VISION 360

OCTOBER 2022

ISSUE 25

A TREASURY OF KEY TAX & REGULATORY DEVELOPMENTS!

TCA TAXCRAFT ADVISORS

GLS GST LEGAL SERVICES

VMG & ASSOCIATES

tiol ONE-STOP DESTINATION FOR TAXMAN AND TAXPAYER

EDITORIAL

Vision 360: Festivities all around!

With the festivities all around in the last quarter of the calendar year, the spirits are high among the people! A big gift by the Judiciary in this festive season has been the re-opening of the TRAN-1/TRAN-2 facility on the GSTN portal. The facility is currently live and the taxpayers are making the best out of this last opportunity given.

In this past month of September 2022, the CBIC had issued a slew of notifications amending various provision under the CGST Act along with corresponding amendments in the GST Rules. Most notably, Section 16 of the CGST Act has been amended, extending the time limit for availing ITC in respect of invoices or debit note for a particular Financial Year till the 30th of November of following Financial Year. The CBIC has also issued a Circular clarifying the procedure to revise the transitional forms.

Further, with the start of the month of October 2022, the e-invoicing threshold has also be reduced to INR 10 cr., thus, bringing in more taxpayers within its purview. The said threshold is further expected to be reduced to INR 5 crores w.e.f. January 2023. The CBIC has also issued a set of guidelines for the GST Departments for launching of prosecutions under the CGST Act. With such set of instructions in place, the prosecution proceedings shall be undertaken in a lawful manner.

On the Customs front, the Government has further extended the existing FTP 2015-2020 by six months w.e.f. October 01, 2022. Thus, the stakeholder will have to wait till April 2023 for the new FTP. The CBIC has also issued the IGCR Rules, 2022 for Customs import of goods at concessional rate of duty or for specified end use.

On the Direct Tax front, the CBDT had extended the due date for filing of Tax Audit Reports for the A.Y. 2022-23 from September 30, 2022 to October 07, 2022. Further, in an important judicial development, the HC has granted interest @5% on refund delayed beyond 90 days, determined under the VsV Act. Further, the Mumbai ITAT has held that assessment made by relying on statements under Section 132(4) of the IT Act, on standalone basis, is not sustainable.

In the Regulatory news, the MCA has redefined Small Companies by enhancing the cap of paid-up capital and the turnover. Further, the MCA has amended the CSR Policy. Vide the said amendment, has introduced a new class of entity will may act as Implementing Agency. The MCA has also allowed the filing of e-form DIR-3-KYC and web-form DIR-3 -KYC without filing fee upto October 15, 2022 instead of September 30, 2022 as earlier.

In International news, the Members of Asia Initiative agree on high-level work plan for tax transparency. Further, the OECD has also released Tax Morale Report, focusing on trust between Tax Administrators and MNEs.

Compiling all such developments, we at TIOL, in association with Taxcraft **Advisors LLP, GST Legal Services LLP and VMG & Associates**, are glad to publish the 25th edition of its exclusive monthly magazine 'VISION 360'. We hope that, as always, you will find it an informative and

interesting read. We look forward to receiving your inputs, thoughts and feedback, in order to help us improve and serve you better!

EDITORIAL

Happy Reading!

P.S.: This document is designed to begin with an article peeking into recent tax/regulatory issues allowed by stimulating perspective of leading industry professionals. It then goes on to bring to you latest key developments, judicial and legislative, in 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.

Table of Contents

Vision 360 | October 22 | Edition 25

TRANSFER PRICING

From the Judiciary

- HC confirms ITAT's BLT-rejection, following Sony Ericsson HC-ruling, not being stayed by SC
- ITAT quashes final assessment order passed without draft-order, follows Zuari Cement over Vedanta ruling
- ITAT confirms CIT(A)'s deletion of TP-adjustments qua loans advanced to AEs

...and other judicial developments from September 2022

GOODS & SERVICES TAX

From the Judiciary

- AAR holds ITC to be ineligible on vouchers supplied to customer against loyalty points
- ITC not eligible on inputs/input services procured for promotional scheme
- SC allows 1 month's time for re-opening of TRAN-1 portal

...and other judicial developments from September 2022

From the Legislature

- Amendments to the CGST Act
- Rescinds notification relating to refunds
- Guidelines for filing/revising TRAN-1/TRAN-2 pertaining to re-opening of the GSTN portal

...and other Notifications, Circular, Trade Notice, etc. issued in September 2022

Table of Contents

CUSTOMS & FTP

REGULATORY

ARTICLE

Insider Trading – An offence or not, still a Paradox...

Insider trading is not a victimless crime. Insider trading adversely affects market liquidity and makes transaction costs higher, reducing investor returns. It undermines public confidence in financial markets and feeds the common view that they odds are stacked in favor of the elite and against everyone else. Furthermore, since inside traders profit from privileged access to information rather than work, this makes people believe that the system is rigged.

It was only about three decades back that insider trading was recognized in many developed countries as what it was - an injustice; in fact, a crime against shareholders and markets in general. In India, in 1948, First concrete attempt to regulate Insider Trading was the constitution of Thomas Committee. It helped restricting Insider trading by Securities Exchange Act, 1934. In 1956, Sec 307 & 308 were introduced in the Companies Act, 1956. In 1986, Patel committee recommended that the Securities contracts (Regulations) Act, 1956 be amended to make exchanges reduce Insider Trading and in 1992, India has prohibited the fraudulent practice of Insider Trading through "Security and Exchange Board of India (Insider Trading) Regulations Act, 1992 for the effective functioning and governance of a corporate organisation are attributed to ensuring transparency, openness, and disclosure for maintain a positive relationship among the managers and the stakeholders, and embrace the faith of the investors.

Insider trading is basically the practice of buying and selling publicly-traded company's securities while in possession of material as well as non-public information. Material Information refers to any and all information that may result in a substantial impact on the decision of an investor regarding whether to buy or sell the security whereas Non-public information / Unpublished Information is information that has not been previously disclosed to the general public by the Company, or its agents and it is not specific in nature.

For Ex: Companies employees, Directors or Executive who traded because of non-public information they learned due to the nature of their employment.

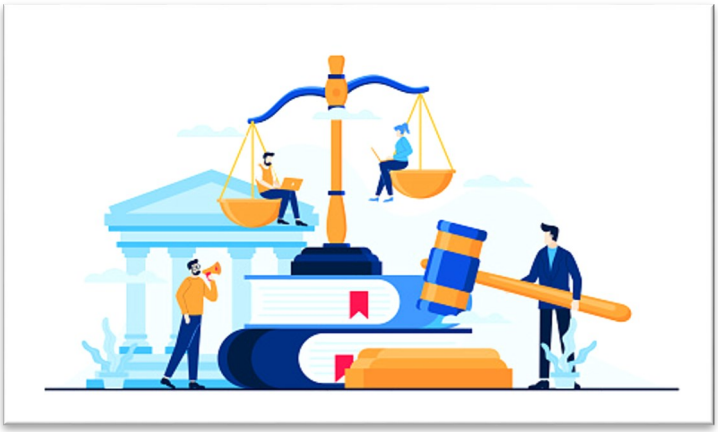
Broadly speaking "Insider" means any person who is reasonably expected to have access to unpublished price sensitive information in respect of securities of a company with whom he is/ was connected. "Unpublished Price Sensitive Information" (UPSI) means any information which relates directly or indirectly to a company which is not published by the company to general public and if published is likely to materially affect the price of securities of company. Some of the examples are information on financial results of the company, dividend information, initiation or decision on capital market transactions such as amalgamation, merger, demerger, acquisition etc.

LEGALITY OF INSIDER TRADING :

Insider Trading can be Legal as well as Illegal. Trading is considered as illegal when one uses a company's confidential stock price information for personal gains and trading in securities against the rules of law. Whereas it can be considered as legal when a company's insiders engage in buying or selling securities of their corporation but regularly report it to the Stock Exchange Commission and publicly discloses the organization's information on timely basis for instance, ESOPs issued to employees. SEBI rules provides for various penal provisions to discourage the Insider trading, the penalties may extend up to three times the profits earned through Insider trading transactions. Recently SEBI has also institutionalized changes which has brought in trading of units if mutual funds also in the ambit of Insider Trading, thus now it is mandatory to report trading of units of mutual fund as well as holding in units of mutual fund executed by the designated persons of Assets Management Companies (AMC) /Trustees, their immediate relatives and by any other person for whom such person takes trading decisions to the compliance officer of the AMC concerned within 7 days from the date of transaction

The Industry have seen various courts taking views on Insider Trading matters and it is noteworthy that each case is unique and therefore courts have taken views on the basis of facts and circumstances of each case. The people who are in possession of UPSI may deal in securities of the companies in normal course of business and it is not necessary that each time there is an element of non-compliance or mala fide intention. There are umpteen cases in past where people have been held guilty or were penalized when they gained through dealing in securities and there were reasons to believe that they had access to UPSI. However, recently we have seen certain judgments including a recent one from Apex Court where courts strictly analyzed the facts and upheld the legality of trading carried out by promoters or people from management team.

For instance, in a recent case, Supreme Court overruled the SEBI and SAT judgements where family members of PC Jewellers were held guilty of dealing in securities as they were considered to be the people in possession of UPSI, where the facts suggested that these family members broke away from PC Jewellers in past and had no active in the business of the company. The basic premises of SEBI finding was wrong as



by merely sharing the same residential address does not lead to the possession of sensitive information. In yet another case of Gammon Infrastructure Projects Limited, the managing director of the company was held guilty in a SEBI investigation as he sold the shares of the company in open market during a time when certain contracts of company were terminated and the information was pending to be disclosed to stock exchanges. The matter was eventually decided by Supreme Court, which deeply analysed the facts of the case and concluded that there were other facts which were missed by SEBI, such as the assets of company including subject equity shares were sold as a part of Corporate Debt Restructuring Scheme and the company didn't had any option but to collect money to ensure promoter contribution as a part of commitment made by it to lenders. Moreover, it was also found that such contracts were representing only a small part of overall revenues and order book of company and cancellation of contracts only has positively benefited the company. Therefore the Apex Court held that it is really important to see the intention behind a transaction rather than simply terming it as Insider Trading merely on the basis of its form.

There has been an evolution of the laws prohibiting the practice of insider trading to a great extent since 1992. The authorities have considered the practice of insider trading as an alarming offence and have amended the statutes with new and stringent provisions from time to time. Further SEBI increased the reward payable to whistleblowers under its prohibition of insider trading regulations to Rs 10 crore from Rs 1 crore to further encourage whistleblowers to come forward to the regulator. To eliminate the offence of insider trading and for the preservation of interest of investors in the market, it is essential to make the people who are considered as 'Insider' in the company, accountable for their unlawful dissemination of price-sensitive information. It is not possible to fully control the actions of the Insiders and hence, the people holding the top managerial positions i.e. directors, officers, and other members of the company should set high standards of ethical behavior in their organizations to ensure that the company's goodwill is not damaged.

INDUSTRY PERSPECTIVE

Gaurav Gupta

Head of Finance
Devyani International Limited

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

Extending the overall timeline for availment of ITC, issuance of Credit note is a welcome step, but riddling it with interpretational issues and effectively curtailing the extension only to a month is tricky to say the least. The amendment is likely to invite litigation for lack of clarity amongst the taxpayers.

Speaking of restrictions on ITC, the food manufacturing industry has already been facing difficulties due to restriction on restaurants to avail ITC. Overall, the government's temperament has been to put availment of ITC under more and more stringencies. Earlier the provisions of Rule 36(4) restricted availability of provisional ITC in lieu of unreported invoices/Debit Note over GSTR 2A and it was followed by Budget 2021 amendment in Section 16 to allow ITC entirely based on GSTR-2A and GSTR-2B. Such stringencies cause despair to many although one may optimistically see the discipline and compliances it silently promotes.

Gaurav Gupta
Head of Finance - Devyani International Limited

This approach is not new, and taxpayers shouldn't be taken by surprise. On previous counts too introduction of TDS mechanism was aimed at forcing the non-compliance taxpayers to file the return and fall in line with the statutory requirement. Over the years, business has struggled to institute discipline and compliances with vendors and other business partners and statistically a large number of such vendors and business partners, especially SMEs lacked in sufficient compliance. These recent statutory stringencies are now an effective tool to address such lack of compliances at the hands of those who have been ensuring sufficient compliance. We must always see both sides of the coin and focus on the side that brings positive outlook. The law will keep evolving and taxpayers must adapt for better reasons. In fact, this will act as a competitive advantage for the matured organisations and the ones who consider compliances an integral part of its culture.

02 What are your views of extension to Foreign Trade Policy 2015-2020?

It makes all the more sense to replace incumbent policy with a new one with effect from a beginning of a new financial year. Bringing in the mid-year has its own challenges, especially when the new policy is likely to bring in some new schemes. It is expected that new policy may introduce new schemes such as district export hubs, schemes for E-commerce exporters, revamp of service export scheme, etc. It will be important how these schemes are designed to promote exports as well as be compliant with the World Trade Organisation's norms.

03 One of the major targets of the current central Government was to digitalise the Indian tax system. How do you think the government has fared so far on this front?

It is no secret that the underlying objective of the Government in digitalization was to curb the tax evasion phenomenon, which is one of the biggest issues faced by the Indian economy. However, in order to put a complete check on the tax evasion, it is imperative for the digital system to work hassle free. With the current faceless customs clearance systems or the faceless assessment scheme in the Direct tax sector, it is seen in many cases that instead of streamlining the processes, there have been numerous technical glitches in the system. However, digitisation is undoubtedly key in the compliances matters, especially in taxation, which has been seen in many developed countries such as the U.S.A. and Australia.

One of the notable achievements in the digital India movement has been GST. Right from electronic filing of returns to the introduction of E-Way Bill, E-Invoicing have been major success. Similarly, the Faceless assessment system in direct tax is also maturing post its implementation by govt few years back. It has saved lot of time both for government and taxpayers. It has worked in reducing any personal bias against the assesses and dispel any apprehension of wrong practices. It has helped in creating a positive environment and improve ease of doing business.

04 What are your views on recent changes in the Direct tax space, more particularly Section 194 ?

As per clause (iv) of section 28 of the Act, the value of any benefit or perquisite, whether convertible into money or not, arising from business or exercise of profession is to be charged as business income in the hands of the recipient of such benefit or perquisite. However, in many cases, such recipient does not report

Gaurav Gupta
Head of Finance - Devyani International Limited

the receipt of benefits in their return of income, leading to furnishing of incorrect particulars of income. Accordingly, in order to widen and deepen the tax base, the Finance Act 2022 inserted Section 194R to the Act to provide that the person responsible for providing to a resident, any benefit or perquisite, whether convertible into money or not, arising from carrying out of a business or exercising of a profession by such resident, shall, before providing such benefit or perquisite, as the case may be, to such resident, ensure that tax has been deducted in respect of such benefit or perquisite. I believe, while it is yet another compliance burden for corporate sector, it will help the exchequer to widen the tax net.

Disclaimer : The views/opinions expressed in this section are personal views of the Author and do not necessarily reflect the views/opinions of the Organisation and/or the publisher.

DIRECT TAX
From the Judiciary

HC holds disallowance for TDS default not sustainable for sum neither claimed in computing Business Income, nor debited to P&L Account

Linde India Ltd

2022-TII-19-HC-KOL-INTL

The Assessee was issued a show cause notice alleging that tax was not deducted at source in terms of the provisions of Section 40(a)(ia) of the IT Act in respect of the advances for import of capital goods. In the reply to the show cause notice, the Assessee contended that the said advances were made towards import of capital goods on FOB basis at foreign ports, leading to transfer of title to the goods outside India. Hence, there was no income chargeable to tax in India and the provisions of Section 195 of the IT Act could not be attracted. It was also contended that such advances to suppliers had also not been charged to P&L Account for the relevant assessment year. The AO completed the assessment by passing an order wherein disallowances to the tune of INR 128 Crores were made under Section 40(a)(ia) of the IT Act .

Aggrieved, the Assessee preferred an appeal before the CIT(A) which passed order in the Assessee's favour which upheld by the ITAT. Aggrieved, the Revenue preferred an appeal before the HC. The HC concurring with the view of the ITAT and CIT(A) that since total amount was not charged to P&L account and had not been claimed as expenditure while computing the total taxable income, observed that the disallowance of the same under Section 40(a)(i) was not justified. Accordingly, dismissing the Revenue's appeal, the HC upheld the order of the ITAT.

HC sets aside Single Judge's remand order where Section 148A (d) order of the Revenue was not relatable to show cause notice

Excel Commodity and Derivative Pvt. Ltd

2022-TIOL-1225-HC-KOL-IT

The Assessee was issued a show cause notice under Section 148A(b) of the IT Act alleging fictitious derivative transactions against which a detailed response with all relevant documents filed and it was submitted that no fictitious derivative transaction was conducted. Unconvinced, the Revenue passed an order against the Assessee. Aggrieved, the Assessee preferred a writ petition before the Single Judge of the HC who quashed the order but remanded the matter back to Revenue to pass a fresh speaking order.

Further aggrieved, the Assessee preferred an intra court appeal before the HC which noted that on the plain reading of order under Section 148A(d) of the IT Act it was evident that Revenue indirectly accepted the

explanation given by the Assessee. The HC observed that the information available with the Revenue at the time of issuance of show cause notice was not properly verified which led to erroneous issuance of order.

The HC further observed that the order was not based on reasons for which show cause notice under Section 148A(b) was issued and thus, it was illegal and unsustainable due to which the necessity to remand the matter back to Revenue did not arise.

HC grants interest at 5% on refund delayed beyond 90 days, determined under VsV Act

Mrs. Anjul

2022-TIOL-1257-HC-DEL-IT

The amount of taxes refundable towards full and final settlement of tax arrears was determined under VsV Act for AY 2010-11 and 2011-12 and was granted final certificate in Form 5. The due amount was refunded to the deceased Assessee through her legal heir. However, the Assessee sought payment of interest on account of delay in payment from Revenue and accordingly preferred a writ petition before the HC. With regard to the Revenue's contention that there was no provision in VsV Act for payment of interest, the HC noted that refund payable to Assessee was a debt-owed and payable by the Revenue. The HC further observed that there was no provision in the VSV Act prohibiting award of interest on delayed refund. Further, the VSV Act did not authorise the Revenue to either delay or withhold the payment of the refund.

As regards to the Revenue's contention before the HC that refund could not be issued due to technical issue at CPC, the HC observed that technical issue at CPC could not result in benefit to the Revenue. Further placing reliance on SC ruling in **Tata Chemicals [2014-TIOL-27-SC-IT]** wherein it was held that the state having received money without right was bound to make party good, the HC directing the Revenue to pay simple interest at 5% per annum within eight weeks, allowed the Asseessee's writ petition.

ITAT holds assessment made by relying on statements under Section 132(4) of the IT Act, on standalone basis, not sustainable

Nilesh M. Agrawal

2022-TIOL-1122-ITAT-MUM

The Assessee was a proprietor and a director of few companies from Satish Saraf Group, which was subject to a search operation. During the course search proceedings, the statements of key persons were recorded under Section 132(4) of the IT Act wherein it was admitted that accommodation entries were provided to various beneficiaries through paper concerns. However, no incriminating documents or material were found during the course of search at the premises of the Assessee qua the addition made in the assessment order. The Revenue during the course of assessment under Section 153A of the IT Act, made the additions for the relevant AYs on account of unexplained purchases at 30%, addition on claim of receivables, loans received/advance written off, futures and options loss, loss on sale of investment, unsecured loans and advances from debtors treating the same as unexplained credit.

Aggrieved, the Assessee approached the CIT(A) who held that the statements of the key persons constituted incriminating material unearthed during the course of search action and accordingly, confirmed the additions made by Revenue while reducing the 30% disallowance on unexplained purchases to 20%. Aggrieved, the Assessee preferred an appeal before the ITAT contending that the Revenue's entire case was based on the statement of key persons which had no bearing on the additions made and could not be reckoned as material found from the search. Further, for AYs 2008-09 to 2010-11 and 2012-13, regular return of income had been filed under Section 139 and the limitation period for passing assessment with respect to above stated AYs had expired on the date of search, therefore the same had to be reckoned as completed assessment and could not be treated as abated assessment under Section 153A of the IT Act.

The ITAT observed that the addition made by the Revenue for the relevant AYs were not based on any specific incriminating material found during the course of search proceedings and even the statements of the key persons did not refer to any corroborative material found in Assessee's possession which could be reckoned as incriminating material. Moreover, no incriminating material had been found during the course of search on Assessee's premises to vitiate that there was unaccounted income from Assessee's business conducted in his individual capacity. The ITAT further observed that the existence of incriminating material found during the course of search was sine-qua-non for making addition under Section 153A where assessment had attained finality and had not been abated. Therefore, placing reliance on a plethora of judgments, the ITAT observed that the statements of person recorded during the course of search could not be used on a standalone basis to make additions in the post-search assessments and further could not be treated as incriminating material found during the course of search. Accordingly, deleting the additions made by the Revenue, the ITAT allowed the Assessee's appeal.

DIRECT TAX
From the Legislature

NOTIFICATIONS

Notification	Key Updates
Notification No. 106/2022 dated September 2, 2022	**CBDT notifies hierarchy of Principal Commissioner of Income Tax, Chief Commissioner of Income Tax and Commissioner of Income Tax (Appeals) units across the country** CBDT notifies that Commissioner of Income-tax (Appeals) units across the country shall be subordinate to the jurisdictional Chief Commissioner of Income -tax who shall be subordinate to the respective Principal Chief Commissioner of Income-tax.
Notification No. 109/2022 dated September 14, 2022	**CBDT notifies amended Form 52A for Film Producers** CBDT amends Rule 121A of the IT Rules prescribing the form to be furnished by producers of cinematograph films or persons engaged in specified activity. Form 52A shall be furnished within 60 days from the end of the previous year. CBDT also states that for the purposes of Section 285B of the IT Act (Submission of statements by film producers), prescribed authority shall be PDGIT(Systems) or DGIT(Systems) or any person authorised by PDGIT/DGIT(Systems).
Notification No. 110/2022 dated September 19, 2022	**CBDT notifies ITR-A under Section 170A of the IT Act, for filing modified return pursuant to business reorganization** CBDT notifies Rule 12AD in the IT Rules and Form ITR-A as return of income under Section 170A of the IT Act to be filed by the successor entity pursuant to a business reorganization with effect from November 1, 2022. Accordingly, in case of assessment or reassessment proceedings, the AO shall pass an order modifying the total income of the relevant AY determined to which the business reorganization order applies. The AO shall proceed to complete the assessment or reassessment proceedings in accordance with the order of the business reorganization and the modified return so furnished. The Rule also modifies ITR-6 for AY 2022-23 or prior AYs to include a tick box for ITR filed as per Section 170A of the IT Act.
Notification No. 111/2022 dated September 28, 2022	**CBDT notifies mechanism for disallowing cess or surcharge, pursuant to retrospective amendment of Section 40(a)(ii) of IT Act** CBDT notifies Rule 132 of the IT Rules along with Forms 69 and 70 for re-computation of total income pursuant to Section 155(18) of the IT Act after disallowing cess or surcharge claimed and allowed as deduction under Section 40(a)(ii) of the IT Act in prior years. The Assessee is then required to make the payment of tax and intimate about it to the AO in Form 70 within 30 days of making the payment. The Rule comes into effect from October 1, 2022.

Circulars/ Guidelines

Circulars/	Key Updates
Circular No. 18/2022 dated September 13, 2022	**CBDT issues Additional Guidelines on Section 194R of the IT Act** CBDT issues additional guidelines under Section 194R (2) of the IT Act to remove difficulties with respect to implementation of TDS on benefits or perquisites. CBDT further provides clarity on TDS implications in loan waiver, reimbursements, OPE, dealers' conference, bonus/right issue of shares, among others.
Press Release dated September 17, 2022	**CBDT revises Guidelines for Compounding of Offences** CBDT revises Guidelines for Compounding of Offences under the IT Act, inter- alia bringing about the following changes: • The offence under Section 276 of the IT Act (Removal, concealment, transfer or delivery of property to thwart tax recovery) can now be compounded; • Compounding charges where relaxation is allowed has been increased from 1.25 to 1.5 times of the normal compounding charges; • Relaxation time for filing compounding application increased from 12 to 24 months and upto 36 months instead of 24 months from the end of the month in which complaint is filed; • Period for payment of compounding charges can be extended upto 6 months instead of 3 months and Regional Principal Commissioner of Income Tax can extend it upto 12 months; • Interest on delayed payment of compounding charges decreased to 1% per month from 2% per month for upto 3 months and to 2% per month from 3% per month beyond 3 months.
Circular No. 19/2022 dated September 30, 2022	**CBDT extends due date for Tax Audit** Taking cognisance of difficulties faced in filing tax audit reports, CBDT extends the due date for filing of various tax audit reports for AY 2022-23 from September 30, 2022 to October 7, 2022..

TRANSFER PRICING
From the Judiciary

HC confirms ITAT's BLT-rejection, following Sony Ericsson HC-ruling, not being stayed by SC

Sharp Business Systems (India) Pvt Ltd

2022-TII-30-HC-DEL-TP

The Revenue preferred an appeal before the HC challenging the ITAT's decision which rejected BLT based AMP adjustment in case of the Assessee for AY 2011-12. Before the HC, the Revenue solely placing reliance on the HC ruling in **Sony Ericsson Mobile Communication [2015-TII-06-HC-DEL-TP]** (which was pending adjudication before the SC) *inter alia* argued that the ITAT erred in rejecting BLT, which was a mere methodology of determining quantum of AMP expense.

The HC noting that in the case of **Sony Ericsson Mobile Communication [2015-TII-06-HC-DEL-TP],** BLT was held to have no statutory mandate and further placing reliance on the HC ruling in **Bausch & Lomb Eyecare (India) (P.) Ltd[2015-TII-65-HC-DEL-TP]** which followed the decision in **Sony Ericsson Mobile Communication [2015-TII-06-HC-DEL-TP]**, observed that the question of applying BLT to determine the existence of an international transaction involving AMP expenditure did not arise. Further, the HC noted that the judgment in **Sony Ericsson Mobile Communication [2015-TII-06-HC-DEL-TP]** was pending adjudication before the SC and there was no stay of the said judgment till date. Accordingly, dismissing the Revenue's appeal as being covered by the aforementioned judgments, the HC held that the order passed in the present appeal shall abide by the final decision of the SC in the SLP filed in the case of **Sony Ericsson Mobile Communication [2015-TII-06-HC-DEL-TP].**

ITAT quashes final assessment order passed without draft-order, follows Zuari Cement over Vedanta ruling

Xander Advisors India Pvt. Ltd

2022-TII-314-ITAT-DEL-TP

The Assessee was a resident corporate entity engaged in providing advisory services to its overseas AE that had filed its return of income. A search and seizure operation was conducted consequent to which a proceeding under Section 153A of the IT Act was initiated. The AO completed the assessment under Section 153A and there was a variation between the income declared by the Assessee and as determined by the AO solely on account of the TP adjustment made by the TPO.

The Assessee unsuccessfully filed an appeal before the CIT(A). This caused the Assessee to prefer an appeal before the ITAT contending that the assessment order passed by AO without draft assessment order was null and void. The Assessee further contended that it was an eligible assessee under Section 144C(15)(b) of the IT Act and the AO had made variation to the income declared by the Assessee, which was prejudicial to the interest of the Assessee and therefore, the AO should have passed a draft assessment order in terms of Section 144C (1) of the IT Act. However, instead of following the mandatory

procedure laid down under Section 144C (1) of the IT Act, the AO passed the final assessment order under Section 153A of the IT Act, which was wholly without jurisdiction and hence non-est in the eyes of law.

The ITAT observed that the AO had not only failed to implement the mandatory provision of Section 144C (1) of the IT Act but had also gone against CBDT Circular No. 9/2013 dated November 19, 2013. The ITAT, placing reliance on a plethora of judgments held that CBDT Circulars could not override the clear statutory provision as contained under Section 144C (1) of the IT Act. Further, placing reliance on HC Division ruling in **Zuari Cement Ltd. [WP(C) No. 5557/2012(AP)]** (which was subsequently upheld by SC) over HC Single Bench ruling in **Vedanta Ltd. [Writ Petition No. 1729 of 2011]** (which held that Section 144C was effective from AY 2010-11 only), the ITAT observed that as per the principle of stare decisis, a decision rendered by a Bench of superior strength would get precedence over a decision rendered by a Bench of lesser strength and accordingly, quashed the final assessment order passed by the AO holding the order to be without jurisdiction and void ab initio.

ITAT confirms CIT(A)'s deletion of TP-adjustments qua loans advanced to AEs

ONGC Videsh Limited

2022-TII-332-ITAT-DEL-TP

The Assessee had advanced a foreign currency loan from its own funds @ 2.5% interest to ONGC Caspian. The Assessee had adopted CUP method and compared the interest charged to the average 6-month LIBOR rate prevailing during the year i.e. 0.59% and used a spread of LIBOR plus 1.91% to arrive at interest rate of 2.5%. The Assessee had also submitted additional benchmarking analysis conducted using Loan Connector database where the effective interest rate paid by comparable companies was 1.40%. The Assessee had also advanced a foreign currency loan to Jarpeno from internal accruals for AY 2013-14, the Assessee charged interest @ 4%, applied internal as well as external CUP and also submitted additional benchmarking analysis using Loan Connector database and had also advanced loans to ONGC (BTC) Ltd. and ONGC Nile Ganga for AY 2014-15 at interest of 4% and 2.5% respectively.

With regards to the loan advanced to ONGC Caspian, the TPO however made a TP adjustment considering credit rating of AE as "CCC" and determined interest @ LIBOR plus 500 basis points. Further, with regards to the loan advanced to Jarpeno, the TPO made a TP adjustment using interest rate charged by SBI and determined arm's length interest @ 5.4357% (LIBOR+4.5%) by assigning lowest credit rating to Jarpeno and had applied interest rate of LIBOR plus 4.5% for loans advanced to ONGC (BTC) Ltd. and ONGC Nile Ganga. Aggrieved, the Assessee approached the CIT(A) who deleted the TP adjustment made by TPO on account of loan advanced to ONGC Caspian, observing that the TPO erred in determining credit rate of AE as 'CCC' instead of considering its credit rating to be the same as that of the parent company. Moreover, TPO applied erroneous and non-comparable search to benchmark the loan transaction - used data regarding loans which pertained to earlier years where the loan was for a period

of 3 years. Further, following CIT(A)'s orders in the Assessee's own case for previous years, wherein addition on similar basis by adopting SBI rates was rejected relying on Delhi HC decision in **Cotton Naturals (I) Pvt. Ltd. [2015-TII-09-HC-DEL-TP]**, CIT(A) also deleted the TP adjustment made by TPO on account of loan advanced to Jarpeno and with regards to the loans advanced to ONGC (BTC) Ltd. and ONGC Nile Ganga, the CIT(A) directed the TPO to benchmark the said transactions @ 6 months LIBOR + 4%. Thus, upholding the CIT(A)'s adjudication of TP adjustments qua loans advanced to AEs by the Assessee, the ITAT dismissed the Revenue's appeal.

ITAT directs fresh adjudication on ALP-adjustment qua payments for Headquarter-services in light of evidences

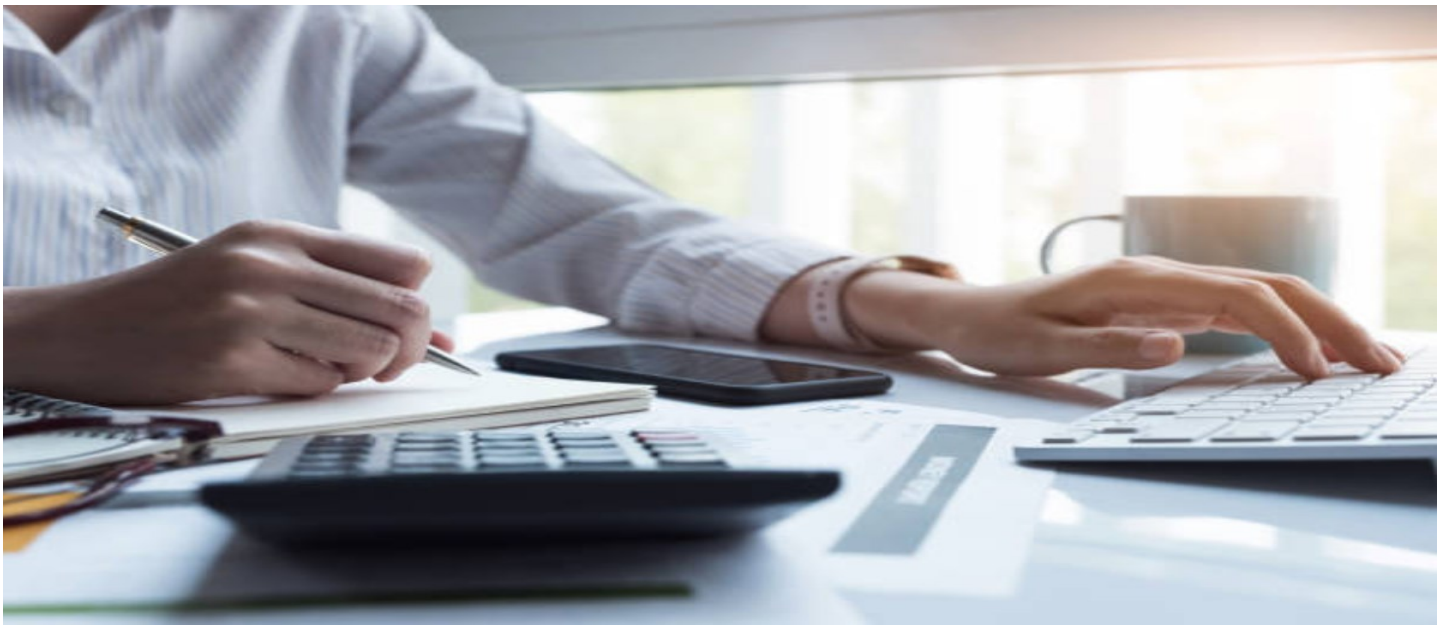
Eaton Power Quality Private Limited

2022-TII-331-ITAT-MAD-TP

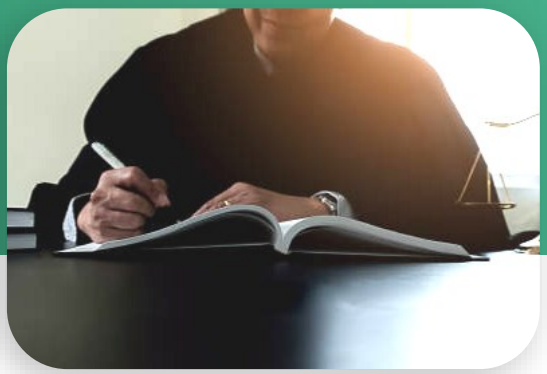
The Assessee had availed umpteen services from its Headquarter entering into a tripartite shared services agreement. The Assessee had benchmarked all international transactions, including payments for Headquarter services under TNMM with OP/ sales as profit level indicator and claimed to be tested party. The Assessee had also furnished copy of agreement between the parties along with invoices and e-mail correspondence to prove rendering of services by the AE.

During the course of proceedings, the TPO and DRP observed that the Assessee could not provide necessary evidence to substantiate payments made to AE for shared services (headquarter services) except filing certain email correspondence between the Assessee and its AE. Therefore, arguments of the Assessee were rejected and disallowed the entire amount paid to AE for Headquarter services.

Aggrieved, the Assessee approached the ITAT which observed that on the basis of e-mail correspondence itself, it could not be held that the AE had rendered services for which the Assessee made payments. Further, placing reliance on the coordinate bench ruling in the Assessee's own case of a previous year, wherein similar issue was remitted back in light of agreement between the parties and evidences to justify claim of services being rendered by the AE, the ITAT, remitted the issue back to AO/TPO for fresh adjudication in light of the existence of various evidences justifying services rendered by AE against payment made for Headquarter services.



GOODS & SERVICES TAX
From the Judiciary



AAR holds ITC to be ineligible on vouchers supplied to customer against loyalty points

Myntra Designs Private Limited [2022-TIOL-111-AAR-GST]

The Applicant had sought an advance ruling to ascertain whether ITC would be available on vouchers and subscription packages procured from third party vendors, made available to eligible customers, participating in the loyalty program.

The AAR observed that vouchers supplied electronically are goods as per Section 2(52) of the CGST Act. It was further observed that redemption of loyalty points is not consideration for vouchers as they do not have any monetary value, are non-transferable and cannot be converted to cash. Accordingly, it was held that ITC would not be available on such vouchers supplied free of cost as gift u/s. 17(5)(h) of the CGST Act.

Authors' Notes:

*Similar to the ruling pronounced by the Tamil Nadu AAR in RE: **GRB Dairy Foods Private Limited [2022-TIOL-12-AAAR-GST]**, the Karnataka AAR in the instant case has also adopted a narrow view to disallow credit on a promotional scheme. The Apex Court in RE: **Ku. Sonia Bhatia vs. State Of U.P. and Ors. [1981 SCR (3) 239]** had defined the term 'gift' as a voluntary transfer without consideration. In the instant case, the vouchers given by Myntra are neither voluntary nor without consideration. They are given on the basis of fulfilment of certain conditions such as purchase of goods of a certain price. Thus, classifying such vouchers as gifts is incorrect.*

SC allows 1 month's time for re-opening of TRAN-1 portal

Filco Trade Centre Private Limited [2022-TIOL-75-SC-GST]

The Apex Court has extended the time for opening GST Common Portal for a further period of 1 month. It has also been clarified that all questions of law decided by the respective High Courts concerning Section 140 of the CGST Act read with the corresponding Rule/Notification or direction are kept open.

Authors' Notes:

While this judgement of the Apex Court is lauded by the Trade and Industry and there is no objection for an extension, there are certain open questions, which one may ponder upon. In this second round of availing transitional credit, the verification of the same has been moved from the post availment date to pre-availment date. It is only after the verification is complete that the credit will be reflected in the claimant's ledger. As the post availment verifications of the credit availed in 2017 is still not complete, it makes one wonder whether the 2 month's period given by the SC to the Revenue for verification would prove to be enough.

GST on Canteen Service charges of employees or contractual workers

Troikaa Pharmaceuticals Limited [2022-TIOL-106-AAR-GST]

The Applicant had sought advance ruling to ascertain whether GST would be applicable on the amount recovered from its employees or contractual workers, towards third-party canteen services and whether ITC would be available on food bills.

In light of Circular No. 172/04/2022-GST dated July 6, 2022, the AAR observed that the core requirements provided by an employer to an employee pursuant to a contractual agreement are not subject to GST under Entry I of Schedule III of the CGST Act. Accordingly, canteen facilities for the Applicant's own employees are not subject to GST, even if the Applicant recovers a part of the amount for the same.

As regards the contractual employees, the AAR ruled that they cannot be considered as 'employees' as it is the Contractor who bears the cost of salary and wages. Accordingly, in absence of employer-employee relationship, Schedule III would not be applicable and therefore, GST on such services would be exigible.

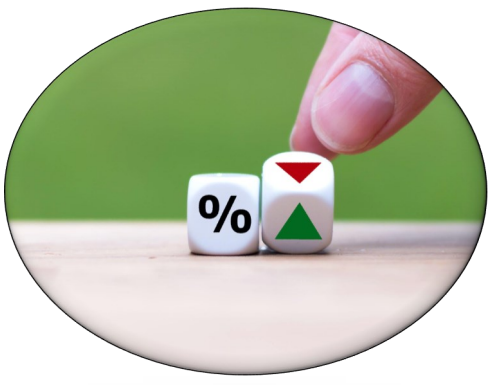
As regards the ITC on food bills, it was observed that since it is obligatory for Applicant to provide canteen facility under Factories Act, the ITC on GST paid on canteen facility is admissible on food bills provided that the GST burden has not been passed on to the employees.

Author's Notes:

It would be pertinent to note that contractual worker are also included in the definition of the term 'worker' under Factories Act. Therefore, the proviso u/s. 17(5) of the CGST Act which inter alia allows ITC where it is obligatory for the employer to provide canteen services to the workers, should also be extended to the contractual workers.

Mere availability of ITC cannot shield the Assessee from the levy of Interest

Yamaha Motors Private Limited [W.P No. 19044 of 2019 dated August 29, 2022]



The Petitioner had challenged an order demanding interest for belated payment of GST. The Petitioner argued that they had sufficient ITC credit in both the Electronic cash ledger as well as the Electronic credit register, thus there had been no loss caused to the Revenue.

The HC declined to insulate Assessee from levy of interest u/s. 50 of the CGST Act holding that unless an Assessee actually files a return and debits the respective registers, the Department cannot be expected to assume that available credits will be set-off against tax liability.

Authors' Notes:

As a settled principle of law, interest is compensatory in nature. It would be pertinent to note that the Apex Court in RE: ***Pratibha Processors [2002-TIOL-273-SC-CUS]*** *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 assessee 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.*

Apex court to decide on the matter of Safari Retreats Private Limited on the interpretation of Section 17(5)(d) of CGST Act

Special Leave to Appeal (C) No(s). 26696/2019 dated September 01, 2022

The Hon'ble Apex Court to decide upon the Revenue's plea against the Orissa HC ruling in RE: **Safari Retreats Private Limited [2019-TIOL-1088-HC-Orissa-GST]** where by the Hon'ble HC had allowed availment of ITC on goods and services used for construction of immovable property (shopping mall) which was let out to various tenants/lessees.

Authors' Notes:

With the slew of landmark judgements pronounced by the Apex Court recently, the instant matter will also be of grave importance for the trade and industry as a whole. The Orissa HC had inter alia read down Section 17(5)(d) of the CGST Act on the premise that denial of ITC, where the assessee retains the property instead of letting it out, would frustrate the very objective of ITC scheme.

ITC not eligible on inputs/input services procured for promotional scheme

RODEC Pharmaceuticals Private Limited [TS-454-AAR (UP)-2022-GST]

Under a sales promotional scheme, the Applicant had offered certain free of cost items to the retailers subject to the quantity of goods purchased by them. The Applicant had sought an advance ruling to ascertain whether ITC would be available on GST paid on procurement of inputs / input services for the promotional scheme.

The AAR held that section 17 (5)(h) of CGST Act categorically restricts ITC on gifts, even if they are procured in the course or furtherance of business. The AAR held that goods under scheme are given voluntarily and therefore qualifies as gifts. Accordingly, it was held that ITC on GST paid on procurement of inputs / input services for promotional scheme is blocked u/s. 17(5)(h) of the CGST Act.

Authors' Notes:

The CBIC vide Circular No. 92/11/2019 dated 07.03.2019 had inter alia clarified that where the goods are given free of cost, subject to the condition of buying certain goods, it in fact is not a supply free of cost. It had been further clarified that ITC shall be available to the supplier for the inputs, input services used in relation to supply of goods or services or both as part of such offers. The instant ruling goes against the intent of the Government clarified vide the said Circular.

Supply of works contract services to Government Authority attracts 18% GST

Suez India Private Limited [2022-TIOL-109-AAR-GST]

The Applicant had entered into a contract with Uttar Pradesh Jal Nigam (UPJN) for supplying water and sewage treatment and disposal services. The Applicant had sought an advance to ascertain the applicable GST rate on such services.

In light of the Apex Court's judgement in RE: **UOI vs. RC Jain [1981 (2) SCC 308]**, the AAR observed that UPJN does not satisfy some of the conditions required for qualifying as a 'local authority'. It was observed that as per the test laid down by the SC, the local inhabitants of the area should elect the authority, however, the members of UPJN were elected by the Government. Further, by way of NN. 15/2021 dated November 18, 2021, the tax of 12% was restricted to works contract supplied to a local authority only. As the UPJN does not qualify as a 'local authority' and it qualifies as a Governmental authority, the services provided by the Applicant to UPJN would be chargeable to 18% GST.

GST not applicable on consideration received on sale of residential site/ sites proposed to be converted

Rabia Khanum [TS-471-AAR (KAR)-2022-GST]

The Applicant owned land and were planning to convert that land into residential sites for sale. The Applicant developed the land according to the District Town and Country Planning Act regulations. The Applicant sought advance ruling to ascertain the GST applicability on sale of these sites.

The AAR observed that in terms of Circular No. 177 dated August 3, 2022, that land may be sold either as it is or after some development. In either case, it is a sale of land covered by Entry 5 of Schedule III of CGST Act which enumerates activities or transactions which shall be treated neither as a supply of goods nor a supply of services and does not attract GST. Accordingly, the AAR ruled that GST is not applicable on consideration and advance received for residential plots/sites proposed to be converted and on plots/sites sold after completion of basic work/necessary work

Foreign resident rendering services from outside India prior to 2006 not taxable

Sojitz Corporation [TS-400-SC-2022-ST dated September 19, 2022]

The Apex Court dismissed the Revenue's appeal against the CESTAT order invalidating the imposition of service tax and penalty on the services provided by a non-resident to a resident of India. Citing the CBEC Circular dated September 26, 2011, it was held that services received in India by a non-resident/person located outside India prior to April 18, 2006 would be exempted from service tax under the Finance Act.

GOODS & SERVICES TAX
From the Legislature

Sr. No	Notification/ Circular	Summary
1	**Notification No. 18/2022 - Central Tax dated September 28, 2022**	**Amendments to the CGST Act** The CBIC vide the Notification has amended various provisions of the Finance Act, 2022, which have come into effect from October 01, 2022. Following are the key amendments: • **Section 16 [Eligibility and conditions for taking input tax credit]** ◊ A new clause (ba) has been inserted in sub-section (2) restricting ITC to the extent it is available in as per GSTR-2B; and ◊ Time limit for availing ITC in respect of invoices or debit note for a F.Y. is extended up to 30th November of following financial year • **Section 29 [Cancellation or suspension of registrations]** ◊ The Proper Officers may cancel the registration of composition dealers who have not furnished their return in a F.Y. beyond three months from the due date; ◊ The Proper Officers may cancel the registration of any registered persons (other than composition dealers), who have not furnished their return for the specified period as may be prescribed • **Section 34 [Credit and Debit Notes]** ◊ Any registered person who issues a credit note in relation to a supply of goods or services or both shall declare the details of such credit note in their return for the month before 30th November of the subsequent F.Y. • **Section 37 [Furnishing details of outward supplies]** ◊ Last date for rectification or error in respect of outward supplies can be made till 30th day of November following the end of the FY to which such invoice pertains • **Section 38 [Furnishing details of inward supplies]** ◊ Only the eligible ITC which is available in Form GSTR-2B can be availed by the recipient

Sr. No	Notification/ Circular	Summary
		• **Section 39 [Furnishing of returns]** ◊ The non-resident taxable person should furnish the return for a month by 13th day of the following month; ◊ Time limit for rectification of errors in the return has been extended up to 30th November of the following F.Y. • **Section 42, 43,43A [Provisions relating to matching and reclaiming ITC]** ◊ Provisions relating to provisional claim of ITC have been omitted, as GSTR-2B is the principal document, basis which credit is to be claimed • **Section 47 [Levy of Late Fees]** ◊ Late fees prescribed for delayed filing of TCS Return in Form GSTR-8 • **Section 49 [Payment of tax, interest, penalty and other amounts]** ◊ Taxpayers can transfer of any amount of tax, interest, penalty, fee etc. available in electronic cash ledger to a distinct person registered under same PAN • **Section 52 [Collection of tax at source]** ◊ Time limit for rectification of errors in return furnished in form GSTR-8 (TCS Returns) has been extended up to 30th November of following F.Y. • **Section 54 [Refund of Tax]** ◊ The time limit for claiming tax refund by the by specialized agency of UNO that has been paid on inward supplies, is extended from 6 months to 2 years from the last day of the quarter in which the said supply was received
2	**Notification No. 19/2022 - Central Tax dated September 28, 2022**	**Amendments to the CGST Rules** In line with the amendments made in the CGST Act, the CBIC has also notified the corresponding amendments in the CGST Rules
3	**Notification No. 20/2022 - Central Tax dated September 28, 2022**	**Rescinds notification relating to refunds** Notification No. 20/2018 – CT dated March 28, 2018 pertaining to special refunds, has been rescinded

Sr. No	Notification/ Circular	Summary
4	**Circular No.180/12/2022-GST dated September 09, 2022**	**Guidelines for filing/revising TRAN-1/TRAN-2 pertaining to re-opening of the GSTN portal** The CBIC has issued guidelines for filing/revising TRAN-1/TRAN-2: • Declaration may be filed in TRAN-1/TRAN-2 or earlier filed TRAN-1/TRAN-2 can be verified, on the common portal; • Entire claim shall be filed in one consolidated Form; • The Applicant shall submit a self-certified copy of the filed form, along with prescribed declaration to the jurisdictional tax officer along within 7 days of filing of declaration; • Applicants may modify/edit, add or delete any record in any of the table of the said forms before clicking the Submit button; • In cases where the credit is availed on the basis of TRAN-1/TRAN-2 filed earlier, which either wholly or partly been rejected, the appropriate remedy is to prefer an appeal against the order or to pursue alternative remedies available as per law. • The declaration in TRAN-1/TRAN-2 filed/revised by the Applicant will be subjected to necessary verification by the concerned tax officers. • Post verification, the jurisdictional tax officer will pass an order on merits after granting reasonable opportunity of being heard; • Thereafter, the transitional credit will be allowed and reflected in the Electronic Credit Ledger of the Applicant.
5	**Instruction No. 04/2022-23 [GST – Investigation] dated September 01, 2022**	**Guidelines for launching of prosecution under the CGST Act** The CBIC has issued guidelines for initiating prosecution under the CGST Act. The Instructions inter alia provide that any person who violates the provision of section 132 of the CGST Act, may be subjected to criminal proceedings and prosecution. Following are the key highlights of the Instructions. • Prosecution should not be launched in cases of technical nature or where there is difference of opinion regarding interpretation of law. • Prior to prosecution, the nature and sufficiency of evidence should be carefully evaluated. Because the standard of proof in a criminal prosecution is higher than in an adjudication proceeding, the evidence must be weighed and must establish mens-rea beyond reasonable doubt in order to recommend prosecution, even if the demand is confirmed in the adjudication proceedings. • The prosecution can be initiated where the amount of tax/ ITC/ refund in relation to specified offences is more than INR 5 crore. However, in case of habitual evaders and arrest cases, the monetary limit shall not be

Sr. No	Notification/ Circular	Summary
		• The decision to prosecute must be made on a case-by-case basis based on the evidence available. In the case of public limited companies, prosecution should not be launched against all directors of the company whereas it should be limited to those who oversee the company's daily operations and actively participated in the tax evasion.

Authors' Notes:

The amendments in the CGST Act had been recommended in the Finance Bill in February 2022. However, the same are being notified after a period of 6 months. Nonetheless, as they say... better late than never. These amendments are welcome by the Trade and Industry. Especially the amendment to Section 16(4) of the CGST Act. Further, in lines with the said amendment, various due dates such as the last day for issuance of credit notes and reporting in GSTR-1, rectifications in GSTR-1, GSTR-3B, etc.

It would further be pertinent to note that generally the Financial Statements of any Company are closed in the month of September. Thus, any missed-out credit, transactions, credit notes, etc. which are identified during the finalizing and closing of the Financials Statements in the month of September, can now be availed by virtue of the amendment in Section 16(4) of the CGST Act.

It shall also be borne in mind that the due date for availing credit u/s. 16(4) has been extended till 30th November of the following F.Y. and not the due date of filing the return for the month of November. Thus, effectively the credit for a particular F.Y. can be availed in GSTR-3B for the month of October of the following F.Y., provided that the same is filed on or before 30th November.

CUSTOMS & FTP
From the Judiciary

Drawback cannot be denied for bona fide mistake in marking drawback claim serial No.

Gujarat Nippon International Private Limited [2022-TIOL-751-HC-DEL-GST]

The Petitioner had claimed duty drawback on exported goods on the Customs component. During the filing of the SB, the Petitioner had inadvertently mentioned the incorrect Sr. No. for claiming drawback i.e., 8455A instead of 8455B. Accordingly, the Respondent had rejected drawback of the Customs component on the premise that the Petitioner had claimed higher drawback.

The HC observed that the issue is no more res integra as the SC in RE: **Shyam Textiles [SLP (C.)No. 19911/2021]** had upheld the Gujarat HC decision holding that it is only a technical requirement to suffix the claim of drawback as 'A' or 'B'. Accordingly, the Delhi HC allowed the Writ.

Ultimate use of goods cannot be criteria for arriving at valuation of goods

Bytesware Electronics [Customs Appeal No. 20321 of 2021]

The Appellant had imported certain Integrated Circuits from China, the value of which had been disputed by the Respondent. Accordingly, the declared value had been re-determined on a higher side. Aggrieved, the Appellant preferred an Appeal against the value enhancement order. The CESTAT observed that Commissioner had based his conclusions on the business model of the Appellant and the description of the item in the BOE.

It was held that the ultimate use of the imported goods cannot be a criteria for deciding the valuation. The Tribunal remarked that every business man is free to adopt his own way of conducting business. The business model cannot be reason for rejecting the value of the goods. In the absence of any technical opinion, comparing the imported goods with other goods, simply on the basis of description, is not acceptable. Moreover, as per Rule 4 of CVR, 2007 the transaction value of identical goods in a sale at the same commercial level and in substantially the same quantity as the goods being valued shall be used to determine the value of imported goods. Accordingly, the CESTAT allowed the Appeal.

CUSTOMS & FTP
From the Legislature

Sr. No.	Notification/ Circular	Summary
1	**Notification No. 37/2015-2020 dated September 29, 2022**	**FTP (2015-2020) extended** The Government has further extended the Foreign Trade Policy 2015-20 by six months w.e.f. October 01, 2022 due to the global economic uncertainties
2	**Notification No. 74/2022 – Customs (N.T.) dated September 9, 2022**	**Customs Import of Goods at Concessional Rate of Duty or for Specified End Use (IGCR) Rules, 2022** To simply and automate the procedures of IGCR Rules, 2022, the CBIC has introduced certain changes to the rules while retaining the basic contours. The changes have broadened the scope of coverage of IGCR and ensure that useful additional data fields are effectively captured. Some of the major provisions introduced notification are as follows: A) Specified End Use • End use may be specified under the Customs Act; • In case of end use, supply to the end user and nature of supply must be captured in the IGCR automated module; and • Importers must keep a record of all goods supplied in a month and provide details on the Common Portal in Form IGCR - 3. B) Time Period for utilization of goods • Where time period for utilization of imported goods is not specified, then time period of 6 months shall apply. This can be extended by the Jurisdictional Commissioner for further 3 months subject to sufficient reason furnished by the importers C) Facility of immediate re-credit of bond • A new form IGCR 3A has been introduced for immediate re-credit of Bonds by Jurisdictional Officer, rather than waiting until the monthly statement is filed.

Sr. No.	Notification/ Circular	Summary
3	**Notification No.33/2015-2020 dated September 16, 2022**	**DGFT amends FTP in sync with RBI circular to enable international trade to be settled in INR** The DGFT has issued permitting invoicing, payment and settlement of exports and imports in INR with all countries through Rupee Vostro Account in sync with the RBI Circular dated July 11, 2022. This notification has been made effective immediately.
4	**Notification No. 79/022-Customs (N.T.) dated September 15, 2022**	**Validity of e-scrips increases from one year to two years** CBIC, had amended the Electronic Duty Credit Ledger Regulations, 2021, wherein the validity of e-scrip from the date of its creation has been extended to two years from one year. After the expiry of two years, the unutilized e-scrip shall lapse, and the validity of the e-scrip shall not change on account of the transfer of the e-scrip.
5	**Trade Notice No. 16/2022-23 dated September 06, 2022**	**The DGFT extends the last date for uploading e-BRCs** The DGFT has extended the last date for uploading of all e-BRCs, where ROSCTL scrips have been issued for shipping bills till September 30, 2022.

REGULATORY
From the Judiciary

HC sets aside CLB order dismissing company petition without hearing shareholder on 'maintainability'

Dinesh Jhunjhunwala vs. Citixsys Technologies Ltd. & Ors.

CO.A(SB) 21/2016 & Co.Appl. No. 1343/2019

In the instant case, the CLB had dismissed the Dinesh Jhunjhunwala i.e Shareholder ("Appellant") petition under Section 397/ 398 of the Companies Act against oppression and mismanagement in the Respondent -Company (Citixsys Technologies Ltd. & Ors) on the ground that Appellant and other shareholders had failed to constitute 1/10th of the total number of members of the Respondent-Company as required under Section 399 of the Companies Act, 1965 on the date of filing the company petition.

The HC noted that the Respondent- Company had merely produced the register of members before CLB and had not filed any application before CLB for challenging the maintainability of the petition. The transfer of shares had taken place prior to filing of petition by the Appellant and the CLB placed reliance on the register of members, without giving any opportunity to the Appellant to challenge the entries made therein, while dismissing the petition on grounds of maintainability.

High Court also considered the decision made in **Dayagen Pvt. Ltd[2008 (105) DRJ 29]**, wherein it was held that a petition could be dismissed at a preliminary stage only if the claim put forward by the applicant could not be established even if all the allegations made in the petition were accepted to be true.

HC quashes Magistrate's order indirectly granting SARFAESI relief to "defaulting borrowers

Phoenix ARC Pvt. Ltd. & Anr (Petitioner) vs State of Maharashtra & Ors (Respondent)

Writ Petition No. 9749 of 2021

In September 2014, the Borrowers had approached Religare Finvest Limited ('Religare') for a loan. The said loan was secured by a registered mortgage created by Borrowers in favour of Religare. Thereafter, the Borrowers committed defaults in repayment of the said loan which led to Religare classify Borrowers' account, as a NPA. Thereafter by a Deed of Assignment, Religare, unconditionally and absolutely, assigned all its right, title, interest and benefit under the said loan agreement to the **Phoenix ARC Pvt. Ltd (**Petitioner), and in that capacity, Phoenix ARC issued notice under SARFAESI Act to the Borrowers calling

upon to make payment which was denied by them. Since the Borrowers had failed and neglected to discharge in full the outstanding loan amount, the Petitioner took symbolic possession of the secured asset.

Simultaneously the Petitioner filed an application under Section 14 of the SARFAESI Act seeking the assistance of Respondent for taking physical possession of the secured assets. The Additional Respondent declined to assist the Petitioner in taking possession of the secured assets after holding that the application filed by Petitioner under SARFAESI Act was legal and valid.

Aggrieved, Petitioner approached the HC which observed that the jurisdiction of the Respondent under Section 14 of the SARFAESI Act was purely ministerial and limited only to assisting secured creditors in taking possession of secured assets and nothing more. The Respondent had not only transgressed the jurisdiction vested in him under Section 14 of the SARFAESI Act but had also acted contrary to it by disposing of Petitioner's application without granting assistance to the Petitioner in recovering possession of their secured assets but in fact granting relief (directly or indirectly) to borrowers. The HC observed that the proceedings adopted by Petitioner to secure possession of its security interest had been effectively scuttled and resulted in relief being granted to defaulting and non-cooperative borrowers. Accordingly, setting aside the order of the Respondent, the HC remanded the matter back with a direction that the same be heard and disposed within a period of six weeks in accordance with the provisions of Section 14 of the SARFAESI Act.

Authors' Note:

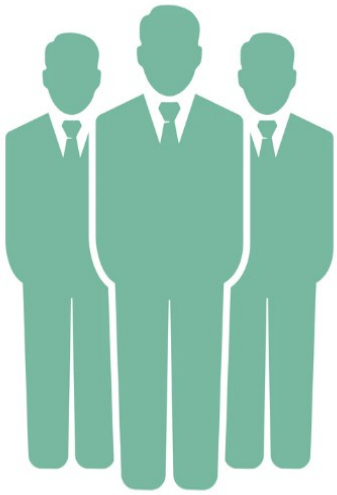
It would be interesting to note that in the present case, the HC also remarked that it was shocked by the grant of reliefs to the borrowers not only in the teeth of the provisions of Section 14 but also despite the fact that these borrowers had not even contested the steps taken by the Petitioner under Section 13 for enforcement of its securing interest.

SAT upholds penalty on Managing Director, relatives for takeover of company without making open offer

Rajiv R. Kotia vs. Shilpa Amit Kotia & Ors.

Appeal No. 337 of 2020

In the instant case, Appellant Rajiv Kotia and his relatives were alleged to have committed violation of various provisions of the SAST Regulations. The issue is regarding the alleged takeover of Sungold Capital Limited ("Sungold") by the Rajiv Kotia (present Appellants) in breach of the provisions of the SAST Regulations. Appellant Rajiv Kotia was already a promoter as well as the Managing Director of the Sungold . SEBI conducted an investigation and found that Rajiv Kotia had acquired more than 20% shares of the Company either directly or thru relatives which SEBI investigation revealed that they were near relatives and were acting in concert. It was also found that they have not fulfilled the requirement of making an open offer as required by SAST regulations. Therefore, a show cause notice was issued to them by SEBI. The Appellants submitted that they were not acting in concert and the trading in the shares of the company was earlier suspended, causing the Rajiv Kotia (appellants) to acquire the shares on different dates, whereas SEBI is falsely considering



only the dematerialization dates. Not convinced with this contention of the Appellants, SEBI passed an order imposing a penalty on the Appellants for the acquisition of the shares and the takeover of the company without making an open offer.

Aggrieved by this order of SEBI, the Appellants approached the SAT which noting that it was not disputed that if the acquisitions by all the Appellants were taken cumulatively into consideration, the necessity to make an open offer would arise, observed that the definition of the term 'acquirer' in terms of SAST Regulations implied that the acquisition of shares by a person with any person acting in concert with him was required to be taken into consideration and the definition of 'persons acting in concert' implied that there was some agreement or understanding either direct or indirect to co-operate for acquiring the shares. The provision further deemed 'persons acting in concert' to include any relative of the person within the meaning of Section 6 of the Companies Act. Thus, as all the Appellants were relatives and therefore deemed to be 'persons acting in concert', the SAT observed that there was nothing on record to establish that the Appellants were indeed not 'persons acting in concert' and accordingly, dismissed the appeal against the SEBI order and penalized the Appellants.

SC holds approval of resolution plan for one borrower doesn't discharge co-borrower, Affirms NCLAT order

Maitreya Doshi (Appealant) vs. Anand Rathi Global Finance Ltd. & Anr (Respondent)

Civil Appeal No. 6613 of 2021

The Appellant is a suspended Director of Doshi Holdings. **Anand Rathi Global Finance Ltd. (**Respondent), a NBFC (hereinafter referred to as Financial Creditor) disbursed loan to Premier Ltd. As per the Loan-cum-Pledge agreements Doshi Holding pledged shared held by it in Premier Ltd. in favour of NBFC as security of Loan. Respondent called upon Premier Ltd. and Doshi Holdings Pvt Ltd., to pay the entire outstanding loan amount and since they were not able to pay the amount, Respondent filed a petition against both of them before NCLT for initiation of CIRP which was admitted by NCLT.

Aggrieved by this, Appellant approached the National Company Law Appellate Authority (NCLAT) which upheld the decision of the NCLT, which caused the Appellant to approach the SC. Remarking that the same amount could not be realised from both the Corporate Debtors, the SC observed that if the dues were

realised in part from one Corporate Debtor, the balance may be realised from the other Corporate Debtor being the co-borrower. However, once the claim of the Financial Creditor was discharged, there could be no question of recovery of the claim twice over. Further, placing reliance on **Lalit Kumar Jain vs Union Bank of India [(2021) 9 SCC 321]**, the SC observed that if there were two borrowers or if two corporate bodies fell within the ambit of Corporate Debtors, there was no reason why proceedings could not be initiated against both the Corporate Debtors and the approval of a resolution in respect of one borrower would not discharge the co-borrower. Accordingly, upholding the decision of the NCLAT of separate insolvency proceedings for same debt, against principal borrower and guarantor, the SC dismissed the appeal filed by the Appellant against the NCLAT order.

SC affirms SAT order acquitting Gammon Infra's ex-Managing Director in insider trading case

SEBI vs. Abhijit Rajan
Civil Appeal No.563 of 2020

Mr. Abhijit Rajan (Respondent) was the Chairman and Managing Director of Gammon Infrastructure Projects Limited ('GIPL') till September 09, 2013 . In the year 2012 GIPL was awarded a contract by National Highways Authority of India. GIPL entered into two shareholders agreements with another company Simplex Infrastructure Limited ('SIL'). Under these agreements, GIPL was to invest in one of the SPV and SIL was to invest in other SPV for their respective projects. The Board of Directors of GIPL passed a resolution authorizing the termination of both shareholders agreements. Thereafter, Respondent sold majority of shares (approx.) held by him in GIPL on August 22, 2013. Subsequently, GIPL made a disclosure to the NSE and the BSE regarding the termination of two shareholders agreements on August 30, 2013. The Respondent later resigned from the post of Chairman and Managing Director of GIPL in August 20, 2013. In a preliminary enquiry SEBI held that Respondent violated the provisions of the SEBI Act and consequently restrained him from buying, selling or dealing in securities and accessing the security markets directly or indirectly. Further SEBI passed an order by which it was held that the Respondent was guilty of insider trading and hence liable to disgorge the amount of unlawful gains made by him. Aggrieved, the Respondent approached the SAT which observed that he was in dire need to sell the shares at that time for the purpose of Corporate Debt Restructuring package and hence could not have been said to have indulged in trading on the basis of information within his knowledge.

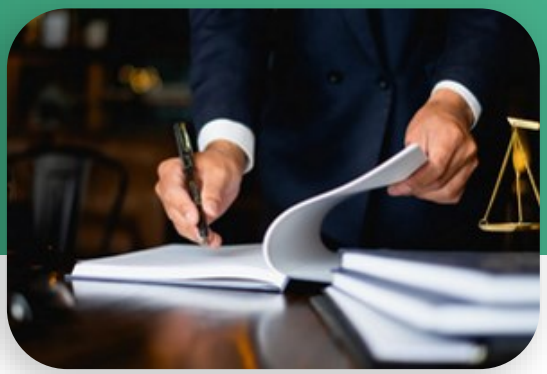
Aggrieved, SEBI approached the SC which upheld the findings of the SAT, observed that sale by a person at a time when the price of the securities was likely to shoot up on account of price sensitive information coming into the public domain or the purchase by a person at a time when the price of shares was likely to go downward due to price sensitive information getting published, could not come under the category of insider trading. Further, if a person sold his stocks without waiting for the market trend to show up, it could only be taken as a sale, devoid of any desire to make unlawful gains, even if it could not be termed as a distress sale. Moreover, an attempt by the insider to encash the benefit of the information is not exactly the same as mens rea, and the court could always test whether the act of the insider in dealing with the securities, was

an attempt to take advantage of or encash the benefit of the information in his possession. Thus, in light of the above observation, the SC set aside the appeal of SEBI.

Authors' Note:

It would be interesting to note that in the present case, the SC observed that if a person entered into a transaction which was surely likely to result in loss, he could not be accused of insider trading. In other words, the actual gain or loss was immaterial, but the motive for making a gain was essential. The Apex Court also observed that despite such a natural phenomena, if a person sells his stocks without waiting for the market trend to show up, it can only be taken as a sale, devoid of any desire to make unlawful gains, even if it cannot be termed as a distress sale.

REGULATORY
From the Legislature



Revision of Scope of Small Company

MCA vide Notification No. G.S.R. 700(E) dated September 15, 2022 has amended the the Companies (Specification of Definition Details) Rules, 2014 to relax the threshold limits provided for Small Company.

Such relaxation is as follows:

Particulars	Old Provision	New Provision
Definition of Small Company	Paid-up Capital ≤ INR 2 Crore; and Turnover ≤ 20 Crore	Paid-up Capital ≤ INR 4 Crore; and Turnover ≤ 40 Crore

Author's Note:

Such amendment has increased the ambit of Small Company by virtue of which privileges will apply to greater extent, as provided by the Companies Act, 2013 to Small Companies. Some instances are like no requirement of preparation of Cash flow statements, holding 2 board meetings instead of 4, and reduced amount of penalties etc. This increase in scope would help more start-ups and MSME sector to operate in company framework with lesser burden of compliances

MCA has amended the Corporate Social Responsibility ("CSR") Policy

MCA vide Notification No. G.S.R. 715(E) dated September 20, 2022 has introduced the Companies (Corporate Social Responsibility Policy) Amendment Rules, 2022 to amend the Companies (Corporate Social Responsibility Policy) Rules, 2014.

Brief of such amendments are as follows:

Author's Note:

Aspect	Particular
CSR Applicability	Now, if any company has any amount in its Unspent Corporate Social Responsibility Account shall constitute CSR Committee and comply with the other CSR provisions. As per prevalent rules prior to the current amendment, the requirement of making CSR expenditure and other compliances as per Rule 3(2), even after the company ceases to be covered within the threshold limits. However such requirement has done away with by way of this amendment.

Aspect	Particular
CSR Activities	Now MCA has also widened the scope of implementing agency by allowing the companies to undertake the CSR activities through Section 8 Company (NPO), or a registered public trust or a registered society, in form of hospital, educational institution or university, charitable institution or fund, and religious/charitable trust as exempted under sub-clauses (iv), (v), (vi) or (via) of clause (23C) of Section 10 of
Impact Assessment	As earlier, a company undertaking impact assessment may book the expenditure towards CSR for that financial year, which shall not exceed 5% of the total CSR expenditure for that financial year or 50 lakh rupees, **whichever is less**. Now, such threshold limit for booking expenditure has been changed to 2% of total CSR expenditure for that financial year or 50 lakh rupees, **whichever is higher**.
Annual Report on CSR Activities	The same has now been rationalized by omitting the requirement of mentioning the details of each project (on-going and others).

~~Such amendment was much awaited from MCA. Considering that the monitoring of CSR activities will~~ continue to be required for amount spent from the unspent CSR account, the CSR committee will have to be continued and can't be resolved.

Further, MCA vide this amendment has introduced a new class of entity will may act as Implementing Agency. And increase in limit will enable companies to undertake comprehensive impact assessment for large scale CSR projects and account for the same towards their CSR obligation.

Relaxation of Filling Fee of Form DIR-3-KYC

MCA vide General Circular No. 09/2022 dated September 15, 2022 has now allowed the filing of e-form DIR-3-KYC and web-form DIR-3 -KYC without filing fee upto October 15, 2022 instead of September 30, 2022 as earlier

SEBI has restricted Stock Brokers those provide algorithmic trading facility

SEBI vide circular no. SEBI/HO/MIRSD/DOP/P/CIR/2022/117 dated September 02, 2022 has restricted stock brokers providing algorithmic trading facility to investors through their platforms. Some unregulated platforms offering algorithmic trading services/strategies to investors for automated execution of trades and promoting such services by making high return claims. So, in order to prevent acts and instances of mis-selling and to protect the interest of investors in the securities market, SEBI has been decided that stock brokers who provide services relating to algorithmic trading shall not:

- directly or indirectly make any reference to the past or expected future return/performance of the algorithm; and/or
- directly or indirectly associate with any platform providing any reference to the past or expected future return/performance of the algorithm.

Stock brokers already making reference or in association as abovementioned shall remove the same from their website and/or disassociate themselves from the platforms within seven days from date of issue of circular.

Modification in the Operational Guidelines for Foreign Portfolio Investors

SEBI vide circular no. AFD/P/CIR/2022/125 dated September 26, 2022 has made modification in the Operational Guidelines for Foreign Portfolio Investors ("**FPIs**"), Designated Depository Participants ("**DDPs**") and Eligible Foreign Investors ("**EFIs**") pertaining to FPIs registered under Multiple Investment Managers ("**MIM**") structure. Such operational guidelines was issued vide circular no. IMD/FPI&C/CIR/P/2019/124 dated November 05, 2019. Earlier, the designated depository participant is required to grant certificate of registration, bearing the registration number generated by NSDL in a centralised manner. Now, the designated depository participant is required to grant the certificate of registration, bearing the registration number generated by SEBI.

Foreign Investors can now Participate in Exchange Traded Commodity Derivatives thru FPI

SEBI vide circular no. SEBI/HO/MRD/MRD-RAC-1/P/CIR/2022/131 dated September 29, 2022 has allowed foreign investors to participate in Indian Exchange Traded Commodity Derivatives ("**ETCDs**") through the Foreign Portfolio Investors ("**FPI**") route, subject to conditions prescribed by SEBI. And considering the non-participation by Eligible Foreign Entities EFEs in ETCDs in spite of more than three years since the EFE framework came into force, SEBI has repealed the same vide this circular.

To begin with, FPIs will be allowed to participate in cash settled non-agricultural commodity derivative contracts and indices comprising such non-agricultural commodities. FPIs desirous of participating in ETCDs shall be subject to risk management measures applicable, from time to time.

RBI Introduced Guidelines on Digital Lending

Aspect	Particulars
Applicability	Digital lending extended by • All Commercial Banks • Primary (Urban) Co-operative Banks, State Co-operative Banks, District Central Co-operative Banks; and
Loan Disbursal, Servicing and Repayment	Loan Disbursal, Servicing and Repayment shall be ensured by REs to be executed directly between RE's bank account and borrower's bank account except for disbursals covered exclusively under statutory or regulatory mandate.

RBI vide its notification no. RBI/2022-23/111 dated September 02, 2022 has accepted the guidelines on

Aspect	Particulars
Fees/Charges to LSP	REs shall ensure that any fees, charges, etc., payable to LSPs are paid directly by them and are not charged by LSP to the borrower directly.
Upfront Disclosures to Borrowers	REs shall disclose these following terms upfront in Key Fact Statement and to be provided to borrower before execution of contract: • Rate of Penal Interest/ Charges • Annual Percentage Rate (APR) i.e. annualised rate charged to the borrower of a digital loan. • Other disclosures-the recovery mechanism, details of grievance redressal officer Any fees, charges, etc., which are not mentioned in the KFS cannot be charged by the REs to the borrower at any stage during the term of the loan
Assessing the borrower's creditworthiness	REs shall capture the economic profile of the borrowers covering (age, occupation, income, etc.), before extending any loan over their own DLAs and/or through LSPs engaged by them, with a view to assessing the borrower's creditworthiness in an auditable way. REs shall ensure that there is no automatic increase in credit limit unless explicit consent of borrower is taken on record for each such increase.

Author's Note:

This move will discourage ambiguity and bad practices as is prevalent in the market and led to accountability on lenders. Responsibility on the REs will generate transparency in the system, which always leads to trust and eventually to the growth of the sector as well. This restructured relationship between LSPs and REs will also end up safeguarding the eventual borrower from the harassment they face today.

RBI Allowed Foreign Inward Remittances Through Bharat Bill Payment System

RBI vide its circular no. RBI/2022-23/115 A.P. (DIR Series) Circular No. 14 dated September 15, 2022 has decided to allow foreign inward remittances received under the Rupee Drawing Arrangement (RDA), to be transferred to the KYC compliant bank account of the biller (beneficiary) through Bharat Bill Payment System (BBPS) in addition to electronic mode, such as, NEFT, IMPS, etc., subject to the conditions applicable before.

Author's Note

The BBPS, conceptualized by RBI and driven by the National Payments Corporation of India (NPCI), is a one-stop destination for payment of various bills like electricity, gas, water, DTH, among others. It offers an interoperable platform for standardized bill payment experience, centralised customer grievance redress mechanism, uniform customer convenience fee, among others. This amendment has been done with the intention to benefit those senior citizens who were dependent on their children or family living overseas, for remittance, among other as stated by the RBI Governor.

INTERNATIONAL DESK

Members of Asia Initiative agree on high-level work plan for tax transparency

The members of Asia Initiative of OECD's Global Forum on Transparency and Exchange of Information for Tax Purpose agreed on the need for baseline measures as well as complementary activities for enhanced co-operation on specific areas.

The aim of the baseline actions is to inter-alia ensure the following:

- An effective implementation and use of the tax transparency standards, including through the participation to the Convention on Mutual Administrative Assistance in Tax Matters;
- Setting up of an efficient exchange of information (EOI) function;
- Monitoring of EOI activity;
- Measuring the impacts and benefits of EOI in revenue mobilisation to the extent possible;
- Building EOI capacities among tax auditors and EOI officers;

In addition to the above, the members also approved the annual publication of an Asia Initiative progress report and India agreed to host two trainings of the Asia Initiative in February 2023 and September 2023. The members of the Asia Initiative will meet again in Sevilla on November 8, 2022, to discuss the progress of Asia Initiative during the Global Forum Plenary Meeting.

OECD releases Tax Morale Report, focusing on trust between Tax Administrators and MNEs

A report titled "Tax Morale II: Building Trust between Tax Administrations and Large Businesses" was released by the OECD, highlighting the importance of building trust between Tax Administrations and Large Business Corporations, i.e., MNEs.

The report lists actions that could be taken to build and enhance the much-required trust between MNEs and tax administrations such as:

- Encouraging the development of country-level strategies to build trust and tax morale;
- Enhancing existing capacity building, and where necessary developing new capacity building tools, guidance and programmes to respond to the demands identified;
- Reinvigorating the role of business principles/best practices;
- Exploring the feasibility of voluntary multilateral dialogue;
- Undertaking further research on what influences effective relationship building;

- Supporting an increased commitment by all stakeholders to building trust and tax morale.

The report concludes with OECD's assurance that it will continue to identify ways to support both tax administrations and MNEs in building trust, improving communication and increasing tax morale and will also continue to encourage research, dialogue and innovation on tax morale, especially in developing countries.

World Bank releases report on implementation framework for Global Minimum Tax, provides roadmap, decision-making matrix for developing countries

The World Bank released a report titled "The Global Minimum Tax: from agreement to implementation", which focuses on implementation of the GMT and analyses GMT's key elements and the practical implications for the countries, including information on corporate tax policy and incentives, the policy options available to countries to implement GMT, and recommendations for an implementation roadmap. Emphasizing on the importance of Pillar two in developing countries, the report takes note of OECD's estimation that the minimum effective tax rate will result in the collection of USD 150 billion in revenues annually and will have implications for many countries.

Although actions needed will depend on circumstances of the countries, the report urges the countries to take steps to analyse their corporate tax regimes to consider the following implementation options:

- Status quo – no action;
- Introduction of a Qualified Domestic Minimum Top-up Tax;
- Evaluation and reforming of tax incentives to be in line with GMT;
- Introduction of the Income Inclusion Rule;
- Introduction of the Undertaxed Payments Rule;
- Consideration of broader corporate tax reforms including rate policy;
- Optimisation of tax incentive offerings within the GMT rules;

The report recommends that countries take concrete steps now to prepare for the introduction of the GMT, such as:

- Ensuring compatibility with GMT Rules and evaluation of the implementation options;
- Carrying out preparatory work for implementation;
- Engaging with stakeholders to bring greater certainty to taxpayers, minimize disputes, and facilitate policy development;

The report concludes by expressing the World Bank's readiness to support the developing countries in implementing the rules including regional seminars with deep dives on the rules, technical assistance to countries on impact assessments, analysis of policy options, evaluation of tax incentives, and legislative drafting.

SPARKLE ZONE

Tariff Classification of Parts – Heads I win, Tails you Lose!

Bird's eye view on classification system

Ever since the cross-border transactions were conducted around the world, there was a need for a formal way to classify the traded goods. The classification helps in identifying the duties, protect Revenue's interest, political interests, etc. The HS systems has been so successful in meeting its objectives that the same has been adopted and implemented in the domestic trade as well.

In India, the erstwhile Excise and the current GST law also adopts the HS tariff classification system. While the tariff code is essentially a list of codes with the corresponding goods classifiable therewith, it has its fair share of controversy. A major reason being that the fact that the goods today are so technical that it becomes difficult to classify the same in absence of a specific description. Although principles and explanatory notes for ascertaining the tariff classification of goods exists, it is seen that, more often than not, the said becomes a medium for fraudsters to manipulate the system to meet their agenda.

Recent Development

Arguably, one of the fastest growing and major industries throughout the world is transportation (aircraft, vehicles, locomotives, etc.). Given the nuances involved in these engineering marvels, it is difficult for a common-man to ascertain the correct code. Since ages, the classification of parts of railways have been under dispute. This dispute can be majorly attributed to Notes 2 and 3 of Section XVIII.

Section Note 2 inter alia provides that parts of railways, which are classifiable under other headings (other than those of Section XVII i.e., 86, 87 and 88), are to be classified therein. Whereas, Note 3 inter alia provides that parts of railways, which are used solely and principally with the Railways, are to be classified under the principal headings itself (i.e., Section XVII), even if it is classifiable elsewhere. Worthwhile to mention that the principal heading i.e., Chapter 86 provides a lower tax rate compared to other headings.

In RE: **Westinghouse Saxby Farmer Limited [2021-TIOL-121-SC-CX-LB]**, the SC had held that 'relays' are classifiable as parts of railway under Heading 8608 of the Excise Tariff.

The decision came by the Court giving precedence to the 'principal use test' of Section Note 3 vis-à-vis Section Note 2. Aggrieved by the judgement, the Revenue had preferred a review petition before the SC against the order.

Meanwhile, the CBIC issued Instruction No. 01/2022 – Customs dated January 05, 2022, essentially clarifying their position of the classification of parts of vehicles of Section XVII. It was instructed to the officers that the part of vehicles are to be classified, basis the relevant facts, explanatory notes, and the plethora of judicial precedents in this regard, instead of following the principle laid down by the SC in Westinghouse (supra) in a blanket manner for all parts. In the said instruction, the CBIC had categorically mentioned that the Revenue had preferred a review petition against the SC order.

The issue at hand

Now, the Hon'ble SC has finally dismissed the Revenue's review petition. Given that, the CBIC has come up with another instruction dated October 03, 2022 essentially clarifying that the earlier instructions remains to be in force, despite the dismissal of the review petition by the SC. Thus, even if the SC has pronounced its judgement on the subject matter of classification of parts of vehicles, which is the law of land u/ Art. 142 of the Constitution, the same is not be followed.

This move by the CBIC raises a question on the authority of the Apex Court. Can such an instruction be valid, which essentially undermines the applicability of the SC's judgement? Unfortunately, this a not a new phenomenon, as the Revenue in the past have gone nullify the Apex Court's judgements, by either amending a provision under a particular law, or a notification, etc.

Such legislative steps, which essentially negate the judicial precedents, are a blow to the principle of separation of powers. The purpose of separation of powers is to prevent abuse of power by a single person or organ. It guards the society against the arbitrary, irrational and tyrannical powers of the state and allocate each function to the suitable organs of the state for effective discharge of their respective duties.

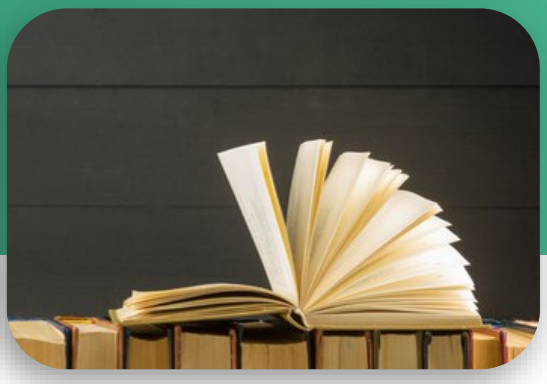
Articles 121 and 211 of the Constitution provide that the Legislature, generally, cannot discuss the conduct of the judges of the High Courts or the Supreme Court. While, issuing an instruction, undermining the applicability of a SC judgement is not discussing the conduct of a judge per se, it however, does undermine the credibility of the Judicial

system of the Country as well as the Constitution.

Parting thoughts

The above discussions clearly demonstrate that there is nothing new in the Revenue trying to undermine the applicability of a SC judgement. However, such acts of the Revenue often trigger more litigation disputes, rather than mitigating it. However, as things stand, in the case of classification of parts of vehicles, it would be advisable for the trade and industry to thoroughly ascertain the correct tariff classification basis the relevant notes and judicial precedents. Whether a SC judgement is available in favour or not, as a ground reality, the Revenue Departments are likely to challenge classification under headings attracting lower rates of taxes. Moreover, the situation today for the Revenue is such that 'Heads I win, Tails you lose!'

GLOSSARY



Abbreviation	Meaning
AA	Adjudicating Authority
AAAR	Appellate Authority for Advance Ruling
AAR	Authority for Advance Ruling
ADD	Anti-Dumping Duty
AE	Associated Enterprise
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
AO	Assessing Officer
AOP	Association of Persons
APA	Advanced Pricing Agreement
ARE	Alternate Reporting Entity
ATO	Australia Taxation Offfice
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
BOI	Body of Individuals
CAG	Comptroller and Auditor General of India
CAT	Common Aptitude Test
CAROTAR	Customs (Administration of Rules of Origin under Trade Agreements) Rules, 2020
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
CG	Central Government
CGST Act	Central Goods and Services Act, 2017
CIRP	Corporate Insolvency Resolution Process
CIT	Commissioners of Income Tax
CLB	Company Law Board
CTH	Custom Tariff Heading
Cus	Customs Act, 1962
CRPC	Code of Criminal Procedure Act, 1973
CVD	Countervailing Duty
CUP	Comparable Uncontrolled Price
DDT	Dividend Distribution Tax
DRC	Dispute Resolution Committee
DRI	Directorate of Revenue Intelligence
DTAA	Double Taxation Avoidance Agreement
ECL	Electronic Cash Ledger
EOIR	Exchange of Information on Region
FDI	Foreign Direct Investment
Fin	Finance Bill Finance Bill, 2022
FM	Finance Minister
FMV	Fair Market Value
FPI	Foreign Portfolio Investors
FTP	Foreign Trade Policy
FT&TR	Foreign Tax and Tax Research

Abbreviation	Meaning
G2B	Government to Business
GMT	Global Minimum 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
HSN	Harmonized System of Nomenclature
IBBI	Insolvency and Bankruptcy Board of India
IBC	Insolvency and Bankruptcy Code
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
INR	Indian Rupees
InvITs	Infrastructure Investment Trusts
IT 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
LR	Liquidation Regulation
LTC	Long-Term Capital Gains
MAM	Most Appropriate Method
MAT	Minimum Alternate Tax
MNEs	Multi National Entities
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-Fungible Tokens
NELP	New Exploration Licensing Policy
NHB	National Housing Bank
NPA	Non-Performing Assets
NPS	National Pension System
NRI	Non-Resident Indian
OBU	Offshore Banking Unit

GLOSSARY

Abbreviation	Meaning
OECD	Organization for Economic Co-operation and Development
OPC	One Person Company
PAN	Permanent Account Number
PBPT	Prohibition of Benami Property Act, 1988
PCIT	Principal Commissioners of Income Tax
PIV	Pooled Investment Vehicle
PMLA	Prevention of Money Laundering Act, 2002
PSU	Public Sector Undertaking
PY	Previous Year
RBI	Reserve Bank of India
REITs	Real Estate Investment Trusts
RE	in the matter of'
REs	Regulated Entities
RIC	Road and Infrastructure Cess
ROC	Registrar of Companies
RTGS	Real Time Gross Settlement
RU	Review Unit
SAD	Special Additional Duty
SAED	Special Additional Excise Duty
SARFAESI	Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest
SAST regulations	Substantial Acquisition of Shares and Takeover Regulations
SCGT	State Goods and Services Tax
SCN	Show Cause Notice
SCRA	Securities Contracts (Regulation) Act, 1956

Abbreviation	Meaning
SEBI	Securities and Exchange Board of India
SFT	Statement of Financial Transaction
SIAC	Singapore International Arbitration Centre
SPF	Specific Pathogen Free
SWS	Social Welfare Surcharge
TAN	Tax Deduction Account Number
TCS	Tax Collected at Source
TDS	Taxes Deducted at Source
TNMM	Transactional Net Margin Method
TPO	Transfer Pricing Officer
TP	Transfer Pricing
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
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**

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

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

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

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

Website: **www.gstlegal.co.in**

RAJAT CHHABRA

Founding Partner

rajatchhabra@taxcraftadvisors.com

+91 90119 03015

VISHAL GUPTA

Founding Partner

Vishal.gupta@vmgassociates.in

+91 98185 06469

GANESH KUMAR

Founding Partner

ganesh.kumar@gstlegal.co.in

+91 90042 52404

PUBLISHERS & AUTHORS

ONE-STOP DESTINATION FOR TAXMAN AND TAXPAYER

Taxindiaonline.com ('TIOL'), is a reputed and FIRST Govt of India (Press Information Bureau) recognised ONLINE MEDIA and resource company providing business-critical information, analyses, expert viewpoints, editorials and related news on developments in fiscal, foreign trade, and monetary policy domains. It covers the entire spectrum of taxation and trade that includes ECONOMY, LEGAL INFRASTRUCTURE, CORPORATE, PUBLIC ADMINISTRATION, INTERNATIONAL TRADE, etc. TIOL's credibility and promptness in providing information with authenticity has made it the only tax-based portal recognized by the various arms of the Government. TIOL's audience includes the ranks of TOP POLICY MAKERS, MINISTERS, BUREAUCRATS, MDs, CEOs, COOs, CFOs, FINANCIAL CONTROLLERS, AUDITORS, DIRECTORS, VPs, GMs, LAWYERS, CAs, etc. It's growing audience and subscriber-base comprises of multinational and domestic corporations, large and premium service providers, governmental ministries and departments, officials connected to revenue, taxation, commerce and more. TIOL also has a huge gamut of various business organisations relying on the exclusivity of its information besides the authenticity and quality. TIOL's credibility in making available wide coverage of different segments of the economy along with its endeavour to constantly innovate makes it stand at the top of this market.

TCA TAXCRAFT ADVISORS

RAJAT CHHABRA
(Partner)

KETAN TADSARE
(Associate Partner)

SAURABH CHAUDHARI
(Manager)

AMIT DADAPURE
(Manager)

RAGHAV PRASAD
(Associate)

GARGEE PADHI
(Associate)

GLS GST LEGAL SERVICES

GANESH KUMAR
(Managing Partner)

BHAVIK THANAWALA
(Partner)

RUSHABH LUHAR
(Manager)

GAURANG JOSHI
(Associate)

PRIYANKA NATHBAWA
(Associate)

SINI ISAAC
(Associate)

VMG & ASSOCIATES

VISHAL GUPTA
(Partner)

ALOK KAUSHIK
(Associate Partner)

PRASHANT SHARMA
(Manager)

SAHAJ CHUGH
(Executive)

GAGANDEEP KAUR
(Executive)

TAXINDIAONLINE.COM

RICHA NIGAM, Marketing Head, TIOL Pvt. Ltd.

richa@tiol.in | +91 98739 83092