VISION 360

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A TREASURY OF KEY TAX & REGULATORY DEVELOPMENTS!

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VISION 360: Not so 'August' after second wave!

The month of August started with a buzz of scrutiny into refund claims on service exports by Fintech and IT/ITES companies, caused by an impasse of decision between Justice Ahuja and Justice Bhuyan of the Hon'ble Bombay High Court. The dispute concerned tripartite agreements with overseas parties and it analysed the Agreement's character qua intermediary services – root cause of the disputed refund.

The distinctive line was whether the Indian set up provides service on its own account, if the answer is yes it amounts to export of service eligible for refund claim, if answer is no it amounts to intermediary service that is not treated as export and deprived of refund benefit.

Revenue put forth its side that when entities set up merely engage in implementing what is being dictated by the foreign entity, it cannot be treated as export, eventually denying the refund benefit. Revenue found assertion from Justice Ahuja. On the other hand, Justice Bhuyan noted that law does not permit parliament to tax, what is essentially an export and thus seeks to treat the concept of intermediary itself as ultra virus. Given this deadlock, the matter is now referred to Chief Justice of Bombay High Court, and until it reaches conclusion, all Fintech and IT/ITES are walking on tight rope.

It is not the first time that intermediary has come under scrutiny, it has had a chequered history since Service tax regime, and no doubt a conclusive and amicable circular now would go a long way in settling the dust.

The month also saw yet another jolt from Commerce and Industry Minister Piyush Goyal indirectly aiming at E-commerce giant Amazon. He was quoted saying in press conference, "I want to make it clear that we won't be changing any policy on e-commerce for FDI. The policy has been crystal clear since it was announced. But certain allegations of policy not being followed have reached us. We will be addressing that shortly."

The minister's statement comes a few days after he criticised "US-based companies" for violating Indian laws. The government has increasingly clashed with major digital players in the e-commerce sector, with the minister recently also saying that foreign e-commerce companies pose risks to the livelihood of millions of people. All of this, while memories of incumbent government's cold shoulder to Amazon's Chief during his recent visit to India, despite announcing massive investment of $1 billion.

Like every coin, there's the Government's side to this story too. The present policy allows 100 percent FDI in the marketplace-based model of e-commerce, prohibiting the inventory-based model of e-commerce. The government has brought out multiple press notes and notifications to ban e-marketplaces from owning the inventory they sell and stop them from showcasing products by entities in which they have equity participation. A measure to protect small business.

The minister had earlier also warned e-commerce giants saying they are not doing any favour to India by investing and that they should focus on following the rules rather than finding loopholes to it. Perhaps nothing wrong to have set the right expectation!

Earlier in July, the Minister also indicated that details of RoDTEP rate are soon to be declared. He was also categorical in stating that RoDTEP is not a subsidy, but only a refund of taxes. "All subsidies' exporters were getting earlier, won't be there now". The entire exercise of releasing RoDTEP benefit revolves around detailed computation of taxes suffered for export of goods and unless well substantiated, it is likely that minimal rate of RoDTEP will be announced that is insufficient to recoup tax impact and

also loosing competitive edge in international market.

Further, following the Finance Minister's announcement during Budget Speech to do away outdated Customs exemptions, the government has now proposed to withdraw exemptions to 97 products imported into India, and although it may shoot up the cost, these withdrawals would strategically encourage domestic producers. CBIC has released a list for public consultation in this regard.

Meanwhile, the Commerce Ministry has also invited suggestions from stakeholders, including industry and trade associations, for the formulation of the next Foreign Trade Policy. Incumbent policy was meant to remain operational only until March 31, 2020. However, it was extended for a year till March 31, 2021, due to the pandemic and again extended for six months till September this year.

The month that passed also saw, the Union Cabinet approve INR 6,322 crore Production Linked Incentive scheme for specialty steel, a move aimed at boosting domestic manufacturing and exports from the sector. These incentives would be provided over a period of five years and result in reduced dependence on import of steel. The Information and Broadcasting Minister Mr. Anurag Thakur was also quoted saying, "It would create about 5,25,000 jobs".

FOLLOWING THE FINANCE MINISTER'S ANNOUNCEMENT DURING BUDGET SPEECH TO DO AWAY OUTDATED CUSTOMS EXEMPTIONS, THE GOVERNMENT HAS NOW PROPOSED TO WITHDRAW EXEMPTIONS TO 97 PRODUCTS IMPORTED INTO INDIA.

With yet another issue of VISION 360, we, the entire team of **TIOL**, in association with **Taxcraft Advisors LLP**, **GST Legal Services LLP** and **VMG & Associates**, look forward to aid you with key tax and regulatory updates!

Happy Reading!

P.S.: This document is designed to begin with couple of articles peeking into recent tax/regulatory issues followed by stimulating perspective of a leading industry professional. 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.

CONTENTS

ARTICLE

INDUSTRY PERSPECTIVE

DIRECT TAX - FROM THE JUDICIARY

TRANSFER PRICING - FROM THE JUDICIARY

DIRECT TAX - FROM THE LEGISLATURE

INDIRECT TAX - FROM THE JUDICIARY

CONTENTS

Slump Sale - Is it still an effective tax planning tool for Business transfer?

In our country, we live in a business and tax environment which is dynamic and businesses sometimes finds it difficult to match the pace of changing tax landscape with their business plans and hence often get caught up in some tax litigation or inefficiency. However slump sale has been a well recognized way of business transfer and group restructuring as it provides lot of flexibility on process, time and cost and is well accepted as a tax minimization tool on such transactions. Though experts are of the view that slump sale needs to be planned vigilantly and scheme shall be curated in a manner that entire business undertaking along with all related assets and liabilities are transferred at a lump sum consideration without individual values being assigned to assets and liabilities. The scheme shall be aligned with provisions of Section 50 B of the Income Tax Act which inter-alia stipulates this very requirement.

The concept of slump sale was introduced way back in year 1999 thru Finance Act. The slump sale primarily enjoys benefits from the direct as well indirect tax acts. If we consider the history of provisions under the direct tax the definition of slump sale as well as tax treatment has undergone a change. The Section 50B read with Section 2(42)(c) defines slump sale consideration as a price which is mutually agreed between the parties, as per provisions the excess of consideration over net worth of undertaking being transferred is subjected to capital gain tax. In past there has been enough discussion on definition of transfer as to which transactions shall be construed as transfer for the purposes of Section 2(42)(c) and there has been various judicial interventions to decide on individual transactions, similarly another questions which has been raised time and again by tax authorities was on the adequacy of slump sale consideration as they have alleged in various cases that consideration has been suppressed by parties to avoid capital gain tax. However, the provisions of Section 50B read with Section 2(42)(c) has been drafted in such a manner that while there are various provisions under the Income Tax Act to determine minimum value of transactions, slump sale has been an exception and hence there was nothing much which tax officers could do.

Some people believe that this loophole was plugged in year 2012 when provisions of GAAR (General Anti Avoidance rules) were introduced as it practically gave the authority to revenue to look at any transaction under the lens of GAAR and they could tax or challenge any such tax planning. However as we all know GAAR had its own share of challenges and could never be implemented in our democratic country. It is interesting to note that a landmark change in this respect has been introduced in Finance Act, 2021 wherein the definition u/s 2(42)(c) has been amended to include various transactions such as exchange in definition of transfer and on the other hand Rule 11UAE has been made applicable to define the consideration. As per amended provision, the slump sale consideration for the purpose of Section 50 B shall be considered as higher of agreed business consideration or Fair Market Value (FMV) of assets and liabilities being transferred as part of business undertaking. This would have a direct impact on seller as on slump sale transactions where consideration is lower than FMV of business undertaking would have an additional tax incidence. Similarly the buyers may also have to shell out extra money as sellers would expect to gross up consideration with additional tax impact.

This amendment takes us back to fundamental question that what is the difference between slump sale and

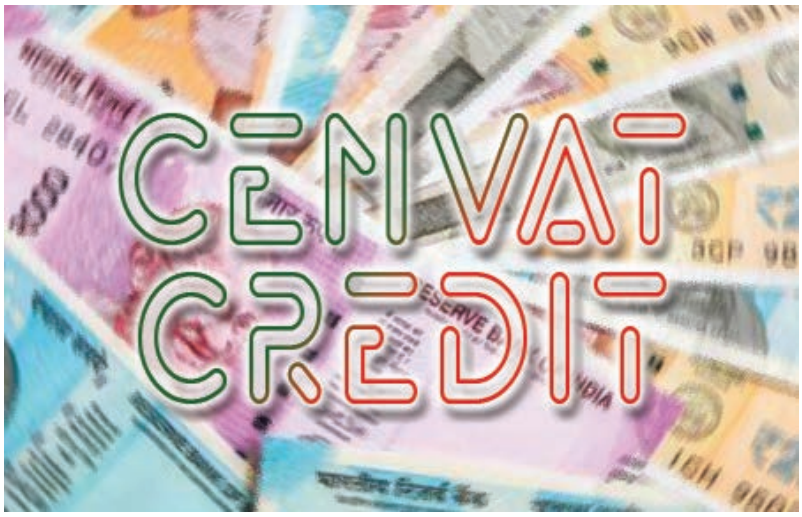
itemized sale of assets, as for the purposes of computation of fair market value, one has to value individual assets and liabilities and assign a part of consideration to them. It seems that this would invite a lot of litigation going forward.

Another important aspect is with reference to applicability of GST on slump sale transactions. By definition, the GST is applicable on sale of goods and services and there has been enough discussion in past supported by judiciary that transfer of business undertaking is neither a sale of goods not a sale of service. The similar interpretation were made in erstwhile sale tax, value added tax and service tax laws. However the question which arises here is that whether aforesaid change in direct tax provisions where each asset and liability would be individually valued as per provision of Rule 11UAE for the purpose of computation of FMV, will it open a can of worms wherein GST authorities would like to consider this as an itemized sale and hence would levy GST on all such transactions.

Refund of CENVAT Credit on Factory Closure – A David and Goliath battle!

As the Biblical story goes, an underdog David defeats the mighty Goliath in the battle of Ain Jalut! Everyone loves to hear a story of an underdog winning the battle. However, unlike our beloved lore, the real life seldom brings surprises and often favors the odds.

In the indirect tax world, naturally, the Revenue authorities, with the large machinery at their disposal, can be believed to be the Goliath while most of the taxpayers are underdogs, often struggling to claim their rightful credits or fighting the levy of penalty on meagre matters, while also having to focus on running their businesses. One of such long-standing battles between the Revenue vis-à-vis the taxpayers, has been that of refund of unutilized CENVAT Credit on account of factory closure. In order to understand the dispute, it would first be pertinent to note the relevant provisions.



Section 11B of the Central Excise Act inter alia allows the refund of duty paid on excisable goods used as inputs in accordance with the provisions of CENVAT Credit Rules. The said provision spells out certain situations, where cash refund is allowed. Admittedly, a situation of closure of factory / business is not covered u/s. 11B of the Excise Act. It is for this reason i.e., absence of specific situation covering factory or business unit closure, that the Revenue often denies the claim of unutilized CENVAT credit.

Business come with their own risks and at times the taxpayers are left with no choice but to close down their business or manufacturing activities eventually resulting in their Excise registration being finally surrendered. In absence of any mechanism to utilize the accumulated CENVAT credit, the assesses have little option but to claim cash refund of the same, as such CENVAT credit has been treated to be a vested right by several judicial forums in the past.

Vested Right

In common parlance, the term 'vested right' or 'indefeasible right' is understood to be a right that so completely and definitely belongs to a person that it cannot be impaired or taken away without the person's consent. The SC in the case of Eicher Motors Limited **[2002-TIOL-149-SC-CX-LB]**, had considered MODVAT Credit as one such 'indefeasible right' of the taxpayer. However, it must be understood that this indefeasible right as stated by the SC is created only once the same gets vested and not before that. Once a right gets vested, it cannot be taken away by any authority and then it becomes indefeasible. Any infringement by any person or authority on such rights, can be interfered by the court. However, the Courts have also held inspite of being a vested right, the Government has a right to impose certain restrictions, which emphasizes that it a conditional right of the taxpayer.

Judicial Background

Basis the settled principle of CENVAT Credit being a vested and indefeasible right, the assessees claimed the refund of unutilized credit. A breakthrough in this regard came with the decision of the Karnataka Tribunal in the case of Slovak India Trading Co. Private Limited [2006 (205) E.L.T. 956 (Tri. - Bang.)], wherein cash refund of unutilized CENVAT Credit had been allowed on account of factory closure. Aggrieved, the Revenue had challenged the said judgement before the Karnataka HC.

Observing that the CENVAT Credit Rules does not expressly prohibit the cash refund of unutilized CENVAT credit, it was held by the HC in **[2006-TIOL-469-HC-KAR-CX]**, that the refund shall be allowed u/s. 11B of the Excise Act, as the assessee had come out of the MODVAT scheme. Aggrieved yet again, the Revenue challenged the said decision by way of an SLP before the SC.

The Apex Court in its decision in [2008 (223) E.L.T. A170 (S.C.)] maintained the HC judgement by observing that the ASG appearing for the Union of India had fairly conceded that the decisions of the Tribunal, which were relied upon by the Tribunal, for allowing the cash refund of CENVAT credit, had not been appealed against. Basis this judgement of the SC, the law had been more or less settled in favour of the assessees and the Courts had been regularly allowing cash refund on account of factory closure.

However, this judicial discipline had been disturbed by the division bench of the Bombay HC in the case of Gauri Plasticulture [2019-TIOL-1806-HC-MUM-CX]. In this case, the moot question which arose before the HC was whether the dismissal of SLP by the SC in Slovak India (supra) would amount to declaration of law under Art. 141 of the Constitution. As the division bench of the HC was unable to arrive at a firm decision, the matter had been referred to the larger bench.

THE DOCTRINE OF MERGER IS AN ESTABLISHED LAW WHICH IS FOUNDED ON THE PRINCIPLES OF PROPRIETY IN THE HIERARCHY OF JUSTICE DELIVERY SYSTEM.

The Larger Bench of the HC in **[2019-TIOL-1248-HC-MUM-CX-LB]**, had evaluated the correctness of the Slovak India Trading decision (supra). In this case, it was inter alia held that the SLP dismissed by the SC in the case of Slovak India Trading Private Limited (supra) is not a confirmation or approval of view and cannot be read as a declaration of law under Article 141 of the Constitution of India. In simple words, it can be said that the Larger Bench of the Bombay HC is of the view that dismissal of SLP filed by the Revenue does not merge the decision of the Karnataka HC, with that of the SC. Accordingly, the Larger bench had held that refund of unutilized CENVAT Credit cannot be claimed u/s. 11B of the Excise Act.

Doctrine of Merger

The Doctrine of Merger is an established law which is founded on the principles of propriety in the hierarchy of justice delivery system. The underlying rationale of Doctrine of Merger is that there cannot be more than one decree or an operative order governing the same subject-matter at a given point of time. The Doctrine of Merger can be better understood from the following observations of the SC in a landmark decision in the case

Kunhayammed **[2002-TIOL-50-SC-LMT-LB]**.

In the said case, it had been held inter alia, that for the doctrine of merger to be applicable, there must be a decision of a subordinate court/forum, in respect of which there exists a right of appeal/revision which is duly exercised, and the superior forum before whom such appeal/revision is preferred must modify, reverse, and/or affirm the decision of the subordinate court. The consequence of such modification, reversal, and/or affirmation is that the decision of the subordinate forum would merge with the decision of the superior forum, which in turn would be operative and capable of being enforced.

The power vested in the SC by virtue of Art. 136 of the Constitution, which deals with the SLPs by the SC is a special power inasmuch as it expands the scope for invocation of the appellate jurisdiction of the SC. In simpler terms, Article 136 allows bypassing of the fixed hierarchy of appeals subject to the satisfaction of the discretion of the Supreme Court.

Basis this doctrine, it was understood that the judgement of the Karnataka HC in Slovak India (supra) stood merged with the SC decision. However, the larger bench of the Bombay HC in Gauri Plasticulture (supra) opined that for the doctrine of merger to be applicable, the SC shall have recorded its reasons on merits. As the SC in Slovak India (supra) had merely dismissed the Appeal basis the concession by the ASG, it would not attract such doctrine and in-turn would not amount to a declaration of law under Art. 141 of the Constitution.

In this regard, it would be pertinent to note that the SC in the case of Gangadhara Palo [2012 (25) S.T.R. 273 (S.C.)] had held that SLP even if dismissed with reasons, however meagre (even one sentence), there is merger of orders. It had been further held that once an SLP is dismissed, giving reasons by the SC, however meagre, it becomes a declaration of law. Thereafter, the decision, which is merged with the SC decision, cannot be reviewed.

Basis the above, it can be inferred that as a settled principle of law, where any SLP has been dismissed by the SC, even on account of a meagre reason, it becomes a declaration of law under Art. 141 of the Constitution. Accordingly, basis this judgement, a view can be taken that the dismissal of SLP by SC in Slovak India (supra) is a declaration of law.

Conclusion

In light of the above, it can be seen that the Larger bench of the Bombay HC has conclusively laid down that the cash refund of CENVAT credit on account of factory closure cannot be granted in absence of any specific provision. This ratio is in stark contravention to that of the Karnataka HC in Slovak India which was upheld by the Apex Court. However, as the Bombay HC is not bound by the decision of the Karnataka HC, it is open for them to take a different view. The question which remains is whether the dismissal of SLP by SC attracts the doctrine of merger and tantamount to declaration of law, or not.

As of date, the assessee in Gauri Plasticulture has not challenged the Bombay HC decision. However, there are n number of similar cases pending before the Tribunals and HCs. It is contemplated once this matter knocks the doors of the SC for a reasoned order, interpreting Section 11B of the Excise Act, it may attain finality.

Until then, the assesses, especially those in the jurisdiction of the Bombay HC, will have to fight the Goliath-like decision of the Larger bench of the Bombay HC, praying for reversal of the decision basis reconsideration on merits.

Bimal Trivedi

Director,
Sundyota Numandis Group

Mr. Trivedi shares his thoughts and perspective on recent covid circumstances and its impact on nutraceutical industry...

What are your views of the incumbent impact of COVID on Nutraceutical Industry?

The pandemic hit the nutraceuticals market adversely in the beginning when people were at home and Doctors were not functioning. Then the immunity boosters market picked up. But the long term impact is renewed focus on preventive healthcare. The Nutraceutical market has been growing at 17% in the pre-pandemic era and is now likely to be grow by around 22%. The Dietary supplements segment constitutes over 65% of the nutraceutical market.

There is a large number of people who now prefer preventive healthcare and understands role of immunity boosting supplements. The proliferation of online portals giving products and disseminating information has started impacting the buying patterns and consumer behavior towards Nutraceutical products. There is a shift from curative to preventive care in the Indian market. The segment is now turning into necessity from its erstwhile 'optional' status.

Considering the current scenario, nutraceuticals industry is all set to grow exponentially.

Section 194Q was introduced in the Income Tax Act vide the Finance Act 2021 making it mandatory for the certain buyers to deduct TDS on purchase of goods from the resident seller from July 1, 2021. Kindly ponder upon the experience of implementing subject provisions.

Section 194Q requires the assessee to deduct TDS on purchase of goods where the aggregate of such value of purchases exceeds INR 50 lakhs in the previous year. Accordingly, we had identified the vendors to whom this provision shall apply and system was accordingly manually aligned to capture and identify the transactions on which TDS under Section 194Q is applicable. Further, there is requirement to ensure that the vendor has filed his Income tax returns for past 2 years failing to which TDS may apply at 5%. It is very difficult to implement such checks in the accounting system which shall ensure automatic compliance.

Earlier there were no means to check whether the vendor had filed his Income tax returns for past two years. We had initiated the process of manually calling for IT Return Acknowledgements to verify the same. To fix this, new facility is now made available which allows to check whether the vendor has filed his Income tax returns or not. However, till the time accounting software's are not integrated with Income tax portal, manual checks are required to ensure correct rate of TDS is applied and thereby, increasing the compliance and associated risks.

There has been delay introduction of RoDTEP scheme in India. What are your views on this scheme?

It seems that decision of announcing implementation of the RoDTEP scheme w.e.f. January 01, 2021 was hasty. We are in August month and even though considerable amount of time has passed since then, there is no clarity on statutory and administrative framework necessary for implementing the scheme. One may realize that export incentives form an integral part of competitive costing in international market and in absence of any clarity as to scope and quantum of this benefit it would become

difficult for Indian exporters to plan the way forward, which at this point is unaffordable. Afterall loss of opportunity is an irrecoverable loss!

The government needs to have a sturdy plan and intent to implement this scheme successfully. Although basic tenets announced by the authorities appear complaint with SCM Agreement, recently USA and some other countries have questioned RoDTEP scheme and its possible coverage.

Needless to say, Indian representatives at WTO cannot afford to be complacent about the scheme and be prepared for a debate, should it be called for, after all a lot, including survival is at stake for many Indian exporters. This will go a long way in improving our exports.

Any comments on threshold and scope of PLI schemes in India?

If the GoI wishes to promote India as a manufacturing hub, it must not limit the scheme only to large scale manufacturing. SME's play a significant and sizeable role in the Indian economy and account for substantial revenue generation. By leaving this segment outside the scope of PLI scheme, the policy makers have paralyzed the scheme themselves. The Policy makers need to think of lowering the current threshold for applicability of this scheme gradually and accordingly, cover the larger scope of manufacturers.

IF THE GOI WISHES TO PROMOTE INDIA AS A MANUFACTURING HUB, IT MUST NOT LIMIT THE SCHEME ONLY TO LARGE SCALE MANUFACTURING. SME'S PLAY A SIGNIFICANT AND SIZEABLE ROLE IN THE INDIAN ECONOMY AND ACCOUNT FOR SUBSTANTIAL REVENUE GENERATION.

What are your views on the current state of SEIS scheme?

SEIS scheme incentivized the service exporters by granting them duty credit scrips or certificates to the tune of 5 to 7% of net foreign exchange earned. As a practice, SEIS notification wherein the rate of benefits declared is issued much later during that financial year. However, SEIS notification for the year 2019-20 has not been issued yet and thus, the release of incentives that was due in 2019-20 under the scheme has been inordinately delayed. The continued silence on availability of SEIS for year 2020-21 and applicability of rate for 2019-20 coupled with Covid-19 impacting various sectors like travel & tourism, aviation, education and so on, has caused double whammy to the service providers.

The various companies and Services Export Promotion Council have filed representations in past to the Ministry requesting to declare the rate of SEIS benefit for the year 2019-20 and to shed light on the applicability of SEIS scheme for the year 2020-21. This issue should be considered by the Authorities urgently to provide breather to the industry in these difficult times.

Recently, few High Court judgements have allowed taxpayers to rectify TRAN-1 which were to be filed and amended prior to December 27, 2017. What is your take on this?

This is a welcome judgement for the tax payers! TRAN-1 was the only means for tax payers to carry forward its transitional ITC into GST regime. TRAN-1 calculations are complex and time consuming in nature as it inter alia involved correct assessment of unutilized ITC from erstwhile registration, inventory verification and calculation of ITC thereon. As the GST law were new at the time of filing of TRAN-1, it resulted in tax payers making bona fide mistakes while filing TRAN-1.

Further, there were technical glitches in GST portal initially and the GSTN portal was not functioning as desired. This had caused great deal of difficulties to the tax payers as they were unable to file the GST returns. All these factors added to the plight of the tax payers and in extreme scenarios this caused the tax payers to file incorrect TRAN-1. However, in the recent judgements where HC has allowed the taxpayers who have faced genuine hardships due to revise their TRAN-1 will come to their rescue.

What are your thoughts on the ITC matching and reconciliation system??

Earlier the provisions of Rule 36(4) restricted availability of provisional ITC in lieu of unreported invoices/Debit Note over GSTR 2A and now the Budget 2021 has amended Section 16 to allow ITC entirely based on GSTR-2A and

GSTR-2B. No doubt the government is bringing the stringencies in ITC mechanism day by day and although it may cause despair to many, one may optimistically see the disciplined compliance it silently promotes.

This approach is not new, and taxpayers shouldn't be taken by surprise. On previous counts too introduction of TDS mechanism was aimed at forcing the non-compliant taxpayers to file the return and fall in line with the statutory requirement.

These recent statutory stringencies are now an effective tool to address such lack of compliance at the hands of those who have been ensuring sufficient compliance. We must always see both sides of the coin and focus on the side that brings positive outlook. The law will keep evolving and taxpayers must adapt for better reasons. In fact, this will act as a competitive advantage for the matured organizations and the ones who consider compliance an integral part of its culture.

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

ITAT deletes declaration-based addition made by AO basis statement made during survey, holds it to lack evidentiary value

Legend Developers & Constructions
ITA Nos. 743, 752, 747, 748, 749 & 750/Hyd/2018

The assessee was a real estate developer who had purchased 12.24 acres of land to develop it as residential plots and sell them.

During the survey operations conducted by the Revenue at the assessee's offices, the managing partner under a declaration, agreed to offer an additional amount of INR 2 Crores as income of the appellant firm. The AO thus made an addition of INR 2 Crores to the assessee's income on a substantive basis and passed an assessment order.

Aggrieved, the assessee approached the CIT(A) contending that the statement was made by the managing partner in a confused state of mind and under stress at odd hours.

CIT(A) observed that the AO did not find any corroborative evidence / incriminating material in survey operations justifying the addition and further, relying on the jurisdictional HC ruling in Gajjam Chinna Yellappa [[2015] 59 Taxmann.com 69] and CBDT circulars which stated that admissions or confessions made during survey did not carry any evidentiary value, deleted the addition made on substantive basis.

Aggrieved, the AO approached the ITAT which from a perusal of the statements recorded during survey noted that it was made clear that admission of income was based on rough estimation to avoid litigation.

Therefore, dismissing the Revenue's appeal, ITAT upheld the order of the CIT(A) and deleted the declaration-based addition made during survey by the AO finding it to lack evidentiary value.

ITAT denies set-off of accumulated losses on amalgamation for non-fulfilment of 75% shareholding under Section 2(1B)(iii) on appointed date

Roca Bathroom Products Pvt. Ltd.
2021-TIOL-1252-ITAT-MAD

The assessee ('transferee company') sought the sanctioning of a scheme of amalgamation with another company ('transferor company/amalgamating company'). While making the assessment, the AO noticed from the Profit and Loss Account that the assessee had claimed set off of accumulated unabsorbed losses of the transferor company and from the Note 30 to the financial statement, the AO noted that the 74% of the equity share capital of the transferor company were bought in 2014 and on the same day itself both the transferor company and the transferee company applied for amalgamation.

Since the assessee was holding only 26% percent of equity shares as on April 1, 2013 which was the appointment date as per the scheme of amalgamation approved by the Madras HC in 2014, the AO disallowing assessee's claim held that the requirements of holding three fourth shares in the amalgamating company laid down in Section 2(1B) of the Act were not fully satisfied on the court appointed date of April 1, 2013 and therefore the assessee was not

entitled to the claim of carry forward and set off of loss of the transferor company u/s Section 72A of the IT Act.

Aggrieved, the assessee filed an appeal before the CIT (A) who relying on the SC decision in the case of Smt. Tarulata Shyam **[2002-TIOL-991-SC-IT-LB]** dismissed the appeal, holding that the AO was right in strictly interpreting the provisions of the IT Act as the appellant had not satisfied the prescribed condition under Section 2(1B) read with Section 72A of the Act.

Aggrieved, the assessee approached the ITAT which dismissing the assessee's appeal upheld the decision of the AO/CIT(A) observing that since the assessee did not have three fourth of the shares of the transferor company as on March 31, 2013. The appointment date being April 1, 2013, the assessee was not entitled to the claim of carry forward and the set off of loss of the transferor company as on March 31, 2013 as it was a settled law that once amalgamation is approved, the amalgamating company ceases to exist and so it cannot be regarded as a person under Section 2(31) of the Act against whom assessment proceedings can be initiated or an order of assessment be passed.

HC holds revenue expenditure deferrable only when specified in the IT Act

Coforge Limited
2021-TIOL-173-HC-DEL-IT

The assessee executed a lease deed with Greater Noida Industrial Development Authority for the period of 90 years under which it had an option either to pay annual rent during the tenure of the lease, or pay a commuted and discounted one time lease rent, which was 11 times the annual lease rent.

The assessee opted to pay the commuted lease rent and claimed it as a business expenditure.

The AO disallowed the lease rent contending that it resulted in enduring benefit and thus was classifiable as capital expenditure.

Aggrieved, the assessee approached the CIT(A) who deleted the disallowance as the expenditure was incurred wholly and exclusively for business purpose.

Aggrieved, the Revenue approached the ITAT which accepted classification of the commuted lease rent as revenue expenditure but directed it to be spread over the tenure of the lease of 90 years by applying the matching principle of accounting.

Aggrieved, the assessee approached the HC contending that there was no concept of deferred revenue expenditure under the Act.

HC placing reliance on the SC ruling in Taparia Tools Ltd. **[2015-TIOL-25-SC-IT]** accepted the assessee's contention and allowed its appeal observing that an expenditure could be spread over a time span only if it was so provided in the Act and there was no concept of deferred revenue expenditure in the Act except under specified sections, such as Section 35-D of the Act where amortization was specifically provided.

ITAT holds mere client code modifications carried out by broker no basis to draw inference of tax evasion against assessee

Kaizen Stock Trade Pvt. Ltd.
ITA No. 1444/Ahd/2018

The assessee was engaged in the business of dealing / broking in shares.

On the basis of data received from the National Stock Exchange, the AO noted that there was change in the code of the assessee maintained with the broker with respect to certain transactions carried out in futures and options segment. This enabled the assessee to shift profit of INR 1.02 Crores and loss of INR 83.63 lakhs.

Accordingly, the AO was convinced that the assessee by way of modification in client codes was booking artificial profits and losses, which had resulted in a reduction of taxable income in the total income of the assessee. Thereby, the AO made an addition to the total income of the assessee to rectify the reduction in taxable income.

Aggrieved, the assessee approached the CIT(A) who deleted the additions stating that the AO had made entire additions merely on the presumptions and without proving that the assessee had evaded taxes.

Aggrieved, the Revenue preferred an appeal before the ITAT which observed that mere client code modifications carried out by the broker could not be the basis to draw an inference that the assessee was trying to evade taxes. Further, there was no corroborative evidence suggesting that there was exchange of cash among the parties involved in such client code modification and no such exercise had been carried out by the AO to verify the same. ITAT also observed that the number of transactions in respect of which the client codes were modified were less than 1% of the total transactions and hence, such changes could not be held to be indicative of a colourable device adopted for shifting out and shifting in the profit/loss.

Thus, finding no reasons to interfere with the findings of the CIT(A), ITAT dismissed the appeal.

HC holds loan or advance given to MD in furtherance of business not taxable as deemed dividend under Section 2(22)(e)

N.S. Narendra
ITA No. 92/2015

The assessee was the managing director of a company in which he held more than 10% of the voting power.

The assessee had filed its return of income in which it was disclosed that he had provided his personal properties as collateral to banks and financial institutions to facilitate borrowings for the company for furtherance of its business and had also provided personal guarantee.

The Company had borrowed loans worth INR 200 Crores which were utilized for its capital requirements. Further, the Company had also paid certain amount to the assessee for purchasing an apartment, which was disclosed under recoverable advances in the accounts of the company. It was submitted that such amounts were paid to the assessee in recognition of his contribution.

The assessee's case was selected for scrutiny assessment and an addition was made by the AO under Section 2(22)(e) on the ground that amount received by the assessee from the company was in the nature of deemed dividend.

Aggrieved, the assessee approached the CIT(A) who deleted the addition stating that payment received by the assessee from the company could not be termed as deemed dividend as the payment was not for the benefit of the assessee, as the company was benefitted by availing loans for furtherance of its business.

Aggrieved, the Revenue approached the ITAT which dismissed the appeal holding that amount received by the assessee from the company was not covered under Section 2(22)(e) as the same was not for the benefit of the assessee.

Revenue, then preferred an appeal to the HC which placing reliance on a plethora of judgments dismissed the appeal holding that Section 2(22)(e) would not be applicable to cases where the loan or advance was given in return of an advantage conferred upon the company by a shareholder, since the loan or advance given to the assessee was a consequence of a further consideration from the assessee which was beneficial to the company, such loan or advance could not be said to be deemed dividend under the Act.

Thus, finding no merit in the Revenue's contention, HC dismissed the appeal.

ITAT holds non-compliance of single DRP's direction by AO does not invalidate entire assessment order

Red Hat India Private Limited
2021-TII-245-ITAT-MUM-TP

The assessee was a software support service provider that compensated its AE in the US with royalty for use of its intellectual property as well as service fee for the provision of support services directly to its customers. In addition to the above, the assessee also rendered sales & marketing and software support service to its AEs. The assessee had adopted TNMM as MAM for determination of ALP of its transactions with its AEs.

During the course of assessment, the TPO made a TP-adjustment disallowing the entire payment of service fees contending that the payment of 'service fees' was a payment of 'royalty' and also alleging concealment of the support services that were provided by AE to the appellant, thereby making a TP adjustment under the software support segment.

Aggrieved, the assessee approached the DRP which confirmed the TPO's decision and also directed the AO to include Akshay Software Technologies Limited as a comparable. The AO without considering the direction of the DRP, passed an assessment order causing the assessee to approach the ITAT contending that the entire order was invalid considering the AO did not follow the direction of the DRP.

The ITAT rejecting assessee's plea held that non-compliance of a single direction of the DRP did not invalidate the entire assessment order as it dealt with several issues and therefore, was not liable to be quashed. However, it deleted the TP adjustment in respect of software support service segment finding no evidence of the concealment alleged by the TPO.

Further, the ITAT placing reliance on the Coordinate bench ruling in the assessee's own case, deleted the TP adjustment in respect of payment of royalty and service fee. It held that the Revenue failed to point out any distinguishing feature from the assessee's own case wherein the Coordinate bench, faced with similar facts, had deleted the adjustment found to be made by the TPO /DRP without any application of mind, holding it to be a settled law that the substance mattered over nomenclature assigned by the party.

ITAT follows Coordinate bench ruling in Nike India's own case in previous years, adjudicates on TP-adjustment on CCD-interest, royalty, AMP for Nike India

Nike India Private Limited
2021-TII-63-ITAT-BANG-TP

The assessee was engaged in the business of wholesale trading of Nike footwear, apparel and sports equipment in India. The assessee was a wholly owned subsidiary of Nike Holding B.V. Netherlands, which in turn was held by M/s. Nike Inc., USA.

The assessee had claimed a sum of INR 65.18 Crores as expenditure on payment of interest on CCDs and had paid royalty of INR 2.02 Crores. The assessee had also incurred expenditure of INR 83.13 Crores towards AMP expenses.

The TPO, by relying on certain rulings/RBI Circular, took the view that the CCDs were in the nature of equity capital and accordingly, held that the ALP of interest payment on CCDs

was nil. Accordingly, he made transfer pricing adjustment of entire amount of interest claim of INR 64.18 Crores.

With respect to payment of royalty, the TPO noticed that the ITAT had confirmed the transfer pricing adjustment made in respect of royalty payment in previous assessment years. Following the same, TPO determined the ALP of royalty payment as nil and accordingly, made transfer pricing adjustment of INR 2.02 Crores. With respect to AMP expenses, the TPO made an adjustment of INR 85.58 Crores.

Aggrieved, the assessee approached the ITAT which placing reliance on the Coordinate bench ruling in assessee's own case, took a consistent view with that of the Coordinate bench and restored the issue of TP adjustment on CCD interest to the file of the TPO for fresh consideration.

Further, with respect to the TP adjustment made on the payment of royalty, ITAT placing reliance on the Coordinate bench ruling in Assessee's own case, took a consistent view with that of the Coordinate bench and confirmed the TP adjustment.

Lastly, with respect to AMP expenses, ITAT observed that it had in Assessee's own case in previous years passed a common order for deciding this issue dividing the AMP expenses into two categories, i) AMP expenses other than BCCI expenses and ii) AMP expenses relating to BCCI. The TP adjustment with regard to the first category of expenses was deleted by the ITAT and the TP adjustment in respect of AMP expenses relating to BCCI was restored to the file of the A.O.

Thus, placing reliance on its own ruling, the ITAT observed that as an agreement between the Assessee and BCCI no longer existed as was the case in previous years, the bifurcation of the AMP expenses no longer served any purpose. Therefore, as the ITAT had in previous years deleted the TP adjustment on AMP expenses which were other than BCCI expenses, the ITAT finding the TP adjustment made in respect of AMP expenses to not be justified, directed the deletion of TP adjustment on AMP expenses.

ITAT quashes Section 263 order against SDT non-reference to TPO, holds omission of Section 92BA(i) unconditional

S.B Cotgin Pvt Ltd
2021-TII-229-ITAT-NAGPUR-TP

The assessee had entered into specific domestic transactions with related parties exceeding INR 5 Crores and reported the various transactions under Section 40A(2)(b) of the IT Act. Therefore, as per Section 92BA and Rule 10E, the assessee was required to obtain and furnish audit report from a Chartered Accountant in Form No.3CEB before the due date of filing of return of income which was not done by the assessee.

During the proceedings, PrCIT observed that neither did the AO report these specific domestic transactions to the TPO for determination of ALP nor did he verify the genuineness of the payments made to related persons under Section 40A(2)(b) of the Act during the assessment proceedings.

Accordingly, the PrCIT held that the assessment was completed by the AO without conducting proper enquiry and verification or assigning any reasons for his satisfaction on the issues relating to Section 40A(2)(b) of the Act. Further, as the case was also not referred to the TPO, PrCIT held that the assessment order erroneous so as to be prejudicial to the interest of the revenue. Accordingly, the PrCIT passed an order under Section 263 of the Act.

Aggrieved, the assessee approached the ITAT contending that when the AO ceased with the matter, the provision of

Section 92BA(i) of the Act stood omitted vide Finance Act, 2017 with effect from April 1, 2017. Thus, it did not warrant reference to the TPO.

The ITAT quashing the PrCIT's Section 263 order and noting that PrCIT had passed its order under Section 263 on February 28, 2020 which was after the omission of Section 92BA(i) vide Finance Act 2017. It was observed that Section 92BA(i) was omitted unconditionally without a saving clause in favour of pending proceedings, it did not say that pending proceedings under Section 92BA(i) would continue in future even after its omission on April 1, 2017. Accordingly, since in the eyes of law, the omission of Section 92BA(i), would be treated as if it never existed in the statute book, PrCIT erred in exercising jurisdiction under Section 263 in case of Section 92BA(i).

Thus, holding PrCIT's order under Section 263 to be void and invalid on the stated legal ground, ITAT allowed the Assessee's appeal.

HC rejects Nil-ALP with reference to royalty-payments, demarcates TPO's jurisdiction

Luwa India Pvt. Ltd.
2021-TII-42-HC-KAR-TP

The assessee had entered into international transactions with its AE and had filed its return of income. One of the international transactions entered into by the assessee with its AE was in respect of payment of royalty. The assessee benchmarked its international transactions at entity level by choosing TNMM as MAM for determination of ALP.

The AO initiated proceedings under Section 148 of the IT Act and made a reference to the TPO for determination of ALP of the royalty payments who determined its ALP at nil and accordingly, made a TP adjustment, holding that the assessee had not shown any proof that other group concerns or third parties were charging identical royalty and that the assessee did not derive any economic benefit from the transaction.

Aggrieved, the assessee approached the CIT(A) who deleted the TP adjustment made by the AO holding that the method adopted by the assessee of benchmarking the international transactions was correct.
Aggrieved, the revenue approached the ITAT which dismissing the appeal preferred by the revenue, affirmed the order of the CIT(A) to the extent of benchmarking the transaction of payment of royalty along with other transactions by applying TNMM.

The ITAT further held that the ALP could not be nil as there was evidence to show that the royalty payment was made against the use of right to use technical know-how. ITAT further held that TPO's jurisdiction was to determine the ALP by testing the same with uncontrolled comparable price and not to examine the allowability of the claim by applying the benefit test or the conditions as provided under Section 37(1) of the Act.

Aggrieved, the Revenue approached the HC which observed that the issue whether TPO while exercising its power can only determine ALP of an international transaction was no longer res integra and the issue was squarely covered in Bombay HC ruling in **Lever India Exports. [No Citation Provided]z**

Accordingly, HC placing reliance on Bombay HC ruling in Lever India Exports observed that it was not part of the TPO jurisdiction to consider whether or not the expenditure which had been incurred by the assessee passed the test of Section 37 of the Act and or genuineness of the expenditure and rather TPO's jurisdiction was specific and limited to determination of the ALP of an international transaction.

Thus, finding no merit, HC dismissed the appeal.

ITAT: Definition of 'relative' under Section 2(41) of IT Act applicable while determining SDT, deletes penalty levied under Section 271AA

Smt. Anita Sunil Mahajan
ITA No.1859/Pun/2017

The assessee filed her return declaring total income at INR 18.61 Lakhs and reported four payments to the tune of INR 19.64 Crores in the tax audit report, as having been made to persons specified under Section 40A(2)(b) of the IT Act. The AO observed that total of such transactions in the nature of Specified Domestic Transactions allegedly exceeded the qualifying limit of INR 5 Crores. Accordingly, the assessee was required to maintain documents and information in terms of Section 92D of the IT Act and furnish audit report as per Section 92E of the IT Act.

The AO therefore called upon the assessee to furnish the same. To which the Assessee replied that the tax auditor inadvertently reported such payments as having been made to persons specified under Section 40A(2)(b).

However, the AO was unconvinced and held that since the assessee had herself reported transactions under Section 40A(2)(b) in the tax audit report under Section 44AB of the IT Act. Additionally, there was no admission of error by the auditor and thus, the assessee was liable to be levied with penalty under Section 271AA of the IT Act for not complying with the provisions of Section 92D and 92E. Total of such transactions given in the tax audit report under Section 40A(2)(b) at INR 19.64 Crores was considered for levying penalty of INR 39.28 Lakhs @ 2%.

Aggrieved, the assessee approached the CIT(A) reiterating her stand that the payments were made to such persons who were not covered within the definition of 'relative'. However, the CIT(A) rejecting the Assessee's contention, affirmed the penalty.

Aggrieved, the assessee approached the ITAT which noting that since the term 'relative' as used in Section 40A(2)(b) was not defined in Section 40A, the general definition under Section 2(41) of the IT Act would be applicable basis which it could be concluded that only the transactions with husband, wife, brother or sister or any lineal ascendant or descendant of the individual would get enveloped under Section 40A(2)(b).

Further, the ITAT also observed that the definition of SDT as per Section 92BA of the Act, embraced transactions referred to in Section 40A(2)(b) provided the aggregate of such transactions entered into by the Assessee in the previous year exceeded a sum of five crore rupees. However, since the assessee's transaction covered under Section 40A(2)(b) was restricted only to INR 1.80 Lakhs, the same could not qualify as SDT under Section 92BA. Consequently, Sections 92D/92E also did not get magnetized and the question of penalty under Section 271AA did not arise.

Thus, accepting the assessee's appeal, ITAT deleted the penalty.

CBDT notifies Rules on capital gains for firms under Section 45(4) of the Act

Notification No. 76/2021
July 2, 2021

CBDT notifies the Income-tax (18th Amendment) Rules, 2021, through which it inserts the following provisions in the IT Rules:

- Sub-rule (5) to Rule 8AA which provides the conditions in which the amount chargeable to tax in the hands of specified entity under Section 45(4) of the Act shall be deemed to be a transfer from short term capital asset or from a long-term capital asset.

- Rule 8AB which provides, for the purpose of Section 48(iii) of the Act, the method of attribution of taxable amount to the capital assets remaining with the specified entity where the money and fair market value of capital assets received by the specified person are in in excess of his capital account balance.

Further, CBDT clarifies the following:

- No attribution is required when amount under Section 45(4) of the Act does not relate to revaluation of any capital asset or valuation of self-generated asset or self-generated goodwill or relates only to the capital asset received by the specified person

- The revaluation of assets would not entitle specified entity for depreciation on the increased value of assets

- The amount under Section 45(4) of the Act shall relate to the revaluation of capital asset if it's based on a registered valuer's report.

- The prescribed Form 5C is to be furnished electronically on or before due date of filing of return by the specified entity with the details of amount attributed to capital asset remaining with it.

CBDT notifies Income tax (19th Amendment), Rules, 2021, Inserts rule 8AC for STCG, WDV computation involving goodwill, depreciation under Section 50 of the Income Tax Act, 1961

Notification No. 77/2021
July 7, 2021

CBDT notifies Rule 8AC in the IT Rules for computation of STCG and WDV under Section 50 of the IT Act.

Accordingly, this Rule would be applicable for determining the WDV of the block of the asset and STCG for AY 2021-22 under proviso to Section 50 of the Act as follows:

- Where goodwill of the business or profession was the only or one of the assets in the block of 'intangible' asset for which depreciation was obtained by the Assessee for the AY 2020-21, the WDV of such block for AY 2021-22 shall be determined as per Section 43(6)(c)(ii) of the Act.

- Where the reduction under Section 43(6)(c)(ii)(B) of the Act, for AY 2021-22 exceeds the aggregate of: (i) WDV of the block for AY 2021-22 [exclusive of reduction under Section 43(6)(c)(ii)(B)] and (ii) the actual cost of asset falling in the block of intangible asset (other than goodwill) acquired during PY 2020-21, such excess shall be deemed to be STCG.

- Where the goodwill being the only asset in the block, on which depreciation was claimed for AY 2020-21, ceases to exist on account of no asset acquired for AY 2021-22, there will not be any capital gains or loss calculated without any prejudice to Section 55(3) of the Act.

- The capital gain/ loss on transfer of goodwill for AY 2021-22 or subsequent AYs, shall be determined in accordance with the provisions of Sections 48, 49 and 55(2)(a) of the Act.

CBDT notifies Income tax (21th Amendment), Rules, 2021, omitting numerous Rules and Forms, Pr. DGIT/DGIT(Systems) to specify forms, procedure for e-filing

Notification No. 83/2021
July 29, 2021

CBDT notifies Income-tax (21st Amendment) Rules, 2021, inserts Rules 130 and 131 in the IT Rules.

Rule 130 omits numerous rules and forms prescribed in Appendix II of the IT Rules and provides notwithstanding the omission: (i) any proceeding pending before any income-tax authority, Appellate Tribunal or any court in appeal, reference or revision, shall continue and be disposed of as if rules and forms have not been omitted, and (ii) any agreement entered into, appointment made, approval given, recognition granted, direction, instruction, notification or order issued under the omitted rules and forms shall be deemed to continue in force as no omission has taken place.

Further, Rule 131 provides that the Principal Director General of Income-tax (Systems) or the Director General of Income-tax (Systems), as the case may be, may (with the approval of the Board) specify the forms, returns, statements, reports, orders, by whatever name called, prescribed in Appendix II, to be furnished electronically:

(i) under digital signature, if the return of income is required to be furnished under digital signature or

(ii) through electronic verification code in a case not covered under clause (i)

a. laying down the data structure, standards and procedure of furnishing and verification of such Forms, returns, statements, reports, orders, including modification in format, if required, to make it compatible for furnishing electronically.

b. being responsible for the formulation and implementation of appropriate security, archival and retrieval policies in relation to the said Forms, returns, statements, reports, orders.

CBDT issues clarification on newly inserted Rule 8AB in the IT Rules

Circular No. 14/2021
July 2, 2021

CBDT clarifies that Rule 8AB also applies to capital assets forming part of block of assets and the term capital assets in Rule 8AB, refers to capital asset whose capital gains is computed under Section 48 of the Act as well as capital asset forming part of block of assets and that wherever reference is made for the purposes of Section 48 of the Act, such reference may be deemed to include reference for the purposes of subclause (c) of clause (6) of Section 43 of the Act and Section 50 of the Act.

Further, CBDT also clarifies that in case the capital asset remaining with the specified entity is forming part of a block of asset, the amount attributed to such capital asset under Rule 8AB of the Rules shall be reduced from the full value of the consideration received or accruing as a result of subsequent transfer of such asset by the specified entity, and the net value of such consideration shall be considered for reduction from the written down value of such block under sub clause (c) of clause (6) of Section 43 of the Act or for calculation of capital gains, as the case may be, under Section 50 of the Act.

Karnataka AAAR upholds classification of alcohol-based Hand Sanitizers under CTH 3808 as Disinfectants

Wipro Enterprises Private Limited
2021-TIOL-19-AAAR-GST

The Applicant had sought an advance ruling before the Karnataka AAR to ascertain the classification and GST rate of hand sanitizers. The AAR observed that as the purpose of hand sanitizers is to disinfect hands to prevent spread of virus, the sanitizers are classifiable as 'disinfectant' under CTH 3808, chargeable to 18% GST, and not as medicaments. The Applicant preferred an Appeal against the said ruling before the AAAR.

The AAAR had observed that a product must have therapeutic or prophylactic quality to be classified as a medicament under CTH 3004. It was further observed that, in the instant case, the sanitizers are manufactured using ingredients regulated under the Drugs and Cosmetics Act, and as per the formula prescribed in the Pharmacopeia. Such alcohol-based hand sanitizers do not have therapeutic or prophylactic properties and therefore cannot be considered as 'medicament'. Basis the above observations, the AAAR upheld the AAR ruling, holding the classification of alcohol-based sanitizers under CTH 3808 chargeable to 18% GST.

Authors' Note

It would be pertinent to note that in common parlance, the term 'prophylactic use' connotes a medication designed and used to prevent a disease from occurring. As alcohol-based hand sanitizers prevent spreading of viruses, it may be possible to argue that such sanitizers have prophylactic use and therefore, may be classifiable under CTH 3003 or 3004 as medicaments. However, the AAR has been taking a contradictory view as even last year, the Goa AAR in the case of Springfields India Distilleries **[2020-TIOL-173-AAR-GST]**, held the alcohol-based hand sanitizers classifiable under CTH 3808.

Karnataka AAR holds facilitation service from Indian Company to parent Company to be 'Intermediary Service'

Airbus Group India Private Limited
2021-TIOL-155-AAR-GST

The Applicant had entered into an agreement with its parent company for undertaking procurement operations, and central service function. In terms of the agreement entered upon, the Applicant was responsible for activities such as identifying local capabilities in Indian market, assessing quality of production, supplier's risk evaluation, obtaining quotations, etc. The Applicant had not been involved in payment to the vendors. In view of the above facts, the Applicant had filed an application before the Karnataka AAR to ascertain whether the Applicant's activity constitute as supply of 'other professional services' or 'intermediary service'.

Referring to the definition of 'intermediary', the AAR observed that the Applicant plays an important role in identifying vendors, explaining the product requirement, without which parent company will not be able to procure goods from vendor. Accordingly, it was observed by the AAR that the Applicant is facilitating supply of goods from such vendors. In view of the above, the AAR observed that manner of payment, commission or cost-plus mark-up, is determinative of 'intermediary' service. Basis the said

observations, the AAR held that the Applicant is providing intermediary services, and the place of supply of such service is in India and service will not qualify as export of service under Section 2(6) of the IGST Act.

Authors' Note

The chargeability of tax on supply of intermediary services has been a matter of perpetual litigation, that dates back to the Service Tax regime. It is generally understood that where a taxable person in India facilitates transactions between two or more persons, such a person would be classified as an 'intermediary'. Further, it is important to analyse the actual role and functions as the intermediary is not supposed to provide any services of his own account. This assumes more importance in case of services to foreign customers, as the place of supply is deemed to be in India and the supplier is not able to enjoy any export benefits on such supplies made.

However, there is another school of thought, which believes that where the location of the recipient of service provided by an intermediary is outside India, treating the place of supply in India basis the location of supplier, by virtue of a deeming fiction, is contrary to the scheme of GST law. Therefore, a question arises as to whether such provision is arbitrary and unconstitutional. In this regard, a division bench of the Bombay HC in the case of Dharmendra M Jani **[2021-TIOL-1326-HC-MUM-GST]** passed a judgment, resulting in a deadlock with Hon'ble judges taking contradictory view. While one judge held the intermediary service provision to be unconstitutional, the other has upheld its constitutional validity. The said matter has now been referred to the Chief justice of the Bombay HC on the administrative side for his decision.

Madras HC denies transition of credit of manufacturing unit closed before GST

MMD Heavy Machinery India Private Limited
2021-TIOL-1423-HC-MAD-GST

The Petitioner had closed down its factory in Tamil Nadu and moved to Andhra Pradesh in June 2016. The Petitioner had accumulated credit under the Excise regime at the time, which was not transferred to Andhra Pradesh unit. Subsequently, in the GST regime, the Petitioner's units migrated to GST regime. The Petitioner filed TRAN-1 to claim the unutilized credit in Tamil Nadu. Thereafter, the Petitioner filed ITC-02 to transfer such ITC to Andhra Pradesh unit, however, such claim was rejected. The Petitioner also filed refund application which was also rejected. Aggrieved, the Petitioner preferred a Writ before the Madras HC to allow transfer of unutilized credit from Tamil Nadu to Andhra Pradesh or alternatively allow refund.

The Madras HC observed that the Petitioner's units in Tamil Nadu and Andhra Pradesh, had different registrations in different States and therefore, will be treated as distinct persons. It was further observed that a distinct person cannot transfer credit u/r. 41 of the CGST Rules. In view of the above, the HC dismissed the Petition, with liberty to work out the remedy in accordance with law under the provisions of the Excise Act and thereafter approach the authorities under the GST enactments for refund.

Authors' Note

It would be pertinent to note that the transfer of credit by way of ITC-02 has limited applications. Only matched ITC balance available in the transferor's ledger can be claimed, etc. Similarly, Section 54 of the CGST Act also has limited application, as only a select few cases are covered under the said provision. It shall be noted that under the erstwhile Excise regime, such transfer of credit had been allowed in certain cases.

AAAR holds the reimbursement of additional discount offered by authorized dealers to be taxable

Santosh Distributors
Order No. AAR/10/20 dated 01 March 2021

The Applicant is an authorized distributor of M/s. Castrol India Limited ('Castrol') for the supply of Industrial and automotive lubricants. The Applicant had been paying tax dues as per the value of the invoices issued and availed ITC of GST shown in the inward invoice received by them from Castrol or their stockiest. In view of the above, the Applicant had filed an application before the Kerala AAR to inter alia ascertain the tax liability on the above-mentioned transaction;

The Kerala AAR ruled that the Applicant is eligible to avail ITC shown in the inward invoice received from the supplier of goods. As for the GST liability on the discounts provided by Castrol, the AAR had observed that the additional discount given by Castrol through the Applicant which is reimbursed to the Applicant, is to offer a special reduced price by the Applicant to the customers. Accordingly, it was observed that the amount represent consideration paid by Castrol to the distributor Applicant for supply of goods by the distributor / Applicant to the customer.

Accordingly, it had been ruled that such additional discount reimbursed by Castrol to the Applicant is liable to be added to the consideration payable by the customer to the Applicant arrive at the value of supply at the hands of the Applicant. The AAR had further ruled that the Applicant is liable to pay GST on the amount received as reimbursement of discount from Castrol. Aggrieved, the Applicant had preferred an Appeal before the Kerala AAAR.

The AAAR observed that the agreement between the Applicant and Principal Manufacturer does not establish that discount was pre-determined. It was observed that the Agreement merely refers to discount with no parameter for its determination. The AAAR had also observed that the Applicant had no control on quantum on discount as it was offered based on Principal Manufacturer's instructions.

Basis the above observations, the AAAR held that discount reimbursed to the Applicant does not satisfy parameters provided under Section 15(3)(b)(i) of the CGST Act and the same cannot be reduced from taxable value. Accordingly, the AAAR held that the discount reimbursed by Principal Manufacturer to the Appellant qualifies as consideration for extending discount by the Applicant to its dealers and exigible to GST.

Authors' Note

In the instant case, the Principal Manufacturer offered discount to the Applicant merely for commercial consideration of discount offered by the Applicant to its dealers. Such amount did not relate to the goods sold by the Applicant to its dealers nor the Principal Manufacturer reimbursed this amount to the Applicant on behalf of the Applicant's dealers. Therefore, discount reimbursed by Principal Manufacturer to the Applicant did not qualify as consideration of goods sold by the Applicant to its dealers.

It would be pertinent to note that under the erstwhile Excise regime, the Mumbai tribunal in the case of Voltas Limited [Order No. 2224/2001-WZB/C-I, dated 09 August 2001], had held that additional discount given to dealers on principal-to-principal basis, does not amount to consideration.

Constitutional-validity of 'export of services' provision under IGST Act challenged

Koenig Solutions Private Limited
2021-TIOL-1551-HC-DEL-GST

The Petitioner has challenged the constitutional validity of Section 2(6) of the IGST Act, which defines the term 'import of service' before the Delhi HC. The Petitioner has submitted that such provision is colourable legislation and lacks legislative competency and runs counter to the mandate under Article 286 and Article 269A of the Constitution of India and also against the provisions of Foreign Trade Act.

The Petitioner has also sought a declaration that the amount received in convertible foreign exchange from foreign companies, for its both onshore and offshore activities are in the course of export of services out of the territory of India and not subject to levy of tax under IGST Act. The Delhi HC has listed the matter to be heard on 05 October 2021 on merits.

Authors' Note

The exact scope of the term 'export of service' has been a matter of great discussion. Under the erstwhile Service Tax regime, the New Delhi AAR in the case of GoDaddy India Web Services Private Limited [2016-TIOL08-ARA-ST] had interpreted the term 'intermediary' vis-à-vis 'export of service', holding that business support services provided by an assessee on his own account qualifies as an 'export of service'. Under the GST regime, the Maharashtra AAR in the case of Cliantha Research Limited **[2019-TIOL-183-AAR-GST]**, had held that if the goods are physically made available by the sponsor in India from some other place outside India, then place of supply of service will be considered as India and thus, such will not be considered as export of services. Therefore, even in case of offshore activities, determination of place of supply would be critical and dependent on the nature of services to determine if the same classify as export of services ort not.

Restriction of refund on input-service under Inverted Duty Structure challenged before Rajasthan HC

Rajasthan Patrika Private Limited
D.B. Civil Writ Petition No. 5598/2021

The Petitioner, a leading newspaper publisher, has challenged the retrospective amendment to Rule 89(5) of CGST Rules, restricting refund of accumulated ITC on input services under Inverted duty structure. The HC has listed the matter for hearing on 04 August 2021.

Authors' Note

Rule 89(5) of the CGST Rules, first came to be challenged, before the Gujarat HC in the case of VKC Footsteps India Private Limited [2020-TIOL-1273-HC-AHM-GST]. In this case, the HC had held that the formula prescribed u/r. 89(5) of the CGST Rules to the extent it excludes refund of tax paid on 'input service' as part of the refund of unutilized Input tax credit is contrary to the provisions of Section 54(3) of the CGST Act which provides for claim of refund of 'any unutilized input tax credit.'

However, soon after the pro-assessee judgement by the Gujarat HC, the Madras HC in the case of Transtonnelstroy Afcons Joint Venture [2020-TIOL-1599-HC-MAD-GST] had held that Section 54(3) of the CGST Act qualifies and curtails not only the class of registered persons who are entitled to refund, but also the imposes a source-based restriction on refund entitlement and, consequently, the quantum thereof. Accordingly, it was held that Rule 89(5) of the CGST Rules, is in conformity with Section 54(3)(ii). With contradictory judgments on the matter of refund of input services in case of refund arising on inverted duty structure, the issue remains open to be settled by the Apex Court.

Madras HC allows applicability of GST only on amount exceeding Rs. 7500 for member's contribution in RWA

Greenwood Owners Association vs. UOI
2021-TIOL-1505-HC-MAD-GST

The Petitioner had sought an Advance Ruling before the Tamil Nadu AAR to ascertain whether GST is liable only on the amount in excess of Rs. 7,500/- collected as monthly maintenance charges from the Resident Welfare Associations ('RWAs') or on the entire amount in the context of Notification No. 12/2017- Central Tax Rate dated 28 June 2017. The AAR had held that when the charges or share of contribution goes above Rs. 7,500/- per month, such service will not fit the description appearing in Sr. No. 77(c) of 12/2017 – Central Tax Rate and hence such service will not be exempt and GST will be charged on the full amount of reimbursement of charges or share of contribution. The AAR had further observed that Circular No.109/28/2019-GST dated 22 July 2019 provides that exemption shall be granted only if the charges do not exceed Rs.7,500 per month per member and in cases where the charges exceed Rs.7,500, the entire amount is taxable. Aggrieved, the Petitioner had preferred a Writ before the Madras HC.

The Madras HC observed that in terms of Entry No. 77 of the Notification, the term 'upto' is heavily relied upon by the Petitioner to contend that only the exceeded amount is liable for the tax and not the whole amount collected. It was further observed that the term 'upto' hardly needs to be defined and connotes an upper limit. The HC further

observed that such a term is interchangeable with the term 'till' and means that any amount till the ceiling of Rs. 7,500/- would be exempt for the purposes of GST. Accordingly, the HC quashed the ruling of the AAR and the Circular stating that the matter thereto is contrary to the express language of the Entry in question and therefore, allowed the Writ holding those only contributions to RWA in excess of Rs.7,500/- would be taxable under the CGST Act.

Authors' Note

Earlier, the Tamil Nadu AAR in the case of TVH Lumbini Square Owners Association **[2019-TIOL-226-AAR-GST]** had held that entire member's contribution towards maintenance charges collected by RWA is taxable where same exceeds Rs. 7,500/- per month. In the said case also, the Applicant had preferred a Writ before the Madras HC. In the instant case, the Madras HC has rightly read down the Circular No.109/28/2019-GST dated 22 July 2019 as withdrawal of a statutory exemption by way of a Circular iscontrary to the provisions of the Constitution.

Rajasthan HC allows refund of IGST paid on 'ocean-freight' in terms of Mohit Minerals verdict

Shree Mahesh Oil Products vs. UOI
2021-TIOL-1524-HC-RAJ-GST

The Petitioner had filed a Writ before the Rajasthan HC challenging the Sr. No. 9(ii) of the Notification No. 8/2017 - Integrated Tax (Rate) dated 28 June 2017 to the extent it prescribe rate for levy of IGST on services by way of transportation of goods by vessel from a place outside India, up to custom station of clearance of India, where service provider i.e. supplier of service and service recipient i.e. recipient of service both are located in non-taxable territory i.e. outside India. The Writ further challenged Sr. No. 10 of the Notification No. 10/2017 – Integrated Tax (Rate) dated 28 June 2017 to the extent it deems 'Importer' within meaning of Section 2(26) of the Custom Act, as 'recipient' of service. The Petitioner further submitted that in view of the decision of the Gujarat High Court in the case of Mohit Minerals Private Limited [2021-TIOL-21-SC-GST-LB], the petitioner shall be entitled for refund of IGST paid.

The Rajasthan HC disposed of the Writ Petition in terms of the decisions given by the Gujarat High Court in Mohit Minerals Private Limited (supra) and Comsol Energy Private Limited [2021-TIOL-1334-HC-AHM-GST] wherein, refund to the applicant had been allowed on the basis of Mohit Minerals judgement.

Authors' Note

Levy of GST on ocean freight under RCM had been under dispute right from the erstwhile ST law. A breakthrough in this matter was reached with the decision of the Gujarat HC in the case of Mohit Minerals (supra), wherein, it had been held that the importer cannot be said to be the recipient of services where the entire transaction takes place outside the territorial jurisdiction of India.

However, it shall also be pertinent to note that while the Gujarat HC judgment is under challenge before the Apex Court, the same may be relied upon since the operation of the judgment has not been stayed. Further, post the Gujarat HC decision in Mohit Minerals Private Limited (supra), the Gujarat HC in the case of Trafigura India Private Limited **[2021-TIOL-21-SC-GST-LB]**, had issued notice to Revenue in writ challenging rejection of assessee's refund claim pertaining to IGST paid on Ocean Freight under reverse charge.

Kerala HC holds technical-glitches cannot affect statutory rights to consider ITC transition request

Merchem India Private Limited
2021-TIOL-1534-HC-KERALA-GST

The Respondent had attempted to file GST TRAN-1 Form on 26 September 2017, however, on account of technical glitches at the GSTN portal, failed to complete it. The Respondent had made numerous attempts to file TRAN-1, however, an error popped 'processed with error'. In respect thereto, the Respondent had raised a complaint but no reply was received from the GSTN side. Aggrieved, the Respondent preferred a Writ before the Kerala HC wherein it was directed to the IT Redressal Committee of the GST Council to consider petitioner's request for the transition of un-availed ITC in accordance with law. Thereafter, the Appellant filed the current Appeal before the Kerala HC.

It was observed by the HC that the statute does not provide for any provision for lapsing of unutilized ITC for non-filing of TRAN-1. The ITC is required by law to be credited to the electronic credit ledger of an assessee. It was further observed that the failure to credit the ITC is an infraction of Section 140(1) and to Rule 117(3) of the CGST Rules. Unutilized ITC of the erstwhile regime can be denied from being credited to the electronic credit ledger only under the contingencies mentioned in the proviso to Section 140(1). For other situations, this statutory right cannot be defeated by any procedural rules under the GST regime.

It was further observed that the technical glitches at the transitional stage of GST, should not affect the statutory right of dealers. It should be attempted to not deprive a dealer from a bona fide claim, through technicalities. It was further observed that that u/s. 140, registered persons are eligible to carry forward unutilized CENVAT credit. No time limit is specified under the said provisions to carry forward unutilized credit. It is only Rule 117 of CGST Rules, that provide for a period of 90 days from the appointed day, i.e., 01 July 2017. This period was subsequently extended till 27 December 2017 and thereafter vide Rule 117(1A), the commissioners were given the power to extend the time till 31 August 2018.

Basis the above observations, the HC held that the issue being technical in nature is only in the interest of all that such technical issues do not stand in the way of rendering justice. Thus, the impugned judgment does not reflect any error of law warranting an interference by the HC in the instant appeal.

Authors' Note

Post implementation of GST, various assessee had been subjected to technical issues in transitioning their erstwhile credit to the GST regime. The HC of Gujarat in the case of Siddharth Enterprises vs. Nodal Officer **[2019-TIOL-2068-HC-AHM-GST]** had held that Transitional credit cannot be denied only because form TRAN-1 could not be filed. Requirement of filing form TRAN-1 is procedural in nature and not mandatory and therefore right of transitional credit cannot be denied to those taxpayers who could not file such returns. Procedure provided cannot overtake law.

Following suit, various other HCs had allowed the assesses to avail transitional credit, who had failed to do so within the due date, on account technical glitches. Notably, the Madras HC in the case of Samrajyaa and Company **[2020-TIOL-381-HC-MAD-GST]** had allowed filing of TRAN-1 after the due date, even where the assessee did not have evidence of technical glitches. There is no denying the fact that there were several glitches on the GSTN Portal which was also in a nascent stage. Therefore, the Government ought to take a liberal view on such matters to avoid unnecessary long-drawn litigations, especially when the Courts have already consistently held in multiple judgments, that such glitches or procedural lapses should not curtail the assessee's right to carry forward such credit.

ITC restriction as per provisions of Rule 36(4) challenged before Allahabad HC

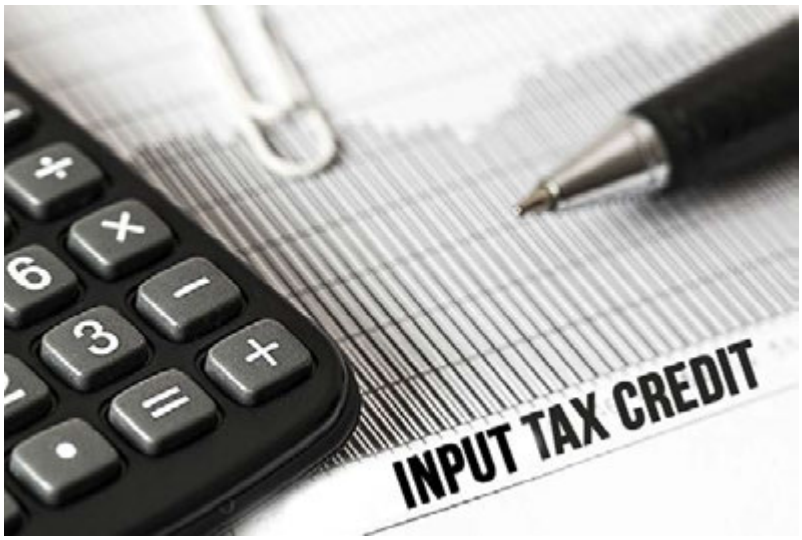
Vivo Mobile India Private Limited
Writ Tax No. - 433 of 2021

The Petitioner, inter alia engaged in the business of manufacturing and sale of cellular phones, telephone sets, wireless apparatus and other ancillary devices, had availed the benefit of Notification No. 30/2020 dated 03 April 2020 and made all the ITC related adjustments while filing GSTR-3B of September 2020 in the month of October 2020. Thereafter, the Dy. Commissioner had raised a demand for wrongful availment of ITC in violation of Rule 36(4) of the CGST Rules. Aggrieved, the Petitioner has challenged the ITC restriction u/r. 36(4) of the CGST Rules. The Petitioner has further challenged Circular no. 123/42/2019-GST dated 11 November 2019, which clarifies the ITC restriction under the said provision.

The Allahabad HC observed that interpretation of the Circular No. 123/42/2019-GST dated 11 November 2019 issued by the CBIC is involved in the instant matter. Accordingly, the HC granted time to Revenue to file Counter Affidavit and listed the matter for hearing on 13 August 2021.

Authors' Note

A number of assessees in various states have filed similar Writs challenging the ITC restriction u/r. 36(4) of the CGST Rules. However, the matter is yet to attain any finality. The Gujarat HC in the case of Surat Mercantile Association **[2021-TIOL-248-HC-AHM-GST]** has issued notice to the revenue department with respect to the writ challenging constitutional validity of Rule 36(4). Similar notices have been issued in the Rajasthan and Calcutta HC.



Orrisa HC quashes Department proceedings resumed after 18 years

Maxcare Laboratories Limited
2021-TIOL-1405-HC-ORISSA-CX

The Petitioner, engaged in the business of manufacturing perfumed hair oil, etc. in Bhubaneshwar had initially been subjected to an SCN in the year 1995 inter alia alleging suppressed production and removal of goods without payment of excise duty, for the period 1994-95. Aggrieved, the Petitioner had duly filed its reply to the SCN. Treating the reply to be not convincing, another SCN was issued on 29 March 2000. Thereafter, the Petitioner did not hear from the Revenue for 17 years, until a fresh SCN was issued in the year 2017, giving reference to the earlier SCN of 2000.

Aggrieved, the Petitioner preferred a Writ before the Orissa HC, challenging the SCN being time barred, illegal and arbitrary. The HC observed that the attempt to revive the proceeding after 18 years appeared to be contrary to the circulars issued generally by the Department for expeditious disposal of the SCNs. It was further observed that no convincing explanation is offered as to why the Department sat over the matter for 18 years, except saying that they decided in 2016 to revive the case.

The HC further observed that the Petitioner cannot be expected to preserve its records for these many years and to be able to answer a SCN after 18 years. No effective opportunity of defence can be afforded to the Petitioner in such proceedings.

Basis the above observations, the Orrisa HC held that there was no justification for the Revenue to revive the adjudication proceedings 18 years after the issuance of the SCN. Accordingly, the SCN and the notices were quashed and writ petition was allowed in the Petitioner's favour.

Tribunal permits refund of unutilized CENVAT credit as statutory provisions override the rules

Punjab National Bank
2021-TIOL-453-CESTAT-BANG

The Appellant had initially filed an ST-3 return on 31 August 2017 for the period April 2017 to June 2017 utilising the balance of CENVAT Credit. During the filing of such return, the Appellant's closing balance of CENVAT Credit stood 'NIL', basis which, even the transitional form i.e., GST TRAN-1 Form was filed 'NIL'. Subsequently, the Appellant filed revised ST -3 return for unavailed CENVAT Credit and KKC amount and thereafter, filed for refund application in term of provisions of Section 142(9) of the CGST Act. However, the Revenue rejected the refund application holding that the refund was time barred and requisite documents were not submitted and alleged contravention of the provisions of Section 11B of the Central Excise Act. The Commissioner (Appeals) upheld the refund rejection order. Aggrieved, the Appellant filed the current Appeal before the Bangalore Tribunal.

The Bangalore Tribunal observed that the authorities did not consider the submissions of the Appellant that primarily the refund of CENVAT Credit was filed in terms of Section 142(9)(b) of the CGST Act and the authorities considered provision of Section 11B of the Central Excise Act for rejecting the refund. It was further observed that as a well settled legal position, if there is a conflict between the substantive provision of the statute and the Rules framed thereunder then the statute will override.

The Tribunal further observed that in the instant case,

Section 142(9)(b) has an overriding effect over Section 11B of the Central Excise Act. Emphasizing on the words 'notwithstanding anything contrary contain in said law' u/s 142(9)(b) of the CGST Act, the Tribunal observed that the provisions of the said provision shall prevail over the provisions of existing law and the Appellant had complied with all the relevant conditions therein.

In view of the above, the Bangalore Tribunal set aside the order rejecting the refund and held that the Appellant was entitled for cash refund in view of Section 142(9)(b) of the CGST Act and remanded the matter back to original authority for document verification.

Authors' Note

Substantive law is generally understood as superior law and procedural law as subordinate to substantive law. Procedural laws are enshrined in law to determine how substantial laws are to be complied with. In the case of Thirumalai Chemicals Limited vs. Union of India and others [Civil Appeal Nos.3191-3194 OF 2011] the Supreme Court has held that all those laws which affect the substantive and vested rights of the parties have to be taken as substantive law, whereas any provision of law dealing with the form of the trial, mechanism of the trial or procedure thereof, has to be treated as procedural in nature.

In the instant case, the Bangalore Tribunal has rightly held that the provision of Section 142 of the CGST Act would over-ride Section 11B of the Excise Act. Section 11B merely provides the procedure for claiming erstwhile refunds, whereas, the CGST provisions, provide for substantive right of the assessees to claim refund.

Considering doctrine of revenue neutrality, the CESTAT Bangalore quashed the demand on services received from abroad

Air Asia India Limited
Service Tax Appeal No. 20085 of 2020

The Appellant, engaged in the business of providing airline operations, were in receipt of services of Back End Operations such as payrolls and finance input services from it related party outside India. Based on the CERA Audit, the Appellant had been subjected to an SCN, wherein service tax was proposed to be demanded, invoking the extended period of limitation, along with applicable interest and penalty.

In response to the SCN, the Appellant had rebutted the demand on ground of revenue neutrality and argued that remittance of tax on RCM basis has been made post-service tax regime and hence CENVAT Credit for the same cannot be availed. Basis the reply, the Revenue restricted the demand only to the extent of tax already paid and dropped the demand for interest and penalty following the principle of revenue neutrality. Further, the refund claim by the Appellant as per Section 142(6) of the CGST Act, was also rejected. The Commissioner (A) confirmed the Asst. Commissioner order. Aggrieved, the Appellant filed the present Appeal before the Bangalore Tribunal.

The Tribunal observed that both the authorities had not taken into consideration the decision of the Tribunal in the case of Jet Airways (India) Limited **[2018-TIOL-1561 -CESTAT-MUM]** which was upheld by the Hon'ble Apex Court, as the facts and circumstances were clearly applicable to the present case. The Tribunal in Jet Airways (supra) had held that the Appellant can avail CENVAT Credit of the service tax paid on RCM as they are liable to pay tax on output service and hence, Revenue neutral situation arises wherein appellant pays the tax and takes the credit. Further, it was also observed that the erstwhile CBEC vide Circular No. 354/148/2009-TRU dated 16 July 2009 had clarified that the service tax paid by a service recipient on RCM basis would also qualify as input service for availment of CENVAT Credit.

The Tribunal further noted that the invocation of extended period of limitation was not sustainable in law since the Appellant had not concealed any material fact and had

filed the returns regularly along with payment of service tax under RCM. Basis the above, the Tribunal allowed the Appeal on the grounds of revenue neutrality. As regards the refund of unavailed amount, the Tribunal held that the refund cannot be granted through the Appeal and the Appellant would be required to file the refund application as per law.

Authors' Note

The concept of revenue neutrality has not been discussed in any specific Acts or Rules. However, assessees have often taken recourse to this concept, where unnecessary demands have been created, especially where proportionate credit was otherwise available. The SC in the case of CCE Pune vs. Coca-Cola India Private Limited **[2007-TIOL-245-SC-CX]**, had held that if there is no revenue implication involved, then no tax is required to be paid. It had been further held that, if for the same assessee, tax paid is MODVABLE/CENVATABLE, then no tax is required to be paid. Therefore, the Appellant is not liable to pay tax for normal period of limitation as well.

FROM THE LEGISLATURE
GOODS & SERVICES TAX

Notification / Circular	Summary
Circular No. 157/13/2021 dated July 20, 2021	**CBIC issues clarification in respect to SC ruling on timeline-extension to judicial/quasi-judicial proceedings** Upon receipt of several representations for clarification on the time extension, CBIC to ensure uniformity in the implementation of the provisions of law across the field hereby clarifies following: ▸ **Proceedings/Compliances that need to be initiated/complied by the taxpayers** It clarified that the aforementioned actions would continue to be governed only by the statutory mechanism and time limit provided/ extensions granted under the statute itself. The SC order would not apply to the said proceedings/ compliances on part of the taxpayers ▸ **Quasi-Judicial proceedings by tax authorities** It further clarified that other proceedings including original proceedings would be governed by the time limit as prescribed under the statute or Notification issued thereunder and not by the Supreme Court Order ▸ **Appeals by taxpayer's/tax authorities against any quasi- judicial order** It further clarified that extension of timelines granted by the SC vide its Order, is applicable in respect of any appeal required to be filed before Joint/Additional Commissioner (Appeals), Commissioner (Appeals), Appellate Authority for Advance Ruling, Tribunals, Courts etc. The Circular states that extension is not applicable to any other proceedings under GST law.

Notification / Circular	Summary
GSTN Update	**Functionality to check PAN misuse in GST Registration** ▸ Introduction of functionality to register complaints on GST Portal. ▸ Registered complaint will be sent to the concerned jurisdictional authority where the registration is claimed. ▸ Steps prescribed for Registration of complaint on GST portal.
Notification No. 29/2021 – Central Tax dated July 30, 2021	**Functionality to check PAN misuse in GST Registration** CBIC has notified the self-certification of reconciliation statement in GSTR-9C instead of Chartered Accountant certificate
Notification No. 30/2021-Central Tax dated July 30, 2021	**CBIC amends the CGST Rules in respect GSTR-9 and GSTR 9C** Following rules are duly inserted in the CGST Rules: ▸ Every registered person, other than an Input Service Distributor, a casual taxable person, a non-resident taxable person and any person paying TSD/TCS under CGST Act, shall furnish an annual return electronically for every financial year in FORM GSTR-9 on or before 31 December following the end of such financial year through the common portal; ▸ Taxable person registered under composition levy scheme needs furnish the annual return in FORM GSTR-9A; ▸ An electronic commerce operator collecting tax at source shall furnish annual statement in Form GSTR-9B; ▸ In form GSTR-9C the need of CA Certification has been amended with the self-certified reconciliation statement by the registered person, other than an Input Service Distributor, a casual taxable person, a non-resident taxable person and any person paying TSD/TCS under CGST Act, whose aggregate turnover during a financial year exceeds five crore rupees.
Notification No. 31/2021 - Central Tax dated July 30, 2021	**Annual Return Requirement for certain taxpayers** CBIC exempts taxpayers having aggregate annual turnover up to Rs. 2 crores, from the requirement of furnishing annual return for the F.Y. 2020-21.

Notifications	Key Updates
Notification No. 58/2021-Customs (N.T.) dated July 01, 2021	**'Cooperation and Mutual Administrative Assistance in Customs matters'** CBIC notifies its Agreements or Arrangements with 32 other countries on 'Cooperation and Mutual Administrative Assistance in Customs matters' of India
Notification No. 35/2021-Customs dated July 12, 2021	**BCD exemption on specified materials for manufacturing COVID test kits** CBIC exempts BCD on the import of specified API/ excipients for Amphotericin B such as 'DMPC', 'DMPG', 'HSPC', 'DSPG', 'Egg Lecithin', falling under CTH 29232090 and 'Cholesterol HP' falling under CTH 29061310 till August 31, 2021 and raw materials for manufacturing COVID test kits falling under any chapter till September 30, 2021
Notification No. 36/2021-Customs dated July 19, 2021 Read with Notification No. 37/2021-Customs dated July 19, 2021 Read with Circular No. 16/2021-Customs dated July 19, 2021	**Clarification on leviability of IGST on goods exported for repairs** CBIC clarifies goods exported for repairs abroad not falling under any duty exemption scheme or claim for drawback or refund of IGST or under any bond as well as cut and polished precious and semi-precious stones exported for treatment abroad, shall on their re-import, be liable to IGST and Cess besides the already existing customs duty that is to be levied. These Notifications are also followed by Board's clarification that which refers to decision of the CESTAT pending before the SC in the matter of M/s Interglobe Aviation Limited vs Commissioner of Customs, dated 2nd November, 2020 **{2020 (43) G.S.T.L. 410 (Tri. - Del.)}** by which integrated tax and compensation cess would be wholly exempt on re-import of goods sent abroad for repair CBIC clarifies that the GST Council in its 43rd meeting decided that re-import of goods sent abroad for repair would attract IGST and cess (as applicable) on a value equal to the repair value, insurance and freight.
Notification No. 61/2021–Customs (N.T.) dated July 23, 2021 Read with Notification No. 62/2021–Customs (N.T.) dated July 23, 2021	**Amendment in Sea Cargo Manifest Regulations, 2018 and Customs Broker Licensing Regulations, 2018** CBIC amends the Sea Cargo Manifest Transhipment Regulations, 2018 ('SCMTR') and Customs Brokers Licensing Regulations, 2018 ('CBLR'), to abolish the requirement for renewal of license/ registration by incorporating the following measures: ▸ Provision of lifetime validity of the licenses/registrations. ▸ Provision for making the licenses/registrations invalid in case the licensee/registration holder is inactive for the period exceeding 1 year at a time. ▸ Empowering the Principal Commissioner or Commissioner of Customs to renew a license/registration which has been invalidated due to inactivity. ▸ Provision for voluntary surrender of license/registration.

Circulars/Instructions	Key Updates
Circular No. 18/2021-Customs dated July 31, 2021	**CBIC removes requirement for manual renewal of AEO-T1 entities, every three years, allows auto-renewal of all AEO-T1 entities certified after April 1, 2019 from August 1, 2021** Owing to the reported difficulties faced by Authorised Economic Operator ('AEO') T1 (including MSME AEO T1) entities in seeking renewal and with a view to reduce their compliance burden, CBIC allows the facility of continuous AEO certification/ auto-renewal for AEO-T1 entities subject to the submission of annual self-declaration and review thereof between October 1 to December 31 each year. All AEO – T1 entities certified on or after April 1, 2019, shall stand migrated to the auto renewal process with effect from August 1, 2021. Accordingly, the zonal AEO Programme Manager that had approved the AEO-T1 certification shall take the annual self-declaration, as mentioned above, on record and in cases where, any change in AEO- T1 compliance as per self-declaration is noticed or any adverse input is received from any field formation/investigation agency, the zonal AEO Programme Manager shall take suitable action by providing electronic intimation to such AEO-T1 entity as well as to the National AEO Programme Manager, Directorate of International Customs. Further, on the basis of the annual self-declaration, the concerned zone shall initiate a Comprehensive Compliance Review for the AEO-T1 entities (including MSME AEO-T1), as outlined hereunder: ▸ The review shall be conducted on the basis of at least two annual self-declarations filed after issuance of AEO T1 certificate or from the date of the last auto renewal of certification on account of successful review, whichever is later. ▸ The review process has to be completed before the commencement of the due date for submission of the 3rd annual self-declaration (i.e. before October 31) from the date of the certification or from the date of last auto renewal of certification on account of successful review whichever is later. ▸ During the review process, the Zonal AEO Programme Manager may seek additional documents/information, if required for completion of the review process. Based on the Comprehensive Compliance Review exercise done, CBIC clarifies that the concerned zone shall approve or revoke, as the case may be, continuous certification of the AEO-T1 entity and inform the National AEO Programme Manager, Directorate of International Customs. Once revoked, a new AEO-T1 (including MSME AEO-T1) certification would only be granted through fresh filing of application for AEO certification. In addition to the above, CBIC clarifies that the annual self-declaration for the AEO Auto Renewal process is required to be submitted by the applicant through the AEO online web portal <aeoindia.gov.in > and the AEO entities certified between January 1 to December 31 of each year shall be exempted from filing the annual declaration for that year. Therefore, AEO-T1 entities certified on or after January 1, 2021, for the present year will not be required to submit annual self-declaration for the present year.

Circulars/Instructions	Key Updates
	Furthermore , CBIC also clarifies that the AEO-T1 entities certified between April 1, 2019 and December 31, 2019 and January 1, 2020 to December 31, 2020 would be required to submit the details of the previous two financial years as their first annual self-declaration for the current year i.e., between October 1, 2021 and December 31, 2021 and October 1, 2022 and December 31, 2022 respectively and such annual declarations would be scrutinized by the zone concerned within 60 days i.e., by the end of February, 2022 and February, 2023 respectively and all other AEO T1 (including MSME AEO-T1) entities would be required to submit one annual self-declaration for previous financial year only, each year.
Circular No. 18/2021-Customs dated July 31, 2021	**New web application for online filing of AEO T2 & T3 applications, physical filing temporarily allowed till July 31, 2021** With reference to transition to the new version of the AEO application ('V 2.0') which allows continuous real-time and digital monitoring of physically filed AEO T2 and AEO T3 applications for timely intervention and expedience. CBIC clarifies that AEO T2 and T3 applicants are required to register and upload the annexures on V 2.0. after physical submission of their AEO T2 and AEO T3 applications to the jurisdictional Principal Chief Commissioner/Chief Commissioner's office. Further as a transitory measure, CBIC also allows physical filing of AEO application without registering on V.2.0 till July 31, 2021 to ensure smooth transition.
Circular No. 14/2021-Customs dated July 7, 2021	**Improvements in Faceless Assessment - Measures for expediting Customs clearances** With the intention to ensure quick customs clearance and to enhance the uniformity in assessments, CBIC decides to implement the following measures in the Customs Faceless Assessment and clearance processes: **Enhancement of facilitation levels:** Effective from July 15, 2021, the facilitation level across all Customs stations relating to Risk Management Division would be increased to 90%. In order to enable faster clearance of non-risky imports with enhanced focus on risky imports, the element of randomness in interdiction of any Bill of Entry would be retained by Risk Management System ('RMS'). **Expediting assessment process:** CBIC has decided that the working hours of all Faceless Assessment Groups ('FAGs') shall be uniform from 10 am till 8 pm. National Assessment Centres ('NACs') and jurisdictional Pr. Commissioners/Commissioners of Customs shall monitor that FAGs communicate the 'first decision' on the Bill of Entry within 3 working hours after its allocation. Further, the total number of queries that can be raised by an Appraising Officer in respect of a Bill of Entry would now be restricted to 3. **Re-organisation of FAGs:** CBIC has decided to create separate FAGs for certain commodities which contribute appreciably to revenue. The new FAGs would become operational from July 15, 2021. Further, with the endeavour to ensure that the reconfiguration of the FAGs does not lead to a disproportionate reduction/increase in the overall workload, CBIC has decided to carry out periodic reviews in consultation with NACs for further improvement in the performance of Faceless Assessment.

Circulars/Instructions	Key Updates
	Enhancing Direct Port Delivery ('DPD'): CBIC has decided that as a general principle, all the advance Bills of Entry which are fully facilitated (do not require assessment &/or examination) would be granted the facility of DPD. This facility would be over and above the present system of entity based DPD extended to Authorised Economic Operator ('AEO') clients.
	Automated generation of examination orders: CBIC has decided to introduce RMS generated uniform examination orders at all Customs stations across the country. Accordingly, the imports of items which ordinarily warranted first check would now be directly routed to the shed for first check examination. Such First Check Bills of Entry will now be referred to the FAG for assessment only after a First Check examination report has been uploaded by the Shed Officers in the Customs system. **Anonymised escalation:** DG Systems has decided to operationalise an Anonymized Escalation Mechanism ('AEM') on ICEGATE which would empower importers/customs brokers to directly register their requirement of expeditious clearance of a delayed Bill of Entry, which may be pending for assessment or examination. The modus operandi of the AEM shall be as follows: o The importer/customs broker shall initiate AEM through ICEGATE or approach Turant Suvidha Kendra ('TSK') in case of delay of more than 1 working day; o The AEM will automatically route the grievance to the concerned FAG/Import Shed, with a notification to Additional/Joint Commissioners of Customs of the concerned FAG and Port of Import; o The concerned FAG would then be required to dispose the grievance promptly and same shall be monitored by the concerned Additional/Joint Commissioner of Customs of the concerned FAG/Import Shed; and o The status of the disposal would be updated on the dashboard of ICEGATE, TSK, FAG and to the concerned officers
Circular No. 15/2021-Customs dated July 15, 2021	**Implementation of Risk Management System in exports for processing Duty Drawback claims** CBIC clarifies that in the second phase of the implementation of Risk Management System ('RMS') for processing of duty drawback claims, the RMS will process the shipping bill data after the export general manifests ('EGM') is filed electronically and thereafter provide required output to Indian Customs EDI System ('ICES') for selection of shipping bills for risk-based processing of duty drawback claims. The risk-based processing of shipping bills with claim of duty drawback shall be initiated with effect from July 26, 2021. Subsequent to RMS treatment, ICES will be informed for each shipping bill whether for the processing of the drawback claim, a particular shipping bill will be facilitated without intervention or will be routed to the proper officer. For shipping bills routed to the said Customs officers for drawback processing, CBIC clarifies that all necessary checks shall continue to be undertaken by the Customs officers as before and the extant procedure for payment of the duty drawback amount into the exporters' account will also remain unchanged.

Circulars/Instructions	Key Updates
	Accordingly, documents that may be required to accompany the drawback claim in terms of Rule 14 of the Customs and Central Excise Duties Drawback Rules, 2017 can be attached to the shipping bill electronically on e-Sanchit with the required e-Sanchit document codes. CBIC further states that the second phase of export RMS also envisages post clearance audit ('PCA') of the duty drawback shipping bills and therefore till the time the development of an electronic module for PCA of such shipping bills is underway in the Systems Directorate and the electronic PCA module is implemented, the current instructions for audit, as stipulated in the Manual for Customs Post Clearance Audit, 2018 shall continue to be followed. Furthermore, CBIC clarifies that National Customs Targeting Centre ('NCTC') will monitor and review the facilitation of duty drawback shipping bills in a phased manner and take required measures to enhance the facilitation levels in due course.
Circular No. 17/2021-Customs dated July 23, 2021	**CBIC amends CBLR, 2018 and SCMTR, 2018 abolishing requirement for renewal of license/registration** CBIC notifies its decision to amend the Sea Cargo Manifest Transhipment Regulations, 2018 ('SCMTR') and Customs Brokers Licensing Regulations, 2018 ('CBLR'), to abolish the requirement for renewal of license/ registration by incorporating the following measures: ▸ Provision of lifetime validity of the licenses/registrations. ▸ Provision for making the licenses/registrations invalid in case the licensee/registration holder is inactive for the period exceeding 1 year at a time. ▸ Empowering the Principal Commissioner or Commissioner of Customs to renew a license/registration which has been invalidated due to inactivity. ▸ Provision for voluntary surrender of license/registration. Further, considering the far-reaching implications of these measures, CBIC clarifies that the impact of the above measures shall be assessed after six months in January 2022, and changes made if necessary.

Notifications/Trade Notices/Public Notices	Key Updates
Notification No. 11/2015-2020 dated July 1, 2021	**Extension in modification of IEC and waiver of fees for IEC updation during July, 2021** DGFT notifies extension of period of modification of Importer-Exporter Code ('IEC') for the year 2021-22 till July 31, 2021 and accordingly, waives fee chargeable for such modifications for the year 2021-22 till July 31, 2021 Further, DGFT also clarifies that the cases where there are no changes in IEC details would need to be confirmed online.
Trade Notice No. 08/2021-22 dated July 8, 2021	**DGFT puts temporary hold on issuance of benefits/scrips under MEIS/SEIS/ROCTL/ROSL scheme** DGFT temporarily keeps the issuance of benefits / scrips under MEIS, SEIS on hold due to changes in the allocation procedure, accordingly, allowing no fresh applications to be submitted online at the IT module during this period. Further, DGFT also clarifies that the applications that are already submitted and pending for issuance of benefits are also to be kept on hold until further notice.
MyGov.in Initiative dated July 8, 2021	**Central Government seeks Industry views for Customs Exemption Review** The Hon'ble Finance Minister in her Budget Speech had announced that a review of existing Customs exemption notifications would be undertaken through extensive consultations. In respect thereto, a list of 97 Customs exemptions under various notifications has been identified for purpose of further review. Some key products covered under the list include fabrics, games/sports requisites, rubber items, magnetron for microwave manufacturing, specified parts for PCB, set-up box, routers, broadband modem, artificial kidneys, etc. The Government has further invited suggestions from the trade and industry in respect of their review, which may include the need for amendment in wording of the notifications for bringing clarity, consolidation, other relevant factors such as extent of use, etc. Accordingly, the Government has asked the trade to suggest suitable actions in the Notifications and the justification for such actions by August 10, 2021 on the MyGov.in portal.
Public Notice No. 14/2015-2020 dated July 13, 2021	**Central Government seeks Industry views for Customs Exemption Review** The claims for assistance under the TMA Scheme for the quarters ending on March 31, 2020 and June 30, 2020 can be filed till September 30, 2021.
Press Release dated July 14, 2021	**Union Cabinet approves extension of RoSCTL scheme till March 31, 2024** The Union Cabinet Ministry approves the continuation of RoSCTL scheme till 31 March, 2021 on Export of Apparel/ Garments (Chapters-61 and 62) and Made-ups (Chapter-63) in order to

Notifications/Trade Notices/Public Notices	Key Updates
	help and generate additional investment and give direct/indirect employment opportunities. Further, other textile products (excluding Chapters-61, 62 & 63) which are not covered under the RoSCTL shall be eligible to avail the benefits, under RoDTEP along with other products as finalised by Department of Commerce from the dates which shall be further notified.
Trade Notice No. 09/2021-22 dated July 16, 2021	**DGFT invites suggestions for New Foreign Trade Policy 2021-26** DGFT invites suggestions/inputs from various stakeholders for formulating the New Foreign Trade Policy 2021-26 requiring stakeholders to send their suggestions in a prescribed google form, on or before July 31, 2021. **Authors' Note** It is good to see the active involvement of stakeholders in the policy formulation. Even in the case of Customs Exemption Review, suggestions are invited from the trade and industry. Such involvement of the stakeholders will address their concerns and ensure that a more assessee-friendly regime is put in place.
Trade Notice No. 10/2021-22 dated July 19, 2021	**Extension of Date for Mandatory electronic filing of Non-Preferential Certificate of Origin through the Common Digital Platform to October 1, 2021** With an objective of providing an electronic, contact-less single window for the CoO related processes, DGFT expands the electronic platform for Certificate of Origin ('CoO') (URL: https://coo.dgft.gov.in) which was made live for issuing preferential certificates under different FTAs to facilitate electronic application for Non-Preferential Certificates of Origin as well. However, DGFT allows the existing system of submitting and processing non-preferential CoO applications in manual/paper mode till September 30, 2021 making electronic filing of the same through the Common Digital Platform mandatory thereafter. Accordingly, all agencies notified under Appendix-2E are required to ensure the on-boarding exercise is completed latest by September 30, 2021.
Public Notice No. 15/2015-2020 dated July 20, 2021	**Enlistment of 18th designated port for import of unshredded metallic scrap and waste** Kamarajar Port is enlisted as the 18th designated port for import of unshredded metallic scrap and waste apart from the 17 existing designated ports namely, Chennai, Cochin, Ennore, JNPT, Kandla, Mormugao, Mumbai, New Mangalore, Paradip, Tuticorin, Vishalchapatnam, Pipava, Mundra, Kolkata, Krishnapatnam, Kattupalli and Hazira.
Public Notice No. 16/2015-2020 dated July 22, 2021	**Amendments in Para 4.41 and Paras 4.51 and Para 4.57 of HBP 2015-20** DGFT amends Para 4.41 pertaining to validity period for import and Revalidation of Authorisation to allow only one revalidation for a period of 12 months to Advance Authorisations issued on or after August 15, 2020 instead of two revalidation of 6 months each, as allowed earlier.

Notifications/Trade Notices/Public Notices	Key Updates
	In addition to the above, DGFT also amends Para 4.51 of HBP 2015-20 which provides for the maintenance of proper accounts, requiring the records of consumption and utilisation of duty free imported/ domestically procured goods against each authorisation as prescribed in Appendix 4H or 41, to be filed online on the DGFT website at the beginning of each licensing year for all those authorisations, which have been redeemed in previous licensing year. Further, DGFT also amends Para 4.57 of HBP 2015-20 which provides for the maintenance of proper accounts of import and its utilisation, requiring the records of consumption and utilisation of duty free imported/ domestically procured goods against each authorisation as prescribed in Appendix 4H to be filed online to Regional Authority concerned along with request for bond waiver/transferability.
Public Notice No. 17/2015-2020 dated July 27, 2021	**DGFT introduces new proforma for filing of applications for revalidation of SCOMET export authorisation** DGFT notifies a new ANF proforma, namely, ANF 2O(d) for the filing of application for revalidation of Special Chemicals, Organisms, Materials, Equipment, and Technologies ('SCOMET') export authorisation. The new ANF proforma, ANF 2O(d) will facilitate the trade and industry to file application for revalidation of SCOMET export authorisation. Guidelines for applicants are as herein below: ▸ Application shall be filed through email at scomet-dgft@nic.in at sanjay.kt@nic.in . ▸ The licensee would be required to apply online by navigating to the DGFT website (under export management systems tab found under the Services tab) with effect from August 5, 2021, subsequent to the new online module for filing paperless applications. ▸ The following documents shall be attached along with the application: o A duly filled and signed copy of ANF 20(d). o A copy of Export Authorisation duly attested by the authorised signatory of the firm in ink with office seal. o A copy of the bank receipts/EFT/credit card /online payments evidencing payment of application fee of INR 500. Further DGFT clarifies that, the requests seeking revalidation of SCOMET authorisation are required to be filed at least 30 days prior to the expiry of authorisation, however, the period of renewal of authorisation shall be counted from the date of actual expiry of authorisation leading to less validity time in delayed submitted applications. The total validity time, in any case will not exceed 12 months.
Trade Notice No. 11/2021-22 dated July 28, 2021	**Introduction of new online Restricted Exports IT Module for issuance of Export Authorisation for SCOMET Items with effect from August 5, 2021** As part of IT Revamp of its exporter/importer related services, DGFT notifies the introduction of a new online module for filing of electronic, paperless applications for Export

Notifications/Trade Notices/Public Notices	Key Updates
	Authorizations for SCOMET Items with effect from August 5, 2021. All applicant exporters seeking export authorization for SCOMET items are advised to apply online by navigating to the DGFT website Accordingly, applications for issuance of export authorization of SCOMET items as well as amendment/re-validation thereof will need to be submitted online and all the existing pending applications (as on August 5, 2021) will be automatically migrated to this new system and will be processed as usual at DGFT(HQ). Further, the following processes will also be made available online as part of this new SCOMET Module: ▸ Authorisation for Site Visit by the foreign entity(ies) wants to the Premises of the Indian Manufacturer /exporter. ▸ Type of IEC to check production processes for SCOMET Export Items. ▸ Post Reporting of Export of SCOMET Items, Software/Technology in following cases: o Export of chemicals permitted to specified countries without authorisation. o Repair and return of imported SCOMET items after repair abroad. o Return of SCOMET items (imported/indigenous) aftee demo / display / exhibition / RFP / RFQ / tender etc, abroad. o Stock and Sale. o Global Authorisation for Intra-company Transfer (GAICT). o Others, if mandated in export authorisations.
Trade Notice No. 12/2021-22 dated July 28, 2021	**Introduction of Online Deemed Exports Application Module** DGFT introduces an online Deemed Exports Module on the DGFT website as a part of IT Revamp for receiving applications under the Chapter 7 of FTP 2015-20. Henceforth, the following applications are required to be submitted online through the importer/exporter's dashboard on the DGFT Website: i. Refund of Terminal Excise Duty (TED) ii. Grant of Duty Drawback as per AIR and iii. Fixation of Brand Rate for Duty Drawback Accordingly, DGFT clarifies the procedure for submission of applications as below:

Notifications/Trade Notices/Public Notices	Key Updates
	▸ The applicants are required to login to the portal, fill in the requisite details in the form, upload the necessary documents and submit the application after paying requisite fee. ▸ The system will then generate a file number which can be used for tracking purposes through the portal. The RAs would issue online deficiency letters calling for any additional information/document required and the exporter would be able to reply to the deficiency letters online only. ▸ However, the applicants will have to submit the corresponding supporting physical documents as prescribed under ANF -7A to concerned RAs within 7 days of online submission of such applications for processing of the applications at RAs. Further, DGFT clarifies that the new application Module will cater to new applications filed in this regard by the applicants and old/legacy physical applications submitted earlier manually will continue to be processed manually by concerned RAs.

SC dismisses Revenue's appeal against CESTAT order disallowing inclusion of brand-promotion expenses in valuation of imported sport-goods

Indo Rubber and Plastic Works
Civil Appeal No. 3685/2020

The Assessee was engaged in the import and distribution of 'Li Ning' brand of sports goods like Badminton Racquets, shuttles, shoes, clothes, bags, water bottles etc. from a company in Singapore with which it had entered into a distribution agreement for import and sale of goods within India (except Tamil Nadu, Andhra Pradesh & Kerala).

The Revenue held the imported goods liable for confiscation, alleging that marketing, advertising, sponsorship and promotional expenses/ payments made by the Assessee to promote the 'Li Ning' brand were a condition of sale and consequently such amount was liable to be included in the value of the imported goods in terms of Rule 10(1)(e) of the Customs (Determination of

Value of Imported Goods) Rules, 2007 (CV Rules).

Aggrieved, the Assessee approached the CESTAT which setting aside the order observed that there was nothing in the agreement that a fixed amount or fixed percentage of the invoice value of the imported goods, was obliged to be spent by the appellant as a condition of sale/ import and the activity of advertisement and sales promotion was a post import activity incurred by the appellant on its own account, not for discharge of any obligation of the seller under the terms of sale.

Aggrieved, the Revenue approached the SC which finding no merit in the Revenue's appeal refused its admission.

CESTAT remands matter to Commissioner (Appeals) for consideration on merits, holds mere dispatch of Order in Original through registered post to address of Assessee not sufficient service under law

Jang Badhur Singh Gujral
Customs Appeal No. 40081 of 2020

The Appellant was issued with a SCN with regard to a vehicle imported in 2008 and granted personal hearing by the Adjudicating Authority in which the Appellant had filed its written submissions.

Subsequently a decision was passed by the SC in Mangali Impex Ltd. v.s. Union of India [2016 (335) ELT 605] with regards to whether DRI had the power to issue SCN which caused the department to issue instructions to keep the impugned matter pending in a call book.

The Appellant did not receive any further intimation from the Adjudicating Authority post the personal hearing. Thereafter, the Appellant received a letter from the Department on December 28, 2018 requiring him to pay arrears as per the Order in Original passed on June 22, 2016 which was dispatched on July 12, 2016 and was also attached to the letter.

Aggrieved, the Appellant approached the Commissioner (Appeals) who dismissed the appeal on the ground of it being time barred.

Aggrieved, the Appellant approached the CESTAT contending that he was not aware of the Order in Original passed by the Adjudicating Authority until he received the letter from the Department.

The Department contended before the CESTAT that as per the dispatch register the Order in Original was dispatched by registered post to the address of the Appellant and therefore as per law the Order in Original had sufficiently been served upon the Appellant.

The CESTAT observed that there was no supporting evidence to show that the order had been served/communicated upon the Appellant. Merely, dispatching a letter/consignment by registered post to the Appellant was not sufficient service under the law. The Department ought to have tracked the consignment and made sure that it had been delivered to the Appellant and kept a copy of the tracking in the same manner that they maintain the dispatch register.

Further, taking note of the fact that many cases were kept in abeyance when the matter of the powers of DRI to issue SCN was taken up by the SC, CESTAT accepting the contention of the Appellant, remanded the matter back to the file of the Commissioner (Appeals) to consider the same on merits.

Madras HC holds inadvertent human error not sufficient to deny substantial benefit under MEIS scheme

K.I. International Limited
2021-TIOL-1384-HC-MAD-CUS

While filing MEIS application on the EDI portal, the Petitioner inadvertently selected the intent for claim of benefit as 'No' instead of 'yes'. Accordingly, the claim of MEIS had been rejected by the Revenue. Aggrieved, the Petitioner preferred a Writ before the Madras HC seeking quashing of the order rejecting benefit under the MEIS Scheme.

The HC observed that the Petitioner had unintentionally made an error while uploading the shipping bills on the EDI system and the error is hyper-technical, inadvertent and a human error. The HC further observed that the intention of the Petitioner was clearly expressed in the shipping bills. Basis the above observations, the HC set aside the order passed by the Revenue and held that the Petitioner was entitled to the benefit under the MEIS Scheme and also directed the Respondent to grant consequential benefits.

Authors' Note

It is now a settled principle that the Revenue shall not withhold substantial benefits to an assessee on account of hyper-technical inadvertent errors. Notably, the Bombay HC in the case of Portescap India Private Limited **[2021-TIOL-522-HC-MUM-CUS]** it was held that such errors are a procedural defect and curable considering the fundamental objective of the scheme. However, the Revenue authorities seldom take note of such judgements before rejecting claims. This only adds to the litigation burden on the assessees and the higher judicial authorities.

SC allows service of notices, summons via instant messaging services like WhatsApp, Telegram and Signal

In Re: Cognizance for Extension of Limitation 2020-TIOLCORP-17-SC-MISC-LB

The SC taking suo moto cognisance of the issue relating to the service of all notices, summons and exchange of pleadings during the period of lockdown observed that, the service of notices, summons and exchange of pleadings/documents, was a requirement of virtually every legal proceeding and that such service of notices, summons and pleadings had not been possible during the period of lockdown because it involved visits to post offices, courier companies or physical delivery of notices, summons and pleadings.

In light of the above, the SC held that the services of all notices, summons and exchange of pleadings could be put to effect by e-mail, fax, commonly used instant messaging services, such as WhatsApp, Telegram, Signal etc.

However, the SC cautioned that if a party intended to effect service by means of said instant messaging services, in addition thereto, the party would also have to effect service of the same document/documents by e-mail, simultaneously on the same date.

Authors' Note

The SC has rightly allowed the service of notices, summons and exchange of pleadings through instant messaging services, fax and email in the light of ongoing pandemic which has already resulted in two unexpected lockdowns. This move of the SC will ensure the timely hearing of proceedings.

HC refrains from interfering with the Arbitral Award passed against the Appellant, remarks court can't sit in appeal over arbitrators' findings, when contract construed fairly

Sulochana Modi vs. Pawan Kumar Modi Arba No.15 of 2017

A deed of Partnership at Will was executed between three partners, namely, the Appellant, Respondent and one Binod Kumar Tibrewal. The partnership had established a firm which was in the business of manufacturing turmeric powder and spices. Subsequently, one of the partners, namely, Binod Kumar Tibrewal retired from the partnership. Thus, a fresh partnership deed was executed between the Appellant and Respondent. The profit and loss sharing of the partners was at 50:50 ratio. Accordingly, the partnership deed was also modified.

Initially, the partnership firm availed financial assistance from the State Bank of India, which was ultimately transferred to Axis Bank. The firm had loan liability of INR 90 Lakhs with Axis Bank towards term loan and INR 1.3 Lakh towards cash credit.

The Respondent, being nephew of the Appellant was the Managing Partner and was looking after the management of the firm. Subsequently, dispute arose between the partners, namely, the Appellant and the Respondent. As the partnership was at Will, the Appellant sent a notice to

the Respondent expressing her intention to bring an end to the said partnership and for payment of her legitimate dues out of the firm's assets. As the dispute could not be resolved, an Arbitral tribunal was constituted on mutual consent of the parties as per the arbitration clause of partnership deed.

The Arbitral Tribunal passed the award which was assailed vide a Petition under Section 34 of the Arbitration Act by the Appellant before the District Judge claiming that the view of the Arbitral Tribunal was per se illegal and opposed to public policy as they have not considered various important part of the claim such as loss of goodwill and non-payment of interest.

Aggrieved, the Respondent approached the HC which observed that by no stretch of imagination, could it be said that majority Arbitrators had construed the contract in a manner which no fair minded and reasonable person could have done.

Thus, dismissing the appeal, the HC remarked that it was not inclined to sit in appeal over the findings and decision of the Arbitral Tribunal and could only entertain an appeal when the Arbitrator had construed the contract in such a way that no fair-minded person would do.

Authors' Note

In the instant case, the HC has rightly placed its reliance on the judgment of the SC in National Highways Authority of India Vs. ITD Cementation India Limited [(2015) 14 SCC 21] where it was held by the SC that construction of the terms of a contract was primarily for an arbitrator to decide. He was entitled to take the view which he held to be the correct one after considering the material before him and after interpreting the provisions of the contract. The court while considering challenge to an arbitral award did not sit in appeal over the findings and decisions unless the arbitrator construed the contract in such a way that no fair minded or reasonable person could do.

SC holds Section 34 "*Lakshman Rekha*" cannot be crossed to modify arbitral award

Project Director, National Highways vs. M. Hakeem & Anr.
SLP (Civil) No. 13020 of 2020

In the instant case, notifications were issued under the provisions of the National Highways Act, which consisted of awards made by the competent authority (Special District Revenue Officer).

The said awards were made based on the 'guideline value' of the lands in question and not on the basis of sale deeds of similar lands. As a result, in all these awards, abysmally low amounts were granted by the competent authority.

In the arbitral award made by the District Collector in all these cases, being an appointee of the Government, no infirmity was found in the aforesaid award, as a result of which the same amount of compensation was given to all the claimants (Respondents).

This led to filing of Section 34 petitions by the claimants before the Districts and Sessions Court which in exercise of jurisdiction under Section 34 Arbitration Act, modified the award of the District Collector, enhancing the amounts to be granted to the claimants.

Aggrieved, an appeal was filed by the Appellant to the Division Bench of the HC which upheld the aforesaid modification of the award by the District Court.

Aggrieved, the Appellant preferred an appeal before the SC which observed that in interpreting a statutory provision, a Judge must put himself in the shoes of Parliament and then ask whether Parliament intended this result, it can be clearly seen from the wording of Section 34 of the Arbitration Act that the Parliament very clearly

intended that no power of modification of an award existed in the section. It is only for Parliament to amend the aforesaid provision in the light of the experience of the courts in the working of the Arbitration Act, 1996, and bring it in line with other legislations the world over.

Thus, observing that Section 34 of the Arbitration Act cannot be held to include within it a power to modify an award, SC remarked that if one were to include the power to modify an award in Section 34, one would be crossing the Lakshman Rekha and doing what, according to the justice of a case, ought to be done. However the Apex Court also considered various other facts such as the higher compensation has been paid by appellant for similar land and the fact that this award was given 7-10 years back and hence it would not be fair to send it back for re-assessment, thus the appeal was dismissed. The Court also took cognizance of provisions of Arbitration Act 1940 which allowed the modification of award in certain circumstances.

Authors' Note:

It would be interesting to note that the Arbitration Act was enacted based on the UNCITRAL Model Law on International Commercial Arbitration, 1985 which made it clear that, given the limited judicial interference on extremely limited grounds not dealing with the merits of an award, the 'limited remedy' under Section 34 was co-terminus with the 'limited right', namely, either to set aside an award or remand the matter under the circumstances mentioned in Section 34 of the Arbitration Act, 1996.

HC holds decision of the Arbitral Tribunal final, states "can't re-appreciate evidence to examine arbitral award"

GAIL India Ltd. vs. Bansal Infratech Synergies Ltd. O.M.P. (COMM.) 177/2021 and IA No. 7093/2021

The Appellant had entered into a contract for 'Civil and Structural Works-II' at its Petrochemical Complex-II. Due to disputes that had arisen between the parties in connection with the contract, the Appellant had appointed Engineers India Limited (EIL) as the consultant for implementation of the Project. EIL invited bids for the Project on behalf of GAIL and the Respondent had submitted its bid pursuant to the said invitation.

The Respondent's bid was accepted and the same was communicated to it by a Fax of Acceptance (FAO), subsequently, a detailed letter of acceptance (DLOA) was issued to the Respondent. The works were required to be completed within a period of seventeen months with effect from the date of issuance of the FOA, However, the time for completing the works was extended and the Respondent finally completed the same.

Thereafter, the Respondent submitted its Final Bill to EIL. The Final Bill was forwarded by EIL to the Appellant and payments against the same were made on the recommendations of EIL.

Shortly after receiving the last payment, the Respondent invoked the Arbitration Clause and issued a notice. The Appellant did not take any steps for either resolving the disputes or constituting the Arbitral Tribunal pursuant to the aforesaid notice, as according to it, there were no disputes between the parties. According to the Appellant, the contract stood discharged by accord and satisfaction in view of the No Claim Certificate ('the NCC') issued by the Respondent.

Since the Appellant did not act on the aforementioned notice for arbitration, the respondent filed a petition under Section 11(6) of the Arbitration Act before the HC seeking appointment of an Arbitrator. The HC allowed the said petition and by an order, appointed the Sole Arbitrator to

adjudicate the disputes between the parties.

The Respondent filed its Statement of Claims before the Arbitral Tribunal, inter alia, raising several claims including that the NCC was invalid and had been obtained by coercion and undue influence.

The Arbitral Tribunal examined the evidence on record and concluded that the NCC was invalid as it was obtained by exerting undue influence and economic coercion. In addition, the Arbitral Tribunal also observed that in terms of the NCC, the claims, dues, disputes and differences between the parties would be fully and finally settled on receipt of the amount of INR 4,78,71,903, the amount released by the Appellant fell short by INR 39,73,669 and so as the said amount was not paid in full, the Arbitral Tribunal held that even de hors the question of coercion and/or duress, the NCC could not constitute a waiver on the part of the respondent.

Aggrieved, the Appellant approached the HC which observing that that the Arbitral Tribunal had examined and evaluated the material on record, and its conclusion to accept the Respondent's claim could not be stated to be perverse or patently illegal, held that it was not required to re-appreciate or re-evaluate the evidence to examine the Arbitral Tribunal's decision on merits as a first appellate court as long as the same was a plausible one.

Thus, finding the petition challenging the Arbitral award to be unmerited, the HC dismissed the same.

Authors' Note:

The HC's finding is in the instant case, in synchronization with the ruling of the SC in Associate Builders v. Delhi Development Authority: **[(2015) 3 SCC 49)]** wherein the SC held it to be a settled law that the Arbitral Tribunal was the final arbiter of facts and the court was not supposed to supplant its opinion in place of the Arbitral Tribunal's unless the same was found to fall foul of the public policy of India.

NCLAT holds liability arising out of corporate guarantee given by Corporate Debtor for group entity's loan, qualifies as 'financial debt'

9M Corporation vs. Naresh Verma & Ors.
Company Appeal (AT) (Insolvency) No. 45 of 2021

In the instant case, the Appellant was a financial creditor of BPPL (the Corporate Debtor). Before the NCLAT, the Appellant claimed that the COC was constituted by the Respondent No. 1 (the Resolution Professional), in pursuance to the order of admission passed on the Section 7 application filed by the Appellant against the Corporate Debtor.

The Appellant had further stated before the NCLAT that, Respondent No. 2 (STCI Finance Limited) had filed a claim based on debtor-creditor relationship, which was the result of a guarantee given by the Corporate Debtor for a loan of INR 24 Crores sanctioned by Respondent No. 2 to Bohra Industries Limited (BIL), which was a group concern of the Corporate Debtor.

It was further claimed by the Appellant before the NCLAT that the Corporate Debtor had furnished a collateral security to Respondent No. 2 and thus, Respondent No. 2 was not a financial creditor as defined in Section 5(7) and Section 5(8) of the IBC since the fundamental requirement of a financial debt is "disbursal against the consideration for the time value of money". According to the Appellant, the NCLT had not considered this important distinction between "debt" and "financial debt" and had considered the debt advanced by Respondent No. 2 to be a financial debt.

The Appellant prayed in its appeal before the NCLAT for setting aside of the order of the NCLT and directions to Respondent No.1 to reconstitute the COC of the Corporate Debtor in accordance with Section 21 of the IBC.

The NCLAT placing reliance on the ruling of the SC in Anuj Jain vs Axis Bank [(2020) 8 SCC 401], concluded that the Corporate Debtor was the corporate guarantor for the loan provided by Respondent 2 and observed that liability arising out of corporate guarantee given by Corporate Debtor for group entity's loan, qualified as 'financial debt'.

Thus, dismissing the appeal filed by the Appellant, the NCLAT observed that on the basis of Corporate Guarantee given by Corporate Debtor for the loan provided by Respondent 2 to a group concern of the Corporate Debtor, Respondent 2 was a financial creditor in CIRP.

Authors' Note:

The SC in Anuj Jain vs Axis Bank [(2020) 8 SCC 401], inter alia explained that for a debt to become "financial debt" for the purpose of Part II of the Code, the basic elements were that it ought to be a disbursal against the consideration for time value of money and it may include any of the methods for raising money or incurring liability by the modes prescribed in Section 5(8) of IBC. The NCLAT placing reliance on this ruling of the SC in the instant case, rightly observed that the Corporate Debtor was the corporate guarantor for the loan provided by Respondent 2 and therefore, the liability arising out of corporate guarantee given by Corporate Debtor for group entity's loan, qualifies as 'financial debt'.

SEBI reduces time period to obtain NOC

As per SEBI regulations, the issuer company shall deposit 1 per cent of the issue amount of the securities offered to the public and/or to the holders of the existing securities of the company, as the case may be, with the designated stock exchange.

This amount is released to issuer companies after obtaining a No Objection Certificate from SEBI.

With regard to release of said 1 per cent issue amount, the issuer company at present is required to submit an application on its letter head addressed to SEBI in a specified format, after lapse of 4 months from listing on the exchange.

Vide Notification No. SEBI/HO/OIAE/IGRD/CIR/P/2021/588 dated July 5th, 2021, this time period of 4 month has now been reduced to 2 months to make the application before SEBI.

However, it has been provided that application for NOC to the SEBI shall be subject to the following conditions:

- All issue related complaints have been resolved by the issuer; and
- Merchant banker shall submit a certificate confirming that all the SCSBs involved in ASBA process have unblocked ASBA accounts. SEBI shall consider application as incomplete if the application is not accompanied by above certificate.

Authors' Note:

This move is aimed at reduction of time period of post issue process. Due to the reduction of this time period, the issuer company will get a relaxation to get its deposit money back early. Accordingly, the issuer would get access to funds in a quick manner and same would help it to improve liquidity in these trying times. This is yet another move by SEBI to increase investor confidence and help companies which are already reining under the liquidity pressure.

SEBI relaxes timelines for compliances with regulatory requirements by Debenture Trustees

Due to Covid-19 pandemic situation, much representation had been received regarding the challenges arising out of local restrictions; Vide Circular no. SEBI/HO/MIRSD/CRADT/CIR/P/2021/561 dated May 03, 2021SEI has earlier provided relaxation in timelines to comply with various regulatory requirements of the Circular No. SEBI/HO/MIRSD/CRADT/CIR/P/2020/230 dated November 12, 2020.

Further representations have been received from the Debenture Trustees highlighting the issues faced by them due to local restrictions imposed by various states.

Hence, considering the above representations, timelines for following regulatory requirements have been extended:

S.No.	Regulatory Requirement	Current Timeline	Revised Timeline
1.	**Submission of reports/certifications to Stock Exchanges:**	July 15, 2021	
a.	Asset Cover Certificate		August 31, 2021
b.	A Statement of value of pledged securities		August 31, 2021
c.	A Statement of value for Debt Service Reserve Account (DSRA) or any other form of security offered		August 31, 2021
d.	Net worth certificate of guarantor		October 31, 2021
e.	Financials/value of guarantor prepared on basis of audited financial statement etc. of the guarantor (secured by way of corporate guarantee)		October 31, 2021
f.	Valuation report and title search report for the immovable/movable assets, as applicable		October 31, 2021
2.	**Following disclosures on the websites:**		
i.	Monitoring of asset cover certificate and quarterly compliance report of the listed entity	July 15, 2021	August 31, 2021
ii.	Monitoring of utilization certificate		
iii.	Status of information regarding breach of covenants/terms of the issue, if any action taken by debenture trustee		
iv.	Status regarding maintenance of accounts maintained under supervision of debenture trustees		

Authors' Note:

This is one more step towards supporting businesses to ensure compliances and to provide relaxations keeping in view the practical difficulties faced by corporate sector. To protect the interest of investors in securities and to promote the development of, and to regulate, the securities market SEBI has provided Relaxation in timelines for compliance with regulatory requirements by Debenture Trustees due to Covid-19 pandemic. Debenture Trustees expressed the challenges faced in complying with the requirements within the applicable timelines due to the difficulty in information sharing, limited functioning of the various offices and travelling restrictions and imposition of lock down in most states due to Covid-19.

SEBI defines "Same Line of Business" under new delisting regulation

Recently, SEBI has introduced new delisting regulation for companies willing to go private through a 'Scheme of Arrangement' wherein the listed parent holding company and the listed subsidiary are in the same line of business.

Now SEBI has come up with Notification No. SEBI/HO/CFD/DIL1/CIR/P/2021/0585 dated July 06, 2021 defining the 'Same Line of Business' in the case of opting out for delisting through a scheme of arrangement.

Through this Notification, SEBI, for the purpose of defining 'same line of business', provides the following criteria need to be fulfilled by the listed holding and the listed subsidiary company:-

I. Principle economic activities of both the listed and subsidiary are under the same group under National Industrial Classification (NIC) Code 2008

II. 50% or above of the revenue of both listed and subsidiary must come from the same line of business

III. 50% or above of the net tangible assets of both listed and subsidiary must have been invested in the same line of business

IV. In case of change of name of the listed entities, within the last one year, at least fifty percent of the revenue, calculated on a restated and consolidated basis, for the preceding one full year has to be earned by it from the activity indicated by its new name.

V. The listed holding company and the listed subsidiary have to provide a self-certification with respect to both the companies being in the same line of business.

VI. The above mentioned criteria shall be certified by the Statutory Auditor and SEBI Registered Merchant Banker.

Authors' Note:

There are numerous listed companies which have listed subsidiaries engaged in the same line of business, and equity shares of both entities are actively traded on stock exchanges. Both the listed holding company and the listed subsidiary can attain significant synergies by working together. The SOP was notified in the last month however SEBI has not defined the same line of business.

Hence to avoid the disputes in future on the same line of business, SEBI suo moto has come up with this notification.

New rules on incorporation of a company on not rectifying its name

Last year, Companies Amendment Act 2020 was notified which proposed many amendment into the Companies Act 2013. Vide Notification dated July 22nd, 2021; CG notifies that Section 4 of such amendment will come into effect from September 01st, 2021. Section 4 shall bring the amendments into the Section 16 of the Companies Act, 2013.

Section 16 provided that If, either in the opinion of the CG or on the application by registered proprietor of trade mark, name of the company is too identical or resembles the name of the other registered company or registered trade mark, Central Government may direct the company to change its name with 6 months from the date of issue of direction. If company fails to comply with above directions then company and its officers shall be liable to monetary implications.

However, following amendments shall be brought into the Section 16 which are as follows:

Old Provisions of Section 16	Revised Provisions of Section 16
Earlier, time period of 6 months from the date of issue of directions is given to rectify its name.	Now, this time period has been reduced to 3 months only
Earlier, on the non-compliance with directions issued by CG, company and its officers were liable to monetary implications.	Now neither the company nor its officers shall be liable to any penal provision. However it is now provided that : If company fails to rectify its name within 3 months, then CG shall allot a new name to the company and issue a certificate of incorporation accordingly.

However, the procedure of the allotment of new name to the company was not specified in Section 16.

Hence, the Ministry of Corporate Affairs via Companies (Incorporation) Fifth Amendment Rules, 2021 dated July 22nd, 2021 has inserted a new Rule 33A that is related to the allocation of the new name to the existing company as per Section 16(3) of the Companies Act, 2013.

Now, the ministry has put in place new rules on not complying with above direction issued u/s 16 within 3 months as prescribed in Section 16, salient features of the said Notification are as follows:

i. For such companies, the letters "ORDNC" ('Order of Regional Director Not Complied'), year of passing of the direction, the serial number and the existing Corporate Identity Number (CIN) shall become the new name of the company
ii. ROC will accordingly make the entry of the new name in the register of companies and issue a fresh certificate of incorporation.
iii. Once the company's name is changed, it shall make necessary arrangement to comply with Section 12 which pertains to registered office of company.
iv. A statement 'Order of Regional Director Not Complied' shall be added in bracket below the name of company wherever it is printed, affixed or engraved.
v. No such above statement shall be added if company subsequently changes its name.
vi. Incorporation certificate under this rule shall be issued in the new form of incorporation i.e. form no. 11C.

Authors' Note:

This is a welcome move. This amendment shows that government is focusing on making corporates more compliant than imposing monetary penalty on them.

There are many companies those were not complying with the directions and without taking cognizance of the matter were continuing their businesses. Tagging of statement like 'Order of Regional Director Not Complied' to the name of a company is more detrimental to the company's business than any monetary penal provision.

Extension of holding AGM for top 100 listed entities

SEBI (LODR) Regulations 2015 requires top 100 listed entities by market capitalization to hold their AGM within a period of 5 months from the date of closing of the financial year.

Vide Notification no. SEBI/HO/CFD/CMD1/P/CIR/2021/602 dated July 23, 2021, SEBI has extended the timeline for conduct of AGM by top listed 100 entities by market capitalization. Accordingly, such entities shall hold their AGM within a period of 6 months from the date of closing of the financial year for 2020-21.

Authors' Note:

This move is aimed to relax the procedural burden on the companies amid the various challenges being faced by the corporate due to Covid-19.After many representations have been received by the regulator from the listed corporates, SEBI has come up with such above move. However, in this tough time, SEBI has not left any stone unturned to provide the corporates ease of business which is very visible from the various relaxation provided by the SEBI earlier also, either it is the extension of the time period for the listed companies to submit their Q4 results as Well as annual results amid the second wave of coronavirus pandemic or the relaxation of one month till June 30 given with respect to filing of yearly secretarial compliance report.

Public comments on the proposed changes to commentaries on Article 9 of the Model Tax Convention released by OECD

OECD on June 3, 2021 has released the public comments received from 20+ stakeholders on the proposed changes to the Commentaries on Article 9 (and related articles) of the OECD Model Tax Convention, invited on March 29, 2021 as a part of its ongoing work of OECD/G20 Inclusive Framework on BEPS.

OECD clarifies that the comments received shall be considered by Working Party 1 in the finalisation of the changes to the commentaries on Article 9 and related articles of the OECD Model Tax Convention with the expectation that revised commentaries would be included in the next update of the OECD Model Convention.

Reference:

https://www.oecd.org/tax/treaties/public-comments-received-on-proposed-changes-to-commentaries-in-the-oecd-model-tax-convention-on-article-9-and-on-related-articles.htm

G7 leaders commit to reaching consensus on 15% global minimum tax and global agreement on equitable solution for taxing rights allocation

As a significant step towards building a fairer tax system fit for the 21st century and to reverse a 40 year old race to the bottom by raising more tax revenues to support investments and curb tax avoidance, the G7 leaders at their Carbis Bay Summit, have committed to achieve a fairer global tax by intending to reach consensus on: (i) global agreement on equitable solution for allocation of taxing rights and (ii) global minimum tax of at least 15% on a country-by-country basis through the G20/OECD inclusive framework at the July meet of G20 Finance Ministers and Central Bank Governors.

A communique had earlier been issued post the 2-day meeting of the G-7 Finance Ministers in London which stated that the G-7 countries were agreeing to reach an equitable solution on allocation of taxing rights, with market countries being awarded taxing rights on at-least 20% of profit exceeding a 10% margin for the largest & most profitable multinational enterprises.

The communique further provides for appropriate co-ordination between the application of the new international tax rules and the removal of all digital services taxes.

Reference:

https://www.consilium.europa.eu/en/press/press-releases/2021/06/13/2021-g7-leaders-communique/

Tax liability on liquidated damages - An Unending Saga!

Background:

Even since the Pre-GST Regime, there have been great debates regarding the chargeability of Service Tax on liquidated damages. Undoubtedly, performance is the essence of any contract and it is a very common practice for the parties generally incorporate a clause in the contract in terms of damage caused by failure of either party to perform its obligations as per the agreed terms.

In connection thereto, the agreement or contract may prescribe damages for deficiency in the performance of contract known as 'liquidated damages.' Such clauses are incorporated to discourage non-performance. For example, contracts may state that time is the essence of contract, and any delay attracts 2% of the value of the contract for every month of delay. Liquidated damages therefore, can be said to be in the nature of a measure of damages to which parties agree. By charging damages or forfeiture, one party does not accept or permit the deviation of the other party from the agreed terms.

However, a consistent view has been taken by the Revenue Authorities that liquidated damages are consideration arising out of non-performance of the relevant terms of the contract. Since tolerating an act has been deemed to be a ', the department takes a view that by the recipient party actually provides services by non-tolerating breach of terms of the contract. 'Such view has been based on the premise that the party had 'tolerated' the non-performance and accordingly, they raise demand of Service tax on such liquidated damages.

Recent Tribunal Decision

Despite this persistent view of the Revenue authorities, the judicial forums are time and again seen to be taking a lenient view holding that service tax is not applicable on

liquidated damages. In one such recent instance, the Chennai Tribunal in the case of Steel Authority of India Limited [Service Tax Appeal No. 40052 of 2019] has held that Service Tax is not applicable on liquidated damages collected for supplier's non-adherence to contractual time-limit.

In this case, the Appellant, inter-alia engaged in the manufacture of carbon steel, carbon steel sheet, etc. had recovered liquidated damages from their supplier as per the clauses of the contract for breach of timelines which was treated as declared service of 'agreeing to the obligation to refrain from an act, or to tolerate an act or a situation or to do an act' contemplated u/s 66E(e) of the Finance Act. Accordingly, service tax was demanded on such liquidated charges so recovered.

Aggrieved, the Appellant had preferred an Appeal before the Chennai Tribunal, wherein the Delhi Tribunal had rejected the contentions of the Department that penalty amount, forfeiture of EMD and liquidated damages had been received towards 'consideration' for 'tolerating an act' leviable to service tax under Section 66E(e) of the Finance Act. The Appellant referred to the case of South Eastern Coalfields Limited **[2020-TIOL-1711-CESTAT-DEL]**, wherein a similar issue concerning service tax liability on liquidated damages had been decided in the favour of the appellant. In this case, it was held that the recovery of liquidated damages from other party cannot be said to be towards any service per se, since neither the Appellant is carrying on any activity to receive compensation nor can there be any intention of the other party to breach or violate the contract and suffer a loss.

Basis the said observation, the Chennai Tribunal determined that it was not possible to sustain the view taken by the Revenue authorities that

since the task was not completed within the time schedule, the Appellant had agreed to tolerate the same for a consideration in the form of liquidated damages, which would be subjected to service tax under Section 66E(e) of the Finance Act.

It would be pertinent to note that the Delhi Tribunal in the case of Lemon Tree Hotel **[2020-TIOL-1114-CESTAT-DEL]** had held that no service tax shall be payable on cancellation fee as the said amount was received for agreeing to provide accommodation service and not be treated as tolerating an act. The nature of such amount will not change when the guests do not avail the service.

Similarly, in the case of Accounts Officer, Madhya Pradesh Kshetra Vidyut Company Limited [2019 (7) TMI – 500], it had been held by the Delhi Tribunal that deduction of penalty from contractor's bill will not be considered towards rendition of service under the category of 'tolerating an act.' It was held that no service tax was rendered for which penalty amount was received. It had been further held that imposing service tax on such amount will result in dual levy since service tax was already on contractor's service.

Key Takeaways in GST

It has been often observed that in the erstwhile regime, as a cycle, the Revenue authorities would demand assessees to pay service tax on liquidated damages, whereafter the matter would go into litigation and finally a decision would be passed in the favour of the assessee in the majority of cases. However, this activity unnecessarily adds burden on the assessees to take up settled matters into litigation. During the advent of GST, it had been contemplated that a clear and unequivocal provision or clarification would be laid down in this regard to finally put the issue at rest.

IT WOULD BE PERTINENT TO NOTE THAT THAT UNDER THE GST REGIME, THERE IS NO EXPRESS DEFINITION OF THE PHRASE 'TOLERATING AN ACT'.

It would be pertinent to note that that under the GST regime, there is no express definition of the phrase 'tolerating an act'. An entry has been provided in Schedule II of the CGST Act which provides for 'agreeing to the obligation to refrain from an act, or to tolerate an act or a situation, or to do an act' as a supply of service.

Upon bare perusal of the Schedule II entry, it is amply clear that in order to invoke the above taxable activity, there shall be an agreement to tolerate a situation. While the term 'tolerating an act' is supposed to cover situations such as payment of premium for vacating a property or payment of non-compete fees etc. In such cases, payments are being made for taking a positive action in line with the provisions of the contracts and therefore the same would be treated as taxable to service tax. However, the Revenue authorities, over a period of time, has widen the scope of the term to include every breach of every contract.

Accordingly, given the Schedule II entry under the GST to be similar to that of Section 66E(e) of the Finance Act, rulings such as SAIL, South Eastern Coal Fields would be of paramount importance in the context of the ongoing controversy on the levy of service tax / GST on the recovery of penal charges and liquidated damages stipulated in the contracts for breach of conditions of the contract. The instant decision of SAIL specifically discusses the declared services entry; more specifically, agreeing to the obligation to refrain from an act or to tolerate an act' and has referred to the earlier decisions in the of the Delhi Tribunal. The decision lays down an important principle that the activities should be specifically agreed in the contracts to be taxable as a separate activity.

GLOSSARY

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

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FIRM INTRODUCTION

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

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

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VISION 360

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