VISION 360

DEC 22

EDITION 27

A TREASURY OF KEY TAX & REGULATORY DEVELOPMENTS!

TCA TAXCRAFT ADVISORS

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EDITORIAL

Vision 360: A Fresh Start...

2022 began as a recovery year, businesses world over seemed poised to return to normalcy and to a great extent they indeed did until the improvement was stalled greatly by the Russia -Ukraine crisis.

These two countries account for about a third of the world's wheat and a quarter of barley production, not to mention some 75% of the sunflower oil supply — all critical commodities for keeping humans fed. The ripple effects of this situation reached till far east and west in no time with a looming threat of economic slow-down, surge in energy prices, inflation beyond control and all that threw the human race back into survival mode.

From India's economic standpoint, mid of 2022 saw a mass withdrawal by FII's from the market that led to a sudden downfall, followed by gradual resurrection, and even touching the new highs. India's diplomatic position on Russia- Ukraine crisis although may have invited debate, but Hon'ble Minister of External Affairs of India Mr. S. Jaishankar's well curated responses not only expressed a mass-sentiments but also lauded its strategic decision of procuring fossil fuel from Russia.

These incidences, followed by presidency of G20 starting from December 01, 2022 till November 30, 2023 is certainly a bugle call of its kind. "India's G20 presidency will work to promote this universal sense of oneness. Hence our theme: One Earth, One Family, One Future." – Hon'ble Prime Minister Mr. Modi was quoted as saying on assuming the presidency. In a nutshell India as an economy as well as a country has faired well this year despite difficulties.

From domestic economic standpoint, the GST collections have continued its streak of increasing trend. Since January 2022 till November 2022 the GST collections have consistently been above INR 1,00,000 Crore per month with highest ever GST collection of INR 1,67,540 Crore in April 2022. The trends also show a consistently increasing year on year growth in the GST collection.

The year was also expected to bring in the new Foreign Trade Policy with some of key changes to the existing one. However, with postponement thereof to April 2023 Continued incentivisation of Service exports, capital goods schemes and some other issues await clarity as to its future. The Year also saw mooting the idea to replace the existing law governing Special Economic Zones (SEZs) with a new legislation to enable states to become partners in 'Development of Enterprise and Service Hubs' (DESH). Moreover, the revision to RoDTEP rate, setting up of a committee to take up much needed and long-awaited duty Drawback rate are also some of the key anticipated events in the year to come.

On international tax space OECD's Global Forum on Transparency and Exchange of Information for Tax Purposes published the tenth peer review reports on Exchange of Information on Request for Barbados, the British Virgin Islands, Iceland, Israel, Kuwait, the Maldives, Morocco, Slovenia, South Africa and Turkey.

The ratings have been updated for seven jurisdictions on their practical implementation of the Exchange of Information on Request standard, where six of them i.e., Barbados, Iceland, Morocco, Slovenia, South Africa and Turkey have been granted the "Largely Compliant" rating, whereas the British Virgin Islands has been rated as "Partially Compliant".

Vision 360: A Fresh Start...

To sum up, with a lot more experience and learnings along the way, the year is coming to an end and like they say, 'all is well that ends well', it seems the worst is behind us and its time to rebuild ourselves. As we all embark on this new year with new challenges in true sense, the entire team of TIOL, in association with Taxcraft Advisors LLP, GST Legal Services LLP and VMG & Associates, wish you all a very happy new year and all the best for a fresh start!

Happy Reading!

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

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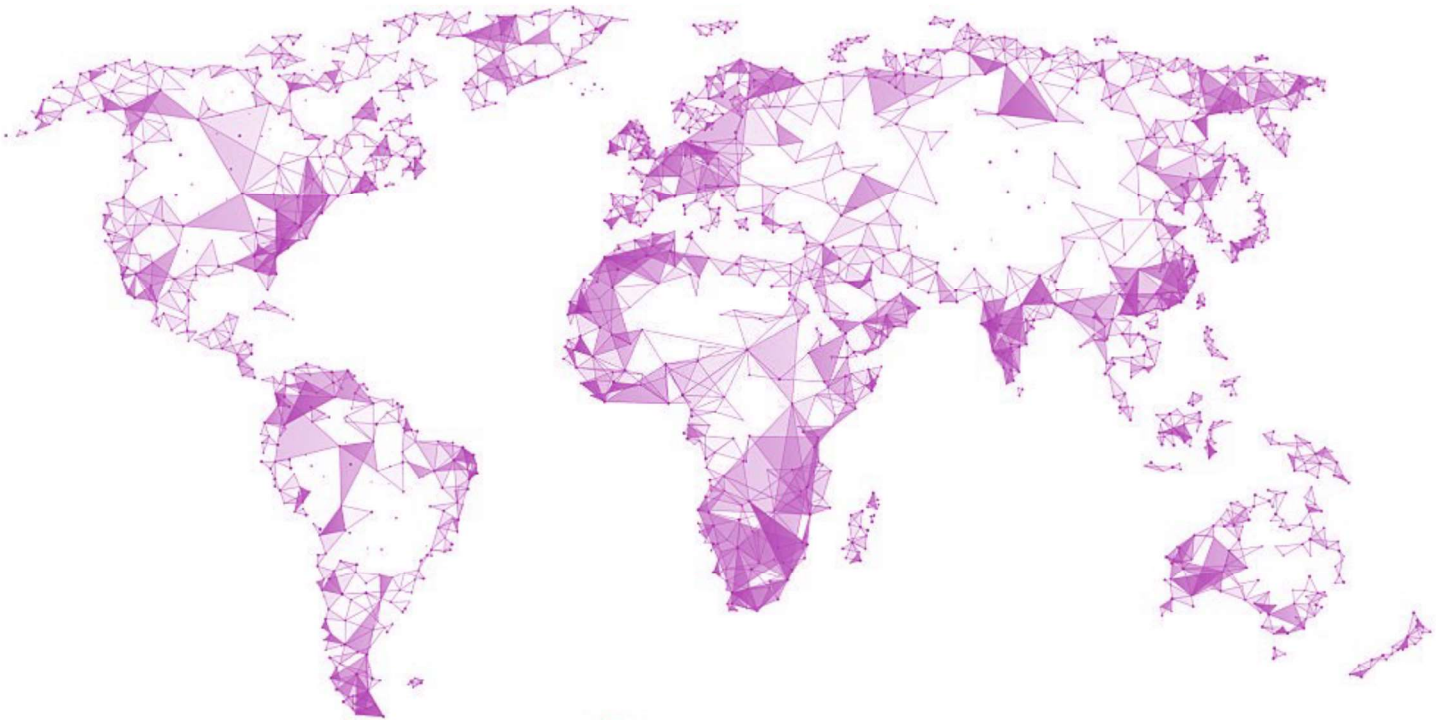

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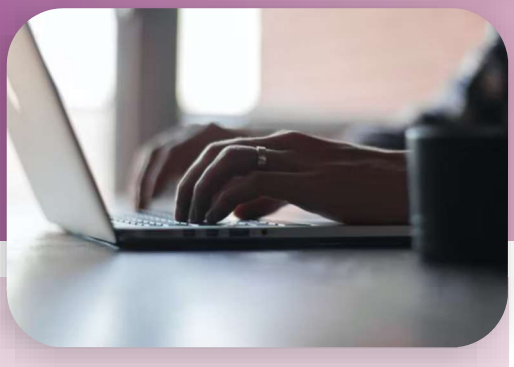


CANTEEN SERVICES: Uncertainty continues ...

Canteen facility provided to employees has always attracted a multitude of issues right from its taxability to availability of Input Tax Credit. As a matter of practice and following the provisions of the Factories Act, 1948, canteen services are provided to the employees either against a nominal value or without consideration. However, conflicting judgements on the tax treatment with regard to applicability of GST on such employee recoveries has been a wide contested issue. Umpteen AAR rulings have given contradictory positions on the subject matter which has caused confusion in the industry. Under the Factories Act, 1948, it is mandatory to provide canteen services to the employees working in factory premise. Usually, the taxpayers procure canteen services from a third-party service provider and a nominal/nil value is recovered from the employees towards canteen recovery.

The Maharashtra AAR in case of Emcure Pharmaceuticals Ltd., held that the provision of canteen services to the employees is employee welfare activity and is also mandated by the Factories Act and is not a factor which will take the applicant's business forward. Given the fact that, the applicant is not in the business of canteen services, the recovery made from employee will not qualify as service under section 7 of the CGST Act and he would rather be recipient of the canteen services.

The above tax position where canteen services do not attract GST has been upheld by various AARs in case of **M/s TATA Motors Limited, M/s Jotun India Private Limited and M/s POSCO India Pune Processing Centre Private Limited.**

While this being the position, a completely inverse view was taken by the AARs in case of M/s. Tube Investment of India Limited and **M/s. Kothari Sugars Chemicals Limited,** wherein it was held that establishing a canteen is in the furtherance of the business of the applicant and supply of food to the employees when the same is not contractually agreed. Thus, the provision of food would qualify as supply made by a taxable person in the course or furtherance of business and attract GST on nominal value recovered from the employees.

The AAR ruling in case of **M/s Bharat Oman Refineries Ltd**, had held that the canteen services are incidental or ancillary to the main business and thus, qualify as supply under GST framework. It was further held that the canteen services provided to employees without any recovery would still qualify as supply as per Clause 2 of Schedule I to the CGST Act. However, the above stand was overturned in AAAR proceedings. With regard to availability of ITC of canteen services, this issue had been discussed exhaustively in the AAR of **M/s Tata Motors Limited** wherein the Gujarat AAR held that ITC on GST charged by the canteen service provider will not be available even when the same is obligatory in terms of Factories Act, 1948.

The AAR stated that ITC is available on purchase of goods or services used in course of furtherance of business unless the same is blocked under Section 17(5) of the CGST Act, 2017. However, Section 17(5)(b)(i) of the CGST Act, 2017 states that ITC is not available in case of food and beverages and thus, it was held that ITC was not available against canteen services. However, **Circular No. 172/04/2022-GST dated July 6, 2022** has clarified that the scope of ITC would be available in respect of goods or services which are obligatory for an employer to provide to its employees, under any law for the time being in force. Accordingly, the ITC with respect to canteen services needs to be re-visited in light of the above Circular.

Further, ITC has also been allowed in MP AAAR judgement passed in the case of M/s Bharat Oman Refineries Ltd wherein it has been held that canteen services are mandated under law and employer was obliged to provide canteen services. Thus, canteen services will be covered by the Proviso to Section 17(5)(b) and ITC against canteen services will be allowed. While the AARs are binding only to the respective Assessee, it does have a persuasive value. In light of the conflicting judgments passed by the Advance Ruling Authorities, it is only prudent to obtain Applicant-specific clarity subject to relevant facts.

INDUSTRY PERSPECTIVE

ASHES NANDI

Vice President- Finance & Corporate Services
Fuji Electric India Pvt Ltd

01 The GST revenue has been climbing up the ladder at a phenomenal speed! With the 11% YoY increase, do you think this growth is parallel to the Economy's growth?

Well, the introduction of GST certainly has revolutionized the tax system in India. I believe one of the reasons for the record GST revenues is that consumption has substantially increased during the festival season that just concluded. Consumer spending was lower over the last two years due to the COVID-19 pandemic. The restrictions of the past two years have only fueled the consumers' desires of spending.

Apart from the consumers, I believe even the GST council has a lot to do with the rise in Revenue. Now that it has become mandatory for taxpayers having a turnover of more than Rs. 10 cr., to generate / issue e-invoices, the menace of fake invoices has substantially decreased. Thus, I can say this without a doubt that growth in GST revenues stands testament to the economic growth of India.

02 Being a global leader in the supply of Power Electronics Products how has the Indian market treated you?

We have been in the Indian market for a couple of years now. Our business has registered robust growth on an annual basis in financial parameters across the board. While India has sufficient and substantial power electronics market, a large proportion of the market remains untapped. This scenario is prevalent mainly because of the lack of optimizing automation and supply chain disruption. Thus, Power Electronics & Automation is certainly a megatrend which continues to be driving force for creating new opportunities, especially in Data Centre Market.

ASHES NANDI
Vice President- Finance & Corporate Services — Fuji Electric India Pvt Ltd

03 Fuji, being one of the biggest players in the electrical and electronics industry, you must be involved in various imports? Do you face any challenges relating to tariff classification?

The tariff classification has certainly been a pain area across the industry. While the tariff is well detailed, it seems that the same cannot keep-up with the technological developments in industry. Since the goods we deal in are highly advanced and technical in nature, the Customs authorities seem to be not very well versed with nitty gritties involved in the trade and technicalities of product. Fair play to them, the field is certainly highly technical. Nonetheless, this often results in disputes, which culminate into demands and the litigation ensues.

However, with the addition of new HS in 2022, a good number of products have found its place in the tariff. Nonetheless, I believe a clarification in respect of classification of various electrical and electronics equipment / product by the CBIC will go a long way in mitigating litigations.

04 What are your views on the Government's objective of faceless scheme of tax? Do you think it is achievable?

Certainly! Everything seems impossible until it is done. Just five years ago, who would have believed that we would be using UPI payments for buying vegetable from a local stall? But here we are. Despite the hiccups in the implementation, the new Faceless Customs procedure seems to be fairly running, albeit with some obstacles. We have seen that instead of cutting down on the time it takes to clear goods from the port, the authorities are taking longer to clear the regular shipments. Most of the time, this is because assessments are sent to officials at ports which are relatively less accustomed to sophisticated sectors such as electrical equipment. Thus, the officials are riddled with rather avoidable queries in relation to valuation, classification, etc.

Having said that, the Faceless system deserves credit for bringing much-needed transparency to the clearance process and allowing 24*7 clearances during the pandemic, which helped the industry overcome pandemic challenges.

As regards the faceless assessments in Direct Tax and GST, a number of players from all the industries have been facing certain issues such as non-granting of personal hearing, issuance of ex-parte orders before the due date for making submissions, etc. This unnecessarily adds to litigation burden on the taxpayers and the Courts. I believe that the solution to this issues that the officers must be trained adequately to conduct faceless assessments.

ASHES NANDI
Vice President- Finance & Corporate Services — Fuji Electric India Pvt Ltd

05 With the completion of 5 years of GST, the Government has started the audits and investigations in full fledge! Are you well guarded on this front?

Surely! We are a compliant organization with highest regard to ethics and adherence to the applicable laws. We understand that as the limitation period for the initial GST periods is nearing, the Government has to move swiftly to issue notices if any. However, in the pursuit of moving swiftly, the authorities often become aggressive in their audit procedures.

Under GST, the law is well established with set rules and procedure for conducting GST Desk audits, however, it is often seen that the Department oversteps their authority and demand the assessees to produce details and documents in unreasonable time-lines, or threaten them with higher penalties even in bona fide cases. While the CBIC has issued instructions and circulars, laying down the procedure for conducting the audit and assessments, they should also ensure that the same is being strictly followed.

Taking your question to a different direction, I would also like to add that the Government has also began Customs audits, which is similar to GST desk audits. A major issue faced in this audit pertains to the declarations made by the Company. Since the import and export declarations involve certain technical jargon, the classification and valuations comes under immense scrutiny. However, I believe this is a part and parcel of doing business in India.

06 Great insight! Now, with India being the fore-runner to becoming one of the biggest economies in the world, do you think our tax sphere is at par with our peers?

Well, traditionally the Indian tax scene was always looked down as being conservative and rather unwelcoming of the foreign companies. However, this has tremendously changed over the past two, two and a half decades. While the burden of compliances in India still remains far greater than the developed nations of the West, the digitalization in the system surely is a sign of being on the right path.

With e-invoicing, e-assessments, faceless appeals, in the Direct and Indirect taxes, the burden has certainly reduced. However, the faceless system in the Customs still remains a huge problem, as the time for clearance of goods, instead of being faster, has rather slowed down due to technical issues as well as the lack of knowledge of the Government official. Nonetheless, I hope that these are only temporary hurdles, which will convert into an efficient tax system in the long run.

ITAT holds pre & post sale services for software solutions requires technical expertise, qualifies as FTS

Sunsmart Technologies Pvt. Ltd.

ITA No.2791/Chny/2019

The Assessee had entered into an agreement with a Dubai-based company to market its product in Middle Eastern countries and in accordance with such agreement had remitted charges to the Dubai-based company, without TDS. During the course of assessment proceedings, the AO observed that the services rendered by the Dubai-based company, were in the nature of FTS as per Explanation-2 to Section 9(1)(vii) of the IT Act, and thereby disallowed payment made without deduction of TDS under Section 40(a)(i) of the IT Act. The Assessee approached the CIT(A) which upheld the above stand.

Aggrieved, the Assessee approached the ITAT. Based on the marketing agreement entered into between the Assessee and the Dubai-based company, the ITAT observed that the Assessee was required to train the resources of the Dubai-based company to provide pre-sale and after sale product services to the customers. Since the Assessee was in the business of providing software solutions and services to various industries, the services provided by marketing personnel definitely required technical expertise and knowledge. Accordingly, the services rendered by the Dubai-based company fell within the ambit of 'technical' services. Thus, ITAT held that the services rendered by the Dubai-based company in terms of agreement were in the nature of FTS and in the absence of TDS, the expenditure was liable to be disallowed under Section 40(a)(i) of the IT Act.

ITAT holds revisionary order passed without DIN, invalid, violative of CBDT Circular

Dilip Kothari

ITA Nos.403 to 405/Bang/2022

Search and seizure operation under Section 132 of the IT Act was conducted at the premises of the Assessee wherein certain incriminating documents were seized. The AO issued a notice under Section 153C of the IT Act in response to which the Assessee filed the return of income and the AO completed the assessment under Section 153C of the IT Act accepting the returned income filed by the Assessee. After completion of the post-search assessment under Section 153C of the IT Act, the PCIT passed a revision order under Section 263 of the IT Act on the ground that the AO failed to enquire about the unexplained cash investment made by the Assessee. Accordingly, the PCIT directed the AO to pass a fresh assessment order after verifying and making enquiry into the unexplained cash investments made by the Assessee.

Aggrieved, the Assessee approached the ITAT. The ITAT noted that the revision order passed under Section 263 of the IT Act by the PCIT did not contain any DIN, nor any reason for non-issuance of DIN, which was in violation of the CBDT Circular No.19 of 2019 dated August 14, 2019. It further observed that with effect from October 1, 2019, no communication was to be issued by the Income Tax Authority unless a DIN was allotted and was quoted in the body of the letter except under exceptional circumstances. Moreover, in the said exceptional circumstances mentioned, the manual communication was required to mention the fact that the communication was issued manually without a DIN and the date of obtaining of the written approval of the Chief Commissioner/ Director General of Income-tax for issue of manual communication in a specific format. Further, any communication issued in violation of the Circular was to be rendered as invalid and deemed to have never been issued. Thus, holding that the PCIT order under Section 263 of the IT Act was invalid and was to be deemed to have never been issued as it failed to mention the DIN in its body, the ITAT allowed the Assessee's appeal.

HC holds centralised services to Indian hotels including marketing & sales, not FTS, follows Sheraton International ruling

Westin Hotel Management LLP

ITA 434/2022 & ITA 435/2022 & CM APPL. 47203/2022

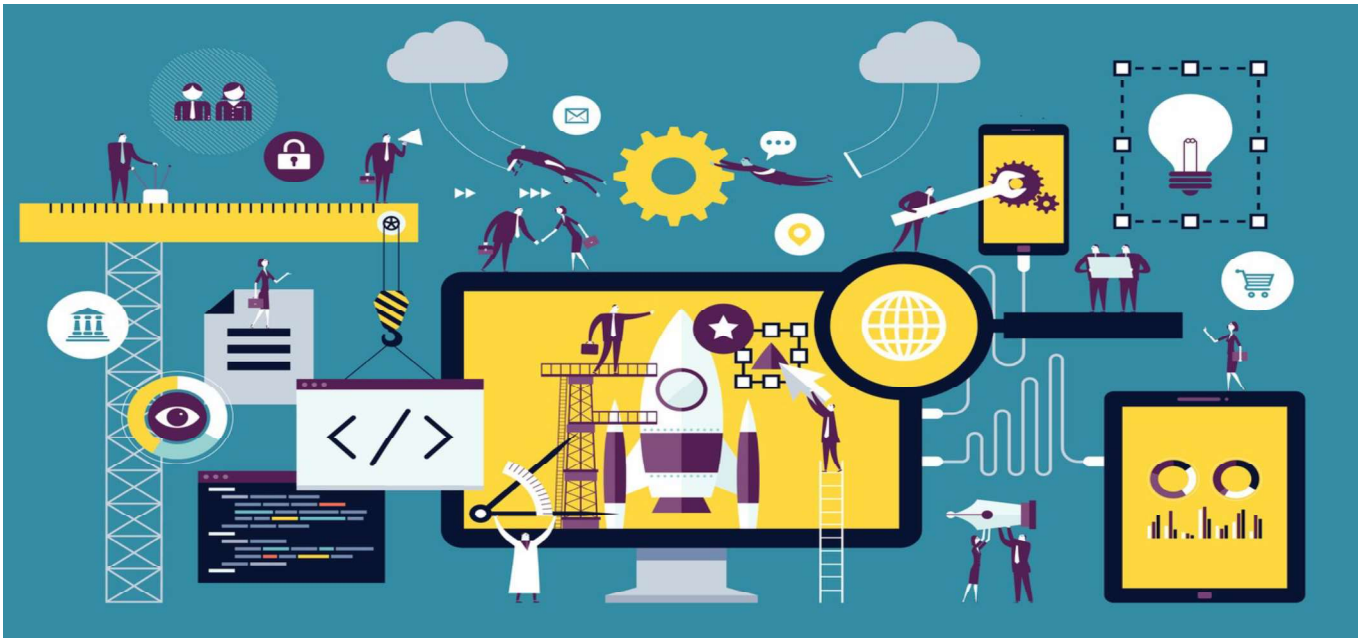
The Assessee was a non-resident company that was engaged in the business of providing hotel related services in several countries including India. It had entered into three agreements with Indian hotels namely, (i) Agreement for grant of right to use trade name, (ii) Operating services agreement and (iii) Centralized service agreement. The Assessee claimed the amount received under Centralized service agreement for providing hotel related services as business income which was denied by the AO on the ground that the services provided by the Assessee were in the nature of FTS as defined in Explanation of

Section 9(1)(vii) of the IT Act.

Aggrieved, the Assessee approached the CIT(A) who observed that the Centralized Service Agreement was merely a subsidiary and ancillary agreement to the main license agreement that would fall within Article 12(4)(a) of India-US DTAA, dismissed the Assessee's appeal. Aggrieved, the Assessee approached the ITAT which placing reliance on the jurisdictional HC ruling in **Sheraton International [2009-TIOL-57-HC-DEL-IT]** which was a group entity of the Assessee, observed that the amount received from customers on account of centralized services viz. sales and marketing, loyalty programs, reservation service, technological service, operational services and training programs did not constitute 'Fee for Technical Service' as defined under Section 9(1)(vii) of the IT Act or Article 12(4)(a) of Indo-US DTAA. Aggrieved, the Revenue approached the HC contending that the ruling in **Sheraton International [2009-TIOL-57-HC-DEL-IT]** had been assailed in SC and was pending adjudication.

The HC observed that the Revenue had failed to bring anything on record to distinguish the facts of the case with the facts involved in **Sheraton International [2009-TIOL-57-HC-DEL-IT]** wherein the issues were decided in favour of the Assessee, except the fact that the SLP against the decision of **Sheraton International [2009-TIOL-57-HC-DEL-IT]** was pending adjudication. The HC placed reliance on the SC ruling in **Kunhayammed [2002-TIOL-50-SC-LMT-LB]** wherein it was held that mere pendency of SLP did not put in jeopardy the finality of the order sought to be subjected to exercise of the appellate jurisdiction and it was only if the application was allowed and leave to appeal was granted, that the finality of the order under challenge was jeopardised as the pendency of appeal reopened the issues decided and the correctness of the decision could then be scrutinised, rejected the Revenue's contention and observed that there was no stay on **Sheraton International [2009-TIOL-57-HC-DEL-IT]** till date.

Accordingly, observing that the decision of SC in **Sheraton International [2009-TIOL-57-HC-DEL-IT]** would have a binding effect to the present appeals, the HC, dismissed the appeal of the Revenue and upheld the order of the ITAT holding that the payment received by the non-resident entity from Indian customers on account of centralized services including sales and marketing could not be considered as fees for technical services as defined in Section 9(1)(vii) of the IT Act or Article 12(4) of India-US DTAA.



DIRECT TAX
From the Legislature

NOTIFICATIONS

CBDT notifies amendments in jurisdiction of Commissionerates, Assessment & Verification Units

Notification No. 121 to 124/2022 dated November 14, 2022

CBDT notifies amendment to its earlier Notification dated June 10, 2022 which notified income-tax authorities for assessment, review and verification units across the country.

The notifications come into effect from the date of publication of the Gazette i.e., November 14, 2022.

CIRCULARS

CBDT releases draft Common ITR, seeks stakeholders' inputs by December 15, 2022

Draft Proposal dated November 1, 2022

- CBDT releases draft Common ITR to bring the compliance system in tandem with international practice by merging all the ITRs except ITR-7.
- Further, CBDT clarifies that ITR-1 and ITR-4 shall continue as an option for the taxpayers.
- CBDT further states that inputs of stakeholders can be sent by December 15, 2022 at ditrpl4@nic.in with a copy to ditrpl1@nic.in.

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CBDT releases Explanatory Notes to Provisions of Finance Act, 2022

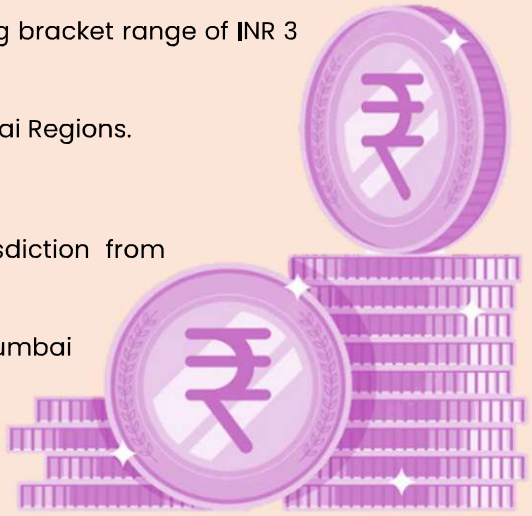
Circular No. 23/2022 dated November 3, 2022

CBDT releases Explanatory Notes to Provisions of Finance Act, 2022.

CBDT revises monetary limit for 'Dossier Cases'

Instruction No. 1/2022 dated November 3, 2022

CBDT revises primary threshold for Dossier cases in view of large number of Dossier cases requiring periodic reporting and review by various Income Tax Authorities. The monetary limit for classification of cases of outstanding demand as a 'Dossier case' has not be revised since 2015, accordingly CBDT modifies the threshold to facilitate a focused monitoring and rationalisation of workload.



CBDT enhances the limit for CCIT's jurisdiction from the existing bracket range of INR 3 Crores to INR 15 Crores, to:

- Above INR 25 Crores to INR 250 Crores – For Delhi and Mumbai Regions.
- Above INR 25 Crores to INR 100 Crores – For other regions.

Likewise, CBDT revises the threshold for Principal CCIT jurisdiction from existing bracket range of INR 15 Crores to INR 25 Crores, to:

- Above INR 250 Crores to INR 500 Crores – For Delhi and Mumbai Regions
- Above INR 100 Crores to INR 500 Crores – For other regions;

Further, CBDT appoints Principal DGIT (Admin & TPS) to be in charge of dossiers above INR 500 Crores, with assistance of ADG (Recovery), as against the earlier limit of above INR 25 Crores providing that the Principal DGIT (Admin & TPS) would submit proposals for monitoring very high demand cases for approval of Member (TPS).

TRANSFER PRICING
From the Judiciary

ITAT upholds deletion of TP-adjustment qua depreciation on purchase of business rights, follows earlier order

WNS Global Services Pvt. Ltd.

ITA No. 2473 & 2474/MUM/2021

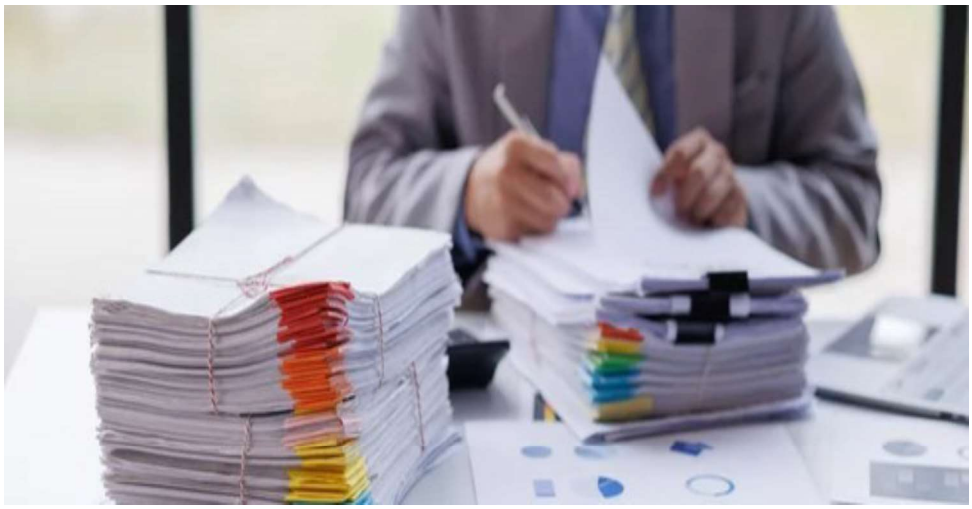
The Assessee was providing IT enabled services and business process outsourcing services and had purchased business and commercial rights from its AE. The Assessee had adopted CUP method and determined ALP on the basis of valuation report by independent valuer. The TPO while determining ALP on 'incremental benefit' approach, made an adjustment on account of depreciation claimed against the business and commercial rights purchased from the AE. Aggrieved, the Assessee approached the CIT(A) who deleted the TP adjustment made by the TPO on the depreciation claimed by the Assessee observing that that the adjustment was result of change in the ALP of amount paid for acquiring the business right (a capital asset), which resulted change in written down value and consequently adjustment/disallowance in depreciation of the capital asset.

Aggrieved, the TPO approached the ITAT. The ITAT noted that the in Assessee's own case for previous years, the coordinate bench had decided the issue in favour of the Assessee and observed that the TPO had not followed any of the methods under Section 92C of the IT Act. Accordingly, the ITAT observed that the valuation of an intangible requires expertise and knowledge in the domain of valuation principles, markets and business. Even if the TPO was not in agreement with the variables assumed/valuation undertaken by the independent valuer, they ought to have desisted from their own exercise of ad-hoc valuation without having appointed a valuation expert. Thus, upholding the deletion of TP adjustment by the CIT(A) on account of depreciation claimed by the Assessee on the value of business and commercial rights purchased by the Assessee from its AE, the ITAT dismissed the appeal of the TPO.

ITAT rules on comparables qua software services/segment, remits royalty-payment issue, emphasizes on consistency

Wipro GE Healthcare Pvt. Ltd.

IT(TP)A No.344/Bang/2021



The Assessee was a captive service provider providing IT/ software services only to its AE's. In the course of determining the ALP of the international transactions entered into by the Assessee, the TPO selected 20 comparables without application of the turnover and RPT filter and made a TP adjustment in respect of the

software segment. The TPO further selected 2 comparables and made a TP adjustment in respect of royalty payments made by the Assessee to its AEs and the Deputy CIT(TP) passed a draft assessment order basis the TP adjustments made by the TPO. Aggrieved, the Assessee approached the DRP pleading the removal of 13 comparables out of the 20, selected by the TPO. In respect of the TP adjustments made on the royalty payments, it contended that margins of the two comparables selected by the TPO (average) worked out at 18.43% whereas the Assessee's operating margin came to 46.69%. Hence, TP addition in this regard was required to be deleted. The DRP, partially accepting the Assessee's plea, directed the TPO to remove 1 comparable out of the 13 comparables requested by the Assessee and directed the AO to pass the final assessment order.

Aggrieved, the Assessee approached the ITAT. The ITAT excluded 6 comparables whose turnover exceeded INR 200 Crores, 3 comparables for failing RPT filter of 15%, and 3 other comparables on account of functional dissimilarity, following various coordinate bench decisions. Further, with regards to the TP adjustment made by the TPO on royalty payments, the ITAT remitted the issue back to AO/TPO to be decided on similar direction as given by coordinate bench in Assessee's own case for previous years, wherein the coordinate bench had observed that the AO had to consider the royalty payment as an operating cost and had to verify whether the margin of the Assessee was higher than the margin declared by the comparable company and set aside the issue to the file of AO/TPO for the limited purpose of comparison of margins with the comparable company. Thus, observing that the that lower authorities failed to consider coordinate bench decisions as judicial precedents, the ITAT allowing the Assessee's appeal, held that judicial discipline required consistency in its proceedings.

ITAT excludes 2 comparables for manufacturing segment following Assessee's own case for a previous year, remits adjustment qua interest on delayed AE-receivables

Biesse Manufacturing Co Pvt. Ltd.

IT(TP)A No.338/Bang/2021

The Assessee was a wholly owned subsidiary of an Italian company engaged in the manufacturing and trading of woodworking machine components and related services. The Assessee had filed income tax return which was selected for scrutiny through CASS and notice was duly served to the Assessee. The Assessee had benchmarked its international transactions using TNMM as MAM and selected 21 comparables and concluded that its international transactions were at arm's length.

A reference was made to the TPO for determination of ALP of the international transactions of the Assessee and the TPO not convinced with the TP study conducted by the Assessee, rejected all the comparables selected by the Assessee and selected three fresh set of comparables and made an adjustment in the manufacturing segment and also on interest on delayed receivables. The AO passed a draft assessment

order incorporating the TP adjustment. Aggrieved, the Assessee filed its objections before the DRP which gave partial relief to the Assessee by reducing the interest on receivables. However, the DRP confirmed the TP adjustment in the manufacturing segment despite the Assessee's plea that out of the three comparables selected by the TPO, two of the comparables had been excluded by the TPO in the Assessee's own case for a previous year. Pursuant to the order of the DRP, the AO passed the final assessment order.

Aggrieved, the Assessee approached the ITAT which noted that during the Assessee's own case for a previous year upon considering the Assessee's response raising objections for inclusion of the said two comparables, the TPO did not make any adjustment in the manufacturing segment and accepted the comparables chosen by the Assessee. Accordingly, the ITAT observed that the TPO could not take a different stand in the current year by rejecting comparables selected by the Assessee and choosing a set of comparables that it had excluded in the previous year. Further, with regards to the TP adjustment made by the TPO on the interest on delayed receivables, the ITAT noting that the Assessee being a debt -free company and receivables being in foreign currency, observed that the DRP erred in applying the short term deposit rate of SBI for the purpose of charging notional interest and placing reliance on a plethora of judgments observed that the PLR should not be considered and rate of interest would be on the basis of currency in which the loan is to be repaid. Accordingly, the ITAT remitting the matter back to the AO/TPO, directed the AO/TPO to benchmark interest on delayed AE receivables and recompute ALP.

ARTICLE

Will Apex Court Ruling on Employees contribution towards PF fix the disarray of Due date!

Employee Provident Fund ("EPF") is one of the popular savings schemes launched and operated under the supervision of the Government of India. The Ministry of Labour regulates EPF schemes in India by virtue of special Act namely Employee Provident Fund and Miscellaneous Provisions Act, 1952 ("Act"). Since an employee in India receives the salary after the deduction of a certain amount of money in name of Provident Fund ("PF"), one might feel that instant available cash-in-hand is reduced, however same turns out to be a great support for livelihood post retirement. There are various kind of benefits of this scheme viz.

- In the long run, this scheme helps to build a sufficient retirement corpus
- This accumulated fund can be used for any unforeseen events that occur in life.
- If the employee loses his job, this fund can be used to meet his expenses. One can withdraw 75% of the accumulated fund after one month of unemployment.
- From the Income tax perspective, the contributions made in EPF by employee are tax deductible. Hence no tax is levied at the time of contribution to PF fund. Similarly, accrual of interest and withdrawal at the time of maturity (if it is within a specific limit) is also tax exempted.

According to the provisions of Income Tax Act, there is requirement of contribution to the provident fund on part of both the Employer and Employee. In this article we have deliberated on Income tax implications on contributions towards PF on part of both the Employer and Employee. As per the Income Tax Act, 1961 ("IT Act") Employer contribution to PF is allowed as expense at time of computing the income from Profit and Gain from Business under section 36(iv) subject to section 43B which allow deduction only on actual payment is made on or before due date of return under sec 139(1) and at same time employees contribution is allowed under section 36(1)(va) if such amount has been deposited before due date as prescribed under PF Act. Section 43B is brought into Act with intention to curb the practice of taxpayer who does not discharge their statutory liabilities for long periods and due to mercantile accounting, they take deduction on accrual basis. Now the moot question that arises from this legal provision is that in case employee contribution to PF deposited after due date of PF Act but before the due date of filing return should be allowed or not as an expenses while computing the profits.

Section 2(24) which defines various kinds of "income" inserted clause (x) vide Finance Act 1987 that states that any sum received by the assessee from his employees as contribution to any provident fund will be treated as income Vide the same Finance Act,1987 Section 36(1)(va) was introduced that states that in order to claim the deduction of employee contribution to PF which is treated as income, the same should be deposited to corresponding fund before the due date.

The last expression "due date" was dealt with in the explanation as the date by which such amounts had to be credited by the employer, in the concerned enactments such as EPF/ESI Acts. There are several confusions regarding interpretation of due date for amount to be deposited for the same. A division of opinion exists on the issue as High Courts of Bombay, Himachal Pradesh, Calcutta, Guwahati and Delhi have given decisions favouring the interpretation beneficial to assessee and on the other hand, High Court's of Kerela and Gujarat have preferred the interpretation in favour of the revenue in case of **Commissioner of Income Tax vs. Merchem Ltd.**

The differentiation of allowability as expense related to employer and employee contribution is also evident from the fact that each of these contributions is separately dealt with in different clauses of Section 36 (1). All these establish that Parliament, while introducing Section 36(1)(va) along with Section 2 (24)(x) from Finance Act, 1987 was also aware of the distinction between the two types of contributions. There was a statutory classification, under the IT Act, between the two. The existence of Section 43B traces back to 1983 when the legislature conceptualised the idea of such a provision in the 1961 Act. Initially, the provision included deductions in respect of sum payable by assessee by way of tax or duty or any sum payable by the employer by way of contribution to any provident fund or superannuation fund. It is noteworthy that the legislature explained the inclusion of these deductions by citing certain practices of evasion of statutory liabilities and other liabilities for the welfare of employees..." Section 43B is a mix bag and new and dissimilar entries have been inserted therein from time to time to cater to different fiscal scenarios, which are best determined by the government of the day. It is not unusual or abnormal for the legislature to create a new liability, exempt an existing liability, create a deduction or subject an existing deduction to override regulations or conditions. The distinction between an employer's contribution which is its primary liability under law – in terms of Section 36(1)(iv), and its liability to deposit amounts received by it or deducted by it (Section 36(1)(va)) is, thus crucial.

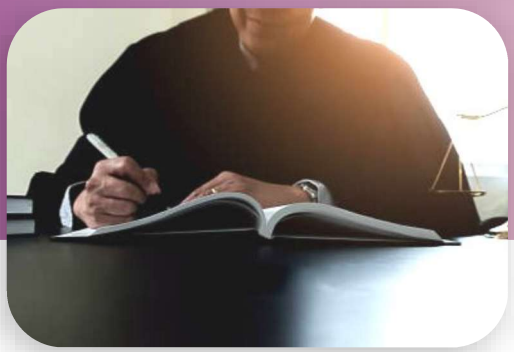
On this matter Supreme Court recently passed a landmark judgement in case of **Checkmate Services Pvt Ltd. vs. Commissioner of Income Tax-1 v**ide civil appeal no. 2833 of 2016 pronounced on October 12, 2022 with stating that in the context of the entire provision of Section 43B which is to ensure timely payment

before the returns are filed, of certain liabilities which are to be borne by the assessee in the form of tax, interest payment and other statutory liability would not in any manner dilute or override the employer's obligation to deposit the amounts retained by it or deducted by it from the employee's income, unless the condition that it is deposited on or before the due date, is correct and justified. They have to be deposited in terms of such welfare enactments. It is upon deposit, in terms of those enactments and on or before the due dates mandated by such concerned law, that the amount which is otherwise retained, and deemed an income, is treated as a deduction. Thus, it is an essential condition for the deduction that such amounts are deposited on or before the due date. Further, in order to strengthen this position Explanation 2 has been inserted vide Finance Act 2021 in section 36(1)(va), which clearly states that section 43B shall not apply for the purpose of determining the due date.

Recently Income tax of Appellant Tribunal held that the disallowance arising from 'indication' in the audit report about delayed remittance of employees' contribution to PF squarely falls under clause (iv) of Section 143(1) prescribing types of adjustments permitted while processing a return. It is undisputed that the audit report filed by the assessee indicates the due dates of payment to the relevant funds under the respective Acts relating to employee's share and whether the said amounts were deposited by the assessee beyond such due dates but before the filing of the return u/s 139(1) of the Act.

These ruling bring transparency for due date to be considered for employee contribution towards provident fund. As the court clearly define the distinction between the nature and character of both employers' contribution and employees' contribution required to be deposited by the employer. The first one is the employer's liability is to be paid out of its income whereas second is deemed an income, by definition, since it is the deduction from the employees' income and held in trust by the employer. Thus, It is statutory liability of employer to deposit employees share within due date defined under respective welfare fund.

GOODS & SERVICES TAX
From the Judiciary

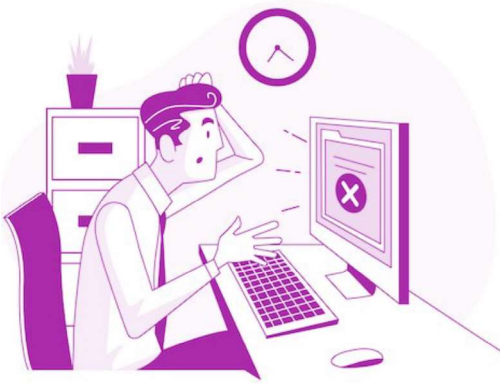


Interest on delayed filing of GSTR-3B if tax deposited prior to filing of GSTR-3B

RSB Transmissions India Limited

[2022-TIOL-1426-HC-JHARKHAND-GST]

The Revenue had imposed interest upon the Petitioner for belated filing of GSTR-3B. The Petitioner challenged the interest imposition by way of Writ before Jharkhand HC.



The HC observed that electronic cash ledger was nothing more than an electronic wallet into which money could be put whenever the necessary challans are generated. Accordingly, a deposit was not a Government appropriation. The amount in cash ledger is only appropriated for tax purposes upon filing GSTR-3B. Therefore, the HC held that the Revenue had correctly imposed interest on delayed payment of tax by the Petitioner.

Author's Notes:

It would be pertinent to note that in a similar matter in RE: Vishnu Aroma Pouching Private Limited [2020-TIOL-703-HC-AHM-GST], the Gujarat HC had held that where the assessee had deposited the tax amount in its electronic cash ledger but could not file its GSTR-3B return due to some technical glitches in the system, the amount credited towards cash ledger, would be treated as discharge of tax liability. Accordingly, it was held that in such cases, there would arise no interest liability

Absence of relevant details in show cause notice a 'serious lapse'

Archana Textile Corporation [TS-569-HC (BOM)-2022-GST]

The Petitioner contented that certain observations and allegations about fake invoices and fake forms were made in the impugned order however, the SCN had no such allegations or any details. Aggrieved, the Petitioner preferred a Writ.

The HC emphasized that it was duty of the proper officer to provide all the details to the Petitioner. It was further held that every SCN should contain every detail required to be effectively responded mandatorily. Accordingly the impugned order and SCN was quashed and set aside.

Author's Notes:

As a settled position of law, there is an implicit requirement of observance of the principles of natural justice that the notice must be expressed in such a manner that reasons could be spelt out from the same. Under the GST regime, it is often seen that the Revenue authorities issue summary notices without making concrete allegations and proceed to raise demands. In a recent judgement by the Gujarat HC in RE: ***Vinayak Metal [2022-TIOL-607-HC-AHM-GST],*** *it was held that notices and orders, which were not decipherable, were non-speaking and therefore, liable to be quashed.*

ITC eligible on CSR expenditure

Bambino Pasta Food Industries Private Limited [2022-TIOL-126-AAR-GST]

During the rise of COVID– 19 pandemic, the Applicant had donated oxygen plants to hospitals. The Applicant sought a ruling to ascertain admissibility of ITC on CSR expenditure. The AAR observed that as per the statutory provisions of the Companies Act, companies were required to incur expenditure towards CSR activities. Accordingly, expenditure made pursuant to the corporate responsibility was held to be an expenditure in furtherance of business. Consequently, ITC was allowed.

Authors' Notes:

While there are contradictory rulings on the subject matter as well, the matter seems to have been clarified post the ruling of the UP AAR in RE: Dwarikesh Sugar Industries Limited [2020-TIOL-305-AAR-GST], wherein, it had been held that inputs and inputs services used for meeting the CSR responsibilities under the Companies Act would be admissible as ITC.

Supply of BPO services is not an Intermediary Service

Genpact India Private Limited [2022-TIOL-1413-HC-P&H-GST]

The Petitioner provided BPO services, to clients of the group company located overseas, on a principal-to-principal basis, under the sub-contracting agreement. The Petitioner claimed refund of unutilized ITC for such export services, which was allowed by the adjudicating authority. Thereafter, the Appellate authority denied the refund on the premise that the services were intermediary because it was not providing services on its own account, and thus, the Petitioner's services did not qualify as export.

The HC noted that a cursory reading of the recitals and relevant sections of the agreement did not suggest that Petitioner was functioning as an 'intermediary' under GST. According to the agreement, the Petitioner offered the principal service directly to the group company's foreign customers but did not receive any remuneration from such clients. The Court further noted that Circular No. 159/15/2021-GST, dated September 20, 2021, clarified that sub-contracting for a service was not an intermediate service.

Authors' Notes:

*It is pertinent to note that the Bombay HC in RE: **Dharmendra M Jani [2021-TIOL-1326-HC-MUM-GST]**, there were been dissenting views by the division bench of the Bombay HC in respect to constitutional validity of the provisions relating to intermediary services under the IGST Act.*

HC allows amendment in GSTR-1 for rectification of mistake

Mahalaxmi Infra Contract Limited [2022-TIOL-1393-HC-JHARKHAND-GST]

On account of a clerical error, the Petitioner had erred in filing Form GSTR-1 by inadvertently mentioning wrong GSTIN against invoices raised on its purchaser. Consequently, the purchaser withheld payment in respect of the invoice as the invoice was not reflected in their GSTR-2A. Aggrieved, the Petitioner preferred a writ petition before the Jharkhand High Court seeking relief by way of rectifying the GSTR-1. The HC held that as there was no loss of revenue to Government, on the interest of justice, the Petitioner and their aggrieved purchaser was allowed to make the necessary correction in their GSTR-1 and GSTR -2 respectively.

Author's Notes:

In a similar matter in respect of rectification of Form GSTR-1, the SC in RE ***: Bharti Airtel Limited [2021-TIOL-251-SC-GST]****, had observed that under self-assessment regime, the absence of online mechanisms on GST Portal could not be resorted to. It was held that the Assessees had to rely on its books of account to avail GST credit.*

Bombay HC allows distribution of ISD credit under GST through filing/revising TRAN-1 Form

Nuvoco Vistas Corporation Limited [2022-TIOL-1455-HC-MUM-GST]

The Petitioner preferred a writ before the Bombay HC seeking relief in relation to the procedural difficulties faced with regards to distribution and eligibility of Input Service Distributor (ISD) credit to their respective units of Service Tax under GST regime.

The HC referred to the decisions in RE: **Unichem Laboratories [2022-VIL-716-BOM]** and RE: **Apar Industries [Writ Petition No.11539 of 2019]** wherein the Courts had granted appropriate reliefs where the Assessees were facing similar issues. Further, relying on the Apex Court's judgement in RE: **Filco Trade Centre [2022-TIOL-57-SC-GST]** and CBIC Circular No. 182/14/2022 – GST dated 10 November 2022, the HC directed the Petitioner through its respective units registered under CGST Act, to avail this open window and file/revise the TRAN-1 at the respective units in terms of the Apex Court's decision in **RE: Filco Trade (supra).** The HC further directed that the TRAN-1/revised TRAN-1 filed by the respective units should be on the basis of manual ISD invoices to be issued by ISD of the Petitioner subject to aggregate credit cumulatively not exceeding the ISD credit available with the Petitioner

HC holds summary in Form DRC-01 could not substitute SCN under Section 74 of the CGST Act

Vinayak Metal and Chemicals [2022-TIOL-1450-HC-JHARKHAND-GST]

The Petitioner was subjected to a summary SCN in Form DRC-01, however, no SCN u/s 74(1) was issued for alleged utilization of excess ITC. Thereafter, the Revenue issued order against the Petitioner and confirmed tax demand, interest and penalty.

The HC observed that Rule 142(1)(a) of CGST Rules provides that the summary of SCN in Form DRC-01 should be issued 'along with'

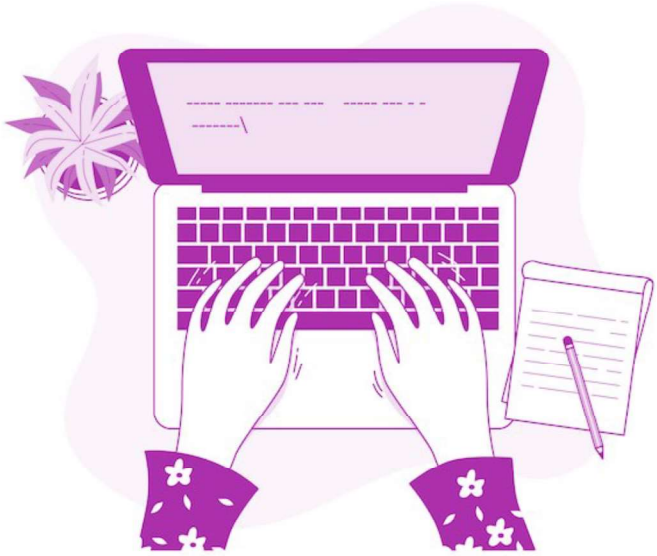
the SCN u/s 74(1). The word 'along with' clearly indicated that in a given case SCN as well as summary thereof both have to be issued. Accordingly, it was held that the impugned SCN was not fulfilling ingredients of a proper SCN and it was in violation of principles of natural justice.

HC sets aside order imposing Tax/Penalty under section 129 of CGST Act

Bharti Airtel Limited

The goods of Petitioner were detained on account of an inadvertent error in EWB. Therefore, SCN was issued for imposing tax and penalty under section 129 of CGST Act. Aggrieved, the Petitioner filed an appeal which came to be dismissed. Thereafter, a writ petition was preferred.

The HC observed that the Revenue may invoke section 129 with respect to goods in transit, and that the goods may be released only if the owner of the goods steps forward to pay the penalty imposed in section 129(1) of the CGST Act. Nonetheless, if the owner of the goods or the person does not voluntarily pay the penalty provided by section 129(1), the Revenue shall initiate proceedings under section 73, 74, and 75 of the CGST Act read with section 122 to determine the tax and the penalty. Accordingly, the entire action of determining the tax and penalty under section 129(1) was not legally substitutable and hence was set aside.



Erstwhile Regime

CESTAT: Demand cannot be raised as CENVAT Credit been reversed voluntarily

GE Power India Limited

The Appellant was registered in erstwhile tax regime and during the relevant period, they have availed CENVAT Credit on the Input and input services. The Department issued SCN for subsequent recovery alleging that the common input services have been used in the manufacture of excisable goods as well as in the trading activity.

The CESTAT observed that when the Appellant had complied with the condition prescribed under Rule 6(3)(ii) of CCR, 2004 and thereafter reversed the proportionate CENVAT Credit attributable to the exempted service it is not enacted to extract illegal amount from the assesse. Accordingly, the impugned orders was set aside.

Service Tax cannot be levied on one time premium/salami for renting Immovable Property

Gujarat Power Corporation Limited

The Assesse was engaged in the business of power generation in the state of Gujarat, they had leased out their land for 30 years and collected the premium amount as cost of the land which they have to handover to the government. Thereafter, the revenue had held the Assesse liable to pay the service tax on

one time premium/salami under the category of renting of immovable property. The Assesse contented that the amount collected is part of the rent and it is the part and parcel of the gross value of taxable service.

Relying upon the judgement in RE: **Greater Noida Industrial Development Authority [2015-VIL-1250-ALH-ST**], it had been emphasised that as a settled legal position that one time premium/salami cannot be considered as consideration towards rent and hence cannot be leviable to service tax for renting of immovable property. Accordingly, the demand of service tax on one time premium/salami under the category of renting of immovable property was set aside.

Delhi Tribunal allows cash refund of unutilized CENVAT credit u/s. 11B of the Excise Act

Monochem Graphics Private Limited [Ex. Appeal No. 51140/2022 dated 04 October 2022]

On account of technical glitches on the GSTN portal, the Appellant could not avail transitional credit in GST. Accordingly, they had filed an application for refund of such unutilized CENVAT credit u/s. 11B of the Excise Act, which could not be transferred. Simultaneously, the Appellant had also prayed the Jurisdictional Department to allow re-filing of Form TRAN-1. The refund application came to be rejected and such rejection was upheld by the Appellate authority inter alia on the ground that Section 11B does not specifically allow refund of unutilized CENVAT credit.

Aggrieved, the Appellant preferred an Appeal before the Tribunal. The Tribunal observed that as the refund rejection order had not disputed the eligibility of credit, the Appellant has rightly claimed the refund of CENVAT credit. It was further observed that mere change in taxation regime should not affect the credit availment right of the assessee. By relying on the judgement passed by the Karnataka HC in RE: Slovak India Trading Co. Private Limited [2006-TIOL-469-HC-KAR-CX], the Delhi CESTAT ruled that the appellant is rightly entitled for the credit and also refund. The Tribunal further stated that as the Appellant was unsuccessful to file TRAN-1 due to IT glitches, the refund of said amount in cash remains the only possibility under transitional provisions of the CGST Act.

GOODS & SERVICES TAX

From the Legislature

Sr No	Notification/ Circular	Summary
1	Notification No. 23/2022 - Central Tax dated November 23 2022,	**Competition Commission of India to examine Anti-Profiteering** The CBIC, has empowered the CCI as the Anti-Profiteering Authority, replacing the NAA under GST, w.e.f. December 01 2022. Thus, the CCI would be empowered to examine whether ITC availed by any registered person or the reduction in the tax rate have actually resulted in a commensurate reduction in the price of the goods or services or both supplied by him.
2	Notification No. 24/2022 - Central Tax dated November 23 2022	**CBIC amends CGST rules related to National Anti-Profiteering Authority** CBIC has made the corresponding amendments in the CGST Rules pertaining to anti-profiteering w.e.f. December 01 2022. Following rules have been omitted; Rule 122 – Constitution of the Authority Rule 124 – Appointment, salary, allowances and other terms and conditions of service of the Chair-man and Members of the Authority Rule 125 – Secretary to the Authority Rule 134 – Decision to be taken by the majority Rule 137 – Tenure of Authority • In Rule 127, 'Duties' of the Authority will now be referred to as 'functions' of the Authority. • In explanation after Rule 137, 'NAI' will be substituted by 'CCI'
3	Circular No. 181/13/2022 – GST dated November 10, 2022	**Clarification in respect of refund related issues under GST** Formula prescribed u/r. 89(5) for refund of ITC on account of inverted duty structure was amended vide Notification No. 14/2022 – Central Tax dated July 5, 2022 and such refund was restricted on certain specified goods from July 18, 2022 vide Notification No. 9/2022 – Central Tax (Rate) dated July 13, 2022. In this regard, it has been further clarified that amended formula will only apply to refund applications filed on or after July 5, 2022. The refund applications filed before July 5, 2022, will be dealt as per old formula.

CESTAT reduces Redemption Fine and Penalty as classification was not conclusive

Shree Keshariyaji Metal Impex [Customs Appeal No.10080 of 2013]

The Appellant had imported goods after sought clearance by paying the duty as demanded by the Department. Thereafter, the Department imposed penalty on the goods on allegation of mis-declaration of goods.

The CESTAT observed that the assessment was made on the basis of the Department's claim and accordingly, the Appellant had paid the duty, therefore at this stage classification cannot be conclusively decided. However, for the purpose of redemption fine and penalty, a prima facie view has to be taken on the nature of goods. Accordingly, the imposed fine and penalty was reduced.

CUSTOMS & FTP
From the Legislature

Sr No	Notification/ Circular	Summary
1	Notification No. 42/2015-2020 dated November 07, 2022	**DGFT amends the Export Policy of broken rice** DGFT has issued amendments has issued amendments to the Export Policy of broken rice. Vide the amendment the Department has been allowed the clearance of shipment the consignments of broken rice that entered the 'CFS' before the ban was imposed on the export of the rice vide Notification No. 31/2015-2020 dated September 08, 2022.
2	Notification No. 99/2022-Customs (N.T.) dated November 29, 2022	**Exemption from deposits in ECL for specified goods u/s 51A(4) of the Customs Act** The CBIC has extended the exemption from maintaining deposits in the ECL under the Customs Act till March 31, 2023.
3	Policy Circular No.44/2015-20 dated November 17, 2022	**Reduction in Annual Average Export Obligation for EPCG for certain sectors** Central Government has observed that there is decline in total exports in certain sectors in F.Y. 2021-22 in comparison to the previous F.Y. by more than 5%. The Central Government has allowed proportionate reduction in Annual Average Export Obligation for EPCG Authorization for F.Y. 2021-22 to such specified sectors.

Notice under Section 148 against struck-off Co. valid, in view of subsequent restoration order

Ravinder Kumar Aggarwal vs. Income Tax Officer

W.P.(C) 7122/2019 & CM APPL.29656/2019

The Petitioner herein is the director of RKA International Pvt. Ltd., which was struck off by ROC in pursuance of the proceedings initiated by MCA through the office of ROC, due to the own defaults of the Company and default in filing its statutory return with ROC. The Promoter and Director filed a writ petition before the HC contending that the reassessment notice was null and void, as the same was issued when it was struck off by the ROC. Subsequently, the NCLT, in the interest of the Revenue, restored the Company to enable the Revenue to recover its dues. Although, Section 250 of Companies Act provides that even where a Company is struck off, it shall be deemed to continue to be in existence for the purpose of discharging its liabilities. Accordingly, the impugned notice that was issued when company was struck off, is valid and not non-existent on the grounds urged in the present petition.

The HC observed that the Promoter's contention that since the reassessment notice was issued when the Company was struck off from the ROC and before the NCLT order, therefore the subsequent NCLT order restoring the Company, would not have the effect of curing the defect in issuance of notice to the non-existent entity was incorrect, fallacious and in contravention of Section 252(3) of the Companies Act. Thus, observing that the Promoter's actions in opposing the appeal before the NCLT for restoration and persisting with the present petition even after the company had been restored was an abuse of the process of law by the Petitioner to obstruct the assessment proceedings, the HC along with dismissing such writ petition, imposed a cost of INR 50,000 on the Petitioner with a direction to deposit the same with the Delhi High Court Legal Services Committee within two weeks.

Authors' Note:

It would be interesting to note that in the present case, the HC also placed reliance on the SC ruling in Commissioner of Income Tax, Jaipur v. Gopal Shri Scrips Private Limited, (2020) 7 SCC 654 wherein it was observed Chapter XV of the IT Act which deals with "liability in special cases" and its Clause (L)

which deals with "discontinuance of business or dissolution", where the Court in the said case has clarified that the existing liability of any director or member prior to the dissolution of the company will continue in spite of the dissolution.

HC denies bail to Bhushan Power's ex-employees arrested by SFIO in INR 5,435 Crores fraud-case

Amarjeet Sharma vs. Serious Fraud Investigation Office

Bail Appln. 2707/2022 & Crl.M.(Bail) 1101/2022

In this case, MCA assigned investigation into the affairs of BPSL and its 10 group companies to SFIO that arrested the Applicants i.e ex employee of BPSL, for allegedly being involved in fraud resulting in misappropriation of public money and filed a complaint against them for offences punishable under Section 447 of the Companies Act and offences under IPC. It was alleged by the SFIO that all the financial statements of BPSL and the other group companies were prepared by one of the Applicants and the financial statements were not reflecting the true and fair view of the affairs of the company. The Applicants had also signed the balance sheets of BPSL for various financial years and were allegedly aware that BPSL used to make the payments in the form of capital advances to various companies based at Kolkata which further invested in the accused companies by rotation of these funds.

Aggrieved, the Applicants approached the HC filing an application for bail. The HC observed that the Applicants being closely associated with various individuals had considerable influence over most of the witnesses who were working under the Applicants, therefore, it could not be said that the constitutional right of the Applicants for speedy trial was infringed, Hence, the applicants were not entitled for grant of bail even on merits. Thus, dismissing the bail applications filed by the Applicants who were arrested by the SFIO for misappropriation of public money, the HC disposed of the matter.

Authors' Note:

*It is interesting to note that while pronouncing the judgement, the HC placed reliance on the SC ruling in **Y.S. Jagan Mohan Reddy vs. CBI [SCC OnLine SC 1178]** wherein it was held that the economic offences constituted a class apart and needed to be visited with a different approach in the matter of bail, observed that the economic offences having deep rooted conspiracies and involving huge loss of public funds needed to be viewed seriously and considered as grave offences affecting the economy of the country as a whole and thereby posing serious threat to the financial health of the country. Therefore, economic offences are treated as separately in court of law and they are considered much serious in eyes of law.*

SAT quashes SEBI order penalising CS for due-diligence lapses in buy-back offer document

V. Shankar vs. SEBI

Appeal No. 283 of 2022

The CS had filed an appeal against on order of SEBI imposing the penalty for non-compliance of section 68 and 77A of Companies Act. SEBI has conducted investigation in the scrip of Deccan Chronicle Holdings Ltd (DCHL/company) in order to ascertain whether the promoters of the company and its directors had made any fraudulent pledging of the shares of the company. On investigation, there were found several irregularities committed by the company that had misled the investors. SEBI observed that the company/ promoters and directors knowingly and consciously contributed in dissemination of wrong, factually incorrect, understated and distorted information relating to the annual financial statements of the company to the public in their annual reports and had artificially inflated profits to the shareholders when there was actually a loss. SEBI further observed that the Appellant had ascribed his signatures on the public announcement for buyback in his capacity as a company secretary instead of exercising utmost due diligence and checking the veracity of the buyback offer document.

Aggrieved, the Appellant approached the SAT which noting that the CS, as part of his duty and responsibility, was only to authenticate the contents indicated in the balance sheet or in the offer document and was not required to go into the veracity of the buyback offer document and its legal compliances before authenticating such document, as such duty was not part of the responsibility of the Appellant as a company secretary. Thus, the SAT allowed the appeal.

Authors' Note:

It is interesting to observe that this judgement does not engage in any jurisprudential analysis of the roles, responsibilities and liabilities of the Company Secretary. A perusal of Section 215 of Companies Act clearly indicates that there is a fiduciary responsibility upon the Board of Directors of the Company to verify the contents of the balance sheet before approving it. Once the balance sheet and the profit and loss is approved by the Board of Directors then the ministerial task falls upon the secretary and two of the directors to sign the balance sheet under Clause (1) of Section 215. Once the offer document and the balance sheet is approved by the Board of Directors the Company Secretary, as part of his duty and responsibility, is only to authenticate the contents indicated in the balance sheet or in the offer document and is not required to go into the veracity of the buyback offer document and its legal compliances before authenticating such document. Such duty is not part of the responsibility of the appellant as a Company Secretary.

NCLT holds no gratuity payable to ex-employee, given non-creation of gratuity fund by Corporate Debtor

Rakesh Sharma vs. Sumat Gupta

LSI-954-NCLT-2022(CHD)

In the instant case, the Applicant had sought a direction against the Respondent to release the amount due towards Gratuity, Leave Encashment and salary during the CIRP of International Mega Food Park Ltd. i.e., the Corporate Debtor. During CIRP, notice of termination is served to the applicant. Aggrieved, the Applicant approached the NCLT challenging the termination and praying for the release of amounts. , the NCLT observed that the Respondent could not be directed to make payment of gratuity to the Applicant as

there was no gratuity fund created by the Corporate Debtor. Further, NCLT observed that the same pertained to the amounts payable to an employee for services rendered during the CIRP and that the expenses clearly fell within the definition of insolvency resolution process cost. Accordingly, placing reliance on the SC ruling in **Sunil Kumar Jain [(2022) ibclaw.in 23 SC]** ,NCLT directed the Respondent to make provisions for payment of salary and leave encashment after taking on record the necessary information from the Applicant as per his entitlement and modify the resolution plan to that extent with the approval of the CoC, thereby allowing the application of the Applicant.

HC holds ED's power to attach assets under PMLA not affected by IBC moratorium

Rajiv Chakraborty, Resolution Professional of EIFL vs. Directorate of Enforcement.

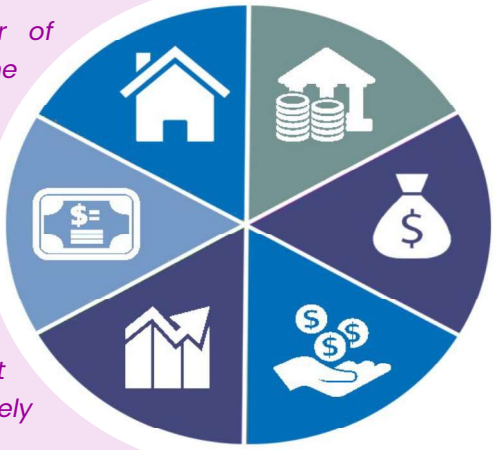
LSI-935-HC-2-22(DEL)

In the instant case, The RP had preferred a writ petition before the HC challenging the provisional attachment orders issued by ED under PMLA contended that once the moratorium in the insolvency proceedings under the IBC had come into effect, the ED stood denuded of jurisdiction to exercise powers under the PMLA. HC observed that while both IBC and the PMLA were special statutes in the generic sense, they both sought to subserve independent and separate legislative objectives. The subject matter and focus of the two legislations were clearly distinct and, in a situation, where both the special legislations incorporated non obstante clauses, it became the duty of the Court to discern the true intent and scope of the two legislations. Moreover, even though IBC constituted the later enactment when viewed against PMLA which came to be enforced in 2005, the extent to which the latter was intended to capitulate to the IBC was an issue which was to be answered on the basis of Section 32A of the IBC through which, the Legislature had authoritatively spoken of the terminal point where after, the powers under the PMLA would not be exercisable. The non obstante clause finding place in the IBC therefore could neither be interpreted nor countenanced to have an impact far greater than that envisaged in Section 32A of the IBC.

Thus, observing that the ED's power to attach properties under PMLA would not be affected by the moratorium which came into effect in terms of Section 14 of the IBC, as the power to attach under the PMLA did not fall within the ken of Section 14(1) (a) of the IBC, the HC dismissed the RP's writ petition challenging the provisional attachment orders issued by ED under PMLA.

Authors' Note:

In the present case, the HC also observed that an order of attachment when made under the PMLA did not result in the Corporate Debtor or the Resolution Professional facing a fait accompli. The statutes provided adequate means and avenues for redressal of claims and grievances. It could be open to a Resolution Professional to approach the competent authorities under the PMLA for such reliefs in respect of tainted properties as may be legally permissible. Moreover, the PMLA sought to subserve a larger public policy imperative. The enactment represented a larger public interest, namely the fight against crime and the debilitating impact that such activities ultimately have on the society and the economy of nations as a whole.



SC quashes HC order appointing arbitrators without holding preliminary inquiry on arbitrability of dispute

Emaar India Ltd. vs. Tarun Aggarwal Projects LLP & Anr.

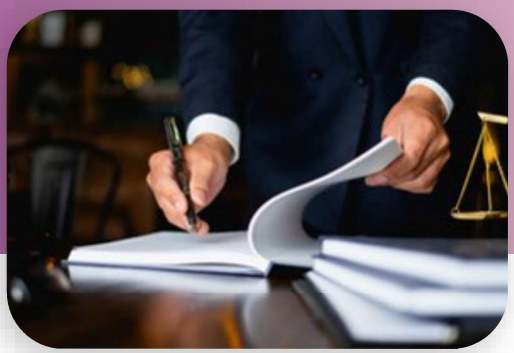
Civil Appeal No. 6774 of 2022

The Appellant and the Respondent had entered into a Collaboration Agreement for the development of a residential colony There was some dispute arisen between the parties. The Respondent issued a legal notice raising demand for the losses/damages suffered by them. As according to the Respondent, they appointed a former judge of the HC as their arbitrator. The Appellant denied appointment of the arbitrator. Therefore, the Respondents approached the HC for appointment of the arbitrators. The said arbitration petition was opposed by the Appellant stating that the dispute fell under Clause 36 of the Addendum Agreement and not under Clause 37 which incorporated the arbitration clause. However, the HC had appointed the arbitrators in terms of Clause 37 of the Addendum Agreement by observing that conjoint reading of Clauses 36 and 37 made it clear that a party did have a right to seek enforcement of agreement before the Court of law but it did not bar settlement of disputes through the Arbitration Act. By observing so, the HC had appointed the arbitrators.

Aggrieved, the Appellant preferred an appeal before the SC which noting that the HC was required to hold a primary inquiry/review on whether the dispute fell under Clause 36 of the Addendum Agreement entered into between parties or not. the HC had appointed the arbitrators by solely observing that the same did not bar settlement of disputes through Arbitration Act, the SC quashed the HC order appointing the arbitrators in the application under Section 11(5) and (6) of the Arbitration Act to resolve the dispute between parties and remitted the matter back to the HC to pass an appropriate order after holding the inquiry.

Authors' Note:

The SC in the present case, also observed that the prima facie review at the reference stage was to cut the deadwood and trim off the side branches in straightforward cases where dismissal was barefaced and clearly stated that the issue of non-arbitrability of a dispute was basic for arbitration as it related to the very jurisdiction of the Arbitral Tribunal.



MCA has amended the Companies (Registered Valuers and Valuation) Rules, 2017

MCA vide notification no. G.S.R. 831(E) dated November 21, 2022 has amended the Companies (Registered Valuers and Valuation) Rules, 2017 through introduction of the Companies (registered Valuers and Valuation) Amendment Rules, 2022. By such amendment rules, MCA has notified following changes:

- In addition to present exclusions, no partnership entity or company shall be eligible to be a registered valuer if it is not a member of a register valuer organisation.
- Although, such partnership entity or company shall not be member of more than one such registered valuers organisations at a given point of time.
- Partnership entity or company already registered on November 21, 2022 shall comply with this rule within 6 months i.e. before May 20, 2023.
- Introduction of payment of *fees for intimation to* the authority in case of changes in the personal details, or any modification in the composition of partners or directors, or any modification in any clause of the partnership agreement or MOA, after registration. In similar way, fees for intimation in case of change in composition of its governing board, or its committees or appellate panel, or other details has also been introduced.
- Insertion of explanation in rules related to *surrender of membership and expulsion from membership,* that a member functioning as a whole time director in the company registered as valuer shall not be treated as taking up employment for the purpose of temporary surrender of membership under Rule 26 of said Rules.
- Clarity has been given on conduct of valuation Rule by virtue of which now the valuer shall make valuation as per-
  - ◊ Internationally accepted valuation standards; or
  - ◊ Valuation standards adopted by any registered valuers organisation.

  As earlier "or" wasn't mentioned which create confusion to follow one or both standards for valuation.

Authors' Note:

Valuation professionals play a key role in corporate restructure, mergers and acquisitions and bankruptcy resolution as these transactions rely on their assessment of assets and liabilities, a key part of the due diligence. Restricting the registration of a valuer to one registered valuer organisation at a given point in time will help in having an effective disciplinary mechanism. The amendments also remove ambiguity in the professional standards by specifying that valuers could follow either of standards.

SEBI reduces timelines for the transfer of dividend and redemption proceeds to unitholders by AMCs

SEBI vide Circular No. SEBI/HO/IMD/IMD-I DOF2/P/CIR/2022/161 Dated November 25, 2022 has reduced the timeline for dividends payout to 7 working days from date of issue of public notice. Also, the transfer of redemption or repurchase proceeds to the unitholders shall be made within 3 working days from the date of redemption or repurchase.

Also Association of Mutual Funds in India, post consultation with SEBI shall publish a list of exceptional circumstances within 30 days of issuance of this circular for schemes which are unable to transfer redemption or repurchase proceeds to investors within time. It is also clarified that interest for the period of delay in transfer of redemption or repurchase or dividend shall be payable to unitholders at the rate of 15% per annum along with the proceeds of redemption or repurchase or dividend. Such interest would be borne by the AMCs and the details of such payments would be sent to SEBI as a part of Compliance Test Reports.

Authors' Note:

In order to protect the interest of unitholders, vide this circular SEBI has reduced the timeline for dividends payout to seven working days from the current fifteen days. It has further reduced the timeline for redemption payout to three working days from the existing ten working days.

Reporting of trades in non-convertible securities under SEBI (Issue and Listing of Non-Convertible Securities) Regulations, 2021

SEBI vide Circular No. SEBI/HO/DDHS/DDHS_Div1/P/CIR/2022/159 Dated November 24, 2022 has prescribed the requirements pertaining to operational and other aspects relating to the issue and listing of Non-convertible Securities. It has been decided all OTC (Over-the-Counter) trades in Non-convertible securities shall be reported by all person(s) dealing in such securities irrespective of whether they are SEBI registered intermediaries or otherwise, as per prescribed format.

Authors' Note:

It has been observed that information on OTC trades in listed Non-convertible Securities provided to the Stock Exchange(s) by the investors is incomplete and/ or inaccurate. This, in turn, amounts to incorrect and distorted information being displayed on the Stock Exchanges' websites. To curb the same, SEBI has come out with this circular. The new guidelines shall come into force from January 01, 2023. The Stock Exchanges shall monitor the compliance of the circular and bring to the notice of SEBI, periodically, discrepancies in reporting of OTC trades by investors.

SEBI clarifies NOC related to Public issues

As per the provisions of regulation 38 (1) of Securities and Exchange Board of India ICDR Regulations, the issuer, before the opening of the subscription list, is mandated to deposit with the Designated Stock Exchange (DSE), 1% of the issue size available for subscription to the public. This amount of 1% shall be released to the issuer after obtaining the NOC from SEBI.

SEBI vide its Master Circular no. SEBI/HO/OIAE/IGRD/P/CIR/2022/015 dated November 07, 2022 notified certain requirements to be complied with in order to obtain NOC from SEBI which are stated as below:

The requirement has been stated namely: -

- The Issuer is required to submit an application on its letterhead addressed to SEBI for the purpose of obtaining the NOC from SEBI after the expiry of 2 months from the date of listing on the latest stock exchange which permitted listing, in format specified by SEBI.
- The application for NOC shall be filed by the Post Issue Lead Merchant Banker ("PILMB"), provided that all issue-related complaints have been resolved by the PILMB/issuer, with the concerned designated office of SEBI under which the registered office of the issuer falls, in format specified by SEBI.
- The application for NOC shall be considered incomplete by SEBI if the application for NOC is not accompanied by a confirmation by PILMB that all the accounts in ASBA have been 'unblocked'.
- SEBI shall issue the NOC after satisfying itself with the following: -
    - ◊ The complaints arising from the issue received on SEBI Complaint Redress System (SCORES) against the issuer have been resolved to its satisfaction.
    - ◊ The issuer has been submitting Action Taken Reports on the complaints in the format specified by SEBI.
    - ◊ The fees due to intermediaries associated with the issue process including ASBA Banks have been paid by the issuer.

Authors' Note:

Considering the increase in usage and security among users of cards, prepaid payment instruments and UPI, RBI has now increased the limits for e-mandate to enhance the user experience and support the growth of Digital India project of the Government of India.

RBI provides for Inclusion of GSTN as a Financial Information Provider under Account Aggregator Framework

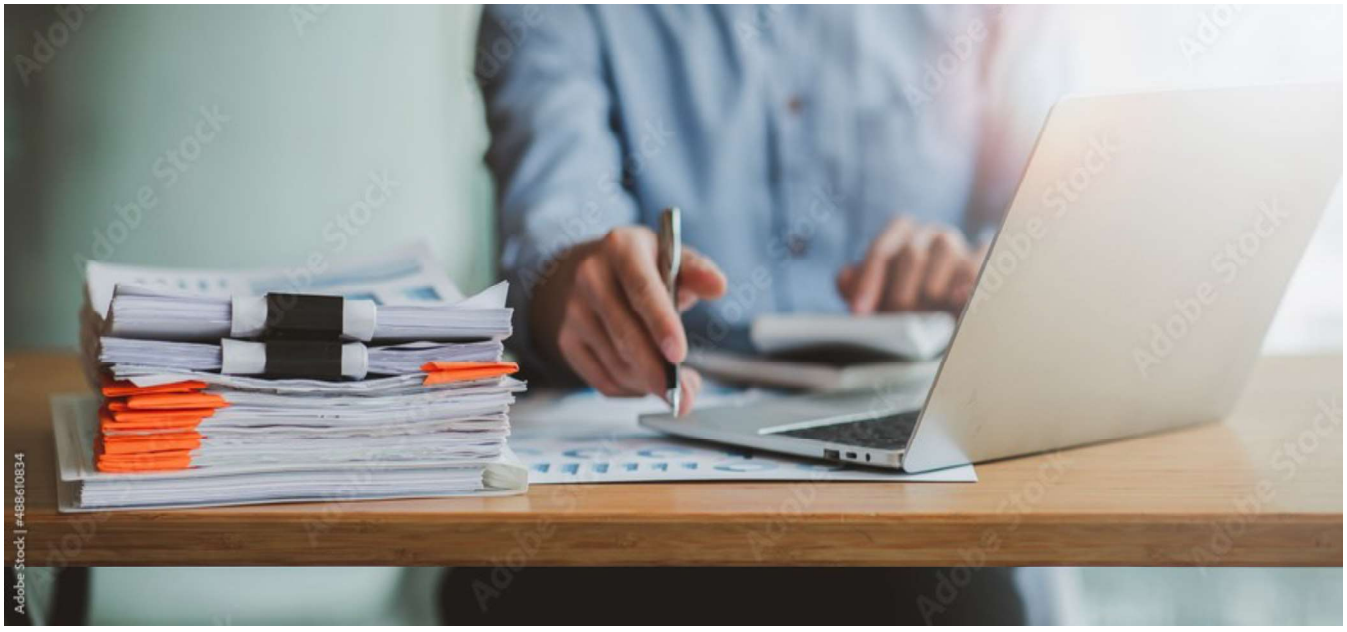
RBI vide its circular no. RBI/2022-23/140 dated November 23, 2022 has provided for inclusion of GSTN as a Financial Information Provider under Account Aggregator Framework. Basically, Account Aggregator means a NBFC that provides the service of retrieving or collecting such financial information pertaining to its

customer for a fee or otherwise. And Financial Information Providers shall share financial information of a customer with an Account Aggregator on being presented a valid consent artefact by an Account Aggregator in accordance with NBFC - Account Aggregator (Reserve Bank) Directions, 2016 (as updated).

Also, Department of Revenue shall be the regulator of GSTN for this specific purpose and GST Returns, viz. Form GSTR-1 and Form GSTR-3B, shall be the Financial Information.

Authors' Note:

The said inclusion is done with prospective of a view to facilitate cash flow-based lending to MSMEs. This facility will enable the NBFC to receive financial information on real time basis. Such Financial Information will help them to identify fraud stating by customer via giving wrong financial information to them for avail the loan, now they can know on real time basis all information about customers.



INTERNATIONAL DESK

OECD's Global Forum releases EOIR peer review reports for 10 countries

OECD's Global Forum on Transparency and Exchange of Information for Tax Purposes (Global Forum) published the tenth peer review reports on Exchange of Information on Request (EOIR) for Barbados, the British Virgin Islands, Iceland, Israel, Kuwait, the Maldives, Morocco, Slovenia, South Africa and Turkey. The ratings have been updated for seven jurisdictions on their practical implementation of the EOIR standard, where six of them i.e., Barbados, Iceland, Morocco, Slovenia, South Africa and Turkey have been granted the "Largely Compliant" rating, whereas the British Virgin Islands has been rated as "Partially Compliant".

Further, the reports for Israel, Kuwait and Maldives only cover the analysis of the legal and regulatory frameworks, with implementation aspects to be analysed in the future. South Africa's report recommends that since Anti-Money Laundering (AML) Legislation is the only source of availability of beneficial ownership information, it should ensure that accurate and up-to-date information on all relevant legal entities and arrangements in line with the standard is always available.

As regards to Slovenia, the recommendation of the peer review report is to ensure that beneficial ownership information of companies and partnerships is standard compliant with availability of up-to-date information on beneficial ownership. As regards Israel, the recommendation of the peer review report is to ensure that the competent authority can access beneficial ownership information and other related documents held by AML obliged persons, in line with the standard and in order to give full effect to its EOI arrangements.

Major jurisdictions sign MCAA, agree to share information on digital economy, offshore financial assets

At the OECD Global Forum's 15th Plenary Meeting, 22 jurisdictions including Canada, Cyprus, the Netherlands, New Zealand and the United Kingdom, signed the Multilateral Competent Authority Agreement (MCAA) for the automatic exchange of information under the OECD Model Rules for Reporting by Digital Platforms, at the signing ceremony held in Seville.

The agreement will allow jurisdictions to automatically exchange information collected by operators of digital platforms with respect to transactions and income realised by platform sellers in the sharing and gig economy and from the sale of goods through such platforms.

In addition to the above, 15 jurisdictions including Cayman Islands, Cyprus, South Africa and the United

Kingdom, also signed a separate MCAA supporting the Model Mandatory Disclosure Rules on Common Reporting Standard Avoidance Arrangements and Opaque Offshore Structures (CRS Mandatory Disclosure Rules), which will enable the annual automatic exchange of information collected from intermediaries that have identified arrangements to circumvent the Common Reporting Standard (CRS) and structures that disguise the beneficial owners of assets held offshore with the jurisdiction of tax residence of the concerned taxpayers. This MCAA will allow tax authorities to ensure compliance of both the taxpayers and the intermediaries involved in such arrangements and structures.

OECD releases Public Comments on 'Progress Report on Administration & Tax Certainty of Amount

OECD releases public comments on 'Progress Report on the Administration and Tax Certainty Aspects of Amount A of Pillar One'. In the public comments, the stakeholders have made the following observations and recommendations:

- The stakeholders have pointed out the issues with both single taxpayer approach and multiple taxpayer approach and suggested that groups should have the flexibility to utilise the entity best placed to manage the process of payments in different countries by allowing the group to nominate an agent to make payments to each market jurisdiction on behalf of the single taxpayer.
- The stakeholders also recommend that similar to Country-by-Country Reporting under Action 13, all Exchange of Information articles should include confidentiality obligations on tax authorities and the requirement for jurisdictions to have in place the necessary framework and infrastructure to ensure only the appropriate use of information received.
- The stakeholders also express concern with respect to requirement of Covered Groups to register in all market jurisdictions and obtain local tax identification numbers.
- It has also been suggested by one of the stakeholders that in order to resolve dispute on attribution of profits to PE, the profits as per FAR analysis should be considered final and there should be no further attribution of profits.

UAE announces new tax platform to "dramatically enhance" ability to collect taxes

The Federal Tax Authority (FTA) confirmed that it would be launching a new tax platform on December 5, 2022. The new platform, called EmaraTax, is planned to coincide with the UAE's National Day Holiday. It is said that EmaraTax will "significantly" enhance taxpayer access to the FTA's services, payment of taxes and obtaining refunds and will also dramatically enhance the ability of the FTA to administer taxes in the UAE and enable better, faster decision-making and earlier engagement with taxpayers that need support.

In addition, the platform has been said to be built to align with the UAE's Digital Government Strategy 2025, which include leveraging emerging technologies and building a solid digital infrastructure to serve people and the business community, along with the directives of Sheikh Mohammed bin Rashid Al Maktoum, Vice President, Prime Minister and Ruler of Dubai. The new platform is also said to help in revolutionising how users manage their taxes, and comes packed with additional features. The FTA will launch more services and features, including a mobile app version of EmaraTax. In the first quarter of 2023. Interested parties can find more information about the platform on EmaraTax's dedicated microsite.

SPARKLE ZONE

Interest on delayed filing, despite sufficient cash balance !

Background

It is a known fact that EVERY taxpayer must pay tax on outward supply on a periodical basis by debiting his electronic credit or cash ledger. Section 49 of the CGST Act, states that any deposit made through internet banking, credit or debit cards, NEFT or RTGS or any other prescribed channel shall be credited to the person's electronic cash ledger. A registered individual is also eligible for ITC of tax paid on inward supply, which is credited to his electronic credit ledger. While filing Form GSTR-3B, such liability reported in Form GSTR-3B is required to be set-off against balances in electronic credit or cash ledger. In lines with the functionality of the GST portal, the payment of tax is concurrent with the submission of returns on the GST portal. Thus, a debit entry is generated in the electronic credit or cash ledger for the return period when a taxpayer chooses to offset a balance against their tax burden at the time of filing the return.

In an ideal scenario, after offsetting tax liability against debit in electronic credit ledger, the balance available on the date of filing return would be automatically reduced. Hence, the tax payment and return submission would be simultaneous. However, when the balance in his electronic credit ledger is inadequate, the residual liability would be deducted from his electronic cash ledger to enable that, the taxpayer must first deposit sufficient funds into his electronic cash ledger before the filing date. At the time of return filing, the taxpayer has to offset the remaining tax liability, by debiting the electronic cash ledger balance, and the corresponding amounts will be debited from the electronic credit and cash ledgers.

Legislative Intent

In both the situations, the amount gets debited from the ledgers for the purpose of making payments towards tax, interest, penalty etc, as the case maybe, at the time of filing of GST returns. Until such time, the amount deposited if any would be lying accumulated in the Electronic cash ledger. Further, in the event of a delay in making tax payments, the proviso to Section 50(1) of the CGST Act would apply automatically. The manner of computing interest liability, i.e., on gross or net tax liability, was litigated for a long time, as evidenced by various High Court decisions. The GST Council finally resolved the issue in its 31st meeting by approving in principle an amendment to Section 50 of the CGST Act to provide that interest would be levied only on the amount payable through the electronic cash ledger. The Government took considerable time to implement this amendment and gave retrospective effect to it by way of insertion of proviso to of section 50(1) of the CGST Act vide section 112 of the Finance Act 2019.

With the introduction of the proviso to Section 50(1), the legislature signalled their intention is to levy

interest only on the portion of output tax liability, discharged by way of cash (i.e., the net tax liability). The scope of the proviso to Section 50(1) came up before the Madras High Court in the recent decision of Srinivasa Stampings [2022-TIOL-659-HC-MAD-GST]. As per Section 50(1) of CGST Act, *every person who is liable to pay tax as per the provisions of the Act, but fails in making the payments towards the tax or any part thereof during the period prescribed, is liable to pay interest on the unpaid amount at the rate of 18% or as may be notified by the Govt. on the recommendations of the Council.*

Judicial view on late filing of return and interest on resultant cash payment

In another recent case of **RSB Transmissions India Limited [2022-TIOL-1426-HC-JHARKHAND-GST],** the Department levied interest due to delay in filing of GSTR-3B returns by the Petitioner. However, the Petitioner denied to pay interest on delay in filing of GSTR 3B for disputed periods on ground that amount of tax had already been deposited prior to filing of GSTR 3B return in its electronic Cash Ledger. Aggrieved, the Petitioner preferred a writ before the Jharkhand HC. The question before the HC was whether the amount deposited as tax through valid challans by a registered person in the Government Exchequer prior to the filing of the GSTR 3B returns could be treated as discharge of the tax liability.

The HC noted that electronic cash ledger is nothing more than an electronic wallet into which money can be put whenever the necessary challans are generated. If the assesse fails to file their returns by the required date, they are liable for interest, and the money deposited in their electronic cash ledger can be refunded at any time by following the prescribed procedure under the GST act and the computation of interest liability is dependent upon delay in filing of returns beyond due date. Therefore, it was held that revenue had rightly computed interest on delayed payment since Petitioner had delayed in filing returns for disputed period.

Our Perspective

From a cursory reading of the preceding judgement, it can be inferred that the court was in favour of the position that interest would be charged on the portion of the cash ledger debited after the due date, even if a sufficient balance was present in the cash ledger on the due date. In other words, *payment of tax would only be taken into account when returns are filed and the amount payable in cash is debited from the electronic cash ledger, even if the cash payment was made on or before the due date for filing returns.* In such unforeseen instances, an taxpayer with a substantial balance and a willingness to pay taxes will be faced with unnecessary interest burden due to system/ technical difficulties.

It would be pertinent to note that as a settled principle of law, interest is compensatory in nature. In the case of **Pratibha Processors [1996 (88) ELT 12 (SC)],** the SC had beautifully explained the distinction between the term 'tax', 'interest' and 'penalty' that are used in fiscal statutes. While explaining the distinction, it had been held that interest is compensatory in character and is imposed on an taxpayer who has withheld payment of any tax as and when it is due and payable. The levy of interest is geared to actual amount of tax withheld and the extent of the delay in paying the tax on the due date. Similarly, in the case of **Bill Forge Private Limited [2012 (26) STR 204],** it had been held that interest is compensatory in character, and is imposed on a taxpayer, who has withheld payment of any tax, as and when it is due and

payable. The levy of interest is on the actual amount which is withheld and the extent of delay in paying tax on the due date. If there is no liability to pay tax, there is no liability to pay interest.

We could therefore assume that interest is nothing more than a payment for the loss of use of the principle sum. It has always been a point of contention whether or not interest should be paid on the total tax liability. The confusion was caused by the fact that the provision had not yet been declared and there was a lack of clarity over whether the law's effect would be prospective or retrospective.

It is also evident from the above that the judiciary has acted discriminatorily in retaining interest payable to innocent taxpayers who have been unfortunate in filing late, regardless of an adequate balance in the cash ledger. Given the nature of 'interest' and the context in which the proviso to Section 50(1) was introduced, it is reasonable to conclude that the legislators intended to levy interest on tax liabilities satisfied through cash labiality. In the current scenario, following the Jharkhand High Court's decision in RE: **RSB Transmissions India Limited *(supra)***, the way the judiciary has interpreted the provision reads as on date is bound to cause difficulties for taxpayers who have delayed payment even though they have sufficient balance in their cash ledger. As a matter of fact, where the taxpayers had correctly discharged the tax lability vide having sufficient cash balance, it is per se believed that the taxes had been collected and rightly deposited with the applicable tax authorities itself.

Pursuant thereto, the businesses may foresee increased litigations on this front. The Revenue Department may levy interest on delayed payment of taxes even on the portions remitted through cash if the returns through which the liabilities have been discharged is filed on time. Therefore, now to mitigate such avoidable litigations, it is the responsibility of the GST Council for making an amendment to the law or for giving the suitable clarification to extend the applicability of the proviso to all cases of belated tax payments so long as the taxpayer had sufficient cash balance.

Conclusion

To summarise, interest is only intended to compensate for the time value of money lost due to late tax payment. Payment of tax liabilities through cash should not be subject to interest because the Revenue is not deprived of funds (so long as the taxpayer had sufficient cash balance).

Legislature needs to bring in an alternative for making necessary changes in return filing functionality on GST portal or in proviso to Section 50(1) of CGST Act, as it would save the taxpayer from the burden of interest which he would bear even when he is having sufficient balance in his electronic cash ledger before or on the due date of filing returns but couldn't succeed (in making debit) due to some technical glitch or error on the portal.

GLOSSARY

Abbreviation	Meaning
AA	Adjudicating Authority
AAAR	Appellate Authority for Advance Ruling
AAR	Authority for Advance Ruling
ADD	Anti-Dumping Duty
AE	Associated Enterprises
AGM	Annual General Meeting
AICD	Agriculture Infrastructure and Development Cess
AIF	Alternative investment Fund
AIFs	Alternative Investment Funds
ALP	Arm's length price
AMT	Alternate Minimum Tax
AMCs	Assets Management Companies
AO	Assessing Officer
AOP	Association of Persons
APA	Advanced Pricing Agreement
ARE	Alternate Reporting Entity
ASBA	Application Supported by Blocked Amount
AU	Assessment Unit
AY	Assessment Year
B2B	Business to Business
B2C	Business to Customer
BBT	Buy-Back Tax
BCD	Basic Customs Duty
BED	Basic Excise Duty
BEPS	Base Erosion and Profit Shift
BPSL	Bhushan Power Steel Limited
BOI	Body of Individuals
CAG	Comptroller and Auditor General of India
CASS	Computer Assisted Scrutiny Selection
CAT	Common Aptitude Test
CBCR	Country By Country Reporting
CBDT	Central Board of Direct Taxes
CBI	Central Board of Indirect Tax
CBIC	The Central Board of Indirect Taxes and Customs
CCIT	Chief Commissioner of Income tax
CG	Central Government
CGST Act	Central Goods and Services Act, 2017
CIT	Commissioners of Income Tax
Cus	Customs Act, 1962
CVD	Countervailing Duty
DDT	Dividend Distribution Tax
DGIT	Director General of Income Tax
DRC	Dispute Resolution Committee
DRI	Directorate of Revenue Intelligence
DTAA	Double Taxation Avoidance Agreement
ED	Enforcement Directorate
FDI	Foreign Direct Investment
Fin	Finance Bill Finance Bill, 2022
FM	Finance Minister
FMV	Fair Market Value

Abbreviation	Meaning
FPI	Foreign Portfolio Investors
FTP	Foreign Trade Policy
G2B	Government to Business
GST	Goods and Services Tax
GST	Goods and Services Tax
H&EC	Health and Education Cess
HFC	Housing Finance Company
HNI	High Net Worth Individual
HUF	Hindu Undivided Family
IBC	Insolvency and Bankruptcy Code
ICDR	Issue of Capital and Disclosure Requirements Regulations, 2009
IFSC	International Financial System Code
IFSCA	International Financial Services Centres Authority Act, 2019
IGST	Integrated Goods and Services Tax
IIM	Indian Institute of Management
IMC	Indian Medical Council Act, 1956
Ind AS	Indian Accounting Standards
InvITs	Infrastructure Investment Trusts
IRP	Interim Resolution Professional
IT Act/ Act	The Income-tax Act, 1961
ITAT	Income Tax Appellate Tribunal
ITC	Input Tax Credit
ITO	Income-tax Officer
KYC	Know Your Customers
LIC	Life Insurance Corporation
LLP	Limited Liability Partnership
LTC	Long-Term Capital Gains
MAT	Minimum Alternate Tax
MoF	Ministry of Finance
MSME	Micro Small and Medium Enterprises
NaFAC	National Faceless Assessment Centre
NBFC	Non-Banking Finance Company
NCCD	National Calamity Contingent Duty
NCLT	National Company Law Tribunal
NFT	Non-Fuungible Tokens
NELP	New Exploration Licensing Policy
NHB	National Housing Bank
NPA	Non-Performing Assets
NPS	National Pension System
OBU	Offshore Banking Unit
OEC	Organization for Economic Co-operation and Development

GLOSSARY

Abbreviation	Meaning
OPC	One Person Company
PAN	Permanent Account Number
PBPT	Prohibition of Benami Property Act, 1988
PCIT	Principal Commissioners of Income Tax
PFUTP	Prohibition of Fraudulent and Unfair Trade Practices relating to Securities Market Regulations, 2003
PIV	Pooled Investment Vehicle
PMLA	Prevention of Money Laundering Act, 2002
PLR	Prime Lending Rate
PSU	Public Sector Undertaking
PY	Previous Year
RBI	Reserve Bank of India
REITs	Real Estate Investment Trusts
RIC	Road and Infrastructure Cess
RPT	Related Party Transactions
RP	Resolution Professional
RTGS	Real Time Gross Settlement
RU	Review Unit
SAD	Special Additional Duty
SAED	Special Additional Excise Duty
SCGT	State Goods and Services Tax
SCN	Show Cause Notice
SCRA	Securities Contracts (Regulation) Act, 1956
SEBI	Securities and Exchange Board of India
SFT	Statement of Financial Transaction
SFIO	Serious Fraud Investigation Office
SIAC	Singapore International Arbitration Centre
SPL:	Special Leave Petition
SPF	Specific Pathogen Free
STT	Security Transaction Tax
SWS	Social Welfare Surcharge
TAN	Tax Deduction Account Number

Abbreviation	Meaning
TCS	Tax Collected at Source
TDS	Taxes Deducted at Source
TPO	Transfer Pricing Officer
TOL Act	Taxation and Other Laws (Relaxation and Amendment of Certain Provisions) Act, 2020
UCB	Urban Co-operative Bank
UK	United Kingdom
USA	United States of America
UTGST	Union Territory Goods and Services Tax
VDA	Virtual Digital Assets
VsV	Vivad se Vishwas
VU	Verification Unit
WTO	World trade Organization
HC	High Court
SC	Supreme Court
FY	Financial Year
NFT	Non-Fuungible Tokens

FIRM INTRODUCTION

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

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

TCA & **VMGG & Associates ('VMGG')** are group firms providing consulting and audit services. While TCA is a multidisciplinary advisory, tax and litigation firm, VMGG is a firm registered with the Institute of Chartered Accountants of India. VMGG is therefore primarily into audit and attestation services (including risk advisory and financial reporting).

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

Website: **www.taxcraftadvisors.com**

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