businesses...

Since ages, railways has been a primal mode of transportation for cargo and passengers. As the COVID 19 has severely impacted the travel and transportation industry due to reduced movement of goods and passengers, what is your assessment of the COVID impact on railway industry and ways to recover from the same?

Needless to say that COVID-19 has had a significant adverse impact on the railway industry like most other sectors. The railway industry witnessed unprecedented challenges on availability & transport of raw material, equipment and labor since the countrywide lockdown from March 2020 . The April - June quarter was a complete washout for most manufacturing companies led by supply chain disruption and lack of availability of skilled labor at the sites . Working capital woes specially for medium and small enterprises surmounted. The July - September quarter saw modest recovery as the workshops of Indian Railways producing locomotives and coaches started their operations gradually trying to utilize their inventory. While October and November showed some rise in business confidence on account of the festival season that led to unexpectedly high consumption led demand in several sectors of the economy. So, we have to wait and watch if this recovery sustains as we move into the next year.

The pandemic has also severely impacted or delayed several new capital intensive infrastructure projects mostly on account of budgetary constraints of Indian Railways. The freight segment revenues from Indian Railways saw growth in October and November over the same period last year which is a healthy economic indicator. The revenues from passenger coach operations remain totally subdued since most trains are not plying on account of the COVID situation. Social distancing norms are here to stay and passengers are not expected to undertake train travel unless it is essential for a long time. The fear would subside only when we have a vaccine hopefully in Q2' 2021 and the faster the country is able to vaccinate its citizens , the quicker it would be for passenger operations to pick up in a meaningful manner. Return to pre COVID levels may still be a year away in my opinion.

As the Indian Railways and the rail transport industry tries to limp back to normalcy, there needs to be clear business continuity plans that must be built by corporations and followed. Capital expenditure , implementation of expansion plans, new product development and stringent cost management is of paramount importance to defend the core business and prepare for the next level of growth as the economy recovers. Efficiency and Productivity improvement to remain competitive in this highly dynamic environment is important to remain relevant in the market place. The crisis can indeed be converted potentially into a huge emerging opportunity if we can get our act together as an industry and tide over this difficult period.

You mentioned that the COVID-19 can convert the current crisis into opportunity for railway industry. Which are the focus areas that can help and turnaround the entire railways industry?

It would be interesting to monitor how Railways and the Central Government tides through the current crisis. We

expect that IR too perceives this situation as an opportunity to rejig its strategy towards its investments in passenger and freight transportation segments in order to be ready for the next phase of growth in infrastructure and technology upgradation. Focus on driving Public Private Partnerships successfully and securing investments from external bilateral funding agencies can fuel faster growth and also generate employment in addition to increasing tax revenues in the long term. I personally believe that this is an opportune time to look beyond the current year and create a growth map for the next decade that can make the rail transport industry emerge much larger and stronger.

Another key area of focus should be to enhance the ease of doing business through Indian Railways both in terms of policy framework or in the review of the process of introducing new products on latest global technologies. The model of procurement with Make in India clauses must be mandatory in tenders. Some other key areas of focus would be to reorganize the passenger operations through privately operated trains, running more trains on profitable routes, enhancing speed and reliability along with passenger comfort. Re modelling the freight operations to generate profitable revenue growth through dedicated freight corridors and high speed freight locomotives in another great opportunity for IR. All these initiatives will enable the growth of both public and private companies in the sector and has the potential to make railways a preferred mode of transport both for passenger and freight in a green environment.

How do you view the recent increase in GST rate on railway products under CTH 8607 from 5% to 12%?

As already acknowledged by experts, GST is a significant move and probably one of the most important tax reforms post liberalization in India. However ,the key to succeeding through this massive change in regulation will always remain the smooth and effective implementation of this tax regime. With the impetus of GST, rail transportation was expected to create new jobs, save energy, improve the environment, while moving people, raw material and goods more efficiently nationwide. However, it has thrown up its own share of problems. Since majority of inputs are procured at 18% or 28% and the initial rate of GST applicable to supply under CTH 8607 was 5%, it resulted in huge credit accumulation and blockage of the working capital. The said disparity in tax imposition had an adverse impact, particularly in the railway industry, where projects execution involves a long gestation period requiring huge capital investment by the companies supplying goods on works contract. The fact that refund under inverted duty structure has been restricted for CTH 8607 did not help the cause. All the major industry players were looking for a huge ITC accumulation in Balance Sheet , which impact the cash flow adversely. Increase in GST rate of railway products supplied under CTH 8607 to 12% certainly helps as it can help in reducing the ITC balance in the books. However, it would have been really more useful if the government would have simply allowed for refund under inverted duty structure for products falling under Chapter 86.

Recently there has been a spur in notices issued to the Railway industries on the classification of Railway Products. Do you think that such classification disputes can be major cause for worry at-least on temporary basis and derail the momentum building around after the COVID-19 effect?

Since the inception of GST, the railway products suffer from a dual problem – one of being under the inverted duty structure and other from classification of products supplied to Indian Railways. After a circular issued in January 2018, the department is looking to classify every product out of CTH 8607 which enjoys a concessional rate compared to other tariff headings. The notices have been issued pertaining to the products which require a detailed deliberation and understanding of the actual functionality and which is for principal or exclusive use by the Railways. It is quite surprising to see the notices being issued after invoking the larger period of limitation where the subject issues has been into litigation from many years with contrary decisions on various products.

I believe that strengthening of AAR benches with judicial members would enable faster resolution of queries in a more reasonable , transparent and rational manner. Even though the AARs may not be binding on the assessees other than the applicant, they do serve as precedents for the tax authorities for raising demand especially where the ambiguity with respect to the classification of railway products existed even during the excise duty regime. We will need to wait and see how the litigation pans out but it will take some time before we can obtain a final judgement on the litigation pertaining to classification of railway products.

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

ITAT: Salary apportioned to Indian PO u/s 40(a)(iii) free from disallowance

Ecorys Nederlands B.V.
I.T.A. No. 6494/Del/2016

The Assessee is a company registered in the Netherlands and has established PO in India. During the course of assessment proceedings, the AO noted that Assessee claimed an amount of INR 73,17,159/- as salary expenses and Assessee has not deducted tax thereon. On being questioned by the AO, it was submitted that the salary of the employees was not chargeable to tax in India due to below mentioned reasons:

- The employees did not come/stay in India for providing the said services;
- The payment was not received by them in India nor from any source in India. It was paid by the Head Office of the Assessee situated in the Netherlands to the consultants in the Netherlands; and
- Only the time cost of employees as was attributable, as per proportionate hourly charge of the employees was charged to the Profit & Loss A/c of the PO.

Thus, in absence of accrue or arise in India, the same salary reimbursed by the PO was not liable to tax in India and hence, no tax has been deducted on such salary reimbursement.

However, the AO disallowed the amount of INR 73,17,159/- claimed as salary expenses and added the same to the total income of the Assessee. The CIT(A) confirmed the disallowance made by the AO.

Aggrieved by the action of the AO and CIT(A), the Assessee preferred an appeal before the Hon'ble ITAT. Based on the afore-mentioned facts, the Tribunal agreed to the submission of the Assessee that neither the employees came to India for providing the services nor the payment was received in India or from any source in India. Further, the ITAT relied on ruling of the Hon'ble Delhi HC ruling in case of Mother Dairy Fruit, Vegetables (P) Ltd., wherein the Hon'ble HC had held that "Since in the instant case services are rendered outside India in respect of which the employees received salary outside India, it cannot be said that the same accrue or arise in India and thus the provisions of Section 40(a)(iii) were not applicable since the salary is not taxable in India".

Accordingly, setting aside the order of CIT(A), the ITAT allowed the appeal of the Assessee.

Authors' Note:

Sub-section (ii) of Section 9 defines 'salaries' which are deemed to be accrued or arisen in India. In simple words, it covers salaries paid to non-resident which is deemed to be accrued or arisen in India subject to the condition that "service should be rendered in India". Further, Section 40(a)(iii) provides for disallowance of any payment which is chargeable under the head "Salaries" which are paid outside India or paid to a non-resident.

In light of the above provisions, salary paid to any non-resident outside India is taxable only in case where the services are rendered in India. Further, the Hon'ble Delhi HC in case of Mother Dairy Fruit, Vegetables (P) Ltd. (Supra) wherein the Hon'ble Court had held that "if the employees outside India, who are non-residents, have received salary even from Indian company, said salary will not be chargeable to tax in India".

In light of the above facts, dispute of deduction of tax on the salary paid to non-residents who never visited India for provision of services is about to reach a favorable conclusion.

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ITAT: TDS compliance on unrealized rent has no effect on its taxability

Vishwaroop Infotech Pvt. Ltd
2020-TIOL-1574-ITAT-MUM

The Assessee is a company engaged in the business of leasing the commercial properties to earn lease rentals and for capital appreciations and also maintaining properties.

During the FY under consideration, the tenant did not make any payment due to financial constraints. Ultimately, the tenant vacated the premises in November, 2011. However, the tenant paid the TDS on the rent payable to the Assessee. Considering the fact that rent was not received by the Assessee, the Assessee did not offer such rental income in the return of income.

The AO considered the same as taxable income and added it to the total income of the Assessee and initiated penalty proceeding u/s 271(1)(c) of the IT Act. Aggrieved by the order of the AO, the Assessee preferred an appeal before the Hon'ble CIT(A), who confirmed the order passed by the AO.

Aggrieved Assessee preferred an appeal to the Hon'ble ITAT. The Hon'ble ITAT held that (i) mere payment of TDS by the tenant would have no bearing on taxability of unrealized rent in the Assessee's hands; and (ii) requirement of Rule 4 were satisfied as the Assessee had decided to settle the disputed unpaid rent amicably with the tenant. Accordingly, the Hon'ble ITAT allowed the issue in favour of the Assessee.

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HC holds that hypothetical income cannot be subject to tax

Karnataka Power Transmission Corporation Ltd.
ITA. No. 196/2013

The Assessee is a Karnataka State Government undertaking, engaged in transmission of electricity. The Commissioner exercising the power u/s 263 set aside the assessment order citing it as erroneous and prejudicial to the interest of the revenue. He directed the AO to re-work the income in light of the directions given in its order.

In line of the above, the AO held that the Assessee was following mercantile system of accounting and made adjustment to the income to the extent of INR 52.89 crores on account of transmission charges / wheeling charges. The said charges were proposed to be recovered by the Assessee from different states for transmission of electricity. The same action was upheld by CIT(A).

On appeal before the Hon'ble ITAT, the adjustment was deleted. Aggrieved, Revenue filed an appeal before the Hon'ble HC.

The HC cited that the decision of the Hon'ble ITAT was based on the facts that there was a dispute regarding the wheeling charges amongst all the constituting states of the Southern Regional Electricity Board. The HC dismissed the appeal of Revenue and held that income was not subject to tax as income did not accrue to the Assessee as being hypothetical income in nature as opposed to real income.

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ITAT: 'Date of transaction' prevails over 'date of registration' for Sec. 56(2)(vii) (b) on land transfers

Rakhi Agrawal
2020-TIOL-1569-ITAT-JABALPUR

The Assessee purchased a piece of land for INR 50.92 lakhs on March 30, 2013. The valuation of the said property for stamp duty purposes was INR 2.81 crores. Accordingly, the addition was made to the extent of difference between guideline value and sale consideration of INR 2.30 crores under the head Income from other sources u/s 56(2)(vii)(b)(ii).

Against the assessment order the Assessee preferred an appeal before CIT(A), the CIT(A) allowed the Assessee's appeal and deleted entire adjustment on the ground that land transfer was brought under the ambit of Section 56(2)(vii) from April 01, 2013 i.e. AY 2014-15 and the date of transfer fell in AY 2013-14. The CIT(A) principally held that the date of transaction was to prevail over date of registration as appearing in documents qua land transfers.

Aggrieved, Revenue filed an appeal before the Hon'ble ITAT.

The Hon'ble ITAT analyzed the terms 'transfer' u/s 2(47)(vi) and 'receipt' u/s 56(2)(vii)(b)(ii) of the IT Act. Further the ITAT relied upon the decision of the Hon'ble SC in case of Podar Cements (P) Ltd. [226 ITR 625 (SC)] wherein the Apex Court had held that de facto transfer would lead to de facto ownership and that the Assessee would enjoy a better right to the property in comparison to the transferor who did not have the right to revoke the transaction executed by an agreement.

Accordingly, the ITAT held that the Assessee was not to be subjected to 'Income from Other Sources' under the provisions as enacted by the Finance Act 2013 keeping in view that date of transaction was to prevail over date of registration as appearing in documents qua land transfers.

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ITAT deletes TP adjustment and holds negotiation by AE to be "negotiation services" and rejected TPO's allegation of deemed international transaction

Gujarat Gas Trading Company Ltd
3397/Ahd/2014

The Assessee company was engaged in trading of natural gas. During its assessment, the AO alleged that purchase of gas from Laxmi Gas Field is a deemed international transaction u/s 92B(2) of the IT Act, as the price was negotiated by Assessee's AE in the UK viz., BG Energy Holding Ltd. ('BGEH'), with Cairn Energy Group, one of owners of Laxmi Gas Field.

The Assessee contended that the AE undertook only the negotiations on behalf of Assessee and it was not a party to the agreement. Further, the Assessee duly paid consideration to its AE for services of negotiation. As such negotiation by the AE was an independent transaction from purchase of gas by the Assessee. Therefore in absence of any contractual involvement of the AE, application of Section 92B(2) was not justified.

The Assessee also relied upon its agreement with Laxmi Gas Field, which formed the only contractual instrument for purchase of gas and also submitted that its AE could not have obligated Laxmi Gas Field by merely negotiating with one of its owners viz. Cairn Group, as Laxmi Gas Field was owned by multiple owners and consensus of all of them was necessary. Thus, involvement of Cairn Group in negotiations per se did not form part of contractual arrangement between the Assessee and Laxmi Gas Field, and on this count as well the provision of Section 92B(2) were to be considered inapplicable.

The Hon'ble ITAT agreeing with the Assessee submissions and dismissing Revenue's appeal held that:

(i) the Assessee has paid USD 3.9414 per Giga Joule including 1% commission to its AE which is lesser than the average price of natural gas in the international market of USD 3.9975 per Giga Joule;

(ii) BGEH had no agreement with Cairn for the purchase of gas from Laxmi field and has provided only negotiation services; and

(iii) The Assessee has purchased the gas from Cairn and other operators from Laxmi field viz. ONGC, World Tata Petrodyne Ltd on the same price therefore it cannot be said that Assessee has not made transaction according to Arms-length principles.

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ITAT rejects TPO's CUP which referred to local non-AE sales for benchmarking exports to AE

Dow Chemicals Internationals Pvt. Ltd.
2020-TII-398-ITAT-MUM-TP

Dow Chemical International Pvt. Ltd. ('the Assessee') applied TNMM to determine the ALP for export of finished goods. During the transfer pricing assessment, TPO rejected TNMM and applied CUP by referring to Assessee's sales to non-AEs in India. The TPO disregarded Assessee's submission which supported applicability of TNMM owing to geographical, quantitative and chronological differences with comparable price.

The matter travelled to the Hon'ble ITAT which noted strict

comparability requirements under CUP and appreciated the fact that pricing of a product varies on the basis of factors such as geographical locations and volume and time of transactions. Accordingly, the Hon'ble ITAT held that *"the price of the products sold in domestic market cannot be compared with the price of the product sold in foreign country due to various factors… If suitable comparable uncontrolled transaction is unavailable, CUP method cannot be applied"*.

Authors' Note:

It is high time for Income tax authorities to accept the fact that conditions specified in Rule 10B(2) for analysing the comparability of an international transaction / a specified domestic transaction are also important. Moreover, it is a well settled principle that CUP Method cannot be accepted as MAM in light of differences on account of geographies, volumes and timing.

Recently, the Hon'ble Gujarat HC in case of Gulbrandsen Chemicals Pvt. Ltd. (ITA 751, 752 and 753 of 2019), has also dismissed the revenue's appeal on a similar issue and held that issue did not contain any question of law and the fact that ITAT had duly considered the voluminous documentary evidence on record for the purpose of selection of MAM.

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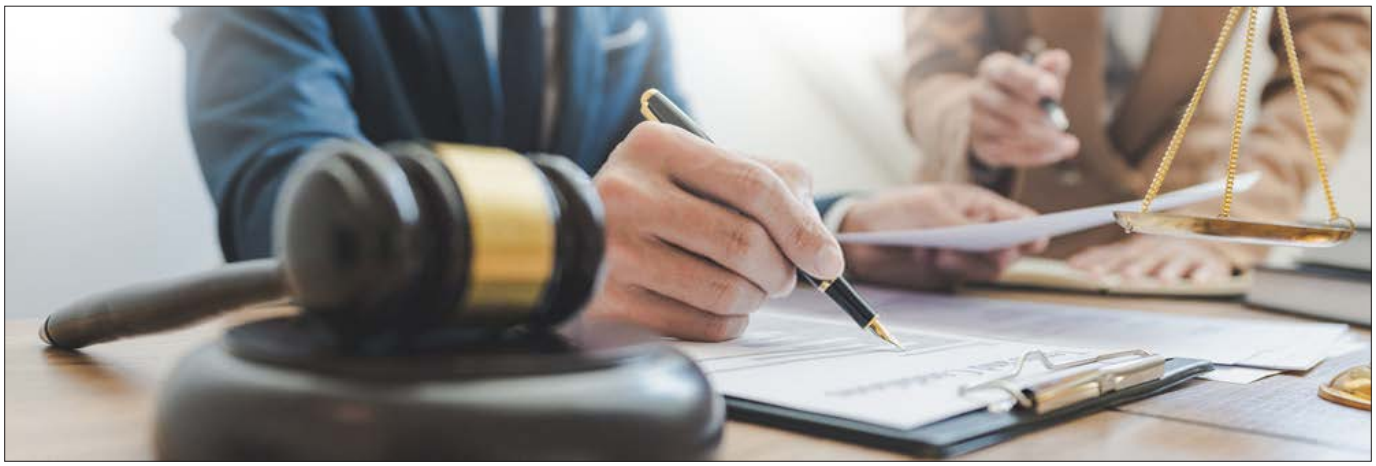

CBDT condones delay in filing of audit report for Section 10(23C) entities

Circular No. 19/2020
November 3, 2020

The CBDT has issued Circular 19 dated November 03, 2020 in relation to condonation of delay in filing of audit report in Form No. 10BB which is applicable to entities claiming exemption under Section 10(23C) of the IT Act.

Condonation of delay relates to filing of the audit report for AY 2016-17 and AY 2017-18. The Circular directs all Commissioner of Income Tax ('CIT') to dispose of all applications in relation to AY 2016-17 and AY 2017-18 for condonation of delay in filing of Form No. 10BB by March 31, 2021.

The circular also empowers CITs to condone delay of up to 365 days for AYs 2018-19 and subsequent AYs.

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CBDT to validate UDIN generated from ICAI portal at the time of upload of Tax Audit Reports

Press Release
November 24, 2020

The MoF has issued a press release to announce integration of Income-tax e-filing portal with the ICAI portal for verification of Unique Document Identification Number (UDIN) relating to tax audit reports. The verification process is intended to curb, fake certifications', states the press release, which is enclosed for your quick reference.

Previously, Income-tax e-filing portal had already mandated quoting of UDIN with effect from April 27, 2020 for documents certified/attested as compliance under the IT Act by a Chartered Accountant.

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Haryana AAR holds that ITC is admissible on motor vehicles leased to Customers

Dream Road Technologies Private Limited
Advance Ruling No. HR/HAAR/2020-21/4 dated 21 August 2020

The Applicant, engaged in the business of providing motor vehicles on operating lease to its customers, purchased the motor vehicles for the purpose of leasing and did not claim depreciation on the GST paid on purchase of such vehicles. In respect thereto, the Applicant sought a ruling before the Haryana AAR to ascertain whether ITC would be admissible under GST in terms of Section 16 and 17(5) of the CGST Act.

The Haryana AAR observed that as per Section 17(5), ITC is not available in respect of motor vehicles for transportation of persons having sitting capacity for not more than 13 persons (including driver) inter alia except when they are used for making further supply of such motor vehicles.

It was further observed that the said exception redirects to the definition of outward supply u/s 2(83) of the CGST Act, which inter alia includes lease and hence further supply of such motor vehicle shall also include leasing of such motor vehicle.

Basis the above observations, the Haryana AAR held that the activity carried on by the Applicant in respect to supply of tax paid motor vehicles on lease rent plus GST as applicable, make it eligible for availment of ITC for the tax paid, subject to fulfilling all the conditions laid down under the CGST Act as applicable.

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Telangana HC holds detention of goods and vehicles for small document defect as arbitrary

Shree Ram Steel
Writ Petition No.4873 of 2020

The Petitioner had purchased certain goods from a vendor, who had duly generated an invoice and e-way bill for the supply of goods to the Petitioner' premises in Andhra Pradesh. After the goods were loaded in the transporter's vehicle, but before the same were received by the Petitioner, a customer of the Petitioner, based in Telangana, placed an order for the said goods.

Accordingly, the Petitioner instructed the transporter to directly send the goods to the final customer in Telangana stating that invoice and e-way bill generated by the Petitioner were also being sent. During the transit of the goods to the final customer, before receiving the new invoice and e-way bill, the Respondent inspected and detained the goods and the vehicle on the ground of wrong destination mentioned on the documents. Upon being pressurized by the Transporter to get the goods released, the Petitioner paid the tax and penalty under protest.

The HC noted that Respondent had not communicated any order to the Petitioner and therefore, rejected the Respondent's contention that Petitioner should avail the remedy of appeal u/s. 107 of the CGST Act. Further, the HC referred to the judgement of the Gujarat HC in the case of Synergy Fertichem Private Limited vs. State of Gujarat [2019-TIOL-2950-HC-AHM-GST], wherein it had been held that a holistic reading of the statutory provisions and the relevant Circular indicates that the Department does not paint all violations with the same brush and makes a distinction between serious and substantive violations and those that are minor / procedural in nature. It was

further observed that in a given case, the contravention may be quite trivial or may not be of such a magnitude which by itself would be sufficient to take the view that the contravention was not with the necessary intent to evade payment of tax.

Basis the above observations, the HC allowed the Appeal and held the action of the Respondent of collecting charges as arbitrary and violative of Art. 14 and 265 of the Constitution of India. The HC further directed the Respondents to refund the amount so collected with applicable interest.

Authors' Note

Sure enough, rules are made by the Legislature to carry out the objectives of the Principal Act and they should be complied with. However, a distinction should be made between a rule that is substantive and one that is procedural. It was further observed by the HC that the CGST Act is a very recent law and the common businessman is admittedly having difficulty to understand these enactments and the related procedures. It had been further observed that the interpretation of taxing statutes should be done in a way to facilitate business and inter-State trading, and not in a perverse manner which would result in impediment of the same by harassing business persons.

In this regard, it would be pertinent to note that the Courts have consistently held that procedural lapses which do not defeat the purpose of the enactment, should be condoned. In the case of Mangalore Chemical and Fertilizers Limited vs. The Dy. Commissioner **[2002-TIOL-234-SC-CX]**, the Apex Court had held that procedural lapses are to be condoned and it is a trite law now that substantive benefit cannot be denied for procedural lapses.

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Madras HC holds that interest on delayed payment of GST to be charged on net liability w.e.f. 01 July 2017

Maansarovar Motors Private Limited
2020-TIOL-1846-HC-MAD-GST

The Petitioners had belatedly filed the GST returns. The Respondents demanded interest on the entire amount of GST liability which was paid after the due date. Aggrieved, the Petitioner filed a Writ before the Madras HC challenging that the interest shall be payable only on the cash component of the tax liability which was paid after the due date.

The Madras HC referred to the 39th GST Council Meeting held on 14 March 2020, wherein it had been recommended that interest is payable on net cash tax liability with effect from 01 July 2017. In connection thereto, the Council had issued a press release wherein, it had been stated that the interest for delay in payment of GST would be charged only on net cash tax liability with effect from 01 July 2017.

The HC further observed that the entire controversy has been settled by the CBIC vide Circular in F. No. CBEC.20/01/08/2019 GST dated 18 September 2020 wherein it had been reiterated that the amendment by insertion of proviso of Section 50 of the CGST Act is intended to be retrospective. Accordingly, it was observed that the Centre, the State and the CBIC are in agreement that the operation of the proviso of Section 50 should only be retrospective and the interpretation to the contrary by the authorities constituted under the Board is clearly misplaced as is the consequential coercive recovery.

Basis the above observations, the Madras HC allowed the Writ Petition and held that the assessing officers are at liberty to raise fresh demands relating to interest on delayed remittances of tax by cash, in accordance with law.

Authors' Note

It would be pertinent to note that the CBIC vide Notification No. 63/2020 – Central Tax dated 25 August 2020 had amended Section 50 of the CGST Act to limit

payment of interest only on net cash liability. The CBIC had further clarified that no recoveries shall be made for past period. However, even then, it is being seen that the Revenue authorities have been demanding interest on the entire GST liabilities on belayed payments.

In this regard, it would be pertinent to note that the MoF has recently issued administrative instructions to all field formations vide GST Policy Wing Circular dated 18 September 2020 for recovery of interest on net cash liability w.e.f. 01 July 2017. NAA upholds profiteering allegation against Starbucks Coffee. Directs deposit of profiteered amount along with applicable interest.

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NAA upholds profiteering allegation against Starbucks Coffee. Directs deposit of profiteered amount along with applicable interest

Starbucks Coffee
2020-TIOL-66-NAA-GST

The Applicant had alleged that the Respondent had not passed on the benefit of reduction in the GST rate on restaurant service when it was reduced from 18% to 5% without benefit of ITC by increasing the base price of the food items sold. The NAA observed that the base price increase was more than percentage increase required to adjust loss of ITC. The NAA further nullified the claim of the Respondent that it had been a consistent business practice to increase the prices in the months of April and October, by observing that records of the pricing practices did not depict the same.

In response to the argument put forth by the Respondent that the investigation should have been restricted to the product in respect of which complaint was made, it had been observed by the NAA that no fetters have been placed either in the CGST Act or Rule 129 of the CGST Rules which provides that DGAP shall restrict his investigation to the complained goods or services. The NAA further observed that under the pretext of the right to complete freedom to fix their prices and profit margin, the Respondent cannot trample upon the right of buyers to get the benefit of tax reduction.

It was further observed by the NAA that the Respondent had not only collected excess base prices but also compelled customers to pay additional GST which defeats the purpose of Government to provide the benefit of tax rate reduction.

Basis the above observations, the NAA confirmed the profiteering allegation against the Respondent and directed them to reduce their prices and to deposit the profiteered amount along with interest @18%.

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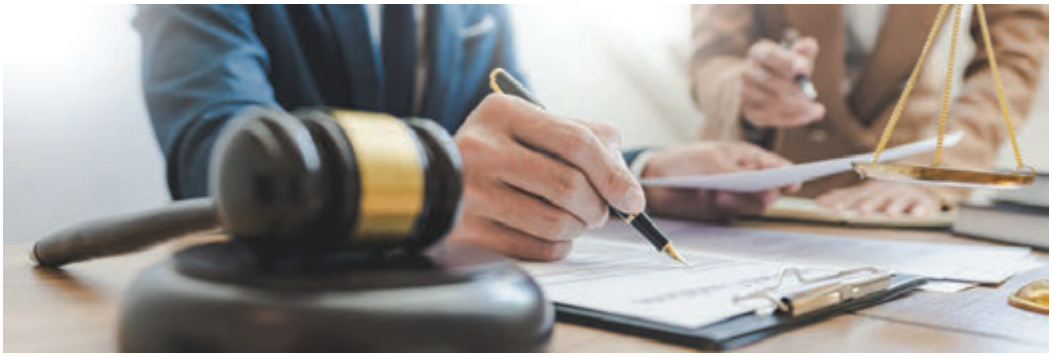

NAA confirms profiteering amount against PGHP while maintaining that Anti Profiteering provisions are here to remain

Procter and Gamble Home Products Private Limited
2020-TIOL-76-NAA-GST

The DGAP had reported that the Respondent had not passed on the benefit reduction in GST rate to the Recipients by way of commensurate reduction in the prices of the products sold by them. It had been further reported that the base prices of the products sold by the Respondent had been increased after the tax rate reduction and therefore the Respondent had contravened the provisions of Section 171 of the CGST Act.

The NAA observed the reduction of GST rate from 28% to 18% w.e.f. 15 November 2017 and held that the Respondent cannot increase prices on intervening night of 14/15 from which rate reduction was notified which comes out to be same amount by which the rate of tax was reduced. The NAA further rejected the Respondent's contention that the sales and profitability was severely impacted due to COVID-19 pandemic, as there was no impact of COVID during disputed period i.e. 15 November 2017 to 30 September 2018.

It was further observed by the NAA that the comparison of average base price for pre and post GST period would be against the provision of Section 171 as well as Article 14 of the Constitution. It had been further observed that Respondent cannot expect their distributors and retailers to pass on the benefit down the supply chain to ultimate consumer when they themselves have not received the tax reduction benefit.

Basis the above observations, the NAA confirmed the profiteered amount against the Respondent while commenting that anti-profiteering provisions are bound to remain on the statute book till the registered persons cultivate the habit of voluntarily passing on benefits as a matter of routine and hence the same are not transitory in nature.

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HC holds that GST Department cannot resort to physical violence for tax evasion

Agarwal Foundries Private Ltd.
2020-TIOL-1898-HC-TELANGANA-GST

The Officials attached to the Directorate General of GST Intelligence had conducted simultaneous raids on the business units and the residence of the Petitioner without any prior intimation. The Petitioners contended that during the questioning by Respondents, they had been abused in filthy language for not giving satisfactory replies and were also repeatedly assaulted in physical manner. The employees of the Petitioner lodged police complaint for such an assault, in response to which few police officials arrived at the premises but refused to take any action against such officials.

The Telangana HC directed that the officials shall not use any acts of violence or torture against the Petitioner or its employees even though they have allegedly evaded tax under the Act. The Official responsible for violence shall not participate in such enquiry and the investigation shall be transferred to another official. Any interrogation of Petitioner shall be between 10:30 am to 05:00 pm on weekdays in the presence of an Advocate who shall not be in hearing range. The Government officials shall adhere to the provisions of the CGST Act, in conducting search, investigation or enquiry in relation to the alleged tax evasion by the Petitioners.

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Madras HC allows rectification of GSTR-1 after the due date in absence of an enabling provision

Sun Dye Chem
2020-TIOL-1858-HC-MAD-GST

The Petitioner had committed an inadvertent error in reporting the credit in Form GSTR-1 in regard to the outward supplies and Intra-state sales had been erroneously reported as inter-state sales, as a result the CGST and SGST credit was reflected in the IGST column. The Petitioner had requested for amendment of GSTR-1, which had been rejected by the Respondents in August 2019 on the ground that there was no provision to grant the amendment sought. Aggrieved, the Petitioner filed a Writ before the Madras HC seeking a mandamus directing the Respondents to permit correction in Form GSTR-1 for the relevant period.

The Madras HC observed that a registered person who files a return involving intra-State outward supply is to indicate the collection of taxes in Form GSTR-1 and the details of tax payment therein are auto populated in Form GSTR -2-A of the buyers. Any mismatch between Form GSTR-1 and Form GSTR-2A is to be notified by the recipient by way of a tabulation in Form GSTR-1A.

The HC further observed that, had the requisite Form GSTR-1A and Form GSTR-2A been notified, the mismatch between the details of credit in the Petitioner's and the supplier's returns might well have been noticed and appropriate and timely action taken. The HC further remarked that in the absence of an enabling mechanism, assessees should not be prejudiced from availing credit that they are otherwise legitimately entitled to. Accordingly, the HC allowed the Writ petition and allowed to re-submit the annexures to Form GSTR-3B with the correct distribution of IGST, CGST and SGST.

Authors' Note:

The Madras HC has passed a well-reasoned order keeping in mind the natural justice and the intent of the law. In this regard, it would be pertinent to note that Kerala HC in the case of Saji S. [2018-TIOL-2902-HC-KERALA-GST] had permitted the request of transfer of tax liability from the head 'SGST' to 'IGST' as it would be inequitable for the Petitioners therein to suffer on the account that the transfer would take some time.

Similarly, the Andhra Pradesh HC in the case of Panduranga Stone Crushers **[2019-TIOL-1975-HC-AP-GST]** had provided an interim relief and allowed the rectification of a clerical error subject to the final outcome of the Writ Petition.

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Delhi HC sets aside orders denying refund of ITC for postal exports by retrospective application of notification

Medical Bureau
2020-TIOL-2014-HC-DEL-GST

The Petitioner had challenged the order of the Appellate Authority denying refund of ITC due to them on exports which were regarded as zero-rated supplies u/s. 16 of the IGST Act, and the Petitioner was entitled to refund of ITC u/s. 54(3) of the CGST Act.

The Respondents had rejected the refund on sole ground that any exports through the Foreign Post Office would be eligible for zero-rated exports and the refund of such duty could be claimed only vide Notification No. 48/2018 – Customs (N.T.) dated 04 June 2018 read with Circular No. 14/2018 – Customs dated 04 June 2018 and that the

Petitioner's refund claim pertains to August 2017 and September 2017 i.e. prior to the date of Notification.

The Delhi HC observed that Circular No. 14/2018 was neither clarificatory nor it determined the eligibility of allowing ITC on exports. It was further observed that in any event, new procedure cannot be made applicable from a retrospective date. The HC further noted that refunds shall be examined with reference to their compliance with the extant provisions, including law and procedures relating to GST and Customs. Basis the above observations, the HC set aside the orders passed by the Respondent and remanded the matter back to the original Adjudicating Authority.

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Right to appeal is a substantive right and cannot be curtailed basis availability of alternate remedy under sub-ordinate legislation

Poonam Courier Pvt. Ltd.
2020-TIOL-2112-HC-MUM-CUS

The CBIC has been conferred the power to make regulations regarding goods imported or to be exported by post or courier under section 84 of the Customs Act. The regulations notified by the board at its regulation No. 14(1) empowers the Principal Commissioner of Customs or Commissioner of Customs to revoke the registration of an authorized courier and also order for forfeiture of security; Regulation 14(2) provides for an opportunity to the aggrieved courier or an authorised officer of customs to represent before the Principal Chief Commissioner of Customs or Chief Commissioner of Customs if aggrieved by an order passed under Regulation 14(1). Thus, the remedy provided under Regulation 14(2) is by way of a representation to the higher authority.

When an appeal was filed by the assesses without resorting representation before Principal Chief Commissioner, the revenue authority challenged the maintainability of appeal itself, based on availability of alternate remedy in the form of representation.

The Bombay High Court noted that remedy of appeal to the CESTAT is provided under section 129A of the Customs Act i.e., by the parent enactment. This right of appeal is a substantive right of an aggrieved person. It is not a matter of procedure but is a vested right conferred by the statute. Being a statutory right, it can only be circumscribed by the conditions of the statute granting it. On the other hand, an additional remedy of making representation to the higher authority is provided under Regulation 14(2) of the Regulations, which were also noted to be merely a subordinate legislation and incapable to supplant or curtail the remedy of appeal granted by the empowering statute. The revenue's appeal was thus dismissed.

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Levy of IGST on import of goods is not in the form of Basic Customs duty, it only borrows the valuation under the Customs provisions while it continues to be a levy under IGST Act

Interglobe Aviation Limited
2020-TIOL-1587-CESTAT-DEL

The Petitioner re-imported parts of aircraft sent for repair and maintenance and the present dispute relates to applicability of exemption from IGST on such re-imports. The exemption Notification under dispute provided that only basic Customs duty be paid on the cost of repairs, and accordingly, the Appellant availed exemption from other duties including levy of IGST.

However, The Customs Authorities, did not agree on this issue with the Appellant, as according to them the Appellant was not entitled to full exemption from integrated tax since the phrase duty of customs, includes both the basic customs duty as also integrated tax.

This view was formed based on levy under Section 12(1) of the Customs Act at the rate as specified under the Customs Tariff Act, 1975 or any other law. The term 'any other law' was interpreted by the authorities to also include Integrated Goods and Service Tax, 2017 so as to treat IGST applicable on import of goods as a 'Basic Customs Duty'.

Such an interpretation meant that appellant had to pay IGST in addition to basic customs duty on re-import of parts.

The tribunal however pointed that integrated tax is levied under section 5 of the Integrated Tax Act, but it is collected in accordance with the provisions of section 3 of the Tariff Act on the value as determined under the Tariff Act. It is for this reason the Tribunal held that IGST cannot be equated with basic customs duty and is thus exempted as per the Notification.

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Transaction value to be preferred over value of similar goods in contemporaneous imports

M/s. Powercon Electricals
2020-TIOL-1591-CESTAT-BANG

Importer discharged its Customs duty liability on goods imported through courier based on price declared on the invoice. Admittedly, such price was undervalued and actual transaction value was agreed over e-mail communication which was retrieved during investigation. Authenticity of the said e-mail communication was not challenged, as a matter of fact the same was corroborated by orally by the importers themselves. Accordingly, differential duty, interest and penalty was levied.

The importer, sought for the value of similar goods as per contemporaneous import so as to reduce the duty liability. However, the Tribunal observed availability of transaction value which is also corroborated by the importers themselves, which is a valid assessable value. In these circumstances reference to value of similar goods as per contemporaneous imports is not warranted.

While hearing the parties on imposition of penalty, Tribunal also set aside the personal penalty on one of the employees of the importer firm, basis that she acted only on the directions of her employer and that she did not make any pecuniary gains herself.

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Interest on delayed refund to be computed from the date of Refund Application

Andhra Organics Limited
2020-TIOL-1645-CESTAT-HYD

Section 27A of the Customs Act provide for payment of interest on delayed refund. The provision is clear to specify the date of refund application as the date for calculation of interest. However, the commissioner preferred to refer to the date of receipt of Final Order of the Tribunal for computation of Interest.

The issue was agitated again before the Tribunal where it was held that interest must be computed from the date of refund application.

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Madras HC upholds Service tax demand on supply of software

K7 Computing Private Limited
2020-TIOL-1859-HC-MAD-ST

The Petitioner had been supplying anti-virus software services to its clients. The Respondent had raised a tax demand along with interest and penalty on the supply of software services for the period July 2012 to March 2013, by classifying the same as 'Information Technology Software Services' under the Finance Act.

Aggrieved, the Petitioner filed a Writ Petition against Service Tax demand order before the Madras HC. It had been argued by the Petitioner that they had discharged VAT on the sale of the Software, since it is deemed to be a 'sale of goods' and has been duly assessed by the authorities under the Tamil Nadu Value Added Tax Act and therefore, the Department's claim that the same is amenable to service tax is not sustainable.

Referring to the judgement of the Division Bench of Madras HC in the case of ISODA vs. Union of India [2010-TIOL-620-HC-MAD-ST], the HC observed that Anti-Virus software is a representation of instructions recorded in a machine readable form that provides interactivity to the End User through a computer that has working internet connectivity and therefore, Anti-Virus Software squarely falls within the definition of 'Information Technology Software'.

It was further observed by the HC that though the software are goods, when the goods as such are not transferred but the transaction of right to use as transferred to the end-user, it would only be a 'service' and not a 'sale'. Accordingly, applying the rationale of the Division Bench in ISODA (supra), the HC concluded that Anti-Virus Software' in CD forms squarely falls within the essential features of the definition of the 'Information Technology Software. Basis the above observations, the Madras HC upheld the Respondent's demand of Service Tax along with interest and penalty.

Authors' Note:

Right from the turn of the decade, the question as to whether 'software' can be termed as 'goods' or 'services' has consistently remained a hot topic. In this regard, a breakthrough came with the judgement of the SC in the case of TCS vs. State of A.P. **[2004-TIOL-87-SC-CT-LB]** wherein it had been held that software, which is incorporated on a media, would be goods and therefore, liable to sales tax.

However, subsequent to the SC judgement, it had been seen that different authorities had been taking different views. The Karnataka HC in the case of Sasken Communications Technologies Limited **[2011-TIOL-707-HC-KAR-ST]** had held that the contract for development of software in question is not works contract but a contract for service and is liable to service tax and not VAT.

It would be pertinent to note that conflicting tax treatments of similar transaction by different tax authorities definitely creates hurdles for the businesses. Accordingly, it is likely that legacy cases in relation to tax demands for software would continue until the matter is settled by the Hon'ble Supreme Court.

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MP HC: Revenue under obligation to extend exemption benefit in letter and spirit

SRF Limited vs. State of Madhya Pradesh
W.P. No. 9628/2020

The Petitioner had been exempted from payment of entry tax on account of the certificate granted under the Madhya Pradesh Udyog Nivesh Samvardhan Sahayta Yojna, 2004 and 2010. In terms of the Yojna, the Companies were entitled for 100% exemption in respect of payment of entry tax. The certificate was granted to the Petitioner in February 2017 with retrospective effect, and therefore, all entry tax assessment orders for the period 2004 to 2013 and subsequent assessment orders also up to 2015 became null and void as the exemption was granted for a period of 9 years that too with retrospective effect. However, the Respondent granted exemption only in respect of 5 assessment years, as the re-assessment for four years was not done.

The Respondents argued that that the statute does not provide for grant of exemption as the matter had become time barred. In respect thereto, the MP HC observed that the exemption certificate itself was granted only in the year 2017 and the cause of action arose for the first time in the year 2017 for grant of exemption as exemption certificate was granted with retrospective effect. Thus, there was a sufficient and reasonable cause in respect of condonation of the delay.

In the light of sufficient cause for condonation of delay, it was further observed by the HC that the stand taken by the Department in respect of the limitation has no meaning. It was held by the HC that as the exemption had been granted with retrospective effect, the Respondent Department was certainly under an obligation to abide by the exemption certificates and to provide exemption in letter and spirit of the eligibility certificate.

Basis the said observations, the HC allowed the Writ Petition and directed the Respondents to confer all benefits to the Petitioner in terms of the Entry Tax Exemption Certificate.

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Tribunal cannot review decisions under the guise of Rectification of Mistake

Shreyas Intermediates Limited
2020-TIOL-1500-CESTAT-MUM

The Appellant had filed an application for Rectification of Mistake in Tribunal's order citing certain contradictions. The Appellant argued that the Tribunal had not considered the decision of Sparkon Engineering vs. CCE [2017-TIOL-3587-CESTAT-MUM] while passing the final order in the instant case. The relevant decision was filed by the Applicant after one month of filing the written submission but before the final order was passed.

The CESTAT dismissed the Rectification Application by observing that no contrary view had been taken while passing the order in the instant case and referring the said order in the impugned order herein would not have made any difference while arriving at the conclusion.

It was further observed that for rectification of mistake

application, there has to be a mistake apparent on the face of record, which the Applicant failed to point out from the impugned order and the grounds raised by the Applicant were not sufficient for any kind of rectification. Accordingly, the application had been dismissed by the Tribunal.

Authors' Note:

Over the years of immense judicial development, it has been often observed that the Revenue resorts to tactics of changing orders or raising demands in the face of 'rectification' or 'corrigendum'. Such practices defeat the very purpose of the Appellate authorities.

In this regard, it would be pertinent to note that the Bombay HC in the case of Philips Electronics India Limited [2009 (16) S.T.R. 523] had held that Appellate Tribunal cannot change order from remand to dismissal of appeal through order on rectification of mistake. The Mumbai Tribunal in the instant case has rightly dismissed the application made under the guise of 'Rectification of Mistake'

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Delhi HC allows rectification of error made in application under SVLDRS

Bhawna Malhotra
2020-TIOL-1855-HC-DEL-ST

The Petitioner had inadvertently filed an SVLDRS application under the category of 'voluntary disclosure' instead of 'litigation'. Subsequently, the Petitioner had filed a rectification application, which had been rejected by the Respondent. Aggrieved, the Petitioner filed a Writ before the Delhi HC seeking a direction for allowance of rectifying the error.

Outlining the scope of Section 128 of the SVLDRS, the HC observed that it is apparent that the designated committee can modify the order in order to correct the error which is visible on the face of the record. An error / mistake apparent on the face of record means a patent, manifest and self-evident error which does not require elaborate discussion of evidence or argument to establish it.

Basis the above observations, the Delhi HC set aside the rectification rejection order and directed the Respondent to rectify the declaration.

Authors' Note:

In the case of Seventh Plane Networks Limited vs. Union of India and Ors. **[2020-TIOL-1369-HC-DEL-ST]**, it had been observed that narrow approach of the authority would defeat the very intent and purpose of SVLDRS.

Similarly in the judgement of the Guwahati HC in the case of Urban Systems vs. Union of India **[2020-TIOL-1494-HC-GUW-ST]**, the HC observed that the issue in the instant case no longer stood res integra in light of the said judgement wherein rectification under SVLDRS had been allowed.

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Determination of 'tax dues' for the purpose of SVLDRS

Jyoti Plastic Works Pvt. Ltd.
2020-TIOL-1874-HC-MUM-CX

As the issue revolves around some key facts, these are summarised below in brief:

- Petitioner was served SCN for duty demand (INR 94,90,264/-);
- Demand was confirmed in Principal, without quantification;
- Petitioner preferred Appeal before CESTAT, where matter was remanded back for quantification and adjudication on merit;
- Commissioner undertook adjudication limited for quantification purpose, which resulted in substantial reduction in duty as demanded in SCN (INR 18,93,585/-), however it refrained from addressing issues on merits. This Order stands accepted by revenue and no appeal was preferred by it;
- Petitioner challenged the reduced duty affirmed by Commissioner on merits, and Tribunal remanded the matter again for deciding the matter on merits; and
- While remanding, tribunal set aside the Adjudication Order affirming the reduced duty demand so as to make way for a fresh Order.

When the scheme was introduced the adjudication was pending as on 30.06.2019 which is the cut-off date. In this backdrop, the revenue adopted a view that since the appellate authority had set-aside the order in original, the said order was not in existence as on 30.06.2019; what was in existence was the show cause notice itself. Therefore, the demand raised in the show cause-cum-demand notice would be the tax dues in the case of the petitioners.

The Hon'ble Bombay High Court have rejected the revenue's contention based on following observations:

- Situation before us is quite unique. Stricto sensu, it is not aptly covered by Section 123 which defines 'tax dues';
- Focus of the scheme is to unload this baggage of the pre-GST regime and allow business to move ahead. Therefore, a liberal interpretation has to be given to the scheme;
- Had the petitioner accepted the Order quantifying the demand, then the amount as reduced by the said Order would have been the 'tax dues';
- If the petitioners had not filed declarations under the scheme, they would still have been better off with the total demand adjudicated by Commissioner;
- Initial SCN cannot be said to be in existence after the order in original was passed and reduced duty demand was accepted by the revenue. Upon such acceptance the duty demand stands modified; and
- Petitioners cannot be put in a worse off condition or the situation faced by them cannot be aggravated because they had availed the remedy of appeal or had sought relief under the scheme which is a beneficial one.

These amounts would now be the tax dues of the petitioners and this position would not change because of the subsequent order of the CESTAT.

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CESTAT allows refund of credit which had not been disputed during availment

Wipro Technologies
2020-TIOL-1418-CESTAT-BANG

The Appellant had filed various refund applications u/r. 5 of the CENVAT Credit Rules, which came to be rejected by the Respondent on various grounds. The Respondent had rejected the refund applications inter alia on the ground that Information Technology Software Services (ITSS) were not taxable for the relevant period and when the said service became taxable, the service provider was un-registered. Aggrieved, the Appellant preferred an Appeal before the Bangalore CESTAT.

The CESTAT observed that the retrospective changes made in the Notification no. 05/2006 dated 14 March 2006 in respect to input services, were to broaden the scope of admissibility of input services for providing output services. Further, relying upon the decision of Karnataka HC's in mPortal India Wireless Solutions Private Limited [2017-TIOL-4340-CESTAT-BANG] where it has been held that CENVAT Credit on input services, for export of output services/exempted services would be available as refund. It was further noted by the CESTAT that most of the services utilized by the Appellant were held to be input services for providing output services in the field Information Technology Services and since the Department did not dispute the availment of credit in the first instance, it was not valid to deny the same when refund was filed. Accordingly, the CESTAT allowed the Appeal of the Appellant.

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Notification/Circular	Key Updates
Notification No. 82/2020 – Central Tax dated 10 November 2020	**Notifies GSTR-3B due dates for taxpayers in specified states** ▸ The CBIC has notified the 13th CGST Amendment Rules effective from the date of notification; ▸ Due date for furnishing GSTR-3B has been prescribed to 20th of the following month of the relevant tax periods; ▸ Staggered due dates for furnishing GSTR-3B for taxpayers in specified states have been prescribed as 22nd and 24th days of the month following the relevant tax periods; ▸ The Due date for furnishing quarterly returns has been extended to 13th of the month succeeding such tax period; ▸ The details of outward supplies furnished by the supplier in GSTR-1 or using the Invoice Furnishing Facility ('IFF') are to be made available electronically to the recipients in Part A of GSTR-2A, in GSTR-4A and in GSTR-6A through the common portal; ▸ GSTR-2B has been notified which will generate auto-drafted details of ITC on monthly basis; ▸ Taxpayers filing return under GST would be required to deposit their tax dues in GST PMT-06 by the 25th day of the month succeeding the relevant month.
Notification No. 83/2020 – Central Tax dated 10 November 2020	**Notifies the extended due date for filing Form GSTR-1 w.e.f. 01 January 2021** ▸ The time-limit for furnishing the details of outward supplies in GSTR-1 for each of the tax periods w.e.f. 01 January 2021 has been extended till the 11th of month succeeding each tax period; ▸ The due date for furnishing GSTR-1 has been further extended to 13th of the month succeeding such tax period for taxpayers required to file quarterly returns
Notification No. 84/2020 – Central Tax dated 10 November 2020	**Option to opt for QRMP Scheme** ▸ Registered persons having aggregate turnover up to Rs. 5 Crore in the preceding F.Y., shall have an option to opt for QRMP Scheme from January 2021 onwards and pay tax due on monthly basis; ▸ Once the option has been exercised, the taxpayers shall continue to furnish the return as per selected method for future tax periods unless they revise the option.
Notification No. 85/2020 – Central Tax dated 10 November 2020	**Notifies Special Procedure for tax payment opting for quarterly basis return filing** ▸ Taxpayers who have furnished return for complete tax period and who have opted to furnish return on a quarterly basis shall be eligible for payment of tax by making a deposit under electronic cash ledger equivalent to: ▸ 35% of the tax liability paid by debiting the electronic cash ledger in the return for the preceding quarter where the return is furnished quarterly;

Notification/Circular	Key Updates
	▸ the tax liability paid by debiting the electronic cash ledger in the return for the last month of the immediately preceding quarter where the return is furnished monthly Provided that no such amount may be required to be deposited ▸ Balance in electronic cash ledger or credit ledger is adequate for tax liability for said month or where there is a nil tax liability, for the first month of the quarter ▸ Balance in electronic cash and credit ledger is adequate for cumulative tax liability for first two months of the quarter or where tax liability is nil for second month of the quarter.
Notification No. 86/2020 – Central Tax dated 10 November 2020	**Rescinds older GSTR-3B due dates** Rescinded Notification No. 76/2020 – Central Tax dated 15 October 2020 which prescribed various GSTR – 3B due dates.
Notification No. 87/2020 – Central Tax dated 10 November 2020	**Notifies extension in time-limit for filing Form GST ITC-04** ▸ Time-limit for filing of GST ITC-04, during the period from July 2020 to September 2020 has been extended till 30 November 2020; ▸ Such extension in time-limit shall be deemed to have come into force w.e.f. 25 October 2020.
Notification No. 88/2020 – Central Tax dated 10 November 2020	**Implements E-invoicing for taxpayers having turnover exceeding Rs. 100 Crores** The requirement for issuance of e-invoice w.e.f. 01 January 2021 has been made applicable to persons whose turnover in any preceding financial year from 2017-18 onwards exceeds Rs. 100 crores in respect of supply of goods or services or both or exports.
Notification No. 89/2020 – Central Tax dated 29 November 2020	**Penalty Waiver for non-compliance of QR Code provisions** Waiver of penalty for non-compliance of provisions of dynamic QR code in B2C invoices between the period 01 December 2020 to 31 March 2021 subject to the condition that such person complies with provisions of dynamic QR code in B2C invoices w.e.f. 01 April 2021
Circular No. 143/13/2020 – GST dated 10 November 2020	**Clarifications in respect of QRMP Scheme** The Quarterly Return Monthly Payment Scheme allows for quarterly return filing along with monthly payment of taxes for taxpayers having aggregate turnover up to 5 crores in preceding FY w.e.f. January 2021. The facility to avail scheme on the common portal would be available throughout the year. The taxpayer must have furnished last return as due on date of exercising such option. The relevant taxpayer who files GSTR-3B return for October 2020 on or before 30 November 2020 will by default be migrated to the scheme.

	Key Updates
	Under the QRMP scheme, the taxpayers will have to furnish details of outward supplies in GSTR-1 (not exceeding Rs. 50 lacs each month) for 1st and 2nd month of a quarter by 13th day of the succeeding month so as to allow such details to be duly reflected in Form GSTR-2A and GSTR-2B of the recipient. The tax due in each of the first 2 months of the quarter shall be deposited vide GST PMT-06 by 25th day of succeeding month. In order to facilitate ascertainment of ITC available, an auto-drafted ITC statement has been made available in GSTR-2B. Any amount left after filing of that quarter's GSTR-3B may either be claimed as refund or may be used in subsequent quarters.

FROM THE LEGISLATURE
CUSTOMS & TRADE LAWS

Notifications	Key Updates
Notification No. 34/2020-Customs (ADD) dated November 09, 2020	The Department of Revenue has amended Notification No. 54/2015-Customs (ADD) dated November 18, 2015, to extend imposition of Anti-Dumping Duty on Carbon black used in rubber applications when imported from China till December 31, 2020.
Notification No. 35/2020-Customs (ADD) dated November 09, 2020	The Department of Revenue has imposed Anti-Dumping Duty on the imports of "Woven Fabric (having more than 50% Flax content)" commonly known as "Flax Fabric" (HSN 5309) from China, Hongkong, etc. for a period of five years form the date of publication of this Notification.
Notification No. 36/2020-Customs (ADD) dated November 11, 2020	The Department of Revenue has revoked the Anti-Dumping duty on the imports of "Acrylic Fibre" falling under Chapter 55 originating and exported from Thailand.
Notification No. 37/2020-Customs (ADD) dated November 11, 2020	The Department of Revenue has imposed Anti-Dumping Duty on imports of clear float glass of nominal thickness ranging from 4mm to 12 mm (both inclusive), the nominal thickness being as per BIS 14900:2000 originating and exporting from Malaysia for a period of five years from the date of publication of this notification.
Notification No. 38/2020-Customs (ADD) dated November 19, 2020	The extension has been provided on the of imposition of Anti-Dumping duty on imports of "Phthalic Anhydride" originating in or exported from Japan and Russia till January 31, 2020.
Notification No. 39/2020-Customs (ADD) dated November 26, 2020	The Department of Revenue has extended imposition of Anti-Dumping duty on imports of all fully drawn or fully oriented yarn/spin draw yarn/flat yarn of polyester falling under Chapter 54 originating in or exported from China and Thailand till December 31, 2020

Circulars/Instructions	Key Updates
Circular No. 49/2020-Customs dated November 3, 2020	**RoSL rebate to be granted by DGFT in the form of electronic duty credit scrips** Rebate for RoSL is to be granted by DGFT in the form of electronic duty credit scrips. These scrips would be granted on lines of the scrips granted under the current RoSCTL scheme. They can be used for the payment of Customs and Central Excise duties and will be freely transferable.
Circular No. 50/2020-Customs dated November 5, 2020	**New Zones prescribed for the setting up of Inland Container Depots (ICDs), Container Freight Stations (CFSs)** New zones have been prescribed for the setting up of ICDs and CFSs as follows: ▸ Green Zone: States with low ICD/CFS infrastructure. (Himachal Pradesh, Bihar, Jharkhand, West Bengal, Sikkim, Assam, Arunachal Pradesh, Nagaland, Manipur, Mizoram, Tripura, Meghalaya, Telangana and Union Territories of Jammu Kashmir and Ladakh. ▸ Blue Zone: States where the proposals can be accepted only for specific trade generating locations with no existing facilities or with over utilised facilities. (Uttarakhand, Uttar Pradesh, Chattisgarh, Odisha, Andhra Pradesh, Goa, Karnataka, Kerala and Union Territories of Puducherry and Daman and Diu) ▸ Red Zone: States with adequate ICD/CFS infrastructure which are closed for CFS development indefinitely but in exceptional cases IMC may approve setting up of ICDs in trade generating locations with high export and import potential and need of new facilities. (All States and Union Territories not listed in Green and Blue Zones)
Circular No. 51/2020-Customs dated November 20, 2020	**Procedure for the temporary import of durable containers not conforming to the standard marine container dimensions clarified.** Procedure for the temporary import of durable containers not conforming to the standard marine container dimensions has been clarified with reference to: ▸ When empty containers are imported into India ▸ When empty containers are moved out of India by sea or air ▸ When containers are imported laden with import cargo ▸ When containers are exported with export cargo
Instruction No. 19/2020-Customs dated November 18, 2020	**Imports and Exports from North Korea** All Customs field formations have been directed to ensure strict compliance of the legal prohibitions in force in regard to imports/exports from/to North Korea, and in case of bona-fide errors in data entry, the Customs clearance (OOC/LEO) are to be allowed only after amending the data entry to delete the incorrect reference to North Korea and mention the correct Country of import/export (other than North Korea).

Public/Trade Notices	Key Updates
Public Notice No. 142/2020 dated November 24, 2020	**Implementation of tariff rate quota (TRQ)** CBIC issued Notifications 28/2020 dated 23.06.2020 and 40/2020 dated 28.10.2020 where concessional rate for BCD has been notified for certain items provided that the quantity of total imports of such goods in a financial year do not exceed the tariff rate quota ('TRQ') quantity as specified in the notifications. The Public Notice has now intimated implementation of a monitoring system to verify TRQ.
Public Notice No. 141/2020 dated November 11, 2020	**Implementation of Sea Cargo Manifest and Transhipment Regulations** Sea Cargo Manifest and Transhipment Regulations were notified vide Notification No. 38/2018-Customs (N.T.) dated 11.05.2018, which were to be effective from August 01, 2019 with transitional provisions till September 30, 2020. This Public Notice is now issued to clarify procedures relating to: ▸ Registration; ▸ Delivery of an arrival manifest in relation to vessel; ▸ Transhipment of goods within India by Train/Truck; ▸ Amendment of arrival and departure manifest; ▸ Cargo Identification Number; and ; ▸ Mandatory filing requirements on parallel basis.
Trade Notice No. 34/2020-2021 dated November 12, 2020	**Suggestions invited for new Foreign Trade Policy** The Foreign Trade Policy ('FTP') (2015-2020) was extended till March 31, 2021. So as to prepare a new FTP, suggestions and inputs were invited from various stakeholders such as Export Promotion Councils (EPCs), Trade/Industry Bodies/Associations, Commodity Boards, RAs and members of trade, industry through a Google Form. They were requested to submit their suggestions and inputs only through the Google Form rather than emails or paper-based submissions within 15 days from this notice.
Trade Notice No. 35/2020-2021 dated November 12, 2020	**DGFT services for Advance Authorization, EPCG, DFIA and Norms planned to be migrated to the new Online DGFT systems from December 1, 2020; License amendment services suspended temporarily from November 20, 2020 to November 30, 2020** The services for Advance Authorization, EPCG, DFIA and Norms have been planned to be migrated to the new IT environment from December 1, 2020 and so services for the amendment of any Advance Authorization, EPCG, DFIA Licenses were suspended from November 20,2020 to November 30, 2020. However, the services for new license issuance, or submission of any new application file was made available for the above-mentioned period.

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SC holds that winding up proceedings pending before high court can be transferred to the tribunal at the request of a financial creditor

Kaledonia Jute and Fibres Pvt. Ltd. Vs. Axis Nirman and Industries Ltd. & Ors.
CIVIL APPEAL NO. 3735 OF 2020

On the petition of a creditor, High Court of Allahabad had ordered for the winding up of M/s Axis Nirman and Industries Ltd. ('the Company'), official liquidator was appointed and proceedings were pending before the High Court.

Meanwhile, another financial creditor ("Appellant") had moved an application before NCLT under Section 7 of IBC, 2016, claiming that the company is due and liable to pay a sum of INR 32 lakhs. Thereafter, the appellant has moved an application before the High court seeking a transfer of the winding up petition to the NCLT, Allahabad. However, the application was rejected by the High Court on the ground that winding up order has already been passed by this court and all necessary steps to comply with Rule 24 with respect to notice of winding up has been complied with and proceeding are in process and hence the matter can't be transferred to NCLT. Aggrieved by this order, the appellant filed a civil appeal before the Hon'ble SC.

The Hon'ble SC considered whether the winding-up proceedings which are pending before a HC can be transferred to the NCLT upon request by a creditor. The SC observed that Rule 5 & 6 of the Companies (Transfer of Pending Proceedings), Rules read with Section 434 of Companies Act and Section 434 of IBC, 2016 deal with the transferability of winding up proceedings and further, referring to its ruling in Forech India, observed that when the IBC, 2016 was enacted, only winding up petitions where no notice of petition was served, were to be transferred to NCLT and treated as petition under the Code.

However, new insertion of 5th Proviso to Section 434(1)(C) of IBC, 2016 provides that the transfer of the winding up proceeding, even at the instance of the party or parties to the proceedings is permissible. Thereafter, SC observed that plain reading of Section 278 of Companies Act interprets that "Party or Parties to the proceeding" would take within its fold any creditor of the company in liquidation.

Hence, SC found that Rule 5 & 6 of the Companies (Transfer of Pending Proceedings) Rules read with Section 434 of Companies Act would not be applicable in case of transfer covered under 5th proviso of Section 434(1)(C) of IBC, 2016. Accordingly, the SC allowed the appeal and ordered the transfer of proceeding pending before the Hon'ble High Court to the NCLT Allahabad.

Authors' Note:

This is an important judgment as there are plenty of cases where proceedings are underway with jurisdictional High Court at instance of one or more creditor, whereas a different financial or operational creditor files a petition under IBC. This would provide appreciable clarity in all such cases, as it is evident from this judgment that matters pending before High Courts can be transferred to NCLT as it would not cause multiple proceedings in multiple forums. In this matter as well, the Hon'ble SC observed that the object of IBC will be stultified if parallel proceedings are allowed to go in different forums. This judgment has also widened the scope of 'party to the winding up proceeding' by covering every creditor in the purview of 'party to the proceeding' irrespective of the fact that whether he actually files the petition for winding up or not. This judgment is likely to have a far-reaching impact on numerous other proceedings.

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NCLAT rejects the plea for insolvency initiation on the ground of debt not being 'Financial Debt'

Arenja Enterprises Pvt Ltd vs. Edward Keventer (Successors) Pvt. Ltd, Company Appeal (Insolvency) 528 of 2020

M/s Arenja Enterprise (financial creditor) had given INR 2 crores to M/s Edward Keventer (corporate debtor) under an MOU which was subsequently cancelled and both parties agreed on a settlement where it was decided that such amount would be refunded by an agreed date failing which corporate debtor would give an allotment of 39,100 sq. ft. area of built-up area as penalty in addition to repayment of principal amount of INR 2 crores. The corporate debtor repaid INR 2 crores in the year 1995 after a delay of 5 years and hence, additionally it was supposed to give 39,100 sq ft of built up area in the designated project.

The corporate debtor could not complete the project and hence have still not delivered the agreed 39,100 sq. ft. of space to financial creditor, due to which financial creditor approached the NCLT to initiate the insolvency proceeding. The NCLT rejected the plea for insolvency initiation on the ground that debt alleged by financial creditor was not a 'Financial Debt' under Section 5(8)(f) of IBC, 2016.

Aggrieved by NCLT order, the financial creditor filed an appeal with the NCLAT to seek relief. The NCLAT observed that the alleged allotment of 39,100 sq. ft. area. pursuant to the settlement agreement was in lieu of claim of Financial Creditor against Corporate Debtor for utilization of INR 2 crores beyond the due date. The Appellant contended that the amount of INR 2 crores had the commercial effect of borrowing from its due date till its refund, as same was refunded after 5 years from the due date.

The NCLAT found that as per Section 5(8)(f), 'Financial Debt' includes 'amount raised from an allottee as defined under Section 2 of Real Estate (Regulation and Development) Act, 2016, under real estate project shall be deemed to have commercial effect of borrowing". However, financial creditor was neither an allottee under Real Estate Act, 2016 and nor had any amount 'being raised' or 'raised' from him for real estate project.

The NCLAT also observed that there is a difference between a claim and a debt - a claim becomes a debt when it was due, moreover a default is triggered when there is a default in payment of debt on due date. In the given case it could not be said that there is a default as the time of performance has not yet arrived as construction of said project is still not completed.

Therefore, the NCLAT was of opinion that there was no reason for interference with the impugned order passed by the Adjudicating Authority (NCLT) and dismissed the appeal.

Authors' Note:

This judgment highlights Section 7 of IBC, 2016 where only financial creditor can make application for initiation of insolvency proceeding in case of default related to financial debt only. More emphasis has been given to the definition of 'default', 'debt' and 'due'. It cannot be said that there is any default by the Corporate Debtor under the Code, as the time for performance has not arrived yet and therefore in terms of umpteen decisions of the Hon'ble SC it is clear that even if the consent decree is a 'debt', even then there is no Default by the Corporate Debtor in terms of the Code. This would open a can of worms as there are various such settlements in trading world wherein real estate space or any other moveable or immoveable property is assigned and if the debtors can take advantage of these provisions and can indefinitely delay the execution or delivery then it would fail the very purpose of the IBC, 2016.

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HC condemns MSME for attempting to 'derail' dues-recovery; Rejects petition for considering OTS-proposal

Unnati Inorganics Pvt. Ltd. vs. Union of India.
LSI-786-HC-2020(GUJ)

An MSME ('Petitioner') had filed writ petition before the Gujarat High Court against a Bank ('Respondent') for rejecting One-time Settlement ('OTS') proposal made by the Petitioner as per the provisions of a RBI Circular. The Petitioner requested the Hon'ble HC to use its extraordinary powers under Article 226 of the Constitution of India and to direct the Bank to allow the Petitioner to take benefits of the RBI Circular with respect to One Time Settlement Scheme.

The HC observed on perusing the communication between Petitioners and Respondent, that OTS proposals offered by the Petitioner didn't offer any concrete proposal which may lead to a settlement, instead petitioner was just trying to misled the process by making high sounding claims. The HC further observed that the said proposals are just to derail the process of dues recovery. The Respondent declared the account of Petitioner as NPA and served the notice u/s 13(2) of the SARFAESI Act for the auction of Petitioner's assets to recover the dues. The RBI Circular referred for OTS, titled 'Framework for Revival and Rehabilitation of MSME', directed the banks to identify incipient stress in the account by creating three sub-categories under the Special Mention Account ('SMA') before a MSME loan account is turned into NPA. It was important to note that in the given case, the Petitioner Account had already been flagged as NPA whereas the RBI Circular is applicable only to the accounts before they are declared as NPA.

Considering above facts and observations, the Hon'ble Court rejected the subject appeal.

Authors' Note:

It is important to note that while the powers given in Article 226 are very wide and can be used by the Hon'ble High Courts without any limitation, however the Courts must insist that petitioners shall first exhaust other remedies given in relevant statutes such as DRT Act and SARFAESI Act. In the past there have been instances where High Courts have used its powers and have stalled recovery process – this being said, in the matter of United Bank of India vs. Satyawati Tondon, the Hon'ble Supreme Court clearly laid down the principle that if Courts use their powers under Article 226 without Petitioners first using the remedies available under the relevant statutes, it would lead to an adverse impact on banks and other financial institution and hence, same is discouraged.

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NCLAT directs to dispose LLP's strike off case considering the deadline of LLP Settlement Scheme, 2020

Reliance India Opportunities LLP ('the Appellant') is struck off in 2016 and thereafter, the Appellant filed an appeal before the NCLT in 2020 u/s 252 of the Companies Act for restoration of its name. The NCLT passed an interim order viewing no urgency as strick-off took place in 2016 and appeal was filed in 2020.

The Appellant filed an instant appeal before the NCLAT to issue directions to the NCLT to take-up the appeal as expeditiously as possible and to dispose it off on the ground that deadline under LLP Settlement Scheme, 2020 has been extended till 31st December, 2020 to file pending documents to be free from the default of filing of documents.

Taking note of above facts and without traversing upon the merits of the case, the NCLAT issued directions to the NCLT to take-up the appeal, dispose it off within 3 weeks after providing necessary opportunities to respective sides and pass the order on merits in accordance with the applicable law.

Authors' Note:

It is noteworthy that the NCLAT has not interfered with the proceedings and did not comment on merits of the case but has only issued directions to the NCLT to expedite the proceedings so that appellant can take the benefits of time bound schemes offered by the MCA. Thus, the NCLAT has not only supported the appellant but has also maintained the integrity and independence of the NCLT.

FROM THE LEGISLATURE
MINISTRY OF CORPORATE AFFAIRS

Extension of LLP Settlement Scheme, 2020

The Government vide MCA's General Circular No. 06/2020 dated March 4, 2020 had introduced the LLP Settlement Scheme, 2020 to promote ease of doing business by giving a Onetime relaxation in additional fees to defaulting LLP to make good their defaults by filing pending documents.

Further, to address the COVID-19 threat and to reduce their compliance burden, Settlement Scheme, 2020 had been revised effective from April 1, 2020 to September 30, 2020. In September, validity of the said LLP Settlement Scheme was further extended to December 31, 2020.

Revised LLP Settlement Scheme, 2020 provided relief to defaulting LLPs to file the belated documents which were due for filing till August 31, 2020. Recently the said period has further been extended till November 30, 2020 vide General Circular No. 37/2020 dated November 9, 2020.
The said Circular further provides that if a statement of accounts and solvency for FY 2019-20 has been signed beyond the period of six months from the end of FY but not later than November 30, 2020, the same shall not be deemed as non-compliance.

Authors' Note:

In wake of continued disruption caused by the COVID 19 and to provide greater ease of doing business, the MCA has also extended several other schemes till December, 2020. The Companies Fresh Start Scheme, 2020 ('CFSS') is one of those several other schemes. Recently passed Companies Amendment Act, 2020 has also removed burden of umpteen compliances and related penalties. These business-oriented moves will help businesses to focus on operational aspects of business rather than consequences of non-meeting the deadlines of legal compliances.

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Guidelines for Right Issues by Unlisted Infrastructure Investment Trusts ('InvITs')

The SEBI vide Circular No. SEBI/HO/DDHS/DDHS /CIR/P/2020/223 dated November 04, 2020, has issued guidelines for further issue of units through rights issue.

SEBI (Infrastructure Investment Trusts) Regulation, 2014 as amended in April, 2019 already provides the framework for further issue through private placement of units by the unlisted InvITs. However, the mechanism for further issue of units by rights issue has been provided through the said Circular dated November 4, 2020 in order to raise further funds by unlisted InvITs.

Salient features of these Guidelines are as follows:

Conditions for Issuance: Following are the pre-requisite conditions for the right issue by any unlisted InvITs:

1. BOD of the investment managers of the InvITs shall pass a resolution approving the rights issue of units and determining the record date.

2. Units proposed to be issued should be of same class which has already been issued by InvITs.

3. Any of the respective promoters or partners or directors of the sponsor(s) or investment manager or trustee of the InvIT is not:

    a. a fugitive economic offender declared under Section 12 of the Fugitive Economic Offender Act, 2018;

    b. debarred from accessing the securities market by the SEBI; and

    c. a promoter, director or a person in control of any other company or a sponsor, investment manager or trustee of any other InvIT which is debarred from accessing the capital market by the SEBI.

Roles and responsibilities of the Investment Manager: These Guidelines consists of following provisions related to letter of offer, application and pricing of units, where the Investment Manager('IM') plays a vital role:

1. **Application for the issue:** IM shall prepare the application form and make arrangements for its distribution along with Letter of Offer to all unit holders as on the record date at least 5 days before the opening of the issue.

2. **Letter of Offer:** The Investment Manager shall file a Letter of Offer containing the disclosures specified in Annexure I of the circular, with the SEBI not later than 5 days before the opening of the issue. Letter of Offer shall also be furnished to the SEBI in soft copy.

3. **Pricing of Units:** The Investment Manager shall decide the issue price before determining the record date and ensure that the issue price is disclosed in the letter of offer.

Disclosure requirement in a Letter of Offer: Letter of Offer shall contain the disclosures regarding the terms of the issue, related party transactions, valuation of the NAV of the units, financials of the InvIT, manner of application and allotment of the units etc.

The Investment Manager shall ensure that Letter of Offer contains only material, true, correct and adequate disclosures and disclosures are in accordance with the InvITs Regulations and guidelines or circulars issued thereunder.

Manner of Issuance and allotment of units:

1. The right issue shall open within 3 months from the record date and shall be kept open from 3 to 15 working days.

2. The rights entitlements shall be credited to the demat account of the unitholders before the date of opening of the issue. The rights entitlements shall include a right to renounce the right to subscribe the units, in favour of any other person. Letter of Offer and application form to be sent to the unitholder shall contain the statement to this effect.

3. Minimum allotment to any investor shall be INR 1 Crore. Allotment of the units shall be made in Waterfall Mechanism which is as follows:

a. Full allotment to those eligible unit holders who have applied for their rights entitlement either in full or in part and also to the renouncee(s), who has/have applied for the units renounced in their favour, in full or in part, as adjusted for fractional entitlement.

b. Allotment to eligible unit holders who having applied for the units in full to the extent of their rights entitlement and have also applied for additional units shall be made as far as possible on an equitable basis, having due regard to the number of units held by them on the record date, provided there is an undersubscribed portion after making allotment in (a) above.

c. Allotment to the renouncees, who having applied for the units renounced in their favour and also applied for additional units, provided there is an undersubscribed portion after making full allotment specified in (a) and (b) above. The allotment of such additional units may be made on a proportionate basis.

d. Allotment to the underwriter appointed for the issue, if any, at the discretion of the board of directors of the investment manager, subject to disclosure in the letter of offer as applicable.

4. Allotment of units shall be made in dematerialized form only.

5. An allotment report containing the details of allottes and allotment made, shall be furnished with the SEBI within 15 days of the issue closing date.

Other key features: Following are the other key features:

1. The InvIT is refrained from making any further issue from the date of filing the Letter of Offer with SEBI to the date of allotment of units.

2. It is the discretion of the InvIT to appoint underwriter in accordance with the SEBI (Underwriter) Regulations, 1993 to underwrite the issue.

Authors' Note:

This is a welcome move towards facilitating investment in the infrastructure sector. During last month as well, the SEBI allowed the listing of units of InvITs and REITs in stock exchanges in International Financial Services Centres ('IFSCs'). This shows that the SEBI is working towards enabling the InvITs to raise more funds and attract investment in the infrastructure market. It is pertinent to note that these guidelines also relaxes the burden of compliances such as appointment of merchant banker and issuance of due diligence certificate etc., which further enables the InvITs to plan for fund raising with optimal disclosure and compliance requirements.

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Enhancement of Overseas Investment limits for Mutual Funds

The SEBI vide Circular No. SEBI/HO/IMD/DF3/ CIR/P/2020/225 dated November 5, 2020, has decided to enhance the investment limits for Mutual Funds for their investments outside India. Present and revised overseas investment limits for mutual funds are as follows:

Particulars	Present	Revised
Overseas Investment	US $ 300 Million within the overall industry limit of US $ 5 billion	US $ 600 Million within the overall industry limit of US $ 7 billion*
Overseas Exchange	US $ 50 Million within the overall industry limit of US $ 1 billion	US $ 200 Million within the overall industry limit of US $ 1 billion

*Limit of overall industry ceiling of US $ 7 billion is subject to reservation of US $ 50 million for each mutual fund individually.

Allocation Methodology of the aforementioned limits:

1. In case of mutual fund launching new scheme, is intending to invest in Overseas securities/Overseas ETFs, then that mutual fund shall ensue that the scheme document shall disclose the amount intended to be invested. Such disclosed amount shall be valid for the period of six months from the date of closure of NFO.

   Unutilized limit shall not be available to the mutual fund but shall be available towards the unutilized industry wide limits.

2. For all ongoing schemes that invest or are allowed to invest in overseas securities/overseas ETFs, an enhanced investment headroom of 20% of the average AUM in overseas securities/overseas ETFs of the previous three-calendar-month exposure to overseas securities / overseas ETFs for that month is permitted by regulator subject to the maximum specified limits as discussed above.

3. Mutual funds shall report the utilization of overseas investment limits on monthly basis, within 10 days from end of each month.

Authors' Note:

This Circular is issued in exercise of the powers conferred under Section 11(1) of the SEBI Act, 1992, read with SEBI (Mutual Funds) Regulations, 1996 to protect the interests of investors in securities and to promote the development of, and to regulate the securities market. Mutual fund houses, as a result, are expanding their product basket with all sorts of overseas products. Through this Circular, in time to come, many more fund houses may launch schemes with an investment mandate to tap the investment opportunities in the overseas markets.

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Amendments to the regulatory framework for Scheme of Arrangements by listed entities

Scheme of arrangement proposed by the listed entities are governed by the regulatory framework provided under the Circular CFD/DIL3/CIR/2017/21 dated March 10, 2017 ('Circular 2017'). Now the SEBI has vide Circular No. SEBI/HO/CFD/DIL1/CIR/P/2020/215 dated November 3, 2020 has issued certain amendments to the framework to protect the interest of investors in securities and to promote the development of and to regulate the securities market. This Circular will be applicable to all the scheme of arrangements filed with Stock Exchange after November 17, 2020. The salient features of said amendment are summarized below:

Enhanced level of obligations of the Audit Committee:

Currently, a report from Audit Committee recommending draft scheme after taking into the consideration the Valuation Report, is submitted with the Stock Exchange along with draft scheme. This circular additionally requires the Audit Committee to include comments on following in its report:

- Need for the merger/demerger/amalgamation
- Rationale of the Scheme
- Synergies of business of entities involved in the scheme
- Impact of the scheme on the shareholders
- Cost-benefit analysis of the scheme.

New requirement of report from the Committee of Independent Directors:

At present, there was no requirement of obtaining report from such committee. However, now the Committee of Independent Directors recommending the draft scheme has to make a report that the scheme is not detrimental to the shareholders of the listed entity.

Elimination of requirement of providing "Observation Letter" by Stock Exchange:

Earlier, the stock exchange, to which draft scheme had been submitted, were supposed to provide either "Observation' letter or "No-Objection' letter to the SEBI on draft scheme. However as per amended guidelines, now the stock exchange has to provide 'No-Objection' letter to SEBI and thereafter SEBI would issue a comment letter to company upon receipt of No-Objection from stock exchanges.

These amendments ensure that draft scheme shall be given a go ahead only when stock exchange at its level, is fully convinced that scheme is fully in compliance with SEBI act, rules and regulations.

Obtaining Valuation Report from "Registered Valuer' instead of "Independent Chartered Accountant':

Earlier, valuation report was to be obtained from an Independent Chartered Accountant. Now amendments require the entity to obtain the valuation report from registered valuer as defined u/s 247 of the Companies Act. This amendment ensures the regulatory framework for the scheme of arrangement is in line with Companies Act.

Additional disclosure requirement:

If a listed issuer, by submitting the Draft Scheme of arrangement, seeks relaxation under Rule 19(7) of Securities Contract (Regulation) Rules, 1957 from the stringent provisions of Rule 19(2) for listing of its securities. Then, it has to make certain disclosures in newspaper as per regulatory framework.

Such disclosure requirements has been expanded by including disclosures related to related parties, restated audited financial statements, contingent liabilities, Business model and strategy, Internal Risk Factors, Regulatory Actions against promoters in last 5 Financial Years like actions taken by SEBI, Outstanding Criminal Proceedings against Promoters etc. These additional disclosure requirements would bring more transparency and enable the stakeholders in better decision making.

Repealing the provisions related to relaxation for listing of securities with Differential Voting Rights ('DVRs'):

New amendment has repealed the provisions providing relaxation from stringent provisions related to listing of securities with differential voting rights. Therefore with this, SEBI has reinstated its thought process that if shares with superior voting rights would be issued to promoters

then it would result into retention of decision making powers with them and hence any such relaxation as envisaged in 2017 circular shall not be given and accordingly it has been repealed.

Authors' Note:

These amendments would further streamline the process of review of draft scheme of arrangement filed by the listed entities. This amended framework provides for stricter levels of scrutiny and compliance by putting more onus on audit committee and independent directors. Further, it would ensure the submission of scheme to the SEBI only post thorough scrutiny and review by Audit Committee, Independent directors and all stock exchanges where company's stocks are traded.

However, one needs to see what kind of clarification the SEBI brings in qua composition of Committee of Independent Directors and composition of Audit Committee as to whether independent directors forming part of Committee of Independent Directors can also play a role in Audit Committee or not.

This is yet another move by the SEBI to strengthen corporate governance in listed entities especially where the decisions are predominantly influenced by promoters.

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Guidelines for Creation of Security in issuance of listed debt securities and 'due diligence' by debenture trustee(s)

In the previous edition, we had covered amendments in the SEBI regulations pertaining to the debenture trustees ('DTs') role, strengthening of the role of DTs in issuance of listed debt securities. In continuation of the same, we would like to highlight certain developments where SEBI has issued further guidelines with respect to creation of security and independent due diligence by Debenture Trustee.

The SEBI has vide Circular No. SEBI/HO/MIRSD/CRADT/CIR/P/2020/218 dated November 3, 2020 and SEBI/HO/MIRSD/CRADT/CIR/P/2020/230 dated November 12, 2020 has issued further guidelines to give effect to gazette notifications issued in October 2020 for strengthening the role of DTs. The key amendments in this regard are summarized below:

a) **Documents/Consents required at the time of entering into debenture trustee agreement:**

At this stage to enable the DTs to exercise due diligence regarding creation of security, issuer shall provide information/documents to the DTs related to details of assets whether movable or immovable including title deeds and other supporting documents for title of asset, status of assets as to whether it unencumbered or encumbered along with details of encumbrance (if applicable), details of Personal guarantor (in case of personal guarantee) with its Net worth certificate, details of corporate guarantor (in case of corporate guarantee) including Audited financial statements etc.

b) **Due diligence by debenture trustee:** At the time of creation of security, DTs shall perform followings functions with regards to independent due diligence to ensure the adequate security cover at all times:

- Verify from ROC, CERSAI, Sub-registrar etc. that assets for creation of security are free from any encumbrances and necessary and valid consent or permission has been obtained from the existing charge holders. In case of personal or corporate guarantee, verify and obtain necessary certificates from statutory auditor;
- DTs itself or thru its appointed agencies such as a practicing Chartered Accountant or a legal counsel shall prepare one or more report viz. valuation report, ROC search report, title search report etc.;
- DTs shall issue 'due-diligence certificate' as per format specified in the circular itself; and
- DTs shall maintain the records and documents pertaining to due diligence exercised for a minimum period of 5 years from the redemption of debt securities.

After creation of security, DTs shall exercise due diligence by monitoring on periodic basis. DTs shall incorporate the terms and conditions of periodic monitoring in the Debenture Trust deed. DTs shall submit following documents within prescribed time limit to the stock exchange:

Reports/Certificate	Periodicity
Asset Cover Certificate	**Quarterly basis** within 60 days from end of each Quarter
A statement of value of pledged securities	
A statement of value for Debt Service Reserve Account or any other form of security offered	
Net Worth Certificate of Guarantor (Secured by way of personal guarantee)	**Half yearly basis** within 60 days from end of each half-year
Financials/value of guarantor prepared on basis of audited financial statement etc. of the guarantor (secured by way of corporate guarantee)	**Annual basis** within 75 days from end of each financial year
Valuation report and title search report for the immovable/movable assets, as applicable	

It is important to note that as per guidelines, for any existing debt securities, issuer and DTs shall enter into supplemental/amended debenture trust deed within 120 days from the date of this Circular.

c) **Disclosures in the offer document or private placement memorandum / information memorandum and filling of OD or PPM/IM by the Issuer:**

The Issuer shall additionally disclose:

- Debt securities shall be considered as secured only if the charged asset is registered with Sub-registrar and ROC or CERSAI or Depository etc., as applicable, or is independently verifiable by the debenture trustee;
- Terms and conditions of debenture trustee agreement including fees charged by debenture trustee(s), details of security to be created and process of due diligence carried out by the debenture trustee; and
- Due diligence certificate as per the format specified in Circular dated November 3, 2020.

c) **Creation and registration of charge of security by issuer:**

- The Issuer shall create charge in favour of the DTs and also execute debenture trust deed before making the application for listing;
- The Stock Exchange shall list the debt securities only upon receipt of a due diligence certificate confirming creation of charge; and
- The charge created by issuer shall be registered with in 30 days of creation of such charge. If charge is not registered anywhere, then same shall be considered a breach of covenants/terms of the issue by the issuer.

e) **Other Regulatory Compliance:** DTs shall submit report such as Half yearly compliance report, Risk based Supervision report and report of other activities carried out on a half yearly basis.

Authors' Note:

These guidelines were inevitable as post issuance of relevant notifications during last month, there was an urgent need to provide procedure on standard practices to be followed by DTs for implementation of enhanced governance on issuance of debt securities and to increase oversight by DTs on creation of security. DTs represent the interest of debenture holders and act as a liaison between them and the issuer company. This move by the SEBI is in the direction of securing the interest of debenture holders, however one has to see how effectively issuers would be able to comply with extensive document requirements and other compliances before hand, as delay in any one of them would lead to delay in issuance of securities. DTs

would have to play a pivotal role here to strike a right balance in ensuring compliance with guidelines as well as timely issuance of securities. We expect that over the next few months, some of these guidelines may have to be relaxed partially by the SEBI keeping in view the practical challenges which companies would face.

It is noteworthy that guidelines also have a transition provision for securities already issued as DTs and issuers are required to comply with revised guidelines within 120 days.

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FDI policy for the media entities- Compliance guidelines for reduced threshold

In our previous edition of Vision 360, we had given a brief on Government recent notification and clarification on FDI in News and Digital Media sector which came in September 2020 through which Government had institutionalized the ceiling of 26% in News and Digital Media sector and also provided other operating guidelines. An apparent conflict then was what to do with companies which already have the FDI in excess of 26%. Now the Government has issued clarification for implementation of these provisions for existing as well as new companies/investments. The key pointers are as follows:

1. Entities having FDI below 26%, within one month of the date of the Circular i.e. November 11, 2020, may provide an intimation containing PAN , audited /unaudited financial statements along with audited report and other required details of the entity and address of its directors/shareholders, name and address of Promoters/Significant Beneficial Owners and lastly, a confirmation of compliance with pricing, documentation and reporting requirements under FDI policy, respective FEMA rules and regulations to the Ministry of Information & Broadcasting.

2. Entities having FDI exceeding 26%, have to provide details within one month of the date of the Circular as specified above to the Ministry of Information & Broadcasting and would take necessary steps to reduce FDI uptil October 15, 2021 and take approval of the Ministry of Information & Broadcasting.

3. Any entity intending to bring in fresh foreign investment in the Country, has to take prior approval of the Central Government through the Foreign Investment Facilitation Portal of DPIIT as per (a) FDI Policy of Government of India, and (b) provisions of the FEMA Rules in this regard.

4. In order to comply with the requirement of deployment of foreign personnel for more than 60 days, entity has to apply to the Ministry of Information & Broadcasting at least 60 days before the deployment and only after receiving the approval, deployment of foreign personnel can be made by the entity.

Authors' Note:

The development comes just days after bringing in the digital news media and streaming services under the jurisdiction of the Ministry of Information & Broadcasting. It essentially marks the first real assertion of the control by the said ministry. These clarifications also clear the air on threshold of FDI investment in companies which has been in operation since long and have already received FDI in excess of 26%, thus companies now have a breather uptil October, 2021 to comply with these requirements. Though as stated in our previous edition as well, it is going to be an uphill task to reduce FDI in these companies given the challenges with respect to available cash flows specifically in these challenging times and to manage underlying tax and regulatory aspects for the said change.

The Circular dated October 16, 2020, had left it vague as to from whom the approval for deployment of foreign personnel for more than 60 days will come from. Through this Circular, the Ministry has given itself the power to scrutinize and approve foreign employees at these entities.

The Ministry of Information & Broadcasting has also reiterated that companies intending to bring in fresh foreign investment would have to seek Government approval through the DPIIT.

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ATO issues guidance on treatment of JobKeeper payments in transfer pricing of MNEs

Australian Taxation Office ('ATO') has provided detailed guidance on treatment of JobKeeper payments (*Payments made under a subsidy scheme for businesses in a significantly affected by COVID-19 pandemic*) in TP arrangements along with relevant illustrations for computation of mark-ups by MNE service provider entities.

ATO has stated that impact assessment would be done to review the arrangements where the said payment: (a) results in a change to the transfer price paid or received by the Australian entity; and (b) was shown to shift the benefit of the government assistance to offshore related parties.

It is also stated that independent parties in comparable circumstances would not share all or part of the JobKeeper benefit. The guidance further states that it is expected that Australian entities will retain the benefit of the JobKeeper payment they receive.

Illustration – Treatment of JobKeeper payment

Australian subsidiary of a multinational group provides information technology services to its offshore related party. It charges the full cost of providing the services plus a profit mark-up of 10%. The profit mark-up is based on a comparability analysis and is assumed to be arm's length.

Australian subsidiary incurs $60 of salary cost and other operating costs of $40, totaling $100. The Australian subsidiary is eligible for and receives the JobKeeper payment amounting to $60, which subsidies the $60 of salary cost.

Particulars	Correct Treatment	Correct Treatment
Salary Cost	$60	$60
Other operating expenses	$40	$40
JobKeeper benefit	--*	($60)
Total Cost	$100	$40
Markup@10%	$10	$4
Total revenue	$110	$44
JobKeeper payment altering transfer pricing	No	Yes**

Source: https://www.ato.gov.au/Business/International-tax-for-business/In-detail/Transfer-pricing/Transfer-pricing-arrangements-and-JobKeeper-payments/

Analysis

* Benefit has been retained by the MNE entity in Australia and hence it is considered as correct approach as per the captioned guidance.

** In the Incorrect treatment scenario, the JobKeeper benefit has been passed on to the MNE and therefore it has resulted into altering the transfer pricing for the Australian subsidiary of the group. The same is unacceptable as per the captioned guidance.

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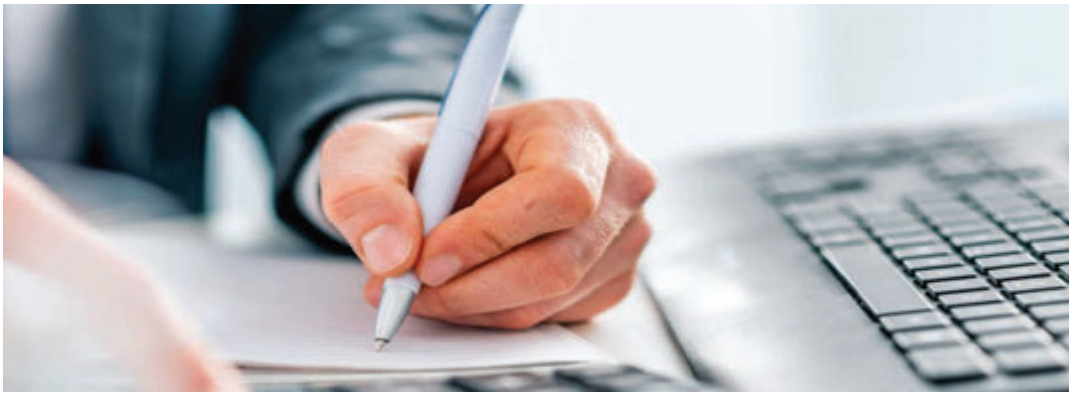

Bahrain signs landmark Multilateral Instrument (MLI) agreement to strengthen its tax treaties

On November 27, 2020, the Kingdom of Bahrain signed the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent BEPS. With this signing of MLI by the Bahrain, total count of countries to sign MLI has touched the 95. MLI now covers over 1,700 bilateral tax treaties over which MLI prevails for certain clauses, as agreed by the jurisdictions.

Shaikh Naser Bin Khaled Al Khalifa, Chargé d'Affaires of the Embassy of the Kingdom of Bahrain in France, signed the Convention at a signing ceremony held in Paris.

Source:
http://www.oecd.org/tax/beps/bahrain-signs-landmark-agreement-to-strengthen-its-tax-treaties.htm

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OECD releases peer review results for 49 preferential regimes

The Forum on Harmful Tax Practice ('FHTP') has been conducting reviews of preferential regimes since its creation in 1998 in order to determine if the regimes could be harmful to the tax base of other jurisdictions.

The FHTP in its meeting in October 2020, updated conclusions for one 'no or only nominal tax' jurisdiction and for 38 preferential tax regimes. These results stood approved on November 16, 2020. Total number of 295 regimes have been reviewed till date, out of which only 22 regimes are still under review or are in the process of being eliminated or amended.

The FHTP actions have resulted into significant legislative changes into tax laws of 44 of the 49 reviewed regimes. To summarize, 29 regimes were abolished, newly designed 4 regimes are compliant with the FHTP standard and therefore are tagged as "not harmful"; 7 regimes are in the process of being amended and hence would be compliant with FHTP standards; 2 regimes are out of scope for the FHTP; and 2 regimes have been found potentially harmful but not actually harmful.

Source:
http://www.oecd.org/tax/beps/harmful-tax-practices-peer-review-results-on-preferential-regimes.pdf

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PLI Schemes coupled with recovery in tax collections and employment opportunities – A Ray of Hope for India's GDP Growth

As the state of economy seems to be on a recovery path, the Government of India has announced Atmanirbhar Package 3.0 which comes with a flurry of benefits like Rozgar yojana, Production Linked Incentive Scheme, Emergency Credit Line Guarantee Scheme, Pradhan Mantri Aawas Yojana, Infra Debt Financing, Subsidised fertiliser, Garib Kalyan Rozgar Yojana, etc.

While a lot of these schemes are meant for middle and lower-income class, if there's one scheme that has caught eye of corporates, it's Production Linked Incentive Scheme or PLI as it is being referred. In its second round, PLI covers 10 champion sectors viz., Advance Cell Chemistry Battery, Electronic/Technology Products, Automobiles & Auto Components, Pharmaceuticals Drugs, Telecom & Networking Products, Textile Products, Food Products, High Efficiency Solar PV Modules, White Goods (ACs & LED), and Specialty Steel.

Selection of these sectors was made based on its employment sensitivity and a financial outlay of INR 1,45,980 crores for all these sectors taken together have been allocated over a five-year period.

PLI offers incentives on incremental sales from products manufactured in domestic units and is aimed at reducing dependence of China. This framework is not a new one per se. In fact, the Government has already approved PLI schemes for three sectors viz., Mobile manufacturing, Pharma and Medical device manufacturing with a total PLI cost of INR 51,355 crores.

Amongst these sectors, the Ministry of Electronics and Information Technology (MeitY) has already approved 16 eligible applicants under the PLI scheme including Samsung, Foxconn Hon Hai, Rising Star, Wistron and Pegatron many of whom are contract manufacturers for Apple. As Samsung and apple together represent over 60% of the mobile handset industry globally, a conducive environment for mobile handset manufacturer creates a huge potentially for India to be 'go to' manufacturing hub.

MINISTRY OF ELECTRONICS AND INFORMATION TECHNOLOGY HAS ALREADY APPROVED 16 ELIGIBLE APPLICANTS UNDER THE PLI SCHEME INCLUDING SAMSUNG, FOXCONN HON HAI, RISING STAR, WISTRON AND PEGATRON.

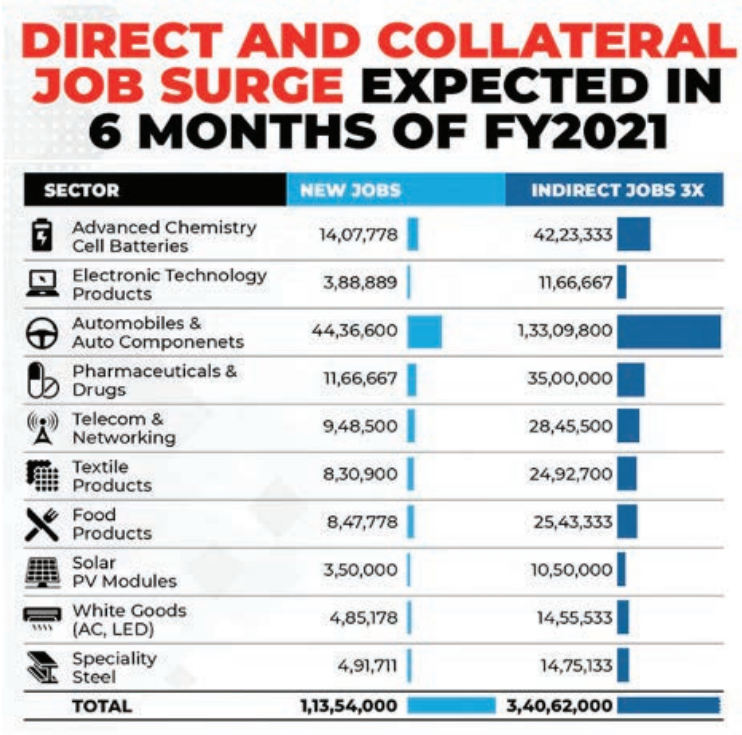
Shri Ravi Shankar Prasad, Union Minister for Electronics and IT, and Communications stated that PLI scheme has been a huge success in terms of the applications received from global as well as domestic mobile phone manufacturing companies and electronic components manufacturers.

PLI now represents another step towards encouraging investments in manufacturing and promoting exports. Though the details of the scheme for each of the 10 sectors are not known yet, it is likely to follow the suit of earlier PLI scheme for electronics which has proved effective as well as compatible with India's obligations towards World Trade Organization commitments. As the PLI is not directly linked to exports or value-addition, it is unlike anything but Merchandise Exports from India Scheme (MEIS), which was challenged at the WTO and was decided against India.

If being WTO compliant is any indication of Government's intent about PLI, then it is here to stay for a long. Although, details of its implementation are still waited for each of the 10 chosen champion sectors, this scheme has certainly stirred discussion in board rooms, be it in India or outside to grab the first mover advantage!

PLI is expected to be a boon for employment in FY 2021-22. "The PLI scheme has a potential of creating close to 1.40 crore man-months of additional workers. We can say that we are looking to double the workforce engaged in production and manufacturing activities" is the statement by the officials of Indian Staffing Federation.

Below is sector specific new employment expectations and indirect jobs to be generated by the



Source: https://www.moneycontrol.com/news/business/economy/pli-scheme-could-help-double-workforce-requirement-in-manufacturing-sector-in-fy2021-22-6141281.html

The Sparkle...

Towards the new normal, the businesses have started recovering and depositing the taxes in the treasury of the Government. The same is evident from GST collection in October 2020 which was close to INR 1.05 lakh crore. This was the first time in FY 2021 when GST monthly revenues crossed INR 1 lakh crore mark.

Further, it is expected that GST collection will grow in double digit in the coming times. It is pertinent to note that increase in GST collection will also have direct impact on Income tax collection for the coming year.

India's GDP growth has been in negative since first quarter of FY 2020-21. The projections of the Asian Development Bank (contraction of 9%), the Reserve Bank of India (contraction of 9.5%), the World Bank (contraction of 9.6%) and the Organisation for Economic Co-operation and Development (contraction of 10.2%) has been optimistic as compared to the private players like Goldman Sachs (contraction of 14.8 per cent). However, the rating agencies have forecasted recovery of GDP ratio in FY 2021-22 to be in the range of 5% to 9%.

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GLOSSARY

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

PUBLISHER & AUTHORS

ONE-STOP DESTINATION FOR TAXMAN AND TAXPAYER

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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.

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.

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.

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