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EDITORIAL

Vision 360: The flowing light of knowledge...

In a rundown of developments this past month, the Companies Act, 2013 brings us the most exciting news, decriminalising of offences! A relief, from unruly set of stringent laws both on corporate and taxation space. It was about time while businesses as well as regulators are moving towards automation, artificial intelligence in governance, the businessmen must be provided with a friendly and cohesive environment albeit in absence of mala fide and negative impact on public interest.

Speaking of Automation, the E-invoicing has been rolled out as this issue of **Vision 360** goes to digital print and relaxations have been provided to aid the stakeholders in initial phase – a learning implemented from introducing GST portal in the initial phase of implementing GST. The Indirect tax space has seen some more positive developments. The Hon'ble Gujarat High Court continued its streak to lay down benevolent precedents by allowing refund of accumulated ITC distributed by ISD to SEZ unit. The relief comes amidst machinery provision's failure to allow such refund. Few weeks past, it also relived taxpayers with inverted duty structure with the relief of refund on input service amidst shortcomings on part of machinery provisions. The Gujarat High Court is indeed on its course to consistently do the right thing! It however came as a surprise when Madras High Court upheld the restrictions on refund in identical case of inverted duty structure, and also sought to justify distinguishing treatment to 'goods' from 'service', a bone of contention of many disputes in erstwhile tax regime, which was sought to be done away by introduction of GST.

As regards Direct tax, the age-old Capital gains controversy of Vodafone inched closer to its conclusion when the Arbitral award favoured the global telco. But, the Hon'ble Finance Minister's statement to evaluate further strategies has indeed raised many eye brows. Another significant happening is the extension in a number of compliance measures under Income tax, except Income tax returns, Audits and a few others.

While, we are busy re-building ourselves and our business in India, the UAE has amended its Economic Substance Regulations, retrospectively! The amendment changed multiple facets of ESR applicability, compliance and post compliance scenarios.

A snapshot for the past month would remain incomplete without taking note of the Shapoorji Pallonji Group, the largest minority shareholders owning an 18.37% in Tata Sons, which announced in a press release that it's "Time to separate from Tata", parting a 'seventy-year-old' alliance that nurtured India's largest and most respected conglomerate. It is a reminder that, change is the only constant, and one's ability to adapt will decide chances of survival! A philosophy to be held closely in today's time!

Last but not the least, the 'Bureau of Indian Standards', a Government organ set-up to ensure quality, safety and reliability of the imported/domestically manufactured products, has extended the date of implementation for certification of toys by four months in order to facilitate trade, making January 1, 2021 as 'the appointed date'. This of course comes in the wake of challenges being faced by the trade given the COVID-19 pandemic.

Once more, in order to provide you with all the noteworthy tax and regulatory developments in one place, **TIOL**, in association with **Taxcraft Advisors LLP**, **GST Legal Services LLP** and **VMG & Associates**, is glad to publish its exclusive monthly magazine titled '**VISION 360**'.

We hope you will find it an informative and interesting read. Having received an overwhelming response to our first edition, we continue to seek 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 significant developments followed by thought-provoking 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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ITC of GST on employees' transportation charges – Half-baked analysis

Recently, the Maharashtra AAR in the case of Tata Motors Limited (2020-TIOL-245-AAR-GST) has held that Applicants can avail ITC of GST charged by service provider for hiring of bus (motor vehicle having seating capacity of more than 13 persons) after February 01, 2019. In a time when majority of the AAR rulings are passed in favour of the Revenue, the Maharashtra AAR has ruled in favour of the Assessee. Albeit the ruling may serve beneficial to a number of taxpayers, the same is likely to be challenged at higher fora. In this regard, we have analyzed the instant Ruling in the ensuing paragraphs.

Brief Facts

The Applicant had engaged service providers to extend transportation facility to employees in non-air-conditioned buses having seating capacity of more than 13 persons. The Applicant issues bus passes to employees and recovers nominal amount on a monthly basis. The difference between amount paid to service provider and amount recovered from employees is debited to the Applicant's Profit & Loss Account as 'salary cost'. The Applicant sought ruling as to ascertain:

The Applicant had sought ruling to ascertain as to

- Whether they can avail ITC of GST charged by service provider? and
- Whether GST is applicable on amount recovered by Applicant from employees?

Observations and Ruling

The Maharashtra AAR observed that vide amended clause u/s 17(5) of the CGST Act (ref. Notification No. 02/2019-CT dated 29.01.2019), the Government allowed ITC on leasing, renting or hiring of motor vehicles for transportation of passengers having approved seating capacity of more than 13 persons. Accordingly, it was held that the Applicant should be eligible for the ITC of GST paid on transportation services.

In regard to the second question raised by the Applicant, the AAR observed that once the employees cease to be in employment with the Applicant-Company, they are no longer authorized to use the transportation facility. Such condition envisages that the employer-employee relationship is must to avail the facility of transportation.

It was further observed that Schedule III of the CGST Act inter-alia provides that services by an employee to the employer in relation to the employment, shall be treated neither as supply of goods nor services. Accordingly, as the Applicant was not providing any services to its employees, the AAR held that GST was not applicable on nominal amount recovered by the Applicant from the employees for bus transportation facility.

Authors' Analysis

While the Ruling has rightly allowed the ITC of GST paid on bus transportation services, the rationale for holding non-applicability of GST on nominal charges recovered from the employees for bus transportation facility seems to be incorrect. The AAR has relied upon Schedule III of the CGST Act to arrive at the said conclusion. In this regard, it would be pertinent to note that Entry 1 of Schedule III of the CGST provides that services by an employee to the employer shall not be treated as a supply and not vice-versa. In the instant case, the Applicant (employer) has availed services for transportation for the benefit of employees. Therefore, by no stretch of imagination, can it be said that the employees are providing services to the Applicant.

It would further be pertinent to note that the service of non-airconditioned contract carriage other than radio taxi, for transportation of passengers, excluding tourism, conducted tour, charter or hire classifiable under SAC 9964 has been exempted from the levy of GST vide Entry 15 of Notification No. 12/2017 – CT(Rate) dated 28.06.2017, as contended by the Applicant. Nonetheless, this aspect of the argument was completely disregarded by the AAR by relying on Schedule III of the CGST, which as a matter of fact is not at all applicable to the instant case.

Further, as the AAR ruled that recovery from the employees would not amount to 'supply', they have also not touched the aspect of Rule 42 of the CGST Rules, which inter-alia provides that reversal is mandated for that portion of common credit which is attributable to exempt supplies or for non-business use.

Concluding Remarks

The Maharashtra AAR in spirit and equity has correctly held that ITC of GST paid on transportation charges is available to the Applicant in light of the amended Section 17(5). However, in terms of legal veracity of the ruling, one would be inclined to contemplate as to how the subject services can be said to be covered under Schedule III of the CGST Act. Especially when there are several contradictory judgements wherein it has been held that services provided by employer to employees would not amount to supply of services. Most notably, the Maharashtra AAR in the case of POSCO India Pune Processing Center Private Limited (2019-TIOL-25-AAR-GST) had held that recovery of parent's health insurance expenses from employees would not amount to supply of service under GST law.

Similarly, the UP AAR in the case of Ion Trading India Private Limited (2020 (32) G. S. T. L. 800) had held that recovery of premium amount from employee and subsequent deposit it with insurance Company could not be treated as supply of service in the course of furtherance of business. Therefore, GST shall not be applicable on such recovery by employers. In contradiction, the Kerala AAR in the case if Caltech Polymers Private Limited (2018-TIOL-01-AAR-GST), had held that the supply of food items to the employees for consideration in the canteen run by the appellant company would come under the definition of 'supply' and would thus be exigible to GST.

It is also noteworthy that such employee recoveries, being exempt under GST, is subject to ITC reversal under Rule 42 of the CGST Rules, which equally applies on other recoveries as well, such as canteen services. Basis the above analysis, it can be seen that the instant ruling has been passed without complete analysis of the law and related precedents. Accordingly, it would be interesting to see the fate of this ruling in the future.

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De-criminalization of Offences under the Companies Act, 2013

The Indian businesses have long complaint of India's stringent laws including in corporate and taxation space. The subject phenomenon refers to regulations vide which a businessman can land behind bars on account of non-compliances and/or omission/errors leading to non-adherence of various company law and tax regulations. Such draconian provisions have been a sole reason as to why even many large businesses have chosen to function in the form and style of proprietorships and/or partnership firms. Needless to say, if we look at the situation from country's standpoint, as more and more businesses would work under unstructured set-ups such as proprietorships and/or partnerships; higher is the probability for them not to fall in line with various laws including taxation laws. Therefore, while on one hand we (as a progressive nation) are eyeing at creating a new era of digitalization, globalization and artificial intelligence where Government authorities would be using BOT technologies to do rationalization and analysis of corporate's/taxpayer's data, on the other hand it becomes a matter of paramount importance that larger number of businesses are run as structured/professional set-ups, for obvious reasons.

To achieve this end, Government needs to create a cohesive and friendly environment wherein businesses are run without fear of undue litigation and with a strong belief that running businesses under corporate structure would no longer be an uphill task in terms of regulatory compliances and/or related consequences resulting into criminal offences, in case of non-compliances. Of late with a quest to address such concerns, the Ministry of Corporate Affairs (GOI) has come-up with key amendments in the Companies Act, 2013 to decriminalize the offences under various penalty provisions. These entail instances where defaults can easily be determined objectively and they lack any element of fraud and/or are not impacting any large public interest. The said amendments have been brought in by the Companies (Amendment) Act, 2020 which has provided for de-clogging of forty six (46) penal provisions by omitting seven (7) compoundable offences, limiting eleven (11) compoundable offences to fine only by removing imprisonment part, recommending five (5) offences to be dealt with in an alternative framework and reclassifying twenty three (23) offences from compoundable offences to in-house adjudication framework.

Some of the instances comprise of cases of default qua provisions for signing of financial statements, maintenance of books of accounts and appointment of auditors wherein the company may be subjected to a monetary penalty but no officer or director can be subjected to imprisonment. On the contrary, cases of defaults of provisions leading to grave consequences such as non-payment of dividend after declaration or presentation of true and fair financial statement or loan/advances to directors, the penal provisions containing criminal offence and imprisonment have been retained.

The rationale behind this appears to be decriminalizing the minor procedural or technical lapses into civil wrongs and help in reducing the litigation pending at courts and focus on areas where companies or its officer/directors have defaulted into compliances having material impact on rights of shareholders and/or public at large.

This is indeed a welcome step as it would help in creating a positive regulatory environment and provide relief to companies. The said changes shall also support ease of doing business initiative of Government of India provided a smooth implementation of these amendments is effectuated by the executive machinery at ground zero.

Nitin Jain

Head – Global Tax & Treasury at
Oyo Hotels & Homes

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

E-commerce businesses have picked up exceptionally well vis-à-vis traditional ones more particularly in these COVID times. How do you see this phenomenon shaping up in future?

Like all other business, E-commerce too was severely hit of the COVID-19 situation, but given its potency to serve masses amidst lockdown measures, it has recovered at a much faster pace than most of the other businesses.

As a matter of fact, analytics have predicted that India's E-commerce market propelled by lockdown measures would cross INR 7 Trillion by 2023 which is a Compounded Annual Growth rate of 19.6%[1].

The outbreak of pandemic is only going to push consumers' buying behaviour to embrace E-commerce. I would not be surprised if analytics further revise their predictions upward in days to come.

In this era of digitalization, countries are trying to tax E-commerce businesses through some or the other means. For example, India has come-up with Equalisation Levy and its European counterparts are envisaging imposition of Digital Taxation. How do you see these developments affecting the E-commerce space?

With the evolving technology, ways of doing business have also evolved replacing the brick-and-mortar stores by E-marts. With this the dilemma of taxation arose as to whether the country of servers/IT Infrastructures should be considered as the resident country? If yes, many developed/ developing countries shall stand to lose its fair share of taxation. Hence, there is a necessity of building a consensus and a full proof mechanism to tax E-commerce businesses. Moreover, the underlying issue is coupled by the fact that DTAAs do not address such concerns.

There is multitude of challenges being faced by Governments and E-commerce players while optimizing norms for E-commerce taxation such as lack of consensus on methodology of taxation. Given this, varied approaches are being adopted by different countries For example – levy of digital tax in France and Equalisation Levy in India, etc. It is pertinent to note here that, current measures being adopted by many countries are aligned with fundamental suggestions coming from OECD's BEPS Action Plan 1. This being said, it is essentially the right of allocation which is creating concerns where consumer country is eyeing at a fair share of tax revenues vis-à-vis residence country. The other challenge is how do you define 'residence' prudently in case of virtual set-ups to strike a balanced approach.

In my view, E-commerce businesses should also be subjected to tax at par with other businesses. However, the current methodology of unilaterally bringing such businesses under the tax net, may result in double taxation and give rise to commercial disputes between economies. It is therefore desirable that a consensus should be built in order to arrive at a unified approach at the earliest to iron-out any related issues.

[1] https://www.globaldata.com/covid-19-to-further-drive-e-commerce-payments-in-india-says-globaldata/

The Finance Act, 2020 has brought in two major changes viz.,:

- **Section 194-O on TDS (e-commerce operators are liable to deduct 1% of the resident participants); and**
- **Equalisation Levy 2.0 for foreign e-commerce operators.**

How do you see these developments?

Yes, the Finance Act, 2020 has made certain important amendments in the IT Act such as levy of TCS on sale of goods, TDS under Section 194-O and extension of Equalisation Levy to foreign E-commerce operators.

Section 194-O on TDS (e-commerce operators are liable to deduct 1% of the resident participants)...

In particular, Section 194-O mandates E-commerce operators to deduct TDS @ 1% on payments to be made to E-Commerce participants (i.e. seller who sell their products through E-commerce platforms), subject to certain exceptions.

On a brighter side, Government would receive early inflows of taxes and it would be able to tax people engaged in sale of goods/provision of services by using digital platforms. However, an alternate argument is that such sellers could have been traced using data available with GST authorities. The fall-out of bringing such a provision is that it not only entails additional compliance for E-commerce operators, but also leads to working capital and cash position challenges for small businesses.

Equalisation Levy 2.0 for foreign e-commerce operators...

The second major amendment is Equalisation Levy 2.0 which is an extension of the Equalisation Levy enacted through the Finance Act, 2016. It is essentially a unilateral measure to tax E-commerce players which otherwise are not required to pay any taxes in India.

Technically speaking, Equalisation Levy is neither a direct tax nor an indirect tax. So, it can be construed as a hybrid tax tool enabling the administrators to tax E-commerce operators. However, such unilateral taxation is nothing but a means to augment the tax burden on consumers as it is not creditable against taxes to be paid in home country of the E-commerce operator. The woes of consumers are compounded by the fact that in the parallel subject imported services are exigible to applicable GST under reverse charge. So, the said phenomenon creates a double whammy inasmuch as multiple levies and tax compliances undoubtedly enhance the overall costs.

Further, it is well accepted principle in international tax that business profits are NOT taxable in absence of Permanent Establishment. Instead of bringing the unilateral measures to tax E-commerce operators, the countries should build consensus on introduction of concepts such as 'Digital PE' in order to build a robust methodology to tax E-commerce operators. Given that the genesis of such balanced approach emanates from bilateral actions of the countries, E-commerce operators should be eligible for corresponding adjustment in home country.

EQUALISATION LEVY IS NEITHER A DIRECT TAX NOR AN INDIRECT TAX. SO, IT CAN BE CONSTRUED AS A HYBRID TAX TOOL ENABLING THE ADMINISTRATORS TO TAX E-COMMERCE OPERATORS.

Alternatively, taxing such business models under presumptive taxation schemes may also be explored.

There has been a paradigm shift in accounting for companies owing to implementation of IND-AS. How do you see this particular development impacting Income tax liabilities of companies and/or challenges companies may face during assessment?

The IFRS based accounting or the IND-AS (Indian version of IFRS) definitely have changed the way we use to account for transactions and/or present financial statements. IFRS is more of a fair value-based accounting and it looks at and adheres to the principle of 'substance over form'. There are various accounting scenarios where transactions such as leases, revenue etc. are recorded in a form/period which does not coincide with the treatment and/or point of taxation. For instance, revenue recognition in case of a contract may be dependent on completion of a performance obligation, hence there are instances where revenue invoiced and collected may get recognised in a different FY; however, same is subjected to tax according to the invoicing period. Therefore, it is critical to have a robust mechanism in place where tax treatment of all these adjustments are standardized and uniformly followed.

Having said this, one has to see whether the similar progression have been made in approach of Income tax officials as at times they may find it suitable to accept all accounting adjustments which are in favour of revenue and tax them and wherever adjustments result into reduction of taxation, they may simply disregard those adjustments. Therefore, it is important for Government to bring in sufficient clarification or guidelines to set out principles for treatment of accounting adjustments under Income tax. Though Government has come-up with ICDS but that does not address the issue at the fundamental level.

From an indirect tax standpoint, do you see any gaps when it comes to convergence with accounting treatment accorded in the books of accounts in view of the IND-AS application?

Let us understand this with the help of an example. If a player (say) operating in the hospitality sector today takes a hotel on lease and incurs significant expenditure to improve the property, it has to capitalize the said expenditure in its books of accounts in terms of the relevant IND-AS. Given that the subject capitalization results in works contract qua an immovable property, the provisions of Section 17(5) of the CGST Act prohibit availment of corresponding GST paid/payable. This results in significant loss of GST credit for umpteen sectors including hospitality, manufacturing and other service industries.

I recall relief being granted by the Hon'ble Orissa HC in one of the writs filed qua credits pertaining to construction of immovable property, while many such writs are still pending in various High Courts. The Petitioner in these writs have argued that if the underlying structure is being used for purposes of business and to provide taxable supplies exigible to GST, input tax credit qua works contract services as well as goods/services used in construction of such structure ought to form an integral part of the GST credit system.

It is therefore high time that Government should take cognizance of such issues affecting businesses and issue comprehensive clarifications to take into account various newer business models adopted by industry (including best international practices) – bottom-line is our tax policy must reflect the principles and spirit of Transparency, Certainty & Consistency in addition to supporting 'ease of doing business' in India.

What are the recent developments in indirect tax space which you find to have a significant bearing on businesses in general and reasons thereof?

The indirect tax paradigm in India continues to evolve even after three years post implementation of GST. While many of the issues from erstwhile legislations and difficulties faced during implementation of GST are done away with, some still linger on.

I can't help but take note of how Gujarat High Court read down the restriction on refund on Input Service in case of inverted duty structure [Rule 89(5)] while in an identical matter, Madras High Court upheld the virus of the very rule. The tax payers are now forced to wait until Supreme Court would finally address the issue. I am also surprised to see how Madras High Court in its decision has created room for differential treatment for 'goods' and 'service', an age-old issue which was seen as plugged perpetually with introduction of GST. If any clue is to be taken, present Indirect Tax regime continues to call for a vigilante to safeguard taxpayer's interest.

In immediate days to come, it is also worthwhile to see how E-invoicing system fares and how the taxpayers adjust to it. Given the history of online portal's efficiency during implementation of GST, it may not be smooth. But the recent amendments and press release ensuring relaxations in the initial phase is a welcome and well thought after move by the Government, perhaps an indication of its determination to implement the system but with a cushion to its users.

Last but not the least, the machinery of advance ruling though was expected to provide clarity and certainty, nonetheless has struggled with inconsistent views across its various benches, rendering itself incoherent and infructuous. With no judicial members being part of the AAR benches and no visibility qua setting-up of GST Tribunals in the foreseeable future, the aggrieved taxpayers are left with no option but to knock the doors of Hon'ble High Courts/Apex Court in order to seek relief. It is high time that Government brings in an effective dispute resolution system qua GST, which beyond any doubt is the hallmark of any sound, stable and efficient tax system.

__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.

Renovation expenses amount to 'construction'; Allows benefit under Section 54F

Abdul Arif Baig
2020-TIOL-1202-ITAT-HYD

The Assessees being family members and co-owners sold a plot of land for a sum of INR 3.54 crores. The sale consideration was shared by the co-owners in proportion to their land holding from which the Assessee received INR 75.20 lakhs for his share of land). The Assessee claimed exemption of capital gains on purchase of a residential house collectively in the year 2006 to the extent it was incurred for purchase and the balance of the amount was deposited in the Capital Gains Account Scheme.

The period of three years in the Assessee's case expired in AY 2009-10. During the assessment proceedings, the AO observed that the Assessee claimed to have utilized the amount deposited in Capital Gain Scheme Account to renovate the existing residential unit. The AO observed that the extension of the existing residential unit would not amount to investment (purchase/construction) of a new residential house under Section 54F. The AO therefore disallowed the claim of the Assessee. The CIT (A) confirmed the action of the AO.

The Hon'ble ITAT held that Section 54F of the IT Act only mandates that consideration of original asset should be invested in 'a residential house' within the stipulated time by way of purchase or construction. It further held that the amount spent on renovation of such residential house by the Assessee would amount to construction of a residential house and according, the said expenditure is also allowable as exempt under Section 54F of the IT Act.

The ITAT further noted that 'the CIT(A) also agrees that the issue is covered in favour of the Assessee by the decisions of the Hon'ble Karnataka and Calcutta High Courts but chooses to follow the decisions against the Assessee'.

In this regard, the ITAT followed the judgement of the Hon'ble Bombay High Court in the case of CIT vs. Godavari Devi Saraf (1978) **(2003-TIOL-1136-HC-MUM-IT)** wherein the Court had held that 'in the absence of a decision from the jurisdictional High Court, the decision of another High Court which is in favour of the Assessee has to be followed'.

On the basis of the above legal precedents, the ITAT ruled in favour of the Assessee that renovation amounts to 'construction' and expenditure should be allowed as exempt under Section 54F.

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ITAT upholds disallowance for failure to deduct TDS on year-end provisions u/s 40(a)(ia)

Tata Sky Limited
2020-TIOL-1201-ITAT-MUM

The Assessee is engaged in the business of providing Direct to Home Services ('DTH'). A Set Top Box ('STB') at the premises of the subscribers receives television signals through broadcasters which are uplinked to the satellite. During the relevant AY 2009-10, the Assessee made ad-hoc year-end provision of expenses amounting to INR 56.97 crores in absence of receipt of the invoices. The AO disallowed the expenses under Section 40(a)(ia) of the IT

Act citing that the Assessee did not deduct tax in AY 2009-10 on such year-end provisions.

Aggrieved by the order of the AO, the Assessee preferred an appeal before CIT(A). However, the CIT(A) confirmed the disallowance. Aggrieved, the Assessee filed an appeal before the Hon'ble ITAT.

Before the ITAT, the AR contended that there was no obligation on the Assessee to deduct tax on the year-end provisions and accordingly, the expenses should not be disallowed. The AR placed reliance upon Gujarat High Court's decision in the case of Sanghi Infrastructure Ltd. **(2018-TIOL-1480-HC-AHM-IT)**, Mumbai Tribunal's decision in the case of Mahindra & Mahindra Limited **(ITA No.8597/Mum/2010)** and Aditya Birla Nuvo Ltd **(ITA No. 8427/Mum/2010)**, etc. Further, the AR submitted that AO had verified that TDS was deducted in the subsequent AY and paid by the Assessee.

Against this, the DR submitted that as per the provision of Chapter XVII-B of the IT Act, TDS was required to be deducted either at the time of payment or at the time of credit including even a credit in the suspense account was subject to TDS. Hence, there was no merit in the argument of the AR that TDS was not applicable on year end provisions.

The Hon'ble ITAT stated that once the Assessee claimed subject expenses by debiting into Profit & Loss Account, it needed to deduct applicable withholding taxes on said expenses, even if not credited to respective parties' account. The ITAT rejected the reliance placed by the AR on the afore-said ruling and concluded that all quoted cases were contrary to the provisions of Chapter XVII-B read with Section 40(a)(ia) of the IT Act, and hence, could not be relied upon.

Authors' Note:

The Hon'ble ITAT held that taxes were required to be withheld and paid on the year end provisions. It is pertinent to note that the issue has previously been decided in favour of the revenue by the other benches of the Hon'ble ITAT.

However, the ruling by the Bangalore bench of the Hon'ble ITAT in case of Bosch Limited is against the revenue. In this ruling, the ITAT had relied upon the decision of the Hon'ble Supreme Court in case of Shoorji Vallabhdas & Co wherein it was held that mere entries in the books of accounts would not establish the accrual of income in the hands of the payee and liability to deduct TDS would arise only when there was accrual of income in the hands of the payee.

Given this, it shall be interesting to note whether the subject judgment would be appealed against by the Assessee.

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Payment made to non-resident/foreign agent towards non managerial services rendered outside India could not be disallowed u/s 40(a)(i)

Gepach International
2020-TII-129-ITAT-MUM-INTL

The Assessee was engaged in the business of export of Pharmaceutical and Nutraceutical products. During the assessment proceedings, the AO noticed that Assessee had reimbursed certain expenses to M/s Pharmark Consulting FZE which were incurred on behalf of the Assessee. The AO disregarded the explanations submitted by the Assessee and disallowed the reimbursement of expenses under Section 40(a)(i) of the IT Act. On appeal, CIT(A) deleted the addition made by the AO in a detailed order.

Aggrieved by the order of the CIT(A), revenue filed appeal before the ITAT. The ITAT noticed that the Assessee had entered into an agreement with M/s Pharmark Consulting FZE, UAE and appointed them as its agent for the business in Russia. The agents appointed the employees/staffs for

promotion of Assessee's products to identify new customers and carry-out marketing and sales promotion in Russia. The Assessee had reimbursed these expenses to its agent operating from the UAE.

The Hon'ble ITAT observed that the Assessee retained full control over all the marketing activities in Russia and the agent was simply implementing it. The ITAT also observed that there was no evidence that the non-resident agent had rendered any managerial service to the Assessee. The ITAT further observed that provisions of Section 195 were not attracted to payment of reimbursement of expenses made to its agent in the UAE. Accordingly, the ITAT upheld the disallowance under Section 40(a)(i) of the IT Act, as done by the CIT(A)

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ITAT holds that if Assessee's Agent in India has independent status, then the Assessee does not constitute a PE in India

Overseas Transport Co. Ltd.
2020-TII-130-ITAT-MUM-INTL

The Assessee was engaged in shipping business and their operations in India were carried out by two of its agents. During the assessment proceedings, the AO noted that they were working exclusively for the Assessee and hence, the Assessee has DAPE in India under Article 5(5) of the Mauritius Double Tax Avoidance Agreement ('DTAA'). Therefore, the Assessee was held to be liable to tax in India.

Aggrieved by this order, the Assessee approached the first appellate authority which held that since the two mentioned entities were not exclusive agents of the Assessee, the Assessee did not have Permanent Establishment in India and was thus not liable to tax in India. Aggrieved by this order, the revenue approached the Hon'ble ITAT.

In this regard, the ITAT observed that an exception has been carved-out in Article 5(5) to exclude an agent from being treated as a PE, if such agent is of an independent status and provides services in the ordinary course of its business. On the basis of facts available, the ITAT held that both agents were acting in the ordinary course of their business and had their independent status. The ITAT relied on co-ordinate bench decision in Bay Lines Mauritius wherein based on similar facts, it was held that if the agent was not exclusively acting on behalf of the Assessee enterprise, it could not be considered as dependent agent so as to constitute a PE.

The ITAT also rejected the constitution of a fixed place PE, stating that there was no permanent infrastructure, office, supervisory staff, tangible and intangible assets of the Assessee in India to constitute a fixed place PE. It was thus held that the Assessee did not had a PE in India and was eligible to avail the benefits of the DTAA.

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ITAT upholds exclusion of a comparable stressing on importance of year-to-year comparability and product similarity

Elcome Technologies Private Limited
2020-TII-301-ITAT-MUM-TP

The Appellant was engaged in trading of above related surveying and measurement equipment. During the assessment proceedings, the TPO proposed an adjustment of INR 9.33 crores in TP order. The AO in draft order proposed the adjustment considering the TP adjustment into account.

The Assessee filed objections in respect of variations made by the AO in the said draft assessment order. The DRP directed the AO to compare the gross profit of the AE business with the comparable selected by the Assessee. DRP directed the AO to reject the comparable PAE Ltd. as it was engaged in trading of auto batteries, solar and power back-up systems which were dissimilar to products of the Assessee. Following DRP's direction, the AO passed the final assessment order making an adjustment to ALP of INR 2.70 crores. Aggrieved, the Assessee preferred an appeal before the Hon'ble ITAT.

The Assessee contended that in RPM, the nature of products was not of much relevance and that focus was more on same or similar nature of functions rather than similarity of products. The Assessee further contended that subject comparable should be included as it was retained by TPO/AO in the previous AY. However, the revenue supported the order of lower authorities.

The Hon'ble ITAT held that:

- Comparability of a case has to be considered on year to year basis and, therefore, merely because a case had been held to be comparable for one year could not per se be considered as comparable for succeeding year as well;
- Selection of the PLI depends on the factual position of the case, on comparable companies and FAR analysis which could vary on a year-to-year basis; and
- While comparing gross profit margins, minor differences in the products are acceptable if they are less likely to have an effect on the gross profit margin earned from sale of such products;

Accordingly, the ITAT rejected the contentions of the Assessee and the comparable company!

Authors' Note:

The findings of the Hon'ble ITAT were focused on the need of broader product comparability along with the functional comparability in case where RPM is selected as the MAM. The ITAT relied on the OCED TP guidance, UN TP Manual and ICAI Guidance Note on Report Under Section 92E to arrive at the conclusion that products traded by the companies should be similar in nature and product comparability has a direct effect on the FAR and gross profitability of the enterprises.

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HC dismisses revenue's appeal against ITAT MAM selection citing absence of substantial question of law

Gulbrandsen Chemicals Pvt. Ltd.
2020-TII-31-HC-AHM-TP

The Hon'ble Gujarat HC has dismissed the appeal filed by the IT department against the ITAT order which upheld the applicability of Internal TNMM as against the CUP Method.

While dismissing the appeal, the Hon'ble HC cited two important observations as under:

(i) The OECD recognizes that barring exceptional cases, the tax administration should not disregard the actual transaction or substitute other transactions for them and the examination of a controlled transaction should ordinarily be based on the transaction as it has been actually undertaken and structured by the associated enterprises. It is of further significance that the guidelines discourage re-structuring of legitimate business transactions; and

(ii) The finding by the Tribunal regarding the adoption of TNMM as the Most Appropriate Method of arriving at ALP cannot be termed as perverse or contrary to the evidence on record. Difference of opinion as to the appropriateness of one or the other method cannot be gone into in a s. 260A appeal.

Authors' Note:

The industry has embraced the said decision on two counts viz., (i) the fact that Hon'ble ITAT is the last fact-finding authority and application of MAM is a factual exercise which ITAT has duly performed; and (ii) placing reliance on the OCED guidelines to state that the tax administration should not recharacterize the legitimate transactions and ought to trust the transactions as structured by the AEs.

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CBDT introduces new format for Form No. 15C so as to include insurer with banking company

Notification No. 75/2020
September 22, 2020

Rule 29B of the IT Rules deals with application to be filed by a non-resident for obtaining certificate to receive interest and other sums as income without deduction of tax.

Rule 29B (supra) has now been amended to include an insurer. Therefore, wherever the words "banking company" exists, it shall stand substituted with the word "banking company or an insurer".

Further a proviso has been added to define the term 'insurer' as assigned under Section 2(9)(d) of the Insurance Act, 1939. Also, Form 15C has suitably been modified to effectuate the said changes.

FROM THE LEGISLATURE
CIRCULAR

CBDT issues detailed guidelines on E-commerce TDS u/s 194-O and TCS on sale of goods u/s 206C (1H)

Circular No. 17/2020
September 29, 2020

The CBDT has issued detailed guidelines on two key amendments introduced vide the Finance Act, 2020 viz., insertion of new Section 194-O and new Sub-section (1H) to Section 206C of the IT Act ('the provisions') which are applicable from October 01, 2020.

With the critics from industry and tax professionals, there were umpteen concerns qua applicability per se and applicable thresholds of the respective provisions. The CBDT has now clarified on relevant issues such as applicability of the provisions on payment gateways, sale of motor vehicles, insurance agents, computation of thresholds for FY 2020-21, adjustment for sale returns, discounts or indirect taxes, among others. We have enclosed the guidance herewith for your perusal.

Authors' Note:

With the said clarification issued by the CBDT, most of the key issues stand clarified. Below are the key takeaways from the guidelines:

- Threshold of INR 5 Lakhs and INR 50 Lakhs under Sections 194-O and Section 206C(1H) respectively shall be computed from April 01, 2020;
- For Section 206C(1H), TCS is required to be collected even if the sale is made before October 01, 2020 and consideration is received on or after October 01, 2020;
- Sections 194-O and 206C(1H) shall not be applicable to transaction of securities and commodities traded through recognized stock exchanges; and
- Sections 194-O shall be applicable to payment gateways, however the CBDT has clarified that payment gateways should not be liable to deduct TDS once the e-commerce website has deducted TDS on the same transaction. However, payment gateways would be mandated to obtain undertaking from e-commerce websites while facilitating payments.

Relaxations by the Taxation and Other Laws (Relaxation and Amendment of Certain Provisions) Act, 2020 receives assent from the President

Keeping in mind the continuing disruption caused by the COVID-19 pandemic, the Central Government proposed a bill to further extend the several due dates to March 31, 2021. The bill received President's assent on September 30, 2020 and became a law viz., 'The Taxation and Other Laws (Relaxation and Amendment of Certain Provisions) Act, 2020'. Key amendments made are discussed as under:

A. Extensions of the due date of compliances

It extends all compliance due dates falling within the time period from March 20, 2020 to December 31, 2020 are extended till March 31, 2021. The details are

Particulars	Current Due Dates	Extended Due Dates
Completion of any proceeding or passing of any order	All due dates falling within March 20, 2020 to December 31, 2020	March 31, 2020
Issuance of any notice, intimation, notification, sanction or approval		
Filing of any appeal, reply or application or furnishing of any report, document, return or statement or such other record		
Making of investment, deposit, payment, acquisition, purchase, construction or such other action as required under Section 54-54GB or any other sections		
Letter of approval under the SEZ Act for availing deduction under Section 10AA of the IT Act		

However, the below due dates were specifically not extended under the subject law granting relief / relaxation:

Particulars	Current/Extended Due Date
Belated/ revised tax return for AY 2019-20	September 30, 2020 (further extended to November 30, 2020)
Tax Return for AY 2020-21	November 30, 2020
Tax Audit Report (AY 2020-21)	October 31, 2020
Filing of TDS return for quarter ending March 31, 2020	July 31, 2020
Investment under section 54 to 54GB (compliance required till September 29, 2020)	September 30, 2020

B. Insertion of new Section 114B – Faceless assessment procedure

A new Section 144B has been inserted in the IT Act, with effect from April 01, 2021, legislating the faceless assessment scheme notified on August 13, 2021. The new section describes in detail how the faceless assessments shall be conducted and also the procedure in respect of proceedings where the Assessees are eligible for opting Dispute Reolution as notified under Section 144C.

Guidelines for Compulsory Selection of Returns for Complete Scrutiny Assessment

TThe CBDT has laid down guidelines for compulsory selection of returns for complete scrutiny assessment during FY 2020-21. It has prescribed five broad parameters for selection of returns for complete scrutiny under faceless assessment for FY 2020-21. The said parameters are as mentioned below:

The Parameters are as mentioned below:

- Cases pertaining to survey u/s 133A of the IT Act;
- Cases pertaining to search and seizure;
- Cases where return of income was called by the notice u/s 142(1);
- Cases in which notices for reassessment u/s 148 of the IT Act; and
- Cases related to registration/approval under various Sections of the IT Act such as 12A, 10(23FC), 35(ii)/(iia)/(iii), etc.

The selection process has to be completed by September 30, 2020 – this has been instructed to the field offices vide letter dated September 17, 2020.

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Madras HC sets aside non-speaking order passed by the Revenue

Jay Jay Mills India Private Limited
2020-TIOL-1602-HC-MAD-GST

The Petitioner had filed a refund application which had been rejected by the Revenue. The Petitioner challenged the refund rejection of being non-speaking. The HC noted that the Revenue had rejected the refund application merely by stating that the ineligible goods or services are not directly used for making zero-rated supply in terms of Section 54(8)(a) of the CGST Act.

The HC further noted that whenever an application is made, the statutory authority is bound to consider the claim made and pass a reasoned order, however, in the instant case, the Respondent had not taken the contentions of the Petitioner into consideration. Therefore, the HC set aside the rejection orders and directed the Respondent to extend hearing opportunity to the Petitioners and pass an appropriate order.

Authors' Note

Despite the settled principle of law that Revenue authorities are required to pass reasoned order in taxation matters, it has been seen that the lower authorities often issue non-speaking orders. Such non-speaking orders passed by the Revenue authorities or the Judiciary lead to further litigation.

The SC in the case of G. Saraswathi and Ors. vs. Rathinammal and Ors. **(2018-TIOL-470-SC-MISC)** had emphasised the importance of passing reasoned orders. The SC noted that courts need to pass reasoned orders in every case which would enable the parties involved in the litigation to understand as to 'why one party has won and other has lost'. It was observed that non-speaking orders deprive the parties of the knowledge regarding the reason for a particular order.

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HC holds that Petitioner shall file Appeal against confiscation order before Writ

Jay Goga Traders
2020-TIOL-1557-HC-AHM-GST

Perishable goods of the Petitioner had been intercepted and detained by the Revenue authorities. Further, the goods were confiscated and penalty was imposed. Aggrieved, the Petitioner approached the Gujarat HC seeking quashing of the confiscation order and provisional release of the confiscated goods.

The HC observed that in respect of the application for provisional release of the goods, an application for Writ can be made only after filing appeal u/s 107 of the CGST Act. Accordingly, the HC held that the Petitioner should file statutory appeal u/s 107 against the order of confiscation passed u/s 130 of the CGST Act.

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ITC restriction under Rule 36(4) challenged before Delhi HC

Bharti Airtel Limited vs. Union of India and Ors.
2020-TIOL-1621-HC-DEL-GST

Rule 36(4) under the CGST Rules restricts availment of credit in respect of unreported invoices to the tune of 10% of eligible credit available in respect of invoices / debit notes for which details have been uploaded by respective suppliers. It has been contended by the Petitioner that such restriction is discriminatory as it fails to differentiate between the genuine taxpayers vis-à-vis fraudulent persons.

It has been further argued that there is no logic or rationale behind 10% rule for allowing ITC for unreported transactions and that too based on reported transactions. Accordingly, the Petitioner has submitted that such provisions are manifestly arbitrary and ultra vires the provisions of CGST Act.

The Delhi HC has tagged the instant matter along with similar matters pending for consideration.

Authors' Note

Rule 36(4), post its introduction in 2019, was amended to restrict availment of credit to 10% of eligible and matched credit. It is pertinent to note that this Rule had come into power from Section 43A of the CGST Act and not Section 16. Accordingly, one may also argue that such Rule is ultra vires to Article 265 of the Constitution of India, which inter-alia provides that Rules (being sub-ordinate legislations) cannot override the Act (i.e. the principal legislations).

It would further be relevant to note that identical issue also existed in the erstwhile VAT regime, wherein the state authorities attempted to restrict credit in case of default of supplier where the recipient had no control over. The Punjab and Haryana HC in the case of Gheru Lal Bal Chand v. the State of Haryana **((2011) 45 VST 195)** had held that such impossible eventuality is not admissible. Similarly, in In Larsen & Toubro vs. CCE **(2001 (127) ELT (807))**, it was held that the assessee should not be penalized by denial of input credit for the mistake of the supplier of goods.

Under the GST regime too, the provision u/r. 36(4) has been challenged in the cases of Bharti Telemedia Limited **(W.P.(C) 6895/2020)**, Sales Tax Bar Association **(W.P.(C) 13097/2019)**, Himanshu Mohta and Associates **(W.P.(C) 13154/2019)**, before the Delhi HC. The said provision has also been challenged in the case of HSIL Limited [CWP-9861-2020] before Punjab and Haryana HC, and in the case of Society for Tax Analysis and Research **(R/Special Civil Application No. 19529 Of 2019)** before the Gujarat HC. We will have to wait and watch out for the fate of these petitions.

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Madras HC upholds the validity of Rule 89(5) of the CGST Rules

Tvl. Transtonnelstroy Afcons Joint Venture vs. Union of India
2020-TIOL-1599-HC-MAD-GST

The Petitioners had filed a Writ before the Madras HC inter alia to declare the provisions of Rule 89(5) of the CGST Rules as ultra vires Article 14 of the Constitution as well as ultra vires Section 54 of the CGST Act in so far as it excludes the component of credit of input services from the definition of Net ITC in the formula prescribed for claiming refund of unutilized credit in cases of inverted duty structure.

The Madras HC observed that the Gujarat HC had not fully taken into consideration the proviso to Section 54(3) and its import and implications, therefore the judgement in the case of VKC Footsteps **(2020-TIOL-1273-HC-AHM-GST)** the Madras HC needed to independently analyse the relevant provisions before concurring the view of Gujarat HC.

It was observed Section 54(1) empowers the prescription of the form and manner of a claim for refund and Section 54(4) contains procedural requirements as regards the application for refund. In the amended Rule 89(5), the expression 'Net ITC' has been defined as meaning ITC availed on 'inputs' during the relevant period. In light of the conclusion that a refund is permitted only in respect of unutilised ITC that accrues or accumulates as a result of the higher rate of tax on input goods vis-à-vis output supplies, the HC held that the amended Rule 89(5) is in conformity with the statute. Therefore, it was held that both Section 54 and Rule 89 are intra vires the CGST Act.

It was further observed that the explanation to Section 54 uses the terms 'inputs' and 'input services' separately and distinctively, thereby indicating the legislative intent to distinguish one from the other. Accordingly, it was held that the definition of the term 'input' was not be ultra vires to the Constitution.

Basis the above observations, the Madras HC held that Rule 89(5) of the CGST Rules is intra vires to Section 54(3) of the CGST Act. Accordingly, the Writ Petitions were dismissed.

Authors' Note

This judgement of the Madras HC comes as a huge disappointment for a number of taxpayers in sectors where inverted duty structure is prevalent, such as those executing turnkey projects. Such restrictive and regressive position had been taken earlier as well by the Maharashtra AAR in the case of Daewoo-TPL JV **(2019-TIOL-233-AAR-GST)** wherein it was held that Applicant engaged in execution of construction of large projects is ineligible for refund of ITC on 'input services' with respect to transaction covered under inverted duty structure.

The Gujarat HC had given hope to the taxpayers by its judgement in the case of VKC Footsteps (supra), however, the Madras HC has taken a contrary view now. As both the Courts are at the same judicial level, it would be interesting to see whether the matter would be taken-up to the SC or whether the CBIC would analyse the same and issue a decisive clarification.

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AAAR holds that repair services provided to Indian customers on behest of a Foreign Company would amount to composite supply

Volvo Eicher Commercial Vehicles Limited
2020-TIOL-37-AAAR-GST

The Applicant, a joint venture between Volvo Group and Eicher Motors, after providing replacements/repair services to its customers, raised invoices upon its parent Company, for claiming the amount on discharging such warranty obligations. Accordingly, the Parent Company issued credit notes to the Applicant and thereby reimbursed such expenses in convertible foreign exchange. The question involved was whether the supplies made by the Applicant is a supply of services and if yes whether such supply would amount to export of services under GST.

Referring to the definition of 'recipient of supply of services or goods or both' and 'consideration', the Karnataka AAAR observed that the person who is required to make a payment for getting a job done is the recipient of service. Accordingly, the recipient of services supplied by the Applicant during the warranty period would be the manufacturer, Volvo Sweden, as it is at their behest that the Applicant had undertaken the activity of repair and replacement of parts to the customers during the warranty period. It was further held that the supply by the Applicant to Volvo Sweden is a composite supply of goods and services with the principal supply being supply of service. The AAAR further refrained from answering the question in relation to whether the supply of services to Volvo Sweden amounts to export of services, as ascertaining the 'place of supply' is beyond the scope of Advance Ruling authorities.

Authors' Note

The AAR in this case had held that Volvo Sweden is not the recipient of services provided by the Applicant, but only pays the consideration to the provider for such services. The AAAR has reversed the ruling that extent by holding that Volvo Sweden is de facto recipient of services. It is not unusual to have multi-party agreements, wherein supply is made to one party and payment is received from another. The AAAR seems to have correctly analysed the definition of recipient of supply of goods or services or both and held that the manufacturer who is actually making the payment would be considered as the recipient. It should be noted that the identification of the recipient is very important to correctly determine the place of supply in case of supply of various types of services.

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Delhi HC issues notice in Writ Challenging Refund provision u/r. 90(3)

Insitel Services Private Limited
2020-TIOL-1579-HC-DEL-GST

The Petitioner had challenged the Rule 90(3) of the CGST Rules being ultra vires to Art. 14 and 19(1)(g) of the Constitution in as much as rectification of deficiencies is considered as fresh application for the purpose of computing limitation for applying for refund. The Petitioners further contended that issuance of a deficiency memo effectively results in rejection of the refund application without giving any opportunity of hearing to the applicant.

The Delhi HC has listed the matter for hearing on 09 December 2020.

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NAA: No synchronisation required with turnover while passing ITC benefit, confirms profiteering against 'Shapoorji Palonji'

Shri Venugopal Gella and Ors. vs. Shapoorji Palonji
2020-TIOL-59-NAA-GST

The DGAP had reported that the Respondent had not passed the benefit of ITC by way of commensurate price reduction. It had been alleged that the Respondent had availed benefit of ITC of 3.62% of the total turnover in respect of a project during the period from 01 July 2017 to 30 April 2019 which was required to be passed on to the flat buyers of the said project. However, the Respondent failed to do so.

The NAA held that the Respondent had benefited from the additional ITC, which was required to be passed on to the buyers of the flats by commensurately reducing the prices of the flats. Accordingly, the NAA directed that the Respondent shall reduce the prices to be realized commensurate with the benefit of ITC received by him. It was further observed that the Respondent has committed an offence under Section 171(1) during the period from 01 July 2017 to 30 April 2019 and liable for penalty. However, the provisions of Section 171(3A) under which penalty has been prescribed for the above violation, has been inserted w.e.f. 01 January 2020 and it was not in operation during the period in dispute. Therefore, penalty cannot be imposed on the Respondent retrospectively.

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HC allows refund of unutilized ITC distributed by ISD to SEZ

Britannia Industries Limited
2020-TIOL-1495-HC-AHM-GST

The Petitioner, a SEZ Unit making zero rated supplies under GST, was unable to utilize the ITC of IGST from its ISD which was lying unutilized in its Electronic Credit Ledger. Therefore, the Petitioner claimed refund of such ITC, which was rejected by the Respondent.

It was observed that Rule 89 provides for procedure for application for refund of tax, interest, penalty, fees and prescribes that in respect of supplies to a SEZ unit, the application for refund has to be filed by the supplier of goods or services. It was further observed that it is not possible for a supplier of goods and services to file a separate refund application to claim the refund of the ITC distributed by ISD. Therefore, the argument of the department that the Petitioner is not entitled to seek the refund of the ITC paid in connection with goods or services supplied to SEZ unit is not tenable.

Accordingly, it was held that the Petitioner was entitled to claim refund of IGST lying in the Electronic Credit Ledger as there is no specific supplier who can claim the refund under the provisions of the CGST Act and the CGST Rules as ITC is distributed by the input service distributor. Consequently, the HC set aside the IGST refund rejection order and directed the Revenue authorities to process the claim of refund made by the petitioner for unutilized IGST credit lying in Electronic Credit Ledger u/s. 54 of the CGST Act.

Authors' Note

The Gujarat HC took note of its own judgement in the case of Amit Cotton Industries **(2019- TIOL- 1443- HC- AHM -GST)**, wherein, in similar facts, the HC had allowed the claim made by the Petitioner for refund of the IGST in case of an export unit. Reference needs to be drawn to Service Tax Notification No. 28/2012 dated 20th June, 2012 attributable to the services used in more than one unit to be distributed pro-rata on the basis of the turnover during the relevant period of the concerned unit to the sum total of the turnover of all the units. Similarly, in facts of the present case also, credit of service tax is distributed to all the units by the ISD and therefore, the claim of refund made by the SEZ unit would be allowed under law.

HC allows manual filing of Appeal as electronic order was not uploaded by Revenue

Gujarat State Petronet Limited
2020-TIOL-1504-HC-AHM-GST

The Petitioner had filed a refund application which had been partly rejected by the Respondent on the ground of non-submission of invoices. Upon receiving endorsed copies of the invoices, the Petitioner approached the Revenue for submission. However, the Respondent did not take the invoice into consideration as the refund order had already been signed. The Petitioner had requested the Respondent to upload the order copy on the Portal, however, the same could not be uploaded on account of technical difficulties. Thereafter, without receiving electronic copy of the order, the Petitioner filed a manual appeal, which was rejected as being time barred.

Referring to Section 107 of the CGST Act and Rule 108 of the CGST Rules, the HC observed that the appeal is required to be filed in electronic mode only and if any other mode is to be prescribed then the same is required to be notified by way of a notification. It was observed that in the instant case, there was nothing on record to show that any notification had been issued for manual filing of an appeal and in such circumstances, though the physical copy of the adjudication order was handed over to the Assessee, the time period to file appeal would start only when the order is uploaded on the GST portal.

It was held that merely because the Petitioner had filed the appeal manually after exhausting all the efforts to ensure filing of the appeal in proper and legal manner, the order rejecting such appeal on the ground of limitation is not sustainable as the Petitioner cannot be penalised for lack of clarity of the provision when the new law is enacted. Basis the above, the HC allowed the Writ and remanded the matter back to the Appellate authority to decide the same afresh on merits.

Authors' Note:

Albeit more than three years have passed since the introduction of GST, the GSTN portal has not been fully functional yet and even where it is functional, the Departmental authorities are not fully trained or equipped to handle the online functioning as envisaged in the GST Law. It has been observed that the GST order copies are not uploaded on the web portal in many cases, and the Appellants are then forced to file the appeals in manual form. This judgement would serve as a good precedent for Appellants, where appeal may be rejected on limitation on account of manual filing for want of online order copy. Further, proper training should be provided to the authorities to upload the order online on the GST Portal on timely basis to avoid undue hardships to the taxpayers.

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HC directs assessee to file representation before Jurisdictional Commissioner for allowing TRAN-1

Gurukripa Lubricants
2020-TIOL-1462-HC-MP-GST

The Petitioner faced technical difficulties in uploading Form TRAN-1 and therefore relentlessly raised grievances, however the same were not adequately addressed by the Respondent authorities. Accordingly, the Petitioner filed a Writ before the Madhya Pradesh HC seeking to file their TRAN-1.

The Petitioner relied upon the judgement of the Punjab and Haryana HC in the case of Adfert Technologies Private Limited **(2019 TIOL-2519-HC-P&H-GST)**, wherein the HC had allowed a batch of Petitioners to file their TRAN-1 after the due date. Taking cognizance of said decision, the Madhya Pradesh HC directed the Petitioner to file a fresh

representation annexing all the judgments cited, within a period of seven days before the Jurisdictional Commissioner from the date of receipt of the instant order. The HC further directed the Jurisdictional Commissioner to decide the matter in light of the various judgements and pass a reasoned and speaking order.

Authors' Note:

GST law, as drafted and legislated, is not free from the interpretational hassles. The standalone issue in GST right from its inception has been in respect of transitional credit. While a number of Courts have allowed the transitional credit even after due date, there have also been some contradictory judgements. The Gujarat HC in the case of Willowood Chemicals Private Limited **(2018-TIOL-2873-HC-AHM-GST)** had upheld the constitutional validity Rule 117 of the CGST Rules by holding that merely because the rule in question prescribes a time frame for making a declaration, such provision cannot necessarily be held to be directory in nature.

However, the said judgement stood negated by the judgement Punjab and Haryana HC in Adfert Technologies Private Limited **(2019 TIOL-2519-HC-P&H-GST)**. Most recently, the Delhi HC in the case of Brand Equity Treaties Limited **(2020-TIOL-900-HC-DEL-GST)** had read down Rule 117 by holding that such rule cannot affect the substantive right of the registered tax payer to avail of the existing/accrued and vested CENVAT credit. It would be pertinent to note that the said judgement of the Delhi HC has been stayed by the SC in **(TIOL-115-SC-GST-LB)**.

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AAR holds that Fuel Reimbursement received by Aircraft Rental service-provider forms part of value

Global Vectra Helicorp Limited
2020-TIOL-241-AAR-GST

The Applicant, under the Charter Hire services, was responsible for operating and maintaining the aircraft. In terms of the contracts, the Applicant had agreed to provide rental services of aircraft in respect of the ATF. At the locations where the customer is unable to provide the fuel, in order to ensure continuity of flying, the contract required the Applicant to procure the fuel on behalf of the Customer, and subsequently, the cost of the fuel is reimbursed by the Customer at actual (without charging any mark-up). The Applicant undertakes the activity of procurement of fuel as a 'pure agent'.

The AAR observed that the definition of 'consideration' clearly includes any payment made in respect of supply of goods by the recipient or by any other person. It was further observed that in the instant case, the payment made by the recipient includes payment towards the services rendered by the applicant as well as the payment towards fuel, which has been filled by the applicant in the aircrafts.

Accordingly, it was held that the payment made by the recipient to the applicant would also include the amount for the fuel filled in the aircraft by the applicant. Therefore, the amount of fuel, which is received as reimbursement by the applicant will undoubtedly form a part of the 'consideration' i.e. the value of the services provided by the applicant and GST is liable on the same.

The AAR further observed that in order to qualify as a pure agent, there must exist a contractual agreement with the recipient to act as a pure agent and to incur expenditure or costs in the course of supply. However, in the instant case, the Applicant had not provided any documentary evidence to prove that the reimbursement received from their customer is as per actual and without mark up. It was further observed that the Applicant uses the fuel procured for his own interest and therefore, cannot be treated as a pure agent. Therefore, the AAR ruled that amount recovered as reimbursement from the customer, is required to be included in the value of services provided by the Applicant.

AAR holds that Applicant is liable for registration if services rendered on behalf of another taxable person

PATROTAR
2020-TIOL-256-AAR-GST

PATROTAR, the Applicant, is a franchisee of Explore Knowledge Resources LLP, and sell their products such as books and stationery on their behalf under the brand name of ALOHA. The Applicant further offers various courses to students. In regular intervals, the Applicant pays royalty to their franchisor based on fees they collect from their customers.

The AAR observed that the Applicant is not liable to take registration u/s. 22(1) of the CGST Act which mandates registration in case turnover exceeds Rs. 20 lacs as their turnover is below the threshold. However, on-going through the terms of the agreement between the Applicant and Explore Knowledge Resources LLP, it was observed that the Applicant is acting as an agent and selling goods on behalf of another taxable person. It was therefore concluded that the instant case would be covered Sr. No. (vii) of Section 24 which mandates registration for the category of person who supply the goods and service on behalf of the other taxable person, irrespective of the turnover. It was ruled that the Applicant would still be required to obtain registration even though the aggregate turnover of the Applicant does not exceed the threshold limit of 20 lacs.

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AAR disallows deduction of 'actual land-value' from 'transaction-value'

Karma Buildcorn
2020-TIOL-243-AAR-GST

The Applicant enters into agreements with prospective buyers for development of residential /commercial properties. The agreements entered into are inclusive of land or undivided share of land basis. The Applicant submitted that the cost of land that is being transferred to the buyers on inclusive of land or undivided share of land basis need to be allowed to be deducted as a whole and not as provided in Notification No. 11/2017-CT (Rate) and 08/2017 (Rate) both dated 28 June 2017 as one third (33.33%) of the value, because in applicant's case the cost of Land is distinctly determinable and is more than one third (33.33%) of the consideration value of sale of property.

The AAR observed that there is deeming provisions in para 2 of the notification which provides that the value of transfer of land or undivided share of land, and the value of such transfer of land or undivided share of land, in such supply shall be deemed to be one third of the total amount charged for such supply. Accordingly, the contention to allow the deduction of actual value of land from the sale value on the grounds that their land value is ascertainable and other grounds is not legal. The AAR further holds that the reliance placed by the Applicant on VAT provisions is unsustainable as the same is not in existence anymore.

Basis the above, the AAR held that the value of supply for the transaction of sale of residential/ commercial property with undivided rights of land is to be arrived in terms of deeming provision of Para 2 of Notification no. 11/2017.

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AAR: Property-taxes, notional-interest on deposit which influence 'supply-value' form part of 'rental-income'

Midcon Polymers Private Limited
2020-TIOL-260-AAR-GST

The Applicant had proposed to engage in the business of renting of commercial property on monthly rents and allied businesses basis a contractual agreement with an Education Institution. The Applicant discharges the statutory taxes levied by the Municipality and also deposits, as per the contract. These taxes being paid on the property and such deduction are legal in respect of valuing the actual receipt of rent under control.

The Karnataka AAR observed that only exemption u/s 15(2), which deals with value of supply, is for taxes, duties, cesses, fees and charges levied under various GST Acts. Further, it was observed that the Applicant and the recipient are not related and price is sole consideration of the supply and monthly rent is price payable. Further, observing that the security deposit is an interest free refundable deposit which shall be returned to the lessee on lease termination, it was observed that it shall not be considered as a supply of Renting of immovable property service.

The AAR further observed that if at the expiry of the lease tenure, the entire deposit or part of it is withheld and not paid back, then at that stage such amounts not refunded shall be liable to GST. It was further observed that the notional interest earned out of the security deposit by the Applicant, is a general practice that wherever the quantum of deposit is higher the rent charged is less and vice-versa and there is a nexus between security deposit taken and the rent charged beyond doubt. It was however held that in the instant case the Applicant had not furnished adequate data to decide whether actually the notional interest influences the monthly rental amount. Referring to Section 2(31)(b) of the CGST Act, the AAR observed that the Applicant earns the notional interest in respect of supply of rental service though is not by recipient of service but from other persons.

Basis the above observations, it was held that notional interest has to be considered as part of value of supply of service, if and only if the said notional interest influences the value of supply, is leviable to GST along with the monthly rent at applicable rate. It was further held that the Applicant is entitled for general exemption of Rs. 20 lakhs for registration purpose subject to the condition that their annual total turnover which includes monthly rent and notional interest, if it influences the value of supply, does not exceed the threshold limit.

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Arbitrary enhancement in the valuation of imported second hand machinery was rejected in the absence of any evidences justifying the determination of value on notional basis

Champion Photostat Industrial Corporation
2020-TIOL-1466-CESTAT-DEL

The Appellant had imported old and used multifunctional devices with photocopying function, the valuation of which was challenged by the Department. The ld. Commissioner (Appeals) while relying upon the CBEC Circular No.4/2008-Cus dated 12.02.2008, which deals with valuation of second hand machinery/capital goods, upheld that the enhancement of the declared value based by the importer.

In the same circular in Clause 2(iii), it has been provided that however the transaction value of Rule 3 cannot be rejected by ab initio application of Rule 9, in as much as, one cannot, before rejecting the transaction value of Rule 3 with sufficient evidences, straight away arrive at notional value under Rule 9.

Rule 3 read with Rules 12 requires that where the proper officer has reason to doubt the truth or accuracy of the declared value in relation to the imported goods, he may ask the importer to furnish further information including the documents or other evidences. If after receiving such further information, or in the absence of the response of the importer, the proper officer still have reasonable doubt about the truth or accuracy of the value so declared, it shall be deemed that the transaction value of such imported goods cannot be determined under the provisions of Rule 3(1).

In the present case, no such exercise has been done by the proper officer. Thus, rejection of the transaction value is held to be arbitrary and thus, the same is set aside and the declared value restored for the purpose of assessment.

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High Court cannot be approached in the matters requiring 'fact finding' exercise

Geethanjali Exports
2020-TIOL-1529-HC-MAD-CUS

The Petitioner exported certain goods through 11 Shipping Bills in 2000-01 and claimed drawback to the tune of INR 10,25,616/-, which was sanctioned by the department. Allegedly, the sale proceeds towards these exports were not realised, which culminated into issuance of SCN. Petitioner furnished Bank Realisation Certificate for part of the exports (6 Shipping Bills) and SCN was adjudicated accordingly.

The Appeals before first and second appellate forums were dismissed and the Petitioner sought relief from High Court citing additional Bank Realisation Certificates for remaining shipping bills. However, High Court noted that realisation of export proceeds 'being factual issues, could be determined by the Revisional Authority himself. Accordingly, the matter was remanded back to the adjudicating authority.

Authors' Note:

Addressing a legal dispute involves ascertaining two fundamental aspects viz. 'point of law' and 'point of fact'. In summary processes, like the one followed by Indirect Tax regime, the quasi judicial authorities [i.e. Adjudicating

authorities, Commissioner (Appeals), Tribunal] are entrusted with the dual task of 'fact finding' and 'application of law'. On the other hand, High Court may only be approached to address the 'application of law'. Thus, in this hierarchy CESTAT is the last fact finding authority. Accordingly, any dispute brought before High Court, which involves introduction of new facts, is inherently remanded back to the quasi judicial authorities.

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HC allows refund of excess tax deposited on goods supplied at fixed-price

Advanced Systek Private Limited
2020-TIOL-1446-HC-AHM-VAT

The Respondent had received purchase orders from Companies who had invited bids for the installation of machinery. The goods were supplied under the Purchase orders did not issue Form 'C' as a fixed price towards consideration of the goods supplied was to be paid in spite of being an interstate transaction.

The Supplier paid differential tax @ 10%/12.5% inadvertently instead of paying it @ 4% in absence of Form 'C' under the CST Act by making a reverse working in accordance with Section 8A of the CST Act. This of course resulted in excess deposit of tax. The Gujarat Tribunal allowed the refund of excess tax so paid. Aggrieved, the Revenue preferred a Writ before the Gujarat HC.

Referring to Section 8 of the CST Act, the HC observed that when the assessee sold the goods on the price, which is inclusive of tax, the turnover is to be calculated as per the formula provided in Section 8A. Therefore, 4% tax was required to be applied on the turnover as calculated under Section 8A. However, in the instant case, the Respondent paid the tax @ 10%/12.5%. It was noted that the Respondent cannot be said to have collected the CST at the rate of 10%/12.5% from its buyers/receiver of the goods in view of the contract of fixed price. It was further observed by the HC that the provisions of the CST Act do not contemplate any power to forfeiture of refund by the Revenue.

Basis the above observations, the HC rejected the Revenue's Writ and directed them to refund the excess duty paid by the Respondent.

Authors' Note

The HC held that the principal laid down by Apex Court in the case of Mafatlal Industries Ltd. And Others vs. Union of India and Ors reported in **(2002-TIOL-54-SC-CX-CB)** would not be able in the instant case. The Apex Court had held that Excise law provides for the refund of duty only if it is proved that the manufacturer has not passed on the same along with the price to the buyer. It was observed that the respondent-assessee cannot be said to have collected the CST at the rate of 10% or 12.5% from its buyers/receiver of the goods in view of the contract of fixed price and there is no question of passing over the same to its buyer in view of the decision of the Apex Court in the case of Mafatlal Industries (supra).

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Madras HC quashes penalty proceedings in absence of element of mens-rea

TVL Sarathas
W.P.(MD)Nos.7858, 7859 and 7860 of 2020

The Petitioner had imported aluminium sheets and air conditioners, etc. for the purpose of renovation of their business premises. As the same was merely a one-time import for the purpose of own consumption, the Petitioner under the bona fide belief that they were not liable to file returns of entry tax, however paid entry tax @ 3% (at a lower rate). Subsequently, after the Department pointed out the liability to pay entire amount of entry tax @ 10%, the Petitioner immediately paid the balance 7% entry tax. Despite the full payment of applicable entry tax, the Department had imposed penalty upon the Petitioner for imports of the above-mentioned goods.

The Madras HC observed that penalties were levied for the sole reason that the Petitioner had not filed the relevant returns. It was further observed that as a settled principle, penalty involves a penal element. Therefore, the element of mens rea should be recorded to be present. However, in the instant case, there was no such finding. Consequently, the Madras HC allowed the Writ and quashed the order passed by the Respondent.

Authors' Note:

Albeit the principle of law that *mens rea* is required for imposition of penalty, is well settled for decades now, it is often seen that the Revenue Authorities impose penalty arbitrarily. In a landmark judgement of the SC in the case of Hindustan Steel Limited vs. The State of Orissa **(2002-TIOL-148-SC-CT-LB)**, had held that even if a minimum penalty is prescribed, the authority competent to impose the penalty will be justified in refusing to impose penalty, when there is a technical venial breach of the provisions of the Act or where the breach flows from a bona fide belief that the offender is not liable to act in the manner prescribed by the statute.

Although, there have also been a contradictory line of thought which provides that in cases of civil matters, there is no need to substantiate mens rea for imposition of penalty. Most notably, in the case of Shriram Mutual Fund and Another **(2006-TIOL-72-SC-SEBI)**, the SC had held that mens rea is not an essential ingredient for contravention of the provisions of a civil act. In our view, the penalty is attracted as soon as contravention of the statutory obligations as contemplated by the Act is established and, therefore, the intention of the parties committing such violation becomes immaterial. Similar view had also been taken under the Income Tax law in the case of Atul Mohan Bindal **(2009-TIOL-97-SC-IT)**.

Despite innumerable judgements flowing right from the Apex Court to the quasi-judicial Courts upholding that levy of penalty is a subjective matter and would depend on the facts involved in each case, the revenue has never shied away from imposing penalty even where the contravention is prima facie bona fide.

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Tribunal allows refund of payment which loses the character of Service Tax

Lancor Holdings Limited
2020-TIOL-1426-CESTAT-MAD

M/s. LSDL had entered into a construction service agreement with M/s. LGDL. Both the entities had subsequently merged with M/s. Lancor Holdings Limited vide an amalgamation order of Madras HC. During the time of signing of the agreement, M/s. LSDL had paid consideration including service tax to the service provider M/s. LDGL, which had been duly reported in the ST-3 Return. Pursuant to the merger, both the entities had become part of the Amalgamated Company and the service, for which advance was originally given, stood cancelled as the same could not be proceeded with. As the advance stood cancelled, the amalgamated Company claimed the refund of service tax, which was rejected on the ground of limitation.

The Chennai Tribunal observed that Rule 6(3) of the Service Tax Rules permits an assessee to take credit of such excess Service Tax paid. It was further held that such paid tax is categorized as a deposit and hence, loses the characteristics of 'tax', and therefore, the provisions of Section 11B are not attracted. Accordingly, the Tribunal held that when the amount loses the character of service tax, it could only be treated as a deposit, as held in innumerable precedents, which becomes an item for adjustment in terms of Rule 6 (3), since no service could ever be provided. Accordingly, the Tribunal set aside the refund rejection order with consequential relief.

Authors' Note:

This judgement is in similar lines as the judgement of the Ahmedabad Tribunal in the case of Aakash The Place to Celebrate vs. Commissioner of S.T. [2013-TIOL-516-CESTAT-AHM] wherein it had been held that where provisions of the said Rules are applicable, the time-limit mentioned under Section 11B of the Excise Act is not attracted. It had been also noted by the Tribunal that no time-limit had been provided under Rule 6(3) of the ST Rules.

This judgement may serve as a good precedent to clear the pending litigations under the erstwhile ST law for those taxpayers, whose refund applications had been rejected in similar matter.

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HC directs Revenue to unfreeze bank account of ex-director of a Public Company

Shri Girdhari Lal Lath vs. State of Maharashtra and Ors.
2020-TIOLCORP-47-HC-MUM-CA

The Petitioner was a non-executive director of a public Company who had resigned in 2014 The GST Department had attached the bank account of the Petitioner after his resignation for recovery of dues from the Company in terms of Section 44(6) of the VAT Act. Aggrieved, the Petitioner challenged the attachment of bank account before the Bombay HC.

Referring to Section 44(6) of the VAT Act, the Bombay HC observed that the said provision is subject to the provisions of the Companies Act. As Section 44(6) of the VAT Act is subjected to Companies Act, the definitions and distinctions laid down in the Companies Act, vis-a-vis public company and private company would be applicable to the MVAT Act as if by way of incorporation.

Basis the above observations, the Bombay HC held that as the Company in which the Petitioner was a non-executive director is a public Company, attachment of bank account of the Petitioner was unjustified and without legal sanction. Accordingly, the Bombay HC directed the Respondents to unfreeze the bank account of the Petitioner.

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Delhi Tribunal holds that Commissioner (A) is not empowered to remand matters

Rajasthan Antibiotic Limited
2017-TIOL-1599-CESTAT-DEL

The Revenue had observed that the Applicant had wrongly availed CENVAT credit on the strength of the improper duty paying documents, which did not contain certain essential details of the supplier. The Appellant had accepted the deficiencies in the duty paying documents and rectified the same requesting for allowance of the CENVAT credit. Subsequently, the Dy. Commissioner allowed the CENVAT Credit to the Appellant.

Aggrieved, the Revenue preferred an Appeal before the Commissioner (A) alleging suppression of facts. The Commissioner (A) observed that the Dy. Commissioner had passed a non-speaking order and therefore remanded the matter back for fresh consideration. Aggrieved, the Appellant preferred an Appeal before the Delhi Tribunal.

Referring to Rule 9(2) of the CENVAT Credit Rules, the Delhi Tribunal observed that the Legislature has taken into account difficulty that may arise for some discrepancy in the documents on the basis of which, credit has been taken. To alleviate such difficulty and to facilitate the assessee, the jurisdictional Deputy/Asst. Commissioner have been empowered for enquiring the documents, etc. and on being satisfied that the goods or services covered by the said documents have been received and accounted for in the books of account, may allow the CENVAT credit. It was further observed that the Dy. Commissioner had duly inquired both oral and documentary and on being satisfied, allowed the CENVAT credit.

The Delhi Tribunal further observed that the Commissioner(A) has got no powers to order for reinvestigation. Further, the Commissioner(A), being a creature of statute, has no powers to extend the limitation prescribed in the Act for issue of SCN. Basis the above observations, the Delhi Tribunal set aside the order passed by the Commissioner(A) and restored the order passed by the Dy. Commissioner.

Authors' Note:

In the shadows of some burning issues in indirect taxation, namely, transitional credit, inverted duty structure, etc., the question regarding the powers of Commissioner (A) to remand matters back for fresh adjudication has also persisted for some time now. It would be pertinent to note that under the Excise Act, the pre-amended Section 35A(3) specifically empowered the Commissioner (A) to remand back matters. However, the provision was subsequently amended to inter alia remove the word 'remand' from the said provision. However, the SC in the case of Umesh Dhaimode **(2002-TIOL-415-SC-CUS)** had held that power to remand the matter to the authority below for fresh decision is inbuilt in the aforesaid provision.

Subsequently, in another case of MIL India Limited **(2007-TIOL-30-SC-CX)**, the SC had made a passing remark that the power of Commissioner (A) to remand back had been taken away by the amendment to Section 35A(3). Considering the contradictory views, the Delhi Tribunal in the case of Hawkins Cookers Limited **(2012-TIOL-2225-CESTAT-DEL)** had held that as the observation in respect of Section 35A was in the nature of passing remark, the same cannot take precedence over the case of Umesh Dhaimode (supra).

<table>
<tr><th>Notification/ Circular</th><th>Key Updates</th></tr>
<tr><td>Notification No. 64/2020 - Central Tax dated 31 August 2020</td><td>Due date for furnishing return in GSTR-4 for F.Y. 2019-20 extended till 31 October 2020.

Due date for completion or compliances of any action, by any authority or by any person, or as prescribed u/s. 171 of the CGST Act, which falls during the period from 20 March 2020 to 29 November 2020 extended till 30 November 2020.

Earlier, the CBIC had extended the due date for compliances till 30 June 2020 vide Notification No. 35/2020 – Central Tax dated 03 April 2020.</td></tr>
<tr><td>Notification No. 65/2020 - Central Tax dated 01 September 2020</td><td>The GSTN has released FAQs on e-invoicing, inter alia explaining its format, validity and applicability. Following are the key highlights of the FAQs:

‣ E-invoicing is mandatory w.e.f. 01 October 2020 for registered persons having aggregate turnover (based on PAN) of more than Rs. 500 crores in a financial year;
‣ In order to be e-invoice ready, businesses shall continue to issue invoices as per the current practice. Necessary changes on account of e-invoicing requirement (i.e. to enable reporting of invoices to IRP and obtain IRN), would be made by ERP/Accounting and Billing Software providers in their respective software;
‣ SEZ, insurance / banking companies, GTA service provides, among others are exempted from e-invoice mandate;
‣ For small entities not having their own ERP/Software solutions, a free offline utility will be provided, through which invoices can be easily prepared, reported to IRP and obtain IRN/signed e-invoice;
‣ The GSTN has introduced 'Schema' which is a structured template or format for electronic invoice notified as Form GST INV-1; and
‣ A Dynamic QR code made available to buyer through digital display (with payment cross-reference) shall be deemed to be having QR code.</td></tr>
<tr><td>GSTN Update</td><td>Recently, the GSTN had facilitated reconciliation tool for matching GSTR-2B (auto-drafted ITC statement) with purchase register. In respect thereto, the GSTN has now enabled the Matching Offline Tool to view Form GSTR 2B and match the auto drafted details in Form GSTR-2B with the purchase register. The match results are used to create the matching report in offline mode. It has been clarified that the taxpayers are required to install Matching Tool from the GST Portal, and then add profile to match Form GSTR-2B details with the purchase register details.

The FAQs inter alia provide the procedure for downloading and installing the Matching Offline Tool, downloading JSON files, downloading purchase register, etc.</td></tr>
<tr><td>GSTN Update -Introduction of Form GSTR-2B</td><td>Until now, the taxpayers were required to quote the original invoice number while reporting a Credit/Debit Note in Form GSTR-1 or Form GSTR-6. However, the taxpayers are now provided with the facility to:

‣ Report single credit note or debit note issued in respect of multiple invoices in GSTR-1/GSTR-6;
‣ Choose the note supply type to identify the appropriate table;
‣ Indicate Place of Supply against each credit/debit note, to identify the supply type; and
‣ Declare Debit/Credit Notes with tax amount. However, the same can be declared without any taxable value also i.e. if credit/debit note is issued for difference in tax rate only, then note value can be reported as 'Zero'. Only tax amount will have to be entered in such cases.</td></tr>
</table>

Authors' Note:

As the launch of new Return filing system under GST in Form ANX-1, ANX-2, RET-1, etc. have been put on hold, the existing return filing system will be continued until further notice. Most notably, the newly introduced Form GSTR-2B will feature details on the import of goods fetched from the ICEGATE system including details of inward supply of goods from Special Economic Zone units/developers. Further, a summarised statement will indicate whether all the ITC would be available or not under each section. This would clarify the action that can be taken by the taxpayers in the particular section under GSTR-3B.

However, there are certain downsides to this new form which cannot be ignored. The taxpayers would now be required to reconcile Form GSTR-2B with Form GSTR-3B as well as Form GSTR-2A for availing ITC.

In another notable update, the de-linking of debit/credit notes with invoices would really take off some burden from the taxpayers, especially those who sell their goods via e-commerce platforms such as Amazon and Flipkart, who were required to furnish the 'Original date and number of the tax invoice' in order to report credit or debit note issued under GST in his GSTR-1. It was a cumbersome task to spend more time and efforts to maintain such records of debit/credit notes. With the introduction of this new facility, the taxpayers would not be required to furnish original date and number of the tax invoice for issuance of debit/credit note.

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FROM THE LEGISLATURE
CUSTOMS & TRADE LAWS

Amendment in Bill of Entry Format

Notification No. 90/2020 - Customs (N.T.) September17, 2020

The Government has notified Bill of Entry (Forms) (Amendment) Regulations, 2020 vide Notification No.90/2020-Customs (NT) dated September 17, 2020.

Authors' Note:

Recently, Customs (Administration of Rules of Origin under Trade Agreements) Rules, 2020 ('CAROTAR 2020') were brought into force to notify procedural framework governing duty benefits under Preferential Trade Agreement. Above Notification prescribes a substitute format of Bill of Entry in compliance with CAROTAR 2020. Though the intent seems to be a legitimate one to protect the domestic industry from fallacious claim of FTA benefit by certain importers. However, the revised guidelines is already becoming a challenge to even legitimate importers claiming the FTA benefit owing to detailed documentation process and prevailing ambiguity on documents required for substantiating the claim.

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Random sampling and testing of imported LED products in BIS recognized labs

Notification No.32/2015-2020
September17, 2020

A new policy condition is added in the in chapter 85 and 94 of ITC (HS) to enable random sampling of LED products notified under Electronics and Information Technology Goods (Requirement of Compulsory Registration) Order, 2012 in 'Bureau of Indian Standards' recognised lab.

Authors' Note:

Owing to on-going pandemic, many of the importers were facing difficulties in complying with the mandatory requirement of BIS on LED products imposed vide Notification dated April 01, 2020 effective from October 01, 2020. Accordingly, several representations were made by the trade bodies and addressing to the same, Government is considering to extend the applicability of the Notification from April 2021. Though a formal announcement of the same is expected in coming weeks.

Circulars clarifying key aspects

Circular	Key Clarifications
Circular No. 39/2020 September 4, 2020	**Extending the facility of exports to Nepal and Bangladesh though additional Land Customs Station** Facility of exporting transhipments sealed at ICD's/CFS' to Nepal and Bhutan as monitored through Electronic Cargo Tracking System is extended to Fulbari, Chandrabandha and Jaigaon. With this addition, a total of 12 LCS are now equipped to provide aforesaid facility.
Circular No. 40/2020 September 4, 2020	**All India roll out plan for Faceless Assessment** Provides for detailed roll-out plan in phases covering different Customs Zones and Chapters of the Customs Tariff Act, 1975, including the existing Phases I and II, is given in Annexure I. Also provides for constitution of 11 National Assessment Centres. The National Assessment Centres are organized commodity-wise according to the First Schedule to the Customs Tariff Act.
Circular No. 41/2020 September 7, 2020	**Auto Let Export Order under Express Cargo Clearance System** Export goods which are covered under Courier Shipping Bills, fully facilitated by Risk Management System and which pass through the Custom's X-ray scanning shall be automatically given Let Export Order by the Express Cargo Clearance System. **Authors' Note:** The system is expected to reduce dwell time of clearance of export shipments through courier, an attempt by the authorities to enhance global competitiveness of Indian exporters.

Amendment in FTP to discontinue the MEIS w.e.f. January 01, 2020 and to provide ceiling on MEIS benefit till its subsistence

Notification No.30/2015-2020
September 1, 2020

FTP provisions are amended with a ceiling on MEIS benefit and announcing discontinuation of scheme itself w.e.f. 01.01.2021.Accordingly, the total MEIS rewards shall not exceed INR 2 Crores per IEC on exports made in the period September 01, 2020 to December 31, 2020 (period based on LEO date and shipping bills).

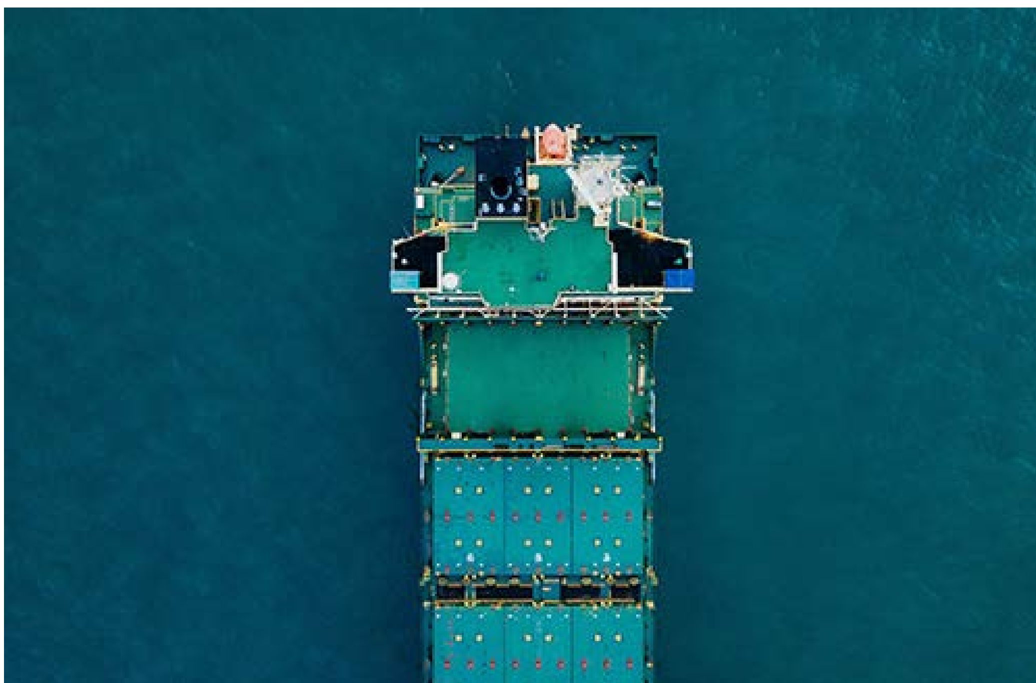
The benefit of MEIS would not be available to an IEC holder who has not made any export with the LEO date from September 01, 2019 to August 31,2020 or has obtained new IEC on or after September 01, 2020 for exports made w.e.f. September 01, 2020.

The cap of INR 2 Crores per IEC is subject to a downward revision to ensure that the total claim for the period September 01, 2020 to December 31, 2020 does not exceed the fund of INR 5,000 Crores allocated by the Government of India.

Authors' Note:

Previously, owing to US-INDIA dispute before WTO, it was decided that MEIS scheme would be replaced by RoDTEP – a WTO compliant scheme. Consequently, the MEIS module was also blocked from accepting new applications having LEO of April 01, 2020.

With this Amendment, the MEIS module is expected to re-open, for the limited time-frame and given the ceiling on overall MEIS quota, exporters need to expedite their applications.



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Public/Trade Notices clarifying key aspects

Public/Trade Notices	Key Updates/Clarifications
PN. 16/2015-20 September 22, 2020	**Extension in the Implementation of the Track and Trace system for the export of drug formulations** Due date for implementation of Track and Trace system for export of pharmaceuticals and drug consignments along with maintaining Parent-Child relationship in the level of packaging and their movement in supply chain has been extended from October 01, 2020 to April 01, 2021.
PN. 17/2015-20 September 22, 2020	**Amendment in the MEIS Schedule** Amendments have been made to Chapter 38 of the MEIS Schedule in Table 2 of Appendix 3B to harmonise the same with the amended ITC HS as per Notification No. 38/2020 dated January 1,2020 and the changes in the Finance (No. 2) Act, 2019, Fifth Schedule.
PN. 18/2015-20 September 23, 2020	**Revision of ANF-7 of Appendices & ANFs of Handbook of Procedure 2015-2020** The DGFT has revised the Form ANF-7A (Application Form for Claim of Ted Refund / Duty Drawback / Brand Rate Fixation) of Appendices and ANFs.
PN. 122/2020 September 23, 2020	**Exporters with pending Drawback claims due to invalidated PFMS account required to submit online request on e-Sanchit** A list of IECs and pending shipping bills where PFMS account has not been validated is being made available on the JNPT Customs portal. The concerned exporters have been requested to validate their bank account by making an online request along with the copy of passbook or bank authorisation letter.
TN. 26/2020-21 September 14, 2020	**Standardisation of Unit of Quantity in DGFT's EDI and Custom's ICEGATE** In order to attain uniformity in data and standardisation of UQC the DGFT has made following decisions: i. No New authorisation under FTP be issued with non-standard Unit of Quantity; ii. Exports against authorisations already issued in non-standard Unit of Quantity till October 30, 2020. W.e.f. October 01, 2020 exports-imports without standard Unit of Quantity will not be permitted; and iii. In the interim the authorisation holders re required to approach RA' and for correcting the non-standardised Unit of Quantity to standardised Unit of Quantity.

HC Quashes Directors' disqualification, directs reactivation of their DINs, DSCs to allow CFSS benefit

Sandeep Agarwal & Anr. vs. Union of India & Anr.
2020-TIOLCORP-41-HC-DEL-CA

The Petitioners were directors in two companies one of which was struck off from the register due to non filing of financial statement and annual returns. Consequent to which they were disqualified as Directors under section 164(2) of the Companies Act 2013 with effect from November 2016 for a period of 5 years. Pursuant to their disqualification, their Director Identification Numbers ("DIN") and Digital Signature Certificates ("DSC") were also cancelled. Therefore, they challenged the disqualification and sought the quashing of the impugned list of disqualified directors.

The Hon'ble High court of Delhi has considered two principles issues in this matter namely whether the provisions of section 164(2) and 167(1) can be read to operate retrospectively and whether the petitioners can avail benefit of the Companies Fresh Start Scheme (CFSS).

The Court relied upon its judgement in the matter of Mukut Pathak **(2019-TIOLCORP-27-HC-DEL-CA)** where it was observed that proviso to Section 167(1)(a) which came into effect from May 2018, cannot be read to operate retrospectively. It was further held that the said proviso, being a punitive measure with respect to the rights and obligations of directors, cannot be applied retrospectively unless the statutory amendment expressly provides so.

The Companies Fresh Start Scheme (CFSS) is a new scheme, which has been notified on March 30, 2020. The scheme is launched to give a reprieve to such companies who have defaulted in filing documents so that they can file their requisite documents regularize their operations. The Scheme also envisages non-imposition of penalty or any other charges for belated filing of the documents. This Scheme provides an opportunity for active companies who may have defaulted in filing of documents, to put their affairs in order.

In the present case, the Petitioners are Directors of two companies – one whose name has been struck off and one, which is still active. In such a situation, the disqualification and cancellation of DINs would be a severe impediment for them in availing remedies under the Scheme. The launch of the Scheme itself constitutes a fresh and a continuing cause of action. The suspension of the DINs would not only affect the Petitioners qua the company, whose name has been struck off, but also qua the company which is active. In order to enable the Directors of active company to continue the business in the fitness of things and also in view of the judgment in Mukut Pathak (supra), the disqualification of the Petitioners as Directors is set aside. The DINs and DSCs of the Petitioners are directed to be reactivated, within a period of three working days.

Authors' Note:

There is a vital need to raise standards of corporate governance and directors are responsible to ensure the same - the provisions of Section 164(2) intend to uphold the stated position and spirit. However, in view of current pandemic situation as well as consequent introduction of CFSS scheme which aims to provide opportunities to companies to correct their past actions, this judgment would surely help in understanding and implementing the CFSS scheme in its true sense and spirit.

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SC Quashes NCLAT order rejecting resolution plan basis 'misconceived' grounds; Restores NCLT order

The Karad Urban Cooperative Bank Ltd. vs. Swwapnil Bhingardevay & Ors. 2020-TIOLCORP-08-SC-IBC-LB

The Committee of Creditors ('CoC') have petitioned against the NCLAT order through which it set aside the resolution plan as approved by NCLT on the grounds that resolution plan approved by NCLT is wholly untenable, unviable, misconceived and unjustified. The Resolution Professional along with the CoC had approved the resolution plan as submitted by a bidder after considering all financial and business aspects. However, the promoter director of the company approached NCLAT and pleaded that Resolution Professional and CoC have approved the plan without considering various significant aspects and hence, the same was not tenable and should be set aside. It was also alleged that there was a breach of confidentiality wherein important financial numbers were leaked to successful bidder to enable him to match the liquidation value with Resolution Professional. Taking this into account, the NCLAT remanded the matter back to the adjudicating authority with a direction to send back the resolution plan to CoC.

The Hon'ble Supreme Court examined the matter and analysed following key points to arrive at its judgement:

a) **The viability and feasibility of the Resolution Plan**

The Court has referred to its observations in the matter of Essar Steel and K. Sashidar **(2019-TIOLCORP-18-SC-IBC-LB)** and observed that.

'If all the factors that need to be taken into account for determining whether or not the corporate debtor can be kept running as a going concern have been placed before the Committee of Creditors and the CoC has taken a conscious decision to approve the resolution plan, then the adjudicating authority will have to switch over to the hands-off mode'.

The Court further inferred that 'There is an intrinsic assumption that financial creditors are fully informed about the viability of the corporate debtor and feasibility of the proposed resolution plan. The opinion on the subject matter expressed by them after due deliberations in the CoC meetings through voting, as per voting shares, is a collective business decision. The legislature, consciously, has not provided any ground to challenge the "commercial wisdom" of the individual financial creditors or their collective decision before the adjudicating authority'.

b) **The liquidation value mentioned by the Successful Resolution Applicant**

It is alleged that in its Resolution Plan, the offer value tallied exactly with the liquidation value obtained by the Resolution Professional. Thus, there appears to have been a breach of confidentiality, violating Regulation 35(2).

The Court observed that the liquidation value mentioned in the Resolution Plan is much lower than actual payout as it did not include the payments to be made in lieu of statutory dues and dues to employees and workers. The question of breach of confidentiality and leakage of confidential information can easily be tested on the touchstone of the benefit that accrued to the party who got the information. In the given case, no benefit accrued to the party. The NCLAT appears to have made a mountain out of a molehill and has recorded a finding even beyond the pleadings in the Memorandum of Appeal.

c) The Court also considered the other matters alleged such as resolution plan did not consider the plant and machinery of a particular plant or whether the format of advertisement was in conformity with regulations. The Hon'ble Court observed that consideration of values of plant and machinery in the plan is a commercial decision and once plan is discussed and agreed amongst CoC, Resolution Professional and the bidder, then there was no question of viability or interference by an adjudicating authority. Also, so far as advertisement was concerned, it was issued by Resolution Professional as per the guidelines available on the date of publication of advertisement and

should not be treated as a grounds for setting aside the resolution plan. If at all that was to be challenged, it should have been done at the time of advertisement whereas promoter/director didn't take any such action at that stage.

Considering all the above factors, the Hon'ble Court set aside NCLAT order and once again upheld the supremacy of CoC's commercial wisdom.

Considering all the above factors, the Hon'ble Supreme court has set NCLAT order and have upheld once again the supremacy of CoC commercial wisdom.

Authors' Note:

This is a significant decision and shall pave the way for strengthening decisions taken by the CoC. In India, the promoters are trying to vitiate the resolution process in one way or the other to modify the plans to their benefits. On the contrary, once a company is admitted for liquidation, it becomes critical that the interest of employees and creditors must be protected by the CoC which works along with Resolution Professional, with complete autonomy. This being said, given that valuation of a company is a complex matter so one may expect that lot of such litigations would come through in future and Courts would form their views considering the complete facts and circumstances of each case.

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FROM THE LEGISLATURE

MINISTRY OF CORPORATE AFFAIRS

Deposit Norms eased for Start-Up Companies

The Central Government in consultation with the RBI amended Rule 2(1)(c)(xvii) and clause (i) of second proviso to Rule 3(3) of the Companies (Acceptance of Deposits) Rules, 2014 vide Notification issued on 07.09.2020. By virtue of the said Notification, the MCA have substituted the words to "five years" from "ten years" in both the said Rules.

Before this amendment as per Rule 2(1)(c)(xvii), an amount of twenty-five lakh rupees or more received by a start-up company, by way of a convertible note (convertible into equity shares or repayable within a period not exceeding five years from the date of issue) in a single tranche, from a person would not fall under the definition of "deposits".

And as per the explanation given for the purposes of this sub-clause;

I. **"Start-up company"** means a private company incorporated under the Companies Act, 2013 or Companies Act, 1956 and recognised as such in accordance with notification number [G.S.R. 127 (E), dated the 19th February, 2019 issued by the Department for Promotion of Industry and Internal Trade];

II. **"Convertible note"** means an instrument evidencing receipt of money initially as a debt, which is repayable at the option of the holder, or which is convertible into such number of equity shares of the start-up company upon occurrence of specified events and as per the other terms and conditions agreed to and indicated in the instrument.

Post this amendment, this time limit of five years has been increased to ten years which further means that a start-up company when accepting an amount of twenty five lakh rupees or more by way of convertible note in a single tranche and where these convertible instruments are convertible into equity shares or repayable after a period of not exceeding ten years from the date of issue would not fall under the definition of deposits.

Authors' Note:

This is a welcome move as it will help start-ups to commence their business by raising funds quickly without having to comply with the deposits related regulatory compliances under the Companies Act. While the quantum of equity infusion in start-ups is always a difficult decision to make as equity once introduced is always subjected to dividend distribution tax at the time of capital outflow in any form. Therefore, such relaxation provides an impetus to start-up companies.

Extension of due date for filing of Cost Audit Report

In view of representation being received from various stakeholders owing to the extraordinary disruptions faced owing to the pandemic, the MCA vide Circular No. 29/2020 dated September 10, 2020 extended the due date for submission of the cost audit report to the Board of Directors for FY 2019-20 to November 30, 2020.

As per Rule 6(5) of the Companies (Cost Records and Audit) Rules, 2014, every cost auditor is required to share his duly signed report to the Board of Directors of the company within a period of one hundred and eighty days from the closure of the FY to which the report relates. Therefore, last date for submitting cost audit report to the company for FY 2019-20 was September 27, 2020 which is now extended to November 30, 2020.

Consequently, the cost audit report for FY ended on March 31, 2020 shall be filed in e-form CRA-4 within 30 days from the date of receipt of the copy of the cost audit report by the company. Also, no additional fees would be levied for filing CRA-4 on the portal within the extended due date.

Authors' Note:

This is one more attempt to provide relaxation to companies which are facing disruptions caused by COVID-19. It is pertinent to note that this deadline is further eased out for companies which have sought an extension of annual general meeting up to December 31, 2020. For such companies, the cost audit report filing may take place until 30 days of annual general meeting, i.e. by January, 2021.

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Relaxation from default recognition due to restructuring of debt

The SEBI vide Circular No. CIR/ P/ 2020/ 160 dated August 31, 2020 provides relaxation from default recognition due to restructuring of debt till December 31, 2020 to all the Credit Rating Agencies ('CRAs') registered with the SEBI. Accordingly, if the CRAs based on its assessment is of the view that the restructuring by the lenders/investors is solely due to COVID-19 related stress or is as per the RBI resolution framework as provided vide Notification No. RBI/2020-21/16 DOR.No.BP.BC/3/21.04.048/2020-21 dated August 6, 2020, CRAs may not consider it as a default event and/or recognize default - appropriate disclosures in this regard however needs to be made in the press release.

Authors' Note:

The default recognition by CRAs has always been an unprecedented situation for any company and it impairs the credit worthiness of company in financial as well as general terms. Therefore, this relaxation definitely is a breather for companies which are facing financial crisis owing to COVID-19 induced financial stress. Though CRAs are expected to take a pragmatic view, but it shall be interesting to see what views they actually form given that recently they have been reprimanded by regulators on matters relating to good rating given to companies, which were going through financial turmoil internally.

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Extension of Annual General Meeting for financial year 2019-20

Earlier MCA vide General Circular No. 28/2020 dated August 17, 2020 extended the time limit of the Annual General Meeting ('AGM') by clarifying that companies shall seek such extension of time in Form No. GNL-1 from concerned ROCs on or before September 29, 2020. Now in continuation, the MCA vide a Press Release dated September 08, 2020 provides a further extension for holding the AGM till December 31, 2020 from September 30, 2020. The Press Release also issues directions to the ROC to issue orders without filing of formal application (GNL-1 as prescribed in the earlier circular) and payment of fees. Even applications already filed but not approved or rejected are also covered for this relief.

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Revised guidelines on Priority Sector Lending issued by Reserve Bank of India

The RBI on September 04, 2020 released the revised Master Direction – Reserve Bank of India (Priority Sector Lending – Targets and Classification) Directions, 2020 revising the guidelines for Priority Sector Lending so as to promote holistic development by promoting the availability of credit and liquidity to start-ups, agriculture sector and the renewable energy sector including others. The main highlights of this Master Direction are as follows.

- **Objective:** The prime objective of these guidelines is to penetrate new sectors and areas which are in dire need of credit to flourish while at the same time leveraging credit for the companies terribly affected by the global pandemic by incrementing credit flow where priority sector credit flow is low. The guidelines also address issue of regional disparities in the flow of credit at district level, whereas ranking of districts would be carried out based on per capita flow to priority sector and areas with lower flow of credit would be incentivized.

- **Agriculture and Farming Sector:** The lending to agriculture sector includes Farm credit and lending for agriculture infrastructure and ancillary activities. The Farm credit shall be given to individual and farm producing organization/companies for crop (pre and post-harvest) and for purchase of agriculture equipment and machinery or solar agricultural pumps. The guideline prescribes specified agriculture infrastructure development and ancillary activities to be covered under the priority sector.

  Apart from this, the targets prescribed for lending by banks to non-corporate farmers for FY 2020-21 has been set at 12.14% of the Adjusted Net Bank Credit ('ANBC') or Credit Equivalent of Off-Balance Sheet Exposures ('CEOBE'), whichever would be higher. Banks have been directed to increase their lending to 13.5% of the ANBC for lending to the agricultural sector.

- **MSMEs and Start-ups:** All bank loans to MSMEs confirming to guidelines issued vide Notification dated June 26, 2020 on MSMEs classification of enterprises shall qualify as priority sector lending. The revised guidelines have included bank finance to start-ups (up to INR 50 crores). Export credit up to 2% of ANBC or CEOBE shall also be classified as priority sector lending as per prescribed limits.

- **Renewables Sector:** Revised PSL Guidelines envisages bank loans up to a limit of INR 30 crores to borrowers for purpose of setting up solar-based and biomass-based power generators, windmills, micro-hydel plants, and non-conventional energy-based public utilities viz. street lighting systems and remote village electrification, which have been made eligible for priority sector classification. Lending limits to individual households for the purposes of setting up or procuring renewable energy resources or infrastructure have been set at INR 10 lakhs per borrower.

- **Education and Housing:** Loans to individuals for educational purposes, including vocational courses, not exceeding ₹ 20 lakh will be considered as eligible

for priority sector classification. Loans currently classified as priority sector will continue till maturity. Loans up to prescribed limits for purchase or construction and repair of a dwelling unit shall be classified as priority sector.

- **Social Infrastructure:** Bank loans up to a limit of INR 5 crore per borrower for setting up schools, drinking water facilities and sanitation facilities including construction/refurbishment of household toilets and water improvements at household level, etc. and loans up to a limit of ₹10 crore per borrower for building health care facilities including under 'Ayushman Bharat' in Tier II to Tier VI centres are eligible for priority sector classification.

- **Increased Credit Limits for Renewable Energy and Health Infrastructure including 'Ayushman Bharat' initiative:** There is a 100% increase in the credit limit for renewable energy sector and health infrastructure even for those under the 'Ayushman Bharath' initiative and loans up to a limit of INR 5 crore per borrower for setting up of schools, drinking water and sanitation facilities even at the household level has been envisaged. Credit limit of INR 10 crore per borrower for building healthcare facilities including under 'Ayushman Bharat' in Tier II to Tier VI centres has been sanctioned and setting up of solar-based and biomass-based power generators, windmills, micro-hydel plants, and non-conventional energy-based public utilities viz. street lighting systems and remote village electrification has been made eligible for priority sector classification and permitted bank loans of up to INR 30 crore. Individual households for the purposes of setting up or procuring renewable energy resources or infrastructure have been allowed credit up to INR 10 lakh per borrower.

Authors' Note:

This is indeed a welcome move as it shall help in provision of credit to start-ups and agriculture sector (including others) which have often been denied credit due to a myriad of reasons including lack of creditworthiness. This move shall promote 'ease of doing business' for Indian start-ups and makes available funding options to start-ups beyond angel investments, PE and VC funding. Further, the agricultural and healthcare lending growth could go a long way in boosting markets ailing from the pandemic.

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Financial Parameters for Resolution Framework for COVID-19-related Stress

In the previous magazine, we had analysed the provisions of RBI Circular dated August 6, 2020 which laid out resolution framework for COVID-19 related stress. The Circular also envisaged constitution of an expert committee to make recommendations on the required financial parameters with sector specific benchmark ranges which needs to be factored in the resolution plan of borrowers. The expert committee headed by Shri K.V. Kamath came-up with financial parameters as per which following key ratios shall be considered:

Key Ratio	Definition
Total Outside Liabilities / Adjusted Tangible Net Worth ('TOL/ATNW')	Addition of long-term debt, short term debt, current liabilities and provisions along with deferred tax liability divided by tangible net worth net of the investments and loans in the group and outside entities.
Total Debt / EBITDA	Addition of short term and long-term debt divided by addition of profit before tax, interest and finance charges along with depreciation and amortization.

Key Ratio	Definition
Current Ratio Current assets divided by current liabilities Debt Service Coverage Ratio ('DSCR')	For the relevant year addition of net cash accruals along with interest and finance charges divided by addition of current portion of long-term debt with interest and finance charges.
Average Debt Service Coverage Ratio ('ADSCR')	Over the period of the loan addition of net cash accruals along with interest and finance charges divided by addition of current portion of long-term debt with interest and finance charges.

- **Other Financial Parameters to also be considered:** The lending institutions are permitted to factor in other financial parameters as well in addition to the Key Ratios. The requirements to factor in Key Ratios are applicable even in cases when there is only one lending institution with exposure to an eligible borrower.

- **Inapplicability of Key Ratios:** Certain Key Ratios are inapplicable for certain Identified Sectors for instance (i) TOL/ATNW, Total Debt/EBITDA and Current Ratio in the roads sector where the financing is cash flow based and at special purpose vehicle level where the level of debt is decided at the time of initial project appraisal and the working capital cycle is also negative; (ii) DSCR and ADSCR in the aviation and wholesale trading since most of the airline companies work on refinancing of debt as a financing strategy and in wholesale trading where companies rarely use long term debt for funding their operations and are usually unlisted; and (iii) Current Ratio in automobile manufacturing considering the 'just in time inventory' business model for raw materials and parts, and finished goods inventory is funded by channel financing available from dealers.

  The resolution plans are required to take into account the pre-Pandemic operating and financial performance of the borrower and impact of the Pandemic on its operating and financial performance at the time of finalizing the resolution plan, in order to assess cashflows in subsequent years, while stipulating appropriate ratios in each case.

- **Lending Institutions can make their own internal assessment:** With regards to those sectors where the threshold parameters have not been specified by the Expert Committee, lending institutions can make their own internal assessments for the solvency ratios i.e. TOL/ATNW and Total Debt/EBIDTA, however, the current ratio and DSCR shall be 1.0 and above, and ADSCR shall be 1.2 and above.

- **Lending Institutions allowed to make their own impact assessment:** As the Pandemic has a varied impact on various sectors/entities. the lending institutions are allowed to adopt a graded approach depending on the severity of the impact on the borrowers, while preparing or implementing the resolution plan. Impact on the borrowers may also be classified into mild, moderate and severe, as suggested by the Expert Committee.

- **Expectations for meeting of thresholds for Key Ratios:** The lending institutions are expected to ensure adherence to the TOL/ATNW agreed as per the resolution plan at the time of implementation itself, this ratio is required to be maintained as per the resolution plan by 31 March 2022 so are all other Key Ratios and on an ongoing basis thereafter. The threshold TOL/ATNW and Total Debt/ EBIDTA ratios are expected to be met by 31 March 2023 while the other three Key Ratios should be met for each year of the projections starting from Financial Year 2022.

  The compliance in regard to meet agreed ratios must be supervised as financial covenants on an ongoing basis and during subsequent credit reviews. Any such violation not rectified within a reasonable period, in terms of the loan contract shall be considered as financial difficulty.

- **Other Requirements such as ICA:** The requirements of the Circular dated August 6, 2020, such as mandatory requirement for lending institutions to execute an inter-creditor agreement ('ICA'),

maintenance of an escrow account after implementation of a resolution plan etc. shall be applicable at the level of legal entities in which the lending institutions have exposure to. Such legal entity could also include a special purpose vehicle having a legal-entity status, set up for a project.

Authors' Note:

The specified Key Ratios would help the lending institutions to finalize resolution plans expeditiously, defining clear parameters of financial performance that would be required to be achieved by eligible borrowers seeking resolution/restructuring under the August 6th Circular.

The success of the one-time restructuring regime introduced by the RBI also depends on the co-ordination between the institutional/ foreign creditors/investors who are not covered by the August 6 Circular and are currently on hold due to the suspension of Sections 7, 9 and 10 of the IBC.

Thus, the success of resolution plans under the August 6 Circular read together with this Circular would depend on the continued suspension of the IBC beyond six (6) months to be effectively used by lenders to support businesses in distress.

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Increase in Foreign Direct Investment under Automatic Route in Defence Manufacturing

The Government recently announced raising the FDI limit in defence manufacturing, under the automatic route, from 49% to 74%. Subsequently, the Department for Promotion of Industry and Internal Trade ('DPIIT') issued Press Note 4 (2020 Series) dated September 17, 2020 ('PN 4 of 2020') to give effect to the Government's decision to raise FDI in the defence sector to 74% under automatic route. The key changes effected are as follows:

- FDI limit under automatic route is increased from 49% to 74% in an industry requiring industrial license under the Industries (Development & Regulation) Act, 1951;
- FDI limit is increased from 49% to 74% under Government route wherever it is likely to result in access to modern technology or for other reasons to be recorded;
- Infusion of fresh foreign investment upto 49%, in a company not seeking industrial license or which already has Government approval for FDI in Defence, shall require mandatory submission of a declaration with the MoD in case change in equity/shareholding pattern or transfer of stake by existing investor to new foreign investor for FDI up to 49%, within 30 days of such change. Proposals for raising FDI beyond 49% from such companies will require Government approval;
- Foreign investment in the defence sector would be subject to scrutiny on the grounds of national security. Further, the Government reserves the right to review any foreign investment sector that affects or may affect national security; and
- Investee company should be structured to be self-sufficient in the areas of product design and development. The investee/joint venture company along with the manufacturing facility, should also have maintenance and life cycle support facility of the product being manufactured in India.

Authors' Note:

This was awaited from the time Government announced the aforesaid proposal of increasing the FDI limits in Defence manufacturing. The aim is to reduce dependence on other countries and to boost 'make in India' so that as a nation we achieve savings on foreign exchange outflows. However, Government has kept discretionary powers with itself to evaluate each project so that it can strike a right balance between promoting domestic manufacturing vis-à-vis protecting national security interests of the country.

SEBI proposes overhaul of LODR Regulations to Strengthen Corporate Governance

SEBI has been mulling over proposed changes in SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015 ('LODR Regulations') to harmonize various regulatory developments which took place since the regulation came in the year 2015. The primary objective of these changes is to strengthen corporate governance and to ease the compliance burden on listed entities. Consequent to this, SEBI has issued a Consultation Paper dated September 11, 2020 and invited public comments thereon. The key propositions coming out of this Consultation Paper are divided into three categories, the details of which are as follows:

A. Proposed Amendments to Strengthen Corporate Governance Provisions

- **Continuance of market capitalization based and corporate governance applicability of LODR Regulations:** It is proposed that provisions that become applicable to a listed entity on the basis of market capitalization, shall continue to apply irrespective of change or decrease in the market capitalization below prescribed threshold limit. Thus, such provisions once applicable shall continue to apply. In addition to this, corporate governance provisions as enunciated in Regulation 17 to 27, shall be complied with once it becomes applicable to a company (based on net worth or paid capital criterion) despite subsequent changes in net worth/paid-up capital.

- **Special Resolution if shareholding in material subsidiary reduces to or is 50%:** Current provisions envisage special resolution requirement if listed entity disposes of shares in its material subsidiary resulting in reduction of its shareholding (either on its own or together with other subsidiaries) to less than 50% or cease the exercise of control over the subsidiary. To restrict the misuse of the provisions where stake is reduced to exactly 50% (and, the subsidiary ceases to be a subsidiary as per the Companies Act), it is proposed that 'less than 50%' will be read as 'less than or equal to 50%';

- **Financial results to be disclosed within 30 minutes of approval of financials and not conclusion of board meeting:** It is proposed that Regulation 30(6) may be amended, such that disclosure of financial results is made within 30 minutes from the conclusion of the discussion on the agenda, rather than the conclusion of the board meeting;

- **Dividend Distribution Policy mandated for top 1000 companies instead of top 500 companies:** It is proposed to extend the requirement for formulating and disclosing the dividend distribution policy to the top 1000 listed entities, by market capitalization.

- **Corporate debt restructuring related disclosures aligned with Reserve Bank of India (Prudential Framework for Resolution of Stressed Assets) Directions 2019 (RBI Directions):** The following events in relation to resolution plan/restructuring of loans/borrowings from banks/financial institutions, as applicable, will need to be disclosed as material event: (i) Decision to initiate resolution of loans/borrowings; (ii) Signing of Inter-Creditors Agreement (ICA) by lenders; (iii) Finalization of Resolution Plan; (iv) Implementation of Resolution Plan; and (v) Salient features, not involving commercial secrets of the resolution/restructuring plan as decided by lenders.

B. Proposed Amendments to Ease Compliance Burden on Listed Entities

- **Compliance Certificate under Regulation 7(2) to be filed Annually instead of Half yearly submission:** It is proposed that Compliance certificate in respect of Share transfer issued by compliance officer of the Company and Share Transfer Agent shall be submitted within 30 days of FY end instead of earlier requirement to file it on a half yearly basis;

- **Reporting for Loss of Share Certificate:** The listed entity shall submit information regarding a quarterly report to the stock exchange(s) on loss of share certificates and issue of duplicate certificates, if applicable, along with the statement of investor grievances furnished under Regulation 13(3). The earlier requirement of reporting within two days has been dispensed with; and

- **Notice of Board Meeting to Discuss Financial Result not required to be published in Newspaper:** All filings that are made by listed entities under the LODR Regulations are available on the Stock Exchange website, in addition to the entity's website, which is accessible anywhere, anytime and free of cost. Hence, a separate newspaper advertisement on notice of the board meeting to discuss financial results, quarterly statement of deviation or variation is an additional burden on listed entities. Hence, it is proposed to be dispensed with. However, considering the importance of financial results, it will continue to be published in newspapers as specified in Regulation 47(1)(b) of the LODR Regulations.

C. Proposed Amendments to Maintain Consistency with in LODR Regulations and to bring Harmony with Companies Act, 2013

- **Advance notice for bonus issuance, irrespective of delivery of agenda papers to the board:** It is proposed that prior intimation should be given for consideration of bonus issue by the board of listed entity, irrespective of whether it forms part of the agenda papers;

- **Consolidation of financial statements of foreign subsidiary:** The requirement of consolidation of financial statements of foreign subsidiary is aligned with the laws applicable to such subsidiary. Therefore, it is proposed that in case of a foreign subsidiary for whom getting financial statements audited is not a mandate, the listed company can comply by placing such unaudited financial statements on its website. Further, in cases where the foreign subsidiary is mandated under any law of the country of its incorporation to prepare consolidated financial statements, the listed company can place such consolidated financial statements on its website; and

- **Other Proposals:** The Consultation Paper also covers various proposals to harmonize time limit for submission of Corporate Governance Report, Shareholding Pattern and results of voting in General Meeting of Company. It also proposes to mandate compulsory submission of Corporate Governance Report in addition to Secretarial Audit Report.

Authors' Note:

The changes proposed in the Consultation Paper are based on various developments which took place over last few years since issuance of LODR Regulations, 2015. The SEBI has consistently been working on various needs of the industry in this dynamic corporate environment where it is essential to increase standards of corporate governance and at the same time taking care of ease of doing business. The change proposed appears to have addressed umpteen past issues, but it would be interesting to see how companies would adapt themselves and achieve newer levels of corporate governance rather than resorting to a tick box approach.

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If no global consensus reached by OECD, EU announced to implement digital tax

Executive Vice President Dombrovskis at the informal ECOFIN Press Conference discussed about 'Tax Fairness' and stated that 'Large digital companies may emerge more profitable from the crisis and with a larger market share, while traditional businesses are bearing the brunt of the recession'. He also commented on the need for global minimum taxation, both in order to secure much needed tax revenues and to ensure that everyone contributes their fair share.

He stated that EU commission shall move ahead with a digital tax proposal in the first half of next year, if the OECD does not reach a global consensus. He stated that EU will follow-up on reform measures towards international corporate tax framework, which is currently ongoing in the OECD.

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UAE amends its Economic Substance Regulations retrospectively for FY 2019

The UAE Cabinet of Ministers has recently released Ministers Resolution No. 57 of 2020 and Ministerial Decision No. 100 of 2020, which supersede and replace Cabinet of Ministers Resolution No. 31 of 2019 and Ministerial Decision No. 215 of 2019 qua Economic Substance Regulations ('ESR') in the UAE. Key changes in the new ESR vis-à-vis old ESR are summarized below:

A. Definition of 'Licensees' to Include

Amendments to the ESR regulations have added below categories of the persons under the definition of 'Licensee':

- Any Juridical persons (whether incorporated inside or outside the UAE); and
- Unincorporated Partnerships registered in the UAE.

B. New Category of 'Exempt Licensee'

Amendments to the ESR regulations have provided for Licensees treated as exempt for economic substance purposes which are as below:

- An Investment fund;
- An entity that is tax resident in jurisdiction other than the UAE;
- UAE resident owned entity with local activities only and not part of an MNE Group; and
- A branch of a foreign entity whose relevant income is subject to tax where the foreign entity is tax resident.

Exempt Licensees are required to submit a Notification to the relevant Regulatory Authority along with sufficient evidence substantiating its status as an 'Exempted Licensee' which includes tax residency certificate from the foreign jurisdiction.

C. Filing of Notification under ESR

- Exempted Licensees are also required to submit a Notification to their respective Regulatory Authorities;
- Notification to be submitted by an Exempted Licensee must be accompanied by sufficient evidence to substantiate the Exempted Licensee's status for each category.

Licensees that have submitted the initial economic substance Notification to their respective Regulatory Authorities are required to re-submit such Notification electronically on the Ministry of Finance portal.

D. Regulatory Authority

The UAE Federal Tax Authority ('FTA') has been designated as the National Assessing Authority for the purposes of economic substance. Functions of FTA

would be as mentioned below:

D1. National Assessing Authority *(The Federal Tax Authority of the UAE)*

(i) Undertake assessments to determine whether a Licensee has met the Economic Substance Test;
(ii) Impose administrative penalties, applicable;
(iii) Hear and decide on appeals;
(iv) Exchange information to the Competent Authority pursuant to Article 10 of the ESR Regulations; and Carry-out any other functions for the purposes of implementing the provisions of the ESR Regulations.

D2. Regulatory Authorities *(Regulatory Authorities as notified under Cabinet Resolution No. 58 of 2019)*

(i) Collecting Notifications and Economic Substance Reports;
(ii) Collecting all relevant information as required to be submitted by such entities;
(iii) Reviewing Notifications, Economic Substance Reports and any information attached thereto for accuracy and completeness;
(iv) Reporting information to the National Assessing Authority and/or Competent Authority; and carry-out any other functions for the purposes of implementing the provisions of the ESR Regulations.

E. Revision of Penal Consequences

Offences	Revised Penalties
Failure to submit the Notification by the Licensee or the Exempt Licensee	AED 20,000/-
Non-submission of Economic Substance report or failure to fulfill the ES requirements for any financial year	AED 50,000/-
Committing the same violation in the financial year following the initial violation	AED 4,00,000/-
Submitting inaccurate information to the Regulatory Authority or National Assessment Authority	AED 50,000/-

F. Amendments in 'Distribution and Service Center' Activity

Distribution and Service Centre' business refers to two distinct activities (i.e.(i) Distribution of Goods; and (ii) Provision of services) that are covered under one 'Relevant Activity' heading.

Service Centre Business

Old coverage

Licensee that provides consulting, administrative or other services to a foreign group company **AND *those services are in connection with the foreign group company's business outside the UAE.***

New coverage

Licensee that provides consulting, administrative or other services to a foreign group company.

Authors' Note

Any service provided to a foreign related party shall be considered as a 'Service Centre Business' as there is no longer a requirement for services to be provided 'in connection with a business outside the State'. This shall increase the scope of ESR in terms of service entities providing marketing/distribution services to its related parties in connection with the UAE business.

Distribution Business

Old coverage

Purchasing from a Foreign Connected Person ***and importing and storing in the State***: component parts or materials for goods; or goods ready for sale, and reselling such component parts, materials or goods outside the State.

New coverage

A Licensee is considered engaged in a "Distribution Business" if it:

A. Purchases raw materials or finished products from a foreign group company; and

B. Distributes those raw materials or finished goods

Authors' Note

Removing the term 'importing and storing in the state' clearly specifies that even if the UAE entities which engage in distribution/trading activities where goods do not cross the UAE territory could be covered under the Distribution Center and accordingly ESR regulations may apply to such entities.

Authors' Note

The afore-said changes effected by the UAE Cabinet Resolution No. 57 of 2020 and Ministerial Decision No. 100 of 2020 have changed multiple facets of the ESR applicability, compliance and post compliance scenarios.

Amendments through the captioned resolutions have brought a concept of 'Exempt Licensees' wherein Licensees are required to substantiate its status (i.e. taxability scenarios in the other countries). In this regard, it is advisable to maintain all back-up documentation which supports status as an 'Exempted Licensee'.

The amendment has also clarified that all licensees including Exempt Licensees are required to re-submit ESR Notification for FY starting on or after January 01, 2019.

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Vodafone wins international arbitration case under India-Netherlands BIPA - Is it 'THE END' of the controversy?

Vodafone wins international arbitration case pertaining to 'indirect transfer' tax dispute under India-Netherlands Bilateral Investment Promotion and Protection Agreements ('BIPA'). The tax dispute of USD 2 Billion (approx.) has its roots in way back year 2007. The issue was regarding the taxability of sale of shares of a foreign company which derived its value substantially from the assets situated in India. In the deal the Vodafone Group had acquired controlling interest of Hutchison Essar Limited (an Indian company).

In the impugned issue revenue argued that:

- Transfer of shares which derived its value from capital assets situated in India was taxable in India;
- Section 9(1)(i) can 'look through' the transfer of shares of a foreign company, who in turn held shares in Indian company and treated such transfers equivalent to transfer of shares of an Indian company; and
- Indian company was liable to deduct tax in respect of transfer of shares in Hutchison Essar Limited in 2007 as it resulted in capital gains taxable in India.

In view of the above observations, revenue held the entire arrangement as sham and believed that it was colored to avoid / defer taxes to be paid in India. The revenue slapped Vodafone with a demand notice including tax and interest. It is interesting to note that Revenue has completely disregarded the fact that this resulted into huge capital gain in the hands of a Hong-Kong Tycoon, Li Ka-Shing who held these shares through his investment vehicle in Cayman Islands and they did not go after him and rather said that Vodafone India should have deducted prescribed withholding tax.

As against the same, Vodafone International Holding BV (VIH) argued that tax authorities should 'look at' the transaction by the parties rather than extending the provisions to tax the subject with an arbitrary approach.

The Supreme Court of India in 2012 ruled the matter in favour of the VIH and held that such holding structures are recognized in corporate and tax laws as well. The Apex Court further held that:

- FDI should be seen in a holistic manner considering the concept of participation, the duration of investment, the period of investment, the generation of taxable revenues in India, the timing of the exit and the continuity of the business on such exit;
- It is revenue's responsibility to accurately delineate the legal structure of any transaction and while doing so it has to 'look at' the entire transaction as a whole and should not adopt a dissecting approach; and
- The revenue could not start with the question as to whether the impugned transaction was a tax deferment/saving device but it should apply the "look at" test to ascertain the true legal nature of the transaction.

THE COURT OF ARBITRATION RULED THAT INDIA'S ACTION OF RETROSPECTIVE AMENDMENT IS IN BREACH OF 'FAIR AND EQUITABLE' TREATMENT.

As an after-thought, Government brought several retrospective amendments vide the Finance Act, 2012 in Section 9 (Income deemed to accrue or arise in India) and Section 2(47) (definition of transfer) to bring the Vodafone transaction of sale of shares under the tax net. This act of overruling the decision of the Hon'ble Supreme Court through the retrospective amendment was criticized by one and all. However, the revenue reinstated the impugned demand based on the retrospective amendments and offered to waive related interest and penalty.

Aggrieved by the action of the Government, Vodafone triggered dispute resolutions under BIPA which follows the

United Nations Commission on International Trade Law (UNCITRAL) norms. Almost after eight (8) long years, tax dispute has been resolved in favour of Vodafone. The court of arbitration ruled that India's action of retrospective amendment is in breach of 'fair and equitable' treatment.

It would be interesting to wait and watch whether the Government accepts the decision by the court of arbitration and leave its claim on the tax amount or continues to contest it further.

The Sparkle...

The decision of the Hon'ble Supreme Court of India in January 2012 in favour of VIH was seen as a welcome measure by the foreign investors and the corporates as it thrashed the imagination by virtue of which the tax authorities tried to tax the transfer of shares of a foreign company in India.

However, the Government used the approach of 'I will follow him, wherever he may go' and taxed the transaction by making retrospective amendments in the IT Act vide the Finance Act, 2012. The amendments were condemned by foreign investors adversely affecting many investment decisions. On the same lines of the Vodafone case, the Government had also slapped Cairn Energy with a demand notice on a similar issue which is also pending in international arbitration.

Apart from the challenges on the constitutional validity and the judicial limits on the retrospective amendments, such amendments could be considered as injustice to tax payers. Such actions of states could be termed as 'tax terrorism' and significantly impair the investor trust and confidence in the Indian economy. Also as suggested by the SC in its 2012 judgement, FDI should be looked at holistically by the Government including the quantum of tax revenue generated, and period of investment etc.

Unlike 2012, the country is led by a different dispensation known for providing 'ease of doing business'. The present Government has also made umpteen efforts in the said direction leading to significant improvement in the World Bank's ratings of 'ease of doing business' index. Accordingly, it shall be interesting to wait and watch the action taken or contemplated by the Government on the controversy at hand.

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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

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