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A TREASURY OF KEY TAX & REGULATORY DEVELOPMENTS

VISION 360

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EDITORIAL

Vision 360: Opportunities & Challenges Ahead...

Crisis in Euresian continent have had its impact on every business decision across the globe this past month in one or the other way. Personal lives are no exception. The situation has turned grim in no time forcing everyone to think of 'what if' if their worst fear becomes reality.

It is a difficult time like no other but let's remember, previous couple of years haven't been easy either. We all witnessed financial impact of virus outbreak in Wuhan, a tier three city of China, on the global trade. We experienced disruption of global supply chain when 'Ever Given' was stuck in Suez Canal for six days, and many more. By now it is safe to say, we know how to face backlashes like these.

It now also affirms that, international trade has become a close-knit affair than ever before. It has empowered businesses to efficiently function world-wide and tap opportunities that seemed beyond reach so far. While this is a boon, it has also become increasingly vulnerable to adverse events taking place all the way across the globe.

Simply put, global trade has become volatile than ever before and hedging the risk simultaneously with tapping the opportunity is need of the hour. And without any doubt this cannot be achieved without being abreast of latest developments in regulatory, tax, customs and trade laws space, which maintain pace just as rapid as the change in global trade horizon.

Recent Comprehensive Economic Partnership Agreement between India and the UAE, which was concluded in record 88 days, is a perfect example of how fast the changes are inbound. Notably, this Agreement provides zero-duty access to 90% of Indian products in the UAE and will be a key change-maker in Indian sub-continent.

In the parallel, Government of India is also in discussion with the UK for closure of India-UK Free Trade Agreement, which seeks duty exemptions for labour-intensive exports, including textiles. This is in addition to demand for easier market access for fisheries, pharmaceuticals, and agriculture products. Next round of discussions is scheduled on 07th and 18th of March. This discussion by design, is also exploring the possibility for a mini-FTA, a temporary agreement until the comprehensive discussions are concluded. So far, India has a positive trade balance with the UK, which is fast diminishing, and the India-UK FTA will certainly help improve the situation.

While this FTA is a top priority, the news is, India plans to conclude at least six other trade agreement with various countries before end of year 2022. Certainly, an ambitious plan which businesses need to watch out for.

Speaking of regulatory developments, Supreme Court in its recent decision yet again upheld People's priority over Government's priority. It gave precedence to Bank's charge under SARFAESI Act over tax dues. A decision that re-affirms the very reason for which SARFAESI was created.

In Indirect tax space, the Advance Ruling Authorities in a bold move allowed classification of AC used in Railway under Chapter 86, which attract lower tax rate. This is noteworthy given that it involves test of 'sole and principal' use as applicable to Chapter 86, 87 and 88 (which Automobile, Railways – locomotive and Aircraft, respectively) and has been a subject matter of multiple Supreme Court and High Court decisions

Editorial

Vision 360: Opportunities & Challenges Ahead...

with contrary views. The while issue itself have had chequered history. The Indirect tax also saw some changes to GSTN functionality in light of ease of doing business, introducing better HSN search functionality, reducing frequency of filing ITC-04, etc. AT the same time E-invoicing system now becomes applicable with lower threshold, covering more and more assesses in its fold.

The Customs law too witnessed improvements on Implementation of automation in the Customs (Import of Goods at Concessional Rate of Duty) Rules, 2017 with effect from 01 March 2022. Most importantly, the CBIC clarified its position on applicability of SWS upon goods exempt from CBIC, settling multiple disputes and avoiding a controversial and potentially lengthy issue.

As these developments make their way to headlines and board rooms, we at **TIOL**, in association with **Taxcraft Advisors LLP**, **GST Legal Services LLP** and **VMG & Associates**, are glad to publish the 19th edition of its exclusive monthly magazine '**VISION 360**'. We hope that, as always, you will find it an informative and interesting read. We look forward to receiving your inputs, thoughts and feedback, in order to help us improve and serve you better!

Happy Reading!

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

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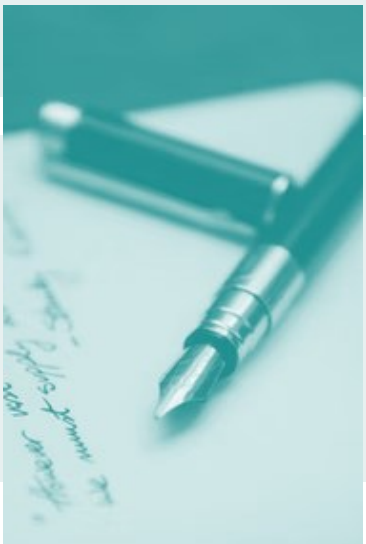

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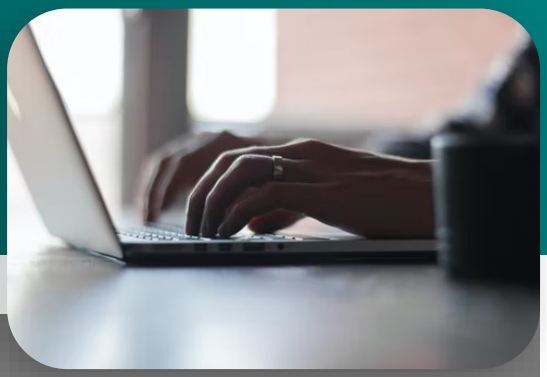


Canon India overturned – An Imperial method of the Legislature to get its way!

Background

Last year, around this time, the Indian importers who had been subjected to litigations by way of notices issued by the DRI, had breathed a big sigh of relief. The relief came in light of the SC judgement in **RE: Canon India Private Limited [2021-TIOL-123-SC-CUS-LB]**, wherein it had been held that the DRI has no authority under law to reassess imports and recover duties under Section 28(4) of the Customs Act. In the absence of necessary authority, the entire proceedings initiated by the DRI by issuing show cause notices were held to be invalid.

However, this relief had been short-lived as the Government, negated this judgement by way of retrospective amendments in the Customs Act, to empower the DRI officers to issue notices u/s. 28(4) of the Customs Act. In the Budget '22, the Government has further proposed to amend Sections 2(34), 3 and 5 of the Customs Act to include DRI, Audit and Preventive Officers, etc. to be designated as 'Proper Officers'.

Now, the question that arises for consideration is whether the Legislature is empowered to notify retrospective amendments to overturn the law declared by the Judiciary. If yes, one may argue that the Legislature enjoys unparalleled power to supercede the declared law. As such amendments are not a new phenomenon, we will have to take a stroll down the road paved by the judicial precedents in this regard.

A brief history

While not the first of its type, but the first to attract global attention, in **RE: Indira Nehru Gandhi vs. Raj Narain [1975 AIR 865]**, the Allahabad HC had set aside the election of Indira Gandhi. While the matter was pending before the Apex Court, the legislature enacted the 39th Constitutional amendment (valid retrospectively) which added Article 392A to the Constitution and stated that the elections of the President, Vice President, Prime Minister and the Lok Sabha Speaker cannot be challenged in any court in the country, and it can be done only before a parliamentary committee.

Thus, the amendment in the Constitution had essentially negated the judgement of the Allahabad HC. However, the SC had held the said constitutional amendment to be unconstitutional. Moreover, this amendment had also met with widespread criticism from around the globe.

In the tax sphere, the most important case in respect to the subject matter is that of **Vodafone [2008-TIOL-602-HC-MUM-IT]**, famously or rather infamously referred as the 'retrospective taxation case'. In May 2007, Vodafone had bought a 67% stake in Hutchison Whampoa for $11 billion. In September that year, the India Government raised a demand of INR 7,990 Crore in capital gains and withholding tax from Vodafone, stating the Company should have deducted the tax at source before making a payment to Hutchison.

Vodafone challenged the demand before the Bombay HC, who ruled in favour of the Income Tax Department. However, the Apex Court in 2012, ruled in favour of Vodafone, holding that the transaction was carried out between two non-resident entities in a contract conducted outside India where the consideration was also rendered outside India. Accordingly, such transaction could not be taxed in India.

However, in 2012, in what was an obvious move to overturn the SC decision in Vodafone, a retrospective amendment was made to make capital gains applicable to transfer of share by a non-resident in a company incorporated abroad if the share derived (directly or indirectly) its value substantially from assets located in India. Thus, the Legislative amendment to the Income Tax Act had overturned the judgement of the SC by taxing a transaction outside India. No doubt the move of the Legislature was widely criticised globally.

It would also be pertinent to note that under the erstwhile Central Excise Rules, excise duty was payable when goods were removed from the factory. In 1979, the Delhi HC had held that if the goods were not removed from the factory but were used by that factory in the further manufacture of other products, there would be no excise duty liability as there was no removal. In the following Budget, the Rules were amended retrospectively w.e.f. 1944 to declare that even captive consumption would be deemed to be a removal.

The Underlying Issue

While only citing a few cases for the sake of brevity, there are umpteen matters where the Legislature has overturned the judicial precedents, wherever, the Courts have not held in their favour. Vide the Finance Bill '22 as well, the Government has held that the Notices issued by the DRI for recovery proceedings from importers, is valid. Thus, even those litigation proceedings, which had been disposed off in light of the Canon India judgement, will now be reopened.

Such retrospective amendments, which essentially negate the judicial precedents, are a mockery of the judiciary and strike 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 Apex Court. While, we understand that overturning a judgement by a retrospective amendment 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.

Under our Constitution, the judiciary has been assigned the function of interpreting laws made by Parliament. In any dispute, the Union or State Governments and the tax payers are adversarial parties and the judgment can be in favour of only one of them. It would be grossly improper to overrule every verdict which is in favour of the taxpayer.

This practice destroys the principle of separation of powers. The Government will thus, never be a losing party because the benefit of a judgment in favour of the assessee or citizen will immediately be taken away by way of overturning the judgement by amending the very basis of the judicial order.

Judicial Actions

It shall be noted that the Apex Court in **RE: The Karnataka Pawn Brokers Assn. and Ors. [Civil Appeal Nos. 5793 of 2008 and 2874-2878 of 2018]** had held that the Legislature cannot set at naught the judgments which have been pronounced by amending the law not for the purpose of making corrections or removing anomalies but to bring in new provisions which did not exist earlier. The Legislature may have the power to remove the basis or foundation of the judicial pronouncement but the Legislature cannot overturn or set aside the judgment, that too retrospectively by introducing a new provision. The legislature is bound by the mandamus issued by the Court.

Similarly, in 2015, in the matter of Netely 'B' Estate, the SC held that the Legislature is competent to amend a law retrospectively so as to remove the lacuna pointed out by the Court and render an earlier decision of the Court ineffective. The legislature cannot, however, directly enact a law with the express object of overriding or revising the judgment of the Court or nullifying its directions to the parties. Also, the amendment must fall within the framework of the Constitution.

It remains to be seen whether the proposed retrospective amendments under the Customs Act are challenged before the Courts or not. At present, the situation is such for the Government that 'Heads I win, Tails you lose!'!

Parting Thoughts

The above discussions, clearly demonstrates that even with judicial constraints, the power to legislate retrospectively on tax matters is almost draconian in nature. However, merely because a power exists does not mean that it has to be exercised. Restraint, more than legislative action, is a much better strategy for building up faith in the tax system and encouraging voluntary compliance with the law.

It is high that the Government realises that taxpayers have to often spend large sums of money on tax litigation. For the most part, the issues involved in such litigation seldom require a court judgment, and should ordinarily be settled at a lower level. However, even when the matters reach the doors of a Higher Court and the taxpayers get their desired judgements, the Legislature, ever so easily, amends the relevant provisions retrospectively and nullifies the judgements.

Now, in the matter of Canon India, it remains to be seen whether the proposed retrospective amendments under the Customs Act are challenged before the Courts or not. At present, the situation is such for the Government that 'Heads I win, Tails you lose!'!

Tax Invasion into the Crypto Sphere!

Much like Mandarin, the very concept of the digital assets consisting of Cryptocurrency and NFTs is all very foreign to most of us, let alone its tax applicability! Accordingly, before delving into the nitty-gritties of the concept and analysing the tax applicability, let us take a short crash course in understanding the meaning of the relevant terms.

Cryptocurrency

Cryptocurrencies are understood to be a digital currency in which transactions are verified and records maintained by a decentralized system based on block-chain technology, using cryptography, rather than by a centralized authority.

NFT – Non-Fungible Tokens

An NFT is a digital asset that represents real-world objects like art, music, in-game items and videos. They are bought and sold online, frequently with cryptocurrency, and they are generally encoded with the same underlying software as many cryptos.

Brief History in India

While the Cryptocurrency transactions began in India in the early 2010s, mainly Bitcoin, others, such as Litecoin, Namecoin, etc. followed suit gradually over the years. While still new, the RBI, vide a press release in 2013, had clarified that virtual currencies are not backed by the Central Bank. Similarly, in 2018, the RBI vide a Circular prevented Commercial and co-operative banks, payments banks, small finance banks, NBFCs and payment system providers from dealing in virtual currencies. This, of course, was a huge blow to the businesses of the crypto exchanges.

However, in March 2020, the Apex Court struck down the RBI circulars calling for a ban on cryptocurrencies. The SC reasoned that the cryptocurrencies are unregulated but not illegal in India. However, the legitimacy of the cryptocurrency and items such as NFTs remained uncertain.

Recent Developments – Income Tax

The Finance Minister in her Budget '22 Speech, proposed to tax crypto transactions of Virtual Digital Assets like Bitcoin and Ethereum @30% income tax. It was also announced that the RBI will launch its own digital currency in FY 2022-23. This is some relief to the crypto traders as the Government seems to be on the path of legitimizing the cryptocurrency.

As regards the taxation on crypto, it must be borne in mind that since the same is not legalised yet by the RBI, it cannot be called as money - however, it does not make it and escape from taxability. An investor earning profits from the sale of cryptocurrency would be liable to pay income tax. For calculating such

income only cost of acquisition is allowed as deduction i.e., no amount pertaining to any other expenditure. However, if the transfer of VDA results into loss, it cannot be set-off against any other income, nor will it be allowed to carried forward to subsequent tax periods - these rules shall be applicable from a notified date.

The Union Budget '22 has also expanded the definition of the term 'property' to include VDA. Thus, the gift of a VDA will become taxable in the hands of the person who has received it w.e.f. 01 April 2022

However for the past, it still remains uncertain whether the VDA would be taxed as Business Income or Capital Gains. In case of frequent traders dealing in high volume VDA, the same is likely to be taxed as Business Income and for those dealing in lower volumes and frequency, mainly for long-term business purpose, it would be classified as Capital Gains. In case of VDA being classified as Business Income, all the direct and indirect expenses will be allowed as deductions from the profits on the sale of the crypto assets. The profits will be added to the other income and taxed as per the income tax slab rates. In the alternative, the VDA being classified as Capital gains, short-term capital gains tax will be leviable if crypto assets are held for less than three years. If the crypto-assets are sold after holding the investment for three years, they will be treated as long-term investments and taxed at 20% with indexation benefit.

Moreover prospectively (from a notified date), any person who pays consideration to a resident for the transfer of a virtual digital asset is required to withhold TDS at the rate of 1%. However, there will be no TDS implication if the consideration is paid by a specified person and does not exceed Rs. 50,000/- (Rs. 10,000/- in case of any other person) in the fiscal year. Further, there shall be no TCS application, where TDS has been paid on VDA.

The Union Budget '22 has also expanded the definition of the term 'property' to include VDA within its fold. Thus, the gift of a VDA will become taxable in the hands of the person who has received it w.e.f. 01 April 2022.

Recent Developments – GST

As regards the taxability of VDAs under GST, it is contemplated that the same would be classified as 'intangible assets' The Chairman of CBIC has remarked that the Government's interpretation is that there is clarity in the law and the commission paid to the operator or an exchange, which is providing a platform for transaction in digital currency, is in a view of service he provides to the users of that platform and, therefore, it is the supply of service which is chargeable to GST.

The media reports suggest that the Central Economic Intelligence Bureau has proposed the CBIC to bring cryptocurrency exchanges under the GST net. Following are the key proposals:

- The act of cryptocurrency mining could be treated as a supply of service as it generates cryptocurrency and charges transaction fees, and as such, should classify as an intangible asset and attract a GST of 18%;
- Taxpayers operating as cryptocurrency miners will be required to register under GST if their annual revenue exceeds Rs. 20 lakhs. GST will be liable on the transaction fee and the currency mined. Consider bringing wallet service providers under the GST purview;

- Trading of cryptocurrency and other related transactions like transfer, storage, accounting etc are also likely to be considered as an act of supply and could be taxed. The transaction value in INR or an equivalent freely convertible foreign currency will be used to determine the value of cryptocurrency and thereby the transaction and subsequent tax liabilities;

- In cases where the buyer and seller are registered as Indian residents and operators, the transaction should be treated as a supply of software. International cryptocurrency transactions by companies registered in India will be treated as import or export of goods and as such will be liable to IGST. Another major reason to consider bringing cryptocurrencies under the GST purview is to curb money laundering and undermining of legitimate currencies.

In view of the above, it can be inferred that even if the CBIC has not yet notified / clarified the position of GST applicability on the trading of / via cryptocurrency, it is most certain that the same would be made exigible to tax. However, there still remains a number of open issues relating to GST on VDAs such as whether transaction fess / reward to miners would also be taxable under GST. Whether GST would be applicable on buying and selling of goods and / or services using crypto.

Parting Thoughts

All in all, it is clear that the Government would be collecting revenue from transfer of VDAs. However, this should be seen as a welcome move instead of a set-back, as it is step further towards legalizing the cryptocurrency in India. The Budget '22 has certainly proven that the cryptocurrency is very much within the radar of Indian taxation. While substantial knowledge has been shared on VDAs under the Income tax, the GST applicability still remains a mystery at large! It remains to be seen whether the coming GST Council meetings or the next Budget '23 will bring about clarity on this front.

INDUSTRY PERSPECTIVE

Mr. Ajay Gupta

Group VP- Accounts and Finance

Conscient Infrastructure Pvt. Ltd.

01 What are your views on Budget 2022 as recently presented by the Hon'ble FM? How does the budget scores in the field of taxation? Further, are you happy with the pronouncements for Infrastructure sector?

In my opinion, Union Budget 2022 is a futuristic budget. The Government has emphasized on development of the Country 25 years from now when India will be entering new century post-independence. Budget 2022 has tried to cover various aspect such as battery swapping policy for EV, revamping of Special Economic Zones, action plan for circular economy to enhance productivity and sustainability, policy to increase solar power generation capacity, introduction of digital rupee based on blockchain model, taxation of digital assets including crypto tokens, polices to further strengthen Atmanirbhar Bharat and Make in India initiative among others.

From Income Tax perspective, the budget has not granted any generic tax benefits by increasing tax rate slabs, however, concessional tax regime u/s 115BAB for new manufacturing companies and capital gains exemption for investment in start-ups has been extended by one year. Further, the Budget aims to achieve simplification and reduction of litigation by announcing key proposal such as voluntarily revision of income tax returns to rectify errors/omissions, litigation management system, streamlining faceless assessment scheme, etc. Further, the profit from digital assets shall be taxed at 30%.

Qua GST, the Government has allowed the transfer of cash from one branch of the Company to another. Further, the GST Council suggestion to not levy interest on ITC wrongly availed but not utilised finds place in this Budget with retrospective impact. Given that many Companies are not able to close their annual accounts and audits by the month of September, extension of time limit to avail credit, make correction and report Credit notes to November 30 of the next FY seems to be beneficial to the taxpayers. Rigorous restrictions are being introduced on the ITC availment, which seem to be now dependent on the accurate and timely tax compliances (including correct tax availment and tax payments) by the suppliers, over which the taxpayer, as a

Mr. Ajay Gupta
Group VP- Accounts and Finance Conscient Infrastructure Pvt. Ltd.

recipient, may have little to no control.

The budget has focused to boost infrastructure. Big infrastructure projects such as expansion of highways in the country by 25,000 kilometers, allocating INR 60,000 crore to the 'Nal-se-Jal' scheme, five river link projects across various states, an additional INR 48,000 crore in the PM housing scheme, and boosting infrastructure development in the North East has been announced. Further, PM Gati Shakti National Master Plan which focuses on developing world-class modern infrastructure and logistics synergy among different modes of movement has been strengthened. Under this plan, seven engines *viz.* roads, railways, airports, ports, mass transport, waterways and logistics infrastructure will be aligned with this framework. This will help in the fields of energy transmission, IT communication, bulk water & sewerage, and social infrastructure

Overall, the budget focuses on futuristic growth of the country keeping India @ 100 in mind.

02 There have been various technology related amendments in tax space. How you think such changes will impact the economy? Do you believe that such changes are aligned with overall long-term growth objectives?

India like most of the progressive economies have shifted to digitalization when it comes to tax compliances. The transparency that these procedures will bring about will ultimately lead to reduced tax evasion and smooth economy. There was a big call for digital technology in almost all industries and job functions during the pandemic.

We see digitisation as a key pillar to improve governance and compliance, by driving greater security, transparency and efficiency in processes – and tax operations are no exception! Government's continuous efforts in digitizing the tax space are a welcome move in the right direction.

Amendments such as the e-way bill, e-invoicing, IT return defaulters tagging, etc. will bring in more transparency in the market and eventually lead to an equal distribution of wealth and reduction in Black Money too.

While we welcome the changes introduced in tax space and recognize its role in maintaining India's economic growth in the long term, these also bring in many practical challenges to the taxpayer in terms of IT systems preparedness, educating and aligning the on-ground team, ensuring timely and correct fling of monthly/annual tax returns. In a way, it also reiterates the very law of nature – 'Adapt to survive'.

Mr. Ajay Gupta
Group VP- Accounts and Finance Conscient Infrastructure Pvt. Ltd.

03 What are your views on restrictions put on availment of ITC by proposed introduction of new Form GSTR 2B? How do you see this affecting the taxpayers?

New Form GSTR 2B has been proposed which will specify the list of invoices against which ITC will be available along with list of ITC that shall be restricted due to various reasons such as – vendor is newly registered under GST, vendor has defaulted in payment of GST or failed to file GSTR 1/GSTR 3B, vendor has availed excess ITC or vendor has failed to make minimum cash payment of GST, etc.

While, Government has been continuously trying to link ITC with payment of GST by the vendor, with this amendment, the Government will actually be able to achieve this. However, the validity of the said proposal shall be challenged under the courts as it shifts the burden of ensuring compliance from the Department to the customer.

Although, it would only be prudent that the taxpayers take steps in this direction by screening the vendors, imbibing stricter tax clauses, amending payment terms, etc. This will allow them to be prepared till the time these provisions are actually implemented.

04 What are your views on RBI's announcement of Monetary policy where the interest rates have been left unchanged? How will this help the realty sector?

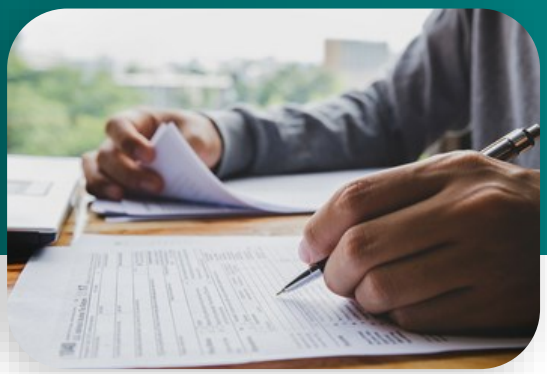
Decision to maintain the *status quo* in relation to the repo rate and reverse repo rates is a welcome move as this was necessary to support growth. Further, this also indicates that there will not be hike in rate of home loans which is a huge positive for real-estate sector. The low interest rate regime has been one of the important factors that has helped the sector go through the pandemic.

With interest being one of the major costs, low rate of interest allows the companies to borrow money at a cheaper rate and also, make it easier for the homebuyers especially salaried class to buy homes.

05 With effect of new COVID-19 variant already fading away, it is possible that slowly business will start operating like pre-covid era?

With most of the population being vaccinated and the new Omicron variant not having as adverse impact as its predecessors, the business has started to operate in a hybrid manner where steps taken by the business only to the extent it curbs the spread of virus. Most of the Companies have increased the capacity of employees working from office while the Government has also been very quick in responding to spread of virus to limit lockdowns and restrictions only to the extent extremely required. Further, the problems faced by logistic sector due to pandemic have also been more or less resolved. With the Government's support and joint efforts by the Company and its employees, the business surely on the way to function like pre-covid era.

However, considering how deadly and contagious virus has been in past, diligence ought to be practiced to avoid loss of life and livelihood.



ITAT holds expenditure for defending promoters in telecom licence case, to protect Assessee's interests, allowable under Section 37(1) of the IT Act

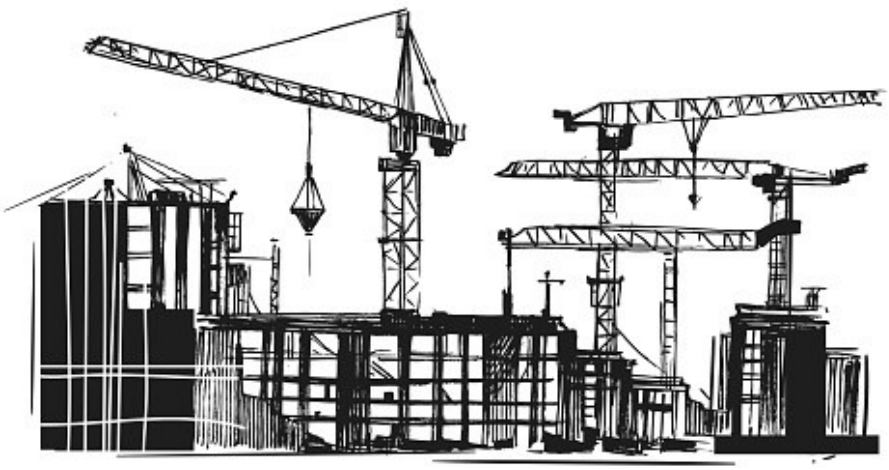
M/s. Majestic Infracon Pvt. Ltd.

ITA Nos.3710 & 3711/M/2019

The Assessee was engaged in the business of civil construction and was subjected to scrutiny assessment. During the scrutiny, the Authorities noticed that the Assessee had claimed legal fees of over INR 16 Crores. It was also found that the Assessee was a holding company of Swan Telecom (now known as Etisalat DB Telecom Pvt. Ltd) and its promoter, who was also the promoter of Swan Telecom who was involved in a criminal conspiracy for getting the UAS license allotted to Swan.

The Assessee submitted that the legal expenses were incurred to protect its promoters and investment which *inter alia* involved the traveling and boarding of the legal professionals. Unconvinced by this argument, the AO disallowed the aforesaid expenditure under Section 37(1) of the IT Act and made an addition of INR 19.88 Crores. Aggrieved, the Assessee approached the CIT(A) which confirmed the order of the AO causing the Assessee to approach the ITAT. The ITAT noted that the Assessee had made investments of INR 593 Crores in Swan Telecom and the CBI had filed criminal cases against the directors and their relatives in connection with allotment of the UAS license. The ITAT further observed that in view of the Assessee's huge business interest in the other entity, if the promoters were not defended, the business interest of the Assessee would be jeopardized and it would put the Assessee into huge financial and commercial losses.

Further, the ITAT also observed that though the business of the related concern was not similar to that of the Assessee's business of construction, however, undoubtedly the interest of the Assessee was certainly there in the success of these criminal cases in defending its directors/their relatives. Thereby, the ITAT placing reliance on the Hon'ble SC ruling in ***Dhanrajgirji Raju Narasingiriji [(1973) 91 ITR 544(SC)],*** held that the expenditure incurred by the Assessee in connection with criminal litigation for the purpose of its business was deductible with no distinction between civil and criminal litigation.



Thus, stating that it was not open to the AO to dictate what expenditure the Assessee should incur and under what circumstances, the ITAT allowed the expenditure incurred by the Assessee on legal, professional, travelling and boarding expenses in defending criminal litigation of the promoters.

HC holds truck operators per se not sub-contractors under Section 194C of the IT Act, restores matter for re-examination of contract

Sri Shivamurthy

Income Tax Appeal No.70 of 2017

The Assessee was engaged in the business of transportation and was subjected to scrutiny assessment whereby INR 8.63 Crores was disallowed under Section 40(a)(ia) of the IT Act on the grounds that the Assessee did not deduct tax at source on payment of INR 50,000 or more made to each lorry owner / driver which was upheld by the CIT(A) and also by ITAT with an observation that the nature of hiring of transporters/contractors was on a permanent and continuous basis, throughout the year and not on a task-basis.

Aggrieved, the Assessee approached the HC submitting that the truck operators were not truck owners and the proceedings concluded by the ITAT were unjustifiable and not in consonance with the CBDT Circular No. 715 dated August 8, 1995. ('CBDT Circular')

The Assessee further submitted before the Hon'ble HC that the Revenue erred in disallowing the amounts considering the aggregate numbers of the trucks used by the Assessee for transportation, irrespective of the different truck operators holding the authorisation to drive such trucks. The Revenue placed reliance on the Hon'ble's SC ruling in ***Shree Choudhary Transport Company [2020-TIOL-126-SC-IT]*** and submitted that the truck operators/ owners answered to the description of sub-contractor for carrying out the whole or part of the work undertaken by the contractor under Section 194C of the IT Act.

The Hon'ble HC placing reliance on the CBDT Circular clarified that each goods receipt could be said to be a separate contract if the goods were transported at one time. But if the goods were transported continuously in pursuance of a contract for a specific period or quantity, each receipt would not be a separate contract and goods receipts relating to that period or quantity would be aggregated for the purpose of TDS. Further with regard to the Revenue's contention, the HC remarked that in absence of any finding on the vital aspect of the matter as to the existence of any contract between the truck owner/ holder of the truck with the Assessee, the Hon'ble SC ruling could not be blindly applied.

Further, the HC noted that the Revenue's action in denying the payments under Section 40(a)(ia) of the IT Act on the premise that the aggregate of the truck amount paid by the Assessee with the different truck drivers was exceeding INR 50,000 could not be accepted on the ground that the contract could not be with the trucks but with the personnel/driver of the truck/truck operators. The HC further observed that the truck

operators/truck owners, could not be considered as the sub-contractors for the purpose of Section 194C of the IT Act. The registration number of trucks/truck owners would not be relevant for the purpose of deciding the applicability of Section 194C of the IT Act but it was the personnel/truck operator from whom the trucks were hired that would be relevant.

Thus, allowing the Assessee's appeal, the HC set aside the order of the ITAT and restored the matter to the Revenue for examination of contract with truck owners/ drivers on applicability of Section 194C of the IT Act to payments made by the Assessee.

ITAT follows SC ruling in Smifs Securities, allows depreciation on goodwill acquired in amalgamation

M/s. Altimetrik India Pvt. Ltd.

IT(TP)A No. 2511/Bang/2019

The Assessee was in the business of providing software development services. Pursuant to the order of the Hon'ble High Court of Karnataka, the amalgamation of the Assessee with Synova Innovative Technologies Private Limited was approved on November 6, 2013. Accordingly, the Assessee had recorded goodwill of INR 27.13 Crores on which acquired during amalgamation. The Assessee claimed depreciation of INR 6.08 Crores.

The AO disallowed the depreciation on the grounds that depreciation on goodwill allowable to the assessee ought not to exceed the deduction calculated at the prescribed rates as if amalgamation had not taken place and such deduction ought to have been apportioned between the Assessee and the amalgamating company in ratio of period of usage.

Aggrieved, the Assessee approached the DRP that observed the Assessee's claim to not be in accordance with the provisions of the Income Tax Law. However, the DRP considered the submission of the Assessee that the disallowance ought to be restricted to INR 6.08 Crores as claimed in the return of income and directed the AO to verify the same. The AO post verification of the same disallowed the depreciation on goodwill and passed the final assessment order.

Aggrieved, the Assessee approached the ITAT. The Assessee contended that in the present case goodwill arose in the hands of the Assessee for the first time and there was goodwill in the books of the amalgamating company prior to amalgamation. The intangible asset in the form of goodwill was acquired by the Assessee as a capital right on amalgamation and was valued at INR 27.13 Crores.

The ITAT noted that the Assessee was the transferee company which did not have any goodwill in the books of account prior to amalgamation and the goodwill was acquired post amalgamation. The ITAT relied on the SC ruling in ***Smifs Securities [2012-TIOL-53-SC-IT]*** wherein it was held that goodwill arising on amalgamation was a capital asset eligible for depreciation and accordingly, observed that the depreciation claimed by the

Thus, ITAT allowed the Assesssee's appeal while directing the Revenue to compute the depreciation in accordance with the principles laid down by the Hon'ble SC in ***Smifs Securities [2012-TIOL-53-SC-IT.***

SC allows adjustment of instalments paid in IDS declaration, later rejected, against tax liability of relevant AY

Yogesh Roshanlal Gupta

SLP(C)No.8955/2021

In pursuance of the Income Declaration Scheme, 2016 ('the Scheme'), the Appellant had declared undisclosed income and had shown willingness to pay tax in terms of the Scheme. As per the Scheme, the amount of tax could be deposited in three instalments. Out of the said three instalments, two instalments were paid by the Appellant but there was a default in payment of the third instalment due to his arrest in a criminal case. The Appellant approached the CBDT to extend the time limit for paying the said instalments under IDS, which was rejected.

Aggrieved, the Appellant approached the Hon'ble HC seeking extension of time to pay the third instalment and continue to avail the benefit under said Scheme. However, the same was also rejected by the HC. Aggrieved, the Appellant preferred an appeal before the Hon'ble SC praying for limited relief with respect

to adjustment of the amounts deposited towards first two instalments against the tax liability computed under revised assessment.

The SC allowing the Assessee's appeal, directed the Appellant to be given benefit of the amounts deposited towards first two instalments while reckoning the tax liability of the Appellant after revised assessment, accordingly, disposing of the appeal.

CIRCULARS

CBDT issues clarification on MFN clause in DTAAs

Circular No. 3/2022

February 3, 2022

Taking cognizance of the various decrees/bulletin/publication on interpretation of the MFN clauses and the representations seeking clarity on the applicability of the MFN clause available in the Protocol to some of the DTAAs with OECD member states, CBDT inter alia issues the following clarifications:

- Unilateral decree of a treaty partner does not represent a shared understanding on the applicability of the MFN clause.
- The third state should be the member of OECD on the date of conclusion of the DTAA with India.
- Concessional rate or restricted scope to apply from the date of entry into force of the DTAA with the third state and not from the date on which such third state becomes an OECD member.
- As per Hon'ble SC ruling in *Azadi Bachao Andolan*, a notification under Section 90 of the IT Act is required in the Official Gazette to implement DTAA or amendment to DTAA. India has not issued any such notification for importing the beneficial provisions from DTAAs with Slovenia, Lithuania & Colombia to the DTAAs with France, the Netherlands or Switzerland.
- Import of concessional rates by invoking MFN clause cannot be done selectively and the benefit of lower rate or restricted scope of source taxation will be available only when the prescribed conditions are met.

TRANSFER PRICING
From the Judiciary

ITAT quashes reopening assessement, terms it invalid for absence of tangible material

Vananchal Properties Ltd

ITA No.1065/M/2020

The assessment under Section 143(3) of the IT Act was initiated by the AO against the Assessee. Thereafter, the assessment was reopened by the AO under Section 147 of the IT Act by issuing notice under section 148 of the IT Act. Finally, the assessment under Section 147 resulted into an addition in the Assessee's income by INR 87,91,502/- with respect to deemed dividend under Section 2(22)(e). Aggrieved, the Assessee approached the CIT(A) challenging the order of AO on jurisdictional issue that the case reopened under Section 147 of the Act was in contravention to various provisions of the IT Act. It argued that it was done in absence of any tangible material on record.

However, the CIT(A) came to a conclusion that the reopening had been validly done as the reasons were properly recorded and a belief was formed that income had escaped the assessment which caused the order of the AO to be upheld by the CIT(A). Aggrieved, the Assessee approached the ITAT which noted that the reasons recorded for reopening were that the Assessee's company received unsecured loan and advance from its sister concern to the extent of Rs.87,91,502 that had escaped assessment within the meaning of Section 147 and the reopening was based on material that was available before AO at the time of the original assessment proceedings.

Thus, placing reliance on the ruling of the Hon'ble SC in ***Kelvinatpor India Ltd. [(2010) 320 ITR 561 (SC)]***, the ITAT considered the reassessment invalid for lack of tangible materials before the AO to initiate reopening, and accordingly quashed it for being contrary to law.

ITAT remits grant of working capital adjustment, rules on comparables for SWD segment

Auriga Software Technologies Private Limited

IT(TP)A No.178/Bang/2021

The Assessee was engaged in the business of provision of Software Development Services (SWD services), to its wholly owned holding company. In terms of the provisions of Section 92A of the IT Act, the Assessee and its wholly owned holding company were AEs.

The Assessee filed a TP Study to justify the price paid in the international transaction as at ALP by adopting the TNMM as the MAM of determining ALP. The Assessee selected Operating Profit/Operating Cost as the PLI for the purpose of comparison of the Assessee's profit margin with that of the comparable companies. The Assessee had chosen companies who were engaged in providing similar services such as the Assessee. The Assessee identified 7 companies whose average arithmetic mean of

profit margin was comparable with the Operating margin of the Assessee. The Assessee therefore claimed that the price it charged in the international transaction should be considered as at Arm's Length.

Being in disagreement with the TP Study of the Assessee, the TPO to whom the determination of ALP was referred to by the AO, accepted TNMM as the MAM and also used the same PLI for comparison i.e., OP/OC. He also selected comparable companies from database. The TPO accepted some companies chosen by the Assessee as comparable companies. The TPO on his own identified some other companies as comparable with the Assessee and arrived at a set of 15 comparable companies and made a TP adjustment and passed the draft assessment order.

Aggrieved, the Assessee approached the DRP which affirmed the decision of the TPO which caused the Assessee to approach the ITAT. The ITAT accepted Assessee's plea to adopt upper turnover filter for exclusion of specific companies and directed exclusion of 7 comparables where the turnover of these companies in previous years was found to be above INR 200 crores (as against Assessee's turnover of INR 18.80 crores).

Further, with regard to the Assessee's plea against non-granting of working capital adjustment, the ITAT drew support from various coordinate bench rulings wherein the importance of working capital adjustment to improve the reliability of the comparable was emphasized along with elucidation as to how the said adjustment should be made as per the Rule 10B(1)(e)(iii) read with Section 92CA of the IT Act and OECD TP Guidelines. And accordingly, the ITAT remitted the grant of working capital adjustment to TPO/AO after affording opportunity of being heard to the Assessee.

ITAT upholds deferred AE receivable as international transaction, imputes LIBOR+2% as ALP interest on outstanding receivables

Swiss Re Global Business Solutions India Pvt Ltd

IT(TP)A No.397/Bang/2021

The Assessee entered into a contract with the Swiss Re Group entities across the globe to provide enabled back-office services such as contract administration, claims administration and technical reinsurance accounting support. During assessment, the TPO selected 9 final comparables. Considering the median of the weighted average Profit Level Indicators as the arm's length margin, the TPO made a TP adjustment under Section 92CA of the Act. While the TPO had also considered notional interest on outstanding trade receivables from the AE.

Aggrieved, the Assessee approached the DRP. The DRP directed the TPO to include Hartron Communications Limited (Seg.) and exclude Capgemini Solutions Ltd. in the final set of comparables subject to condition that it passed all the filters as applied by the TPO in the order under Section 92CA of the IT Act. However, the TPO in the said order rejected the company for inclusion on the ground that it failed the core function filter and neither did it exclude Capgemini Solutions Ltd. Thereby, without giving effect to the order of the DRP, the TPO made a TP adjustment of INR 12.02 Crores in his final assessment order.

Aggrieved, the Assessee approached the ITAT with a plea to include Hartron Communications (Seg.) in the

final set of comparables. The ITAT relied on the Hon'ble SC's ruling in ***National Thermal Power Co and Jute Corporation of India***, additionally excluding 2 companies considering exclusion of the said companies in Assessee's own case in previous years on grounds of being engaged in activities in the nature of KPO or other than BPO and remits 3 companies for verification of profit reported by the said companies in either one of the 3 preceding years.

Further, noting Assessee's plea that deferred AE receivables would not constitute an 'international transaction' and need not be benchmarked separately while determining the ALP of the international transactions, the ITAT observed that in an identical issue in Assessee's own case for previous years, the coordinate bench had relied on Special Bench ruling in ***Instrumentation Corporation. Ltd [[2016] 71 taxmann.com 193/160 ITD 1 (Kol. - Trib.)]*** and upheld that outstanding sum of invoices was akin to loan advanced by Assessee to foreign AE and accordingly deferred receivables was an 'international transaction' which needed to be benchmarked independently.

Further, the ITAT, placing reliance on the judgment of the Hon'ble HC in the case of ***Aurionpro Solutions [99 CCH 0070 (Mum HC)]*** upheld the LIBOR + 2% as the ALP interest rate (noting that transaction between the Assessee and AE was in foreign currency).

ITAT holds ALP adjustment due to estimation difference not concealment, upholds deletion of penalty imposed under Section 271(1)(c) of the IT Act

Zee Entertainment Enterprises Ltd

ITA No. 6278/MUM/2019

The Assessee was a resident company engaged in the business of broadcasting TV Channels. For the assessment year under dispute, the Assessee had filed its return of income under the normal provision of the Act. Subsequently, the Assessee filed a revised return of income and increased its income.

During the year under consideration, since the Assesssee had entered into an international transactions with its AE's, a reference was made to the TPO for determination of the ALP of such transaction.

Based on the order passed by the TPO, a TP addition was made to the income of the Assessee. Besides the aforesaid addition, the AO made further additions towards disallowance under Section 14A of the IT Act, writing off advances given to BCCI and forex loss. Accordingly, the AO completed the assessment under Section 143 (3) read with Section 144C of the IT Act and initiated penalty proceedings under Section 271(1)(c) of the IT Act alleging concealment of income or furnishing inaccurate particulars of income.

Against the assessment order so passed, assessee filed objections before learned Dispute Resolution Panel (DRP) and thereafter, before the Tribunal.

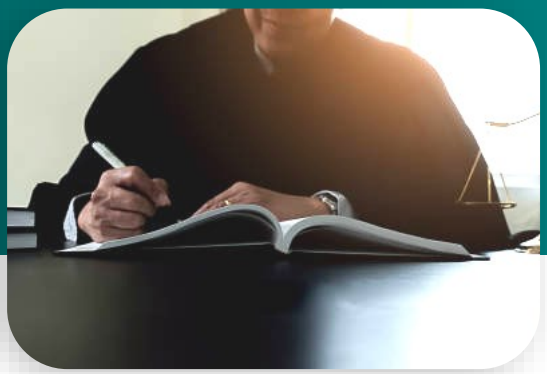
During the penalty proceeding, the AO noticed that the TPO had revoked the TP adjustment by reducing it

by a wide margin. However, rejecting the explanation of the Assessee, the AO imposed penalty of INR 29.32 Crores, being 100% of the tax on the income allegedly sought to be evaded. Against the penalty order so passed, the Assessee filed an appeal before the CIT(A) who noticing that substantial part of the addition was deleted by the Tribunal and the remaining additions did not make out any offence under Section 271 (1)(c) of the IT Act, deleted the penalty imposed under Section 271(1)(c) of the IT Act.

Aggrieved, the Revenue approached the ITAT. Taking cognizance of the fact that substantial part of the penalty was deleted by the Tribunal and the remaining additions did not make any concealment offence, the ITAT deleted the penalty that was imposed. Further, the ITAT also noted that the surviving additions in quantum proceedings was the adjustment amount made towards the provisions of corporate guarantee and for amount being disallowance made under Section 14A of IT Act read with Rule 8D of the IT Rules and viewed that ALP of corporate guarantee, as per certain judicial precedents, had been fixed at 0.5% as against 3% charged by the TPO.

Therefore, considering it a case of estimation, the ITAT observed that the addition on account of corporate guarantee could not lead to a conclusion that the Assessee had concealed its income and considered the disallowance under Section 14A of the IT Act read with Rule 8D of the IT Rules as a notional disallowance. Thereby, concurring with CIT(A)'s decision, the ITAT deleted the levy of penalty for lack of evidence that could lead to any conclusion of concealment of income.

GOODS & SERVICES TAX
From the Judiciary



HC sets aside SCN based on allegation of fraud by others in supply chain

Shiv Enterprises [2022-TIOL-169-HC-P&H-GST]

The Petitioner had preferred a Writ before the Punjab and Haryana HC against the detention of goods in transit u/s. 130 of the CGST Act. The Petitioner submitted that the Revenue authorities had intercepted and detailed the goods in transit basis the allegation on genuineness of the transaction despite the driver of the vehicle being in possession of all the requisite documents.

The Revenue alleged that the inward supply to suppliers of the Petitioner is from a supplier who is not having inward supply and is only engaged in outward supply without paying any tax. In this regard, the HC observed that Section 130 is a penal provision which is invocable only in certain situations, where the contravention has occurred with an intent to evade taxes.

The HC held that a person can be attributed with intent to evade taxes only if the contravention of the provisions has some direct nexus with his action. A person cannot be held liable u/s. 130 for contravention of the provisions by other person in the supply chain. Basis the above observations, the HC set aside the SCN issued by the Revenue for alleged contravention of Section 130 of the CGST Act.

AUTHORS' NOTES :

It should be noted that under the erstwhile VAT regime, the Apex Court had affirmed the Delhi HC's view in RE: ***Arise India Limited [2018-TIOL-11-SC-VAT]*** *that failure to distinguish between bona fide and non-bona fide purchasing, the dealer would be hit by Article 14 of the Constitution. It shall be further noted that as long as the purchasing dealer has taken all the necessary steps to verify that the tax invoice has been issued in accordance with the law, he cannot be expected to keep track of whether the selling dealer has in fact deposited the tax so collected or has been lawfully adjusted.*

AAAR: Due Date to avail ITC to be reckoned from date of supply

Vishnu Chemicals Limited [AAAR/AP/05(GST)/2022]

The Applicant had sought an advance ruling before the AP AAR to ascertain whether the tax invoice dated 01 April 2020 issued by the supplier for the period 2018-19 is hit by the limitation for claiming ITC under Section 16(4) of the CGST Act. The AAR held that such invoice would be hit by limitation. Aggrieved, the Applicant preferred an Appeal before the AP AAAR.

The AAAR held that for determining the time limit to avail ITC u/s. 16(4) of the CGST Act, the term 'financial year to which such invoice or debit note pertains' means the financial year in which supplied is made and not the financial year in which the invoice / debit note is raised. Accordingly, the due date shall be computed from the date of supply and not the invoice. Basis the above interpretation, the Appeal had been rejected, upholding the AAR.

AUTHORS' NOTES :

The AAAR seems to have misinterpreted Section 16(4) of the CGST Act. The term 'financial year to which such invoice or debit note pertains' means the financial year in which such invoice / debit note had been raised and not when the supply was made. It would be pertinent to note w.e.f. 01 January 2021, Section 16(4) of the CGST Act had been amended to delink the date of issuance of debit note from the date of issuance of the underlying invoice for the purpose of availing ITC.

Thereafter, vide ***Circular No. 160/16/2021-GST dated 20 September 2021****, the CBIC had clarified that the phrase 'following the end of financial year to which such invoice or debit note pertains' used u/s. 16(4) qualify only the documents' issued in a financial year, rather than 'supplies made' in a financial year.*

Driver Cab Air Conditioner Unit for Railways classifiable under HSN 8607

Prag Polymers [Advance Ruling No. UP ADRG 86/2021 dated 08 November 2021]

The Applicant had sought an advance ruling before the UP AAR to ascertain the tariff classification of Driver Cab Air Conditioner Unit for railways. It had been submitted that such goods were not viable for use elsewhere other than the Railways.

Accordingly, the Applicant opined that the goods were appropriately classifiable under HSN 8607. The AAR observed that the goods under dispute would be manufactured by the Applicant strictly as per the specification and designs provided by the Indian Railways and meant to be solely used in railway rolling stock and nowhere else. Accordingly, it was held that Driver Cab Air Conditioner Unit for railways are correctly classifiable under HSN 8607 as parts of railways.

AUTHORS' NOTES :

The classification of railway goods/ parts has been a bone of contention between authorities and taxpayers for donkey's years. The issue which incepted under the Excise Regime has been very well carried forward into the GST regime. While certain judicial authorities have held that articles even though principally used for the Railways would merit classification under respective headings, certain judicial authorities have held otherwise. Recently, the Apex Court in RE: ***Westinghouse Saxby Farmer Limited [2021-TIOL-121-SC-CX-LB]****, has held that goods manufactured specifically for the Railways as per the designs and layouts provided by them, are rightly classifiable under CTH 8607. However, it shall be noted that a review application has been filed against the SC judgement in* ***Westinghouse (supra).***

AAAR holds that that Medical Instruments placement in hospitals without consideration constitutes 'supply'

Abbott Healthcare Private Limited

The Applicant had sought an advance ruling before the Kerala AAR to ascertain whether the provision of specified medical instruments to unrelated hospitals, labs, etc. without consideration would constitutes as a 'supply'. The AAR had held that such provision would constitute as a supply. Thereafter, the Applicant had approached the AAAR.

The AAAR, on the basis of the agreement between the Applicant and hospitals, observed that primary intention is to enter into an agreement only where customer in turn agrees to purchase products, hence the Minimum Purchase Obligation of the reagent and forbearance of the customer from using any other reagent than that is prescribed by the Appellant serves as a consideration.

It was further observed that the monetary value of any act or forbearance which causes the inducement of supply of goods or service or both is included in the definition of supply and thereby, the customer's assurance for exclusive usage of reagents, calibrators and disposables constitutes a valid consideration. In view of the above, the AAAR upheld the ruling of the Kerala AAR and rejected the Appeal.

HC holds that hostels used for residence would qualify for GST exemption

Taghar Vasudeva Ambrish [2022-TIOL-242-HC-KAR-GST]

The Petitioner had sought an advance ruling before the Karnataka AAR to ascertain whether exemption prescribed under Entry no. 13 of Notification No. 9/2017 can be sought for providing affordable residential accommodation for students. The Karnataka AAAR had held that that property rented out by the Petitioner is a hostel building which is more akin to sociable accommodation rather than what is commonly understood as residential accommodation, therefore, the exemption for residential dwelling cannot be claimed. Aggrieved, the Petitioner approached the HC.

The HC observed that in absence of meaning of term 'residential dwelling' under the CGST Act, common parlance meaning shall be referred. Referring to the CBIC Education Guide on Taxation of Services and dictionary meanings, it was understood that 'residential dwelling' means a place used for residence or living and not meant for temporary stay like in case of hotels, guesthouses, camp sites etc.

The HC further observed that registration of property as commercial establishment is irrelevant to determine its nature. Accordingly, it was held that as hostels are used by students for residence, they will qualify for GST exemption under Sr. No. 13 of Notification No. 9/2017 'Services by way of renting of residential dwelling for use as residence'. It was also observed that there is no condition under GST exemption Notification requiring lessee to itself use property and ultimate use as residence is only relevant. Accordingly, the AAAR ruling has been overturned.

Activities by a club to its members qualify as a 'supply'

The Poona Club Limited [Advance Ruling No. GST-ARA-123/2019-20/B-12]

The Applicant had sought an advance ruling before the Maharashtra AAR to ascertain whether the membership fee, annual subscription fee, annual games fee collected by the Applicant from its members are liable to tax under CGST Act.

The AAR observed that in terms of the newly inserted Section 7(1)(aa) of the CGST Act Club and its members are distinct persons. Therefore, any activity done by Club for its members will be treated as supply and fee or contribution received from members will be exigible to GST. The AAR further held that post this amendment, principle of mutuality will no longer be applicable.

ITC restricted on expenses of 'Civil and Interior Works'

Broadcast engineering Consultants India Ltd [TS-768-AAR(UP)-2021-GST]

The Applicant had sought advance ruling before the UP AAR to ascertain whether the expenses incurred for 'Civil and Interior Works' would be eligible to ITC as it would be for rental purpose.

The AAR observed that the Applicant had agreed to build and renovate the interior of the Demise office space by charging the cost as rent which would be calculated by adding 10% profit. It was further observed that as per section 17(5) of the CGST Act, which governs restrictions on ITC availment, ITC is blocked in respect of works contract services and goods or services used towards construction of immovable property. Basis the above observations, the UP AAR held that ITC of GST paid in relation to 'Civil and Interior Works' was inadmissible as its clearly stated in section 17(5) of the CGST Act.

ITC available on free samples of supply; not leviable to GST

Golden Tobie Private Limited [TS-763-AAR(UP)-2021-GST]

The Applicant, inter alia engaged in business of manufacturing, marketing and distribution of cigarettes had sought advance ruling before the UP AAR to ascertain inter alia whether the extra packs of cigarettes given free of cost for purchase of certain packs, would be leviable to GST and whether the extra packs of cigarettes would be considered as exempted supplies or free samples.

The AAR observed that the additional packs were supplied for certain payment of packs. Accordingly, the Applicant was supplying two products at the price of one as 'buy one get one free offer'. It was observed that the CBIC vide Circular No. 92/11/2019-GST dated 07 March 2019 had clarified that such additional supplies would not be liable to GST.

Reimbursement of Expenses chargeable to 18% GST

Broadcast engineering Consultants India Ltd [TS-768-AAR(UP)-2021-GST]

The Applicant had sought an advance ruling before the UP AAR to ascertain whether to charge GST for availing reimbursement of expenses i.e., Basic Salary, ESIC, EPF, Bonus with service charge and further to ascertain whether the said service for deployed manpower was NIL rated supply in GST. The UP AAR observed that the Applicant was deploying manpower to MPPKVVCL and MPMKVVCL to distribute electricity in rural area, clamming them to Government entities. However, there was nothing on record to prove that said are Government entities. The invoices issued to MPPKVVCL and MPMKVVCL by the Applicant with

description of supply of manpower was not a sufficient document.

It was further observed that in terms of section 15(1), as the supplier and recipient of the supply was not related then the price would be sole consideration of supply. Accordingly, it was held that GST @18% was chargeable on reimbursement of expenses.

HC differentiates Summons under CGST vis-à-vis Criminal Proceedings

Serum Institute of India Private Limited

The Revenue had conducted search proceedings based on intelligence that a group of unscrupulous persons in collusion with some Custom House Agents are actively involved in GST evasion. The Revenue authorities observed that the Petitioner along with his father had been involved in creation of 200 bogus firms to carry out an enormous ITC fraud of approximately Rs. 350 crores. Accordingly, summons had been issued to both Petitioner and his father, whereby the latter was arrested and sent to judicial custody. Aggrieved, the Petitioner preferred a Writ before the Delhi HC seeking to quash the Summons.

The HC observed that the summons for appearance issued under Section 70 of the CGST Act and the authorization for arrest issued under Section 69(1) of the CGST Act, do not fall within the ambit of the definition of 'Criminal Proceedings', since such proceeding commences, only after the launch of prosecution.

It was further observed that in terms of Section 132(1) of CGST Act there are about twelve different types of offences under Clauses (a) to (l) and five out of these twelve offences are cognizable and non-bailable in view of Section 132 (5) of CGST Act and the remaining seven offences are non-cognizable and bailable in view of Section 132(4) of the CGST Act. In view of the above observations, the HC held that summons under Section 70 of the CGST Act are to be issued only after inquiry is initiated and at the stage of issuance of summons, the Court cannot interfere or grant unreasonable stay on investigation. It was further held that the powers bestowed upon the Revenue officers appointed under numerous tax enactments for search and arrest are in effect intended to aid, assist and provide support to their main purpose of levying and collecting the taxes and duties.

Basis the above observations, the HC concluded that as the investigation is still at a nascent stage and that the present case involves fraud of Rs 350 crores approximately and around 200 firms are involved in placing fraudulent ITC coupled with the fact that one bank official at ICICI Bank has levelled specific allegations against the Petitioner and has stated that at the behest of the Petitioner and his father, he had opened accounts for these 200 firms without physical verification and further, looking into the conduct of the petitioner, the petitioner is not entitled to any relief.

Erstwhile Regime

Delhi CESTAT holds Service Tax not to be payable on notice pay recovery

Rajasthan Rajya Vidhyut Prasaran Nigam Limited [2022-TIOL-134-CESTAT-DEL]

The Appellant had been subjected to an order demanding service tax on amount which it recovered from its employees on their premature resignation, i.e., without serving the requisite notice period. Aggrieved, the Appellant had preferred an Appeal before the Delhi CESTAT.

The Tribunal observed that the definition of the terms 'Service' and 'Declared Service' require the activity to be for a 'Consideration'. It was observed that while a consideration is something received for performance under the contract, compensation is received if the other party reneges or fails to perform as per the contract. Consideration is the object of the contract and compensation is not.

In view of the above observations, the Tribunal held that the confirmation of a demand of service tax on the notice pay received/recovered by the appellant from its employees for premature resignation cannot be sustained and accordingly set aside the demand order.

AUTHORS' NOTES :

It should be noted that Madras HC in RE: ***GE T and D India Limited v. Deputy Commissioner of Central Excise [W.P. Nos. 35728 to 35734 of 2016]****, had held that the amount received by the employer equal to salary for the notice period is not taxable under Section 66E(e) of the ST Act as employer does not render any taxable service or tolerated any act of the employee but merely facilitates sudden exit of employees by imposing cost upon them for such an act. It was held that Notice pay in lieu of sudden termination does not give rise to rendition of service either by employer or by employees.*

GOODS & SERVICES TAX
From the Legislature

Sr. No.	Notification / Circular	Summary
1	GSTN Functionalities	**Key Functionalities introduced in GST effective from January 2022** **Reduction in frequency of filing ITC-04 based on aggregate turnover** In view of amendment introduced vide Notification No. 35/2021-CT dated 24 September 2021, taxpayers having aggregate turnover more than Rs. 5 Crores in preceding financial year will be required to file ITC-04 on half- yearly basis. Other taxpayers are required to file ITC-04 on annual basis. ITC-04 is no longer required to be filed on quarterly basis. This change was made effective from 01 October 2021 but has been made available on GST portal only now. **Enhancement in HSN Search functionality** Taxpayers can now navigate and search appropriate HSN / SAC Code and applicable technical description through common parlance or trade description of goods or services. **Filing of GSTR-1 not allowed in if GSTR-3B for previous tax period not filed** In view of Notification No. 35/2021, GSTR-1 can only be filed if GSTR-3B of previous tax period is filed. **Mandatory Aadhaar authentication** Vide Notification No. 35/2017 read with Notification No. 38/2021 dated 21 December 2021, Aadhaar authentication or uploading of e-KYC documents were made mandatory, effective 01 January 2022 for following activities: • Applying for revocation of cancellation of registration • Claiming of any type of refund The aforesaid restrictions have also been made live on GST portal.
2	Notification No. 01/2022 – Central Tax dated 24 February 2022	**Reduction in Threshold for E-Invoicing** CBIC has notified further reduction in the threshold limit of aggregate turnover, to Rs. 20 crores, for 'e-invoicing' of B2B transactions, w.e.f. 01 April 2022. Accordingly, 'e-invoicing' has been made mandatory for more taxpayers having turnover above Rs. 20 crores and upto Rs. 50 crores, as part of the initiative to replace the physical invoices with 'e-invoices', which will eventually help in dispensing with the e-way bill system.

CUSTOMS & FTP
From the Judiciary

Tribunal allows conversion of free SBs to AA SBs despite inadvertent error

Carboline India Private Limited [2022-TIOL-168-CESTAT-MAD]

The Appellant had obtained an advance authorization license, while exporting certain paints vide two shipping bills. However, the Appellant did not enter correct scheme code in the shipping bills i.e., mentioning '00' instead of mentioning the scheme code as '01'. To correct this mistake, the Appellant had filed an application u/s. 149 of the Customs Act for conversion of free shipping bills to advance authorization shipping bills. However, the request was rejected on the basis of the time limit of 3 months prescribed in Board Circular No. 36/2010 and that goods exported were not subjected to physical examination. Aggrieved, the Appellant preferred and Appeal before the Chennai CESTAT.

As regards the limitation, the Tribunal observed that when the statute does not prescribe any time limit for filing an application for conversion of a shipping bill, the department cannot rely upon a circular to frustrate the provisions contained in the statute. When there is a conflict, the statute will definitely prevail over the Board circular.

In respect of rejection of rectification application on the ground of no physical verification, the Tribunal observed that, there is no requirement u/s. 149 that the amendment can be allowed only if the goods have been subjected to physical examination before export. In view of the above observations, the Tribunal held that the rejection of request for conversion of free shipping bills to advance authorization scheme shipping bills is not justified.

AUTHORS' NOTES :

It is trite law that Circulars, being a subordinate law, cannot override the statutory provisions under law. The Madras HC in RE: ***Precot Meridian Limited [2019 ACR 813]*** *had held that Circulars are issued only to clarify the statutory provision and it cannot alter or prevail over the statutory provision. It shall be further noted that the Courts have time and again allowed rectification of Shipping Bills where the assesses have inadvertently entered the incorrect scheme code. In RE:* ***Visoka Engineering Private Limited [TS-61-CESTAT-2022-CUST]*** *had held that rejection of request for conversion of free shipping bills to Advance Authorization Shipping Bills are not justified.*

HC permits 'put-alert' exporter to export goods subject to Bond and BG

Kaka Exports [2022-TIOL-183-HC-MUM-CUS]

The exporter had been subjected to a seizure memo in respect of its export shipment of silk fabrics. Basis the memo, the exporter, its custodian and custom broker were directed to not remove the goods without

written permission of Dy. Commissioner of Customs. Subsequently, the Appellant had requested for provisional release which was granted against Bond and a BG for 25% of such value. Meanwhile, the exporter had been placed under put alert list. Aggrieved the exporter preferred a Writ before the Bombay HC challenging the decision to put them under 'put alert' list and the seizure memo.

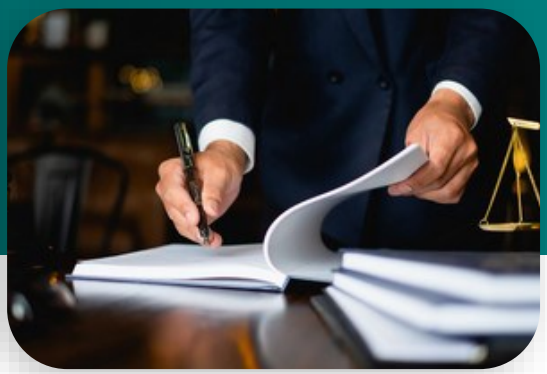
The HC observed that the put alert had been inserted with instructions to the field Officer that 'Goods may be examined carefully and if required samples may be drawn and tested'. It was further observed by the HC that as the investigation is directed to be completed within a period of 4 months, interest of justice would be met with if the order of provisional release is modified by permitting the petitioner to export goods in question on submission of bond equivalent to declared value of goods and submission of bank guarantee to the extent of 20% of the duty drawback payable.

Accordingly, without commenting on the merits of the issue, the HC made it clear that the goods shall be permitted to be released only after the Petitioner complied with the aforesaid two conditions and goods released would be subject to the investigation that would be carried out by the Revenue.

CUSTOMS & FTP
From the Legislature

Sr. No.	Notification/ Circular	Summary
1	Circular No. 3/2022 -Custom dated 01 February 2022	**Clarification on SWS upon goods exempt from BCD** • The CBIC has clarified that no SWS is payable on goods exempted from basic and other customs duties/cesses, even though SWS has not been exempted; • SWS is levied and collected, as a duty of customs and calculated at the rate of 10% on the aggregate of duties, taxes and cesses which are levied and collected by Central Government as a duty of customs on goods imported into India; • SWS is not applicable 'on the value of imported goods' and therefore if aggregate customs duty payable is zero on account of an exemption, SWS shall be 'Nil'; • Chides away position adopted by field formations stating that "Law does not require computation of SWS on a notional customs duty calculated at tariff rate where applicable aggregate of duties of customs is zero"
2	Notification No. 2/2022-Customs dated 01 February 2022	**Amendment in prescribed BCD Rate of certain goods** Amend Notification No. 50/2017- Customs dated 30 June 2017 so as to prescribe effective rate of BCD
3	Notification No. 4 -5/2022- Customs both dated 01 February 2022	**Rescinds old Notifications** Rescinds certain old notifications which had become redundant
4	Circular No. 4/2022 – dated 27 February 2022	**Implementation of automation in the Customs (Import of Goods at Concessional Rate of Duty) Rules, 2017 with effect from 01 March 2022** Certain amendments have been made into the Customs (Import of Goods at Concessional Rate of Duty) Rules, 2017 with effect from 01 March 2022. Following are the ley clarifications: **One-time prior intimation of intent to avail IGCR Benefit** An importer who intends to import goods at a concessional rate of duty shall give a one-time prior information of such goods being imported. This information shall be provided on the common portal in form IGCR-1.

Sr. No.	Notification/ Circular	Summary
4	Circular No. 4/2022 – dated 27 February 2022	**Import of Goods at concessional rate** The importer shall mention the IIN and the continuity bond number and details while filing the bill of entry at the port of import. On the basis of the same, the officer shall allow the benefit of exemption notification. Once a bill of entry is cleared for home consumption, the bond submitted by the importer gets debited automatically in the customs automated system. These details shall be available to the jurisdictional customs officer through the common portal. **Receipt of goods** In cases of goods received at the premises of the importer or the job-worker directly, or partly both, the requirement of intimating the receipt of the goods has been done away with. However, any non-receipt or short-receipt of the goods shall be intimated by the importer immediately on the common portal through form IGCR2. This intimation shall be on the basis of the IIN and details shall be provided against each bill of entry, invoice and item



NCLAT holds abandoned goods lying in Customs warehouse cannot be considered as Corporate Debtor's assets

Central Board of Indirect Taxes and Customs vs. Sundaresh Bhatt

Company Appeal (AT) (Insolvency) No. 236 of 2021

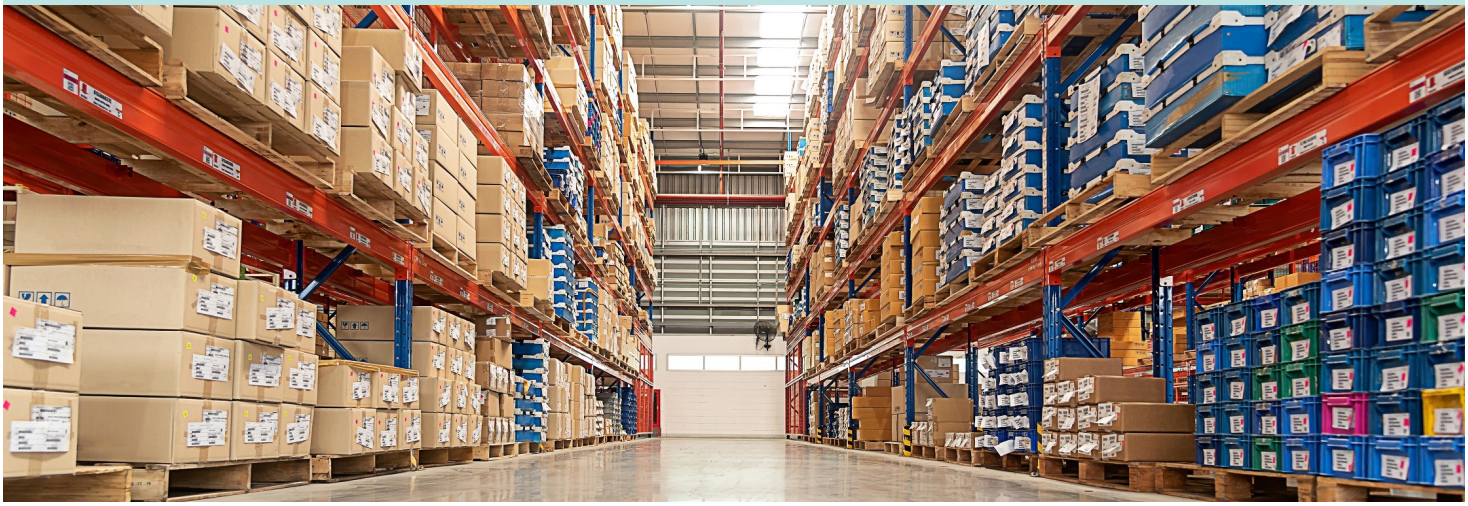
In the instant case, the NCLT had directed the Appellant to allow removal of materials/goods lying in the Customs Bonded Warehouses without payment of Customs Duty under Section 60(5) of IBC, to the extent that the goods could be released or disposed of as per applicable provisions of Customs Act by the Proper Officer.

The NCLT had held that since provisions of Section 53 of IBC prescribed the order of priority for distribution of proceeds from the sale of liquidation assets, which shall prevail over the provisions of the Central Excise Act and other provisions of the Customs Act, Appellant could not legally withhold the releasing of the material/goods, which were the property of the Corporate Debtor (in liquidation) and impose a prerequisite condition for making payment of the customs duty by its Liquidator.

Aggrieved, the Appellant approached the NCLAT which emphasizing that the goods lying in the Customs bonded warehouses were not the Corporate Debtor's assets since it never claimed them, noted that the Corporate Debtor had abandoned the imported goods in the Customs warehouses and failed to pay the import duty and other charges and had not taken any steps to take possession of those goods for several years.

Further referring to the statutory provisions of the Customs Act, the NCLAT observed that the goods imported for home consumption could not be removed from the custody of customs without paying the import duty and charges thereon under the provisions of the Act.

Thus, remarking that the NCLT and NCLAT could not usurp the legitimate jurisdiction of other Courts, Tribunals and fora when the dispute did not arise solely from or relating to the Insolvency of the Corporate Debtor, the NCLAT allowed the appeal of the Appellant.



AUTHORS' NOTES :

It would be interesting to note that in the instant case, the NCLAT also observed that the Customs Act, was a complete code in itself which provided that goods that were once warehoused could not be released from the warehouse unless and until the import duties were paid.

NCLAT holds oppression and mismanagement matters to be outside IBC scope rejects Corporate Debtor's ex-director's plea

Manoj Kumar Agarwal vs. Mehndipur Balaji Infra Developers Pvt. Ltd.

Company Appeal (AT) (Ins) No. 577 of 2018

The Appellant was an ex-Director of the Corporate Debtor/ Respondent and had submitted that he had advanced loan to the Corporate Debtor on various occasions from September, 2014 till April, 2016 amounting to INR 4,69,66,293/-. The Appellant had issued Demand Notice to the Corporate Debtor and on failure of repayment of loan by the Corporate Debtor the Appellant approached the NCLT seeking intitation of CIRP against the Corporate Debtor which was rejected by the NCLT. Aggrieved, the Appellant approached the NCLAT challenging the NCLT order rejecting initiation of CIRP against the Corporate Debtor.

The NCLAT observed that just like the NCLT it was unable to find the 'existence of default' when the amount in question claimed by the Appellant became due and payable and no evidence to substantiate the due date of repayment which was not in compliance with the requirements of Section 7 of the IBC for initiation of CIRP as far as "default" was concerned. Further, the NCLAT also observed that simply, a Demand Notice could not build a term for 'default' as if it was so admitted, there would be no end to such vexatious applications, putting a lot of companies into unwanted operational difficulties.

Lastly, noting that the Appellant and the other members had created a deadlock in the Corporate Debtor, the NCLAT observed that the instant case appeared to be one of oppression and mismanagement between the members of the company, and there was a need to go by the object of the IBC relating to genuine cases of reorganization and insolvency resolution of corporate persons for maximisation of value of assets in a time bound manner and to promote entrepreneurship and balance the interest of stakeholders.

Thus, the NCLAT dismissed the appeal filed by the Appellant challenging NCLT order rejecting initiation insolvency process against the Corporate Debtor on the ground that the Appellant was not able to justify that there was an existence of default.

AUTHORS' NOTES :

It would be interesting to note that in the instant case, the NCLAT also observed that the object of the IBC did not deal with oppression and mismanagement which were exclusively dealt with under Sections 241 & 242 of the Companies Act.

SC holds SARFAESI Act overrides Central Excise Act, Bank charge, dues to have priority

Punjab National Bank vs. UOI & Ors.

Civil Appeal No.2196 of 2012

The Commissioner, Customs and Central Excise, Ghaziabad (Respondent) issued a show cause notice to M/s Rathi Ispat Ltd. ("RIL") for evasion of excise duty and violation of the Central Excise Act.

By an order the Respondent confirmed an excise duty demand of INR 6,97,62,102 against RIL and imposed a penalty of INR 7,98,03,000 under Rule 173Q(1) and confiscated the land, building, plant and machinery of RIL under Rule 173Q(2) of the Central Excise Rules, 1944. Sub rule 2 of Rule 173Q of the Central Excise Rules, 1944, came to be omitted by a notification issued by the Central Government of India ('The Notification'). Subsequently, the order of the Respondent was set aside by the CESTAT on the ground of violation of principles of natural justice, and the matter was remanded back for de novo proceedings.

Thereafter, RIL availed credit facilities under various schemes from the consortium of banks, with the Appellant (Punjab National Bank) as the lead bank, and mortgaged/hypothecated all its movable and immovable properties for securing the loan. RIL created a charge on both the assets and block of the company in favour of the Appellant. Subsequently, the Respondent passed another order confirming the demand of excise duty of INR 7,98,02,226 and a penalty of INR 7,98,03,000 on RIL. The Respondent also ordered the confiscation of all land, building, plant, machinery, material, conveyance etc. of RIL that were used in connection with manufacture, production, storage or disposal of goods. However, in light of the fact that RIL had defaulted in clearing the loan amount and had failed to liquidate outstanding dues, the Appellant, issued notices to RIL under Section 13(2) and 13(4) of the SARFAESI Act,

In light of the notice under Section 13(4) of the SARFAESI Act, the Office of the Assistant Commissioner, Customs and Central Excise Division informed the Appellant, through a letter, that the property was already confiscated by virtue of Rule 173Q(2) of the Central Excise Rules and the matter was subjudice. The Appellant replied to the above letter whereby it informed the department that the properties in question had been mortgaged with the bank and RIL was required to satisfy the debts. In furtherance of this, the Appellant took symbolic possession of the properties. Subsequently, the Appellant was informed by the Assistant Commissioner, Customs and Central Excise, that the properties of RIL should not be dealt with without their written consent.

In essence, it was the contention of the Customs & Excise Department that in view of the fact that that all the movable and immovable properties of RIL stood confiscated by the orders passed by the Respondent, the possession of the property in question could not be taken by the Appellant. Aggrieved, the Appellant preferred a writ petition before the HC which dismissed the same causing the Appellant to approach the SC. The SC observed that the Rule 173Q(2) of the Central Excise Rules could not have been invoked as it was

omitted by the Notification which was issued by the Central Government of India. The SC further observed that where the land, building, plant machinery had been mortgaged/hypothecated to a secured creditor, having regard to the provisions contained in SARFAESI Act, the secured creditor would have a first charge on the secured assets.

Thus, allowing the Appellant's appeal, the SC quashed the order of the Respondent remarking that in spite of omission of Rule 173Q(2), the Respondent was entitled to continue the proceedings under the Central Excise Act.

AUTHORS' NOTES :

> *It would be interesting to note that in the instant case, the SC also observed that the confiscation orders themselves lacked any statutory backing, as they were rooted in a provision that stood omitted on the day of the passing of the orders. Hence, it was this inherent defect in the confiscation orders that paved way for its quashing and not merely the fact that a security interest was created in respect of the very same property that the confiscation orders dealt with.*

SC holds NI Act Section 138 applicable when debt incurred after drawing cheque, but before encashment

Sunil Todi & Ors. vs. State of Gujarat & Anr.

Criminal Appeal No.1446 of 2021

On December 19, 2015, a Letter of Intent was issued by R.L. Steels Ltd. (Company) to the Respondent (Power Supplier) for providing uninterrupted power supply at the plant of the Company situated at Aurangabad in Maharashtra. Clause (k) of the Letter of Intent envisaged that all payments would be made within sixty days through a Letter of Credit('LC') to be opened by the Company. On April 29, 2016, an email was addressed by the Company stating that payment security would be by cheque for an amount equivalent to the quantum of energy to be scheduled for forty-five days.

Payments for monthly billing were to be made by LC within seven days of the receipt of bills. This was agreed upon in a communication dated April 30, 2016 addressed on behalf of the Respondent. On June 30, 2016, the Company addressed a communication to the Respondent that it was issuing a cheque "only for security deposit" and that the cheques was to be deposited "after getting confirmation only.

A cheque post-dated August 28, 2017 in the amount of INR 2,67,84,000/- was accordingly issued with the following endorsement on its reverse: "to be deposited after confirmation only for security purpose". The power supply commenced from July 1, 2016. On July 4, 2016, the Company addressed a communication to its banker, Karur Vysya Bank, requesting to stop payment of the above cheque. On July 24,2016, a Power Supply Agreement was entered into between the Respondent and the Company. The agreement envisaged that the Company would make payment to the Respondent on the tenth day of every calendar month by a LC. On August 10, 2016, September 12, 2016 and September 27, 2016, three LCs' favouring the Respondent were issued by Punjab National Bank at the behest of the Company. On October 20, 2016, the Company terminated its agreement with the Respondent. The post-dated cheque which was issued by the Company was deposited by the Respondent on August 28, 2017.

On September 18, 2017, a legal notice was issued by the Respondents to the Company alleging the

commission of offences under Section 138 of the NI Act. It was alleged in the notice that according to the ledger maintained by the Respondent in its books of account, a sum of INR 6,02,91,089/- remained outstanding. The notice alleged that the Company had issued a cheque dated August 28, 2017 drawn on Karur Vysya Bank which had been dishonored for the reason of 'payment stopped by drawer'. A reply dated October 5, 2017, was addressed in response to the legal notice by the Company. It was stated by the Company that the cheque that was issued was only for the purpose of security and not for encashment.

Thereafter, a criminal complaint was filed by the Respondent in the court of the Additional Chief Judicial Magistrate against the Company seeking issuance of summons and imposition of fine of INR 5,35,68,000. The Magistrate issued summons to the Managing director along with four other directors of the Company ('Appellants'). Aggrieved, the Appellants instituted petitions under Section 482 of the CrPC before the HC for quashing of the criminal complaint. Simultaneously, the Respondent filed a civil suit for recovery of dues. By an order dated June 24, 2019, the HC dismissed the petitions for quashing the complaint, rejecting the Appellants' petition to quash the criminal complaint instituted against them by the Respondent for dishonour of the post-dated cheque. Aggrieved, the Appellants approached the SC contending that the that the cheque was issued by way of a security and was thus not against a legally enforceable debt or liability.

The SC noted that the term debt also included a sum of money promised to be paid on a future day by reason of a present obligation. A post-dated cheque issued after the debt had been incurred would be covered by the definition of 'debt'. Pointing out that the true purpose of Section 138 of NI Act would not be fulfilled if 'debt or other liability' was interpreted to include only a debt that exists as on the date of drawing of the cheque. Moreover, to hold that the cheque was not issued in the context of a liability which was being assumed by the Appellants to pay for the dues towards power supplied would be to produce an outcome at odds with the business dealings.

Thus, holding that the purpose of the Section 138 of NI Act would become otiose if the provision was interpreted to exclude cases where debt was incurred after the drawing of the cheque but before its encashment, the SC dismissed the appeal filed by the Appellants.

AUTHORS' NOTES :

> *It would be interesting to note that in the instant case, the SC also observed that there was no inflexible rule which precluded the drawee of a cheque issued as security from presenting it for payment in terms of the contract, it all depended on whether a legally enforceable debt or liability had arisen.*

SC holds employer liable to pay damages for delay in payment of EPF contribution

Horticulture Experiment Station vs. The Regional Provident Fund Organization.

Civil Appeal No(s). 2136 of 2012

The establishment of the Appellant was covered under the provisions of the Employees Provident Fund & Miscellaneous Provisions Act, 1952 ('the Act') which the Appellant had failed to comply with from January 1, 1975 to October 31, 1988.

For non-compliance of the mandate of the Act, proceedings were initiated under Section 7A and dues towards contribution of EPF for the intervening period of January 1, 1975 to October 31, 1988 amounting to

INR 74,288 were assessed by the competent authority and after adjudication, that was paid by the Appellant to the office of EPF. Thereafter, the authorities issued a notice under Section 14B of the Act to charge damages for the delayed payment of provident fund amount which was levied for the period January 1978 to September, 1988 and called upon the Appellant to pay damages of INR 85,548.

Aggrieved, the Appellant approached the HC which observed that once the default in payment of contribution was admitted, the damages as being envisaged under Section 14B of the Act were consequential and the employer was under an obligation to pay the damages for delay in payment of contribution of EPF under Section 14B of the Act. Aggrieved, the Appellant approached the SC which noted that the Appellant committed a breach of civil obligations/liabilities and after compliance of the procedure prescribed under the Act by affording due opportunity of hearing for the delayed payment of EPF contribution as contemplated, order was passed by the HC directing Appellant to pay damages as assessed in accordance with Section 14B of the Act.

The Appellant before the SC, essentially argued that the justification tendered for which the contribution of EPF could not have been deposited had not been looked into by the authority and the element of mens rea or actus reus was one of the essential elements which had not been considered while imposing damages under Section 14B of the Act.

The SC placing reliance on its ruling in **Union of India & Ors. vs. Dharmendra Textile Processors & Ors [(2008) 13 SCC 369]** observed that any default or delay in the payment of EPF contribution by the employer under the Act was a sine qua non for imposition of levy of damages under Section 14B of the Act and mens rea or actus reus was not an essential element for imposing penalty/damages for breach of civil obligations/liabilities.

Thus, dismissing the Appellant's appeal challenging the HC order, the SC held that the employer was under an obligation to pay the damages for delay in payment of contribution of EPF under Section 14B of the Act.

AUTHORS' NOTES :

Section 14B of the Act, inter alia lays down that where an employer makes default in the payment of any contribution to the Fund or in the transfer of accumulations required to be transferred by him under Section 15(2) or 17(5) of the Act, or in the payment of any charges payable under any other provision of this Act or of any Scheme, the Central Provident Fund Commissioner or such other officer as may be authorised by the Central Government may recover from the employer by way of penalty such damages, not exceeding the amount of arrears, as may be specified in the Scheme.

REGULATORY
From the Legislature

Introduction of Form CSR 2: A Report on Corporate Social Responsibility

Ministry of Corporate Affairs (MCA) vide notification no. G.S.R. 107 (E) dated February 11, 2022 has notified the Companies (Accounts) Amendment Rules, 2022 through gazette notification. The rules of the Companies (Accounts) Rules, 2014 have been amended to introduce the **Form CSR-2 which is a report on Corporate Social Responsibility (CSR)**. This has been introduced in addendum to AOC-4/AOC-4 XBRL/AOC-4 NBFC.

Salient features of introduced form are as follows:

Form CSR 2: Salient Features	
Applicability	Such reporting shall be applicable to every company having net worth of Rs. 500 Cr. or more, or turnover of Rs. 1000 Cr. or more or a net profit of Rs. 5 Cr. or more during immediately preceding financial year.
Filling	For financial year 2020-21, it shall be filled on or before March 31, 2022 after filing Form AOC-4/AOC-4 XBRL/AOC-4 NBFC. From financial year 2021-22 and onwards, it shall be filled as an addendum to Form AOC-4. Declaration in Form CSR-2 to be made by one Director through digital signature.
Reporting	Matters to be reported in this form: • Details of company and its incorporation. • Details of CSR Committee and its constitution. • Details of profits, Net Worth, Turnover and CSR obligations. • Brief description of CSR amount spent and amount transferred to unspent CSR account.

AUTHORS' NOTES :

This new Form brings a new dimension of accountability for companies. This form is a deep dive into CSR Expenditure undertaken by a company and seeks to prevent misuse of CSR money. This new form is introduced to ensure that CSR amount is spent in an appropriate and accountable manner. In addition to this, analysis of information by Ministry of Corporate Affairs will lead to sound policy formation in future.

Further relaxation on levy of additional fees in filing Financial Statement and Annual Returns

Ministry of Corporate Affairs (MCA) vides General Circular no. 01/2022 dated February 14, 2022 has notified the further relaxations on levy of additional fees in filling of e-forms for Financial Statement and Annual Returns for Financial Year 2020-21. Such relaxation provides no additional fees for filling of e-forms for Financial Statements under Form AOC-4/AOC-4 XBRL/AOC-4 NBFC and for Annual Returns under Form MGT-7/MGT-7A upto March 15, 2022 and March 31, 2022 respectively.

AUTHORS' NOTES :

This relaxation is in continuation to previous relaxation provided in December, 2021 was very much expected due to recent extension in dates of Tax Audit Reports under Income Tax Act, 1961.

Applicability of certain sections of Companies Act, 2013 to Limited Liability Partnerships (LLPs)

Ministry of Corporate Affairs (MCA) vide a notification dated February 11, 2022 that still needs to be published in official gazette which provides that certain provisions of Companies Act, 2013 will also be applicable to Limited Liability Partnerships with prescribed modification from the date of publication of notification in official gazette.

Significant Impact of such application on Limited Liability Partnerships and their Designated Partners	• Person who is designated partner of any Limited Liability Partnership which has not filed financial statements or statement of solvency for a continuous period of three financial years shall not be eligible to continue or become designated partner in other LLPs for a period of five years from the date on which he fails to do so. • No person shall be eligible to become designated partner of LLPs if: ◊ he is of unsound mind, ◊ he is an undischarged Insolvent, ◊ he has been convicted of an offence by a court whether involving moral turpitude or otherwise. • No person shall become designated partner in more than twenty LLPs. • Central Govt. may, if it is satisfied that circumstances so warrant directs the inspection of books and papers of LLPs by an inspector appointed by it.

AUTHORS' NOTES :

The move of applicability of provisions of Companies Act, 2013 to LLPs will bring transparency in eligibility, appointment and disqualifications of designated partner in LLPs.

Specific Information to be provided on front cover page of the offer document

Securities and Exchange Board of India (SEBI) vide circular no. SEBI/HO/CFD/SSEP/CIR/P/2022/14 dated February 04, 2022 specified the Information to be provided on front page of the offer document which includes:

- The issuer company/Merchant Banker shall insert a Quick Response (QR) code on the front page of the offer document, abridged prospectus, price band advertisement. Scanning of QR code shall lead to downloading of Prospectus, abridged prospectus, price band advertisement as the case may be.
- Name of the Issuing Company.
- Name of Promoter(s) of company.
- Details of offer to public.
- Details of promoter(s)/Promoter group/selling shareholders.
- Issuing Company and selling shareholder's responsibility.
- Details of listing on stock exchange.
- Bid/offer period.
- Registrar of the offer.

AUTHORS' NOTES :

SEBI has provided a Standard format for front cover page of offer document that will help the prospective investors to easily find out the information which they require for their decision- making purpose.

Requirement of Audit Committee for Asset Management Company (AMC) of Mutual Fund

At present, only the Trustees of Mutual Fund companies are required to constitute an Audit Committee. Securities and Exchange Board of India (SEBI) vide circular no. SEBI/HO/IMD/IMD-I/DOF2/P/CIR/2022/17 dated February 09, 2022 mandates the constitution of Audit Committee for Asset Management Company of Mutual Fund.

Salient Features	
Applicability	This circular is applicable from August 01, 2022.
Composition of Audit Committee	• Audit Committee of AMC shall have minimum three directors as members. • 2/3rd members of the Audit Committee shall be Independent Directors of AMC. • The Chairperson of Audit Committee shall be an Independent Director with adequate experience in finance and financial services.

Salient Features	
Power and Responsibilities of Audit Committee	• Oversight of Mutual Fund Scheme and AMC financial reporting process. • Recommendation to AMC Board regarding adoption of financial statements. • Review and evaluation of the adequacy of internal control system and the steps taken for improving the effectiveness of internal control system. • Reviewing the scope of Internal Auditors. • Reviewing the Internal Audit reports. • Reviewing the findings of Internal investigation by AMC/Internal Auditors. • Review of Audit Opinion issued by statutory auditors. • Reviewing the regulatory inspection reports. • Reviewing the annual compliance reports. • Discussion with internal and statutory auditors on significant findings and follow up there on. • Interaction with statutory and internal auditor of Mutual Fund at least once in a year. • Audit Committee of AMC should interact with Audit Committee of Trustees at least once annually.

AUTHORS' NOTES :

This is a good step taken by SEBI that Asset Management Companies of Mutual Fund should constitute an Audit Committee so that which will increase the accountability of AMCs.

Applicability of IND AS on Financial Statements of Asset Management Company (AMC), Trustees of Mutual Fund Scheme (MFS)

Securities and Exchange Board of India (SEBI) vide circular no. SEBI/HO/IMD-II/DOF8/P/CIR/2022/12 dated February 04, 2022 mandated that financial statement of AMCs and MFSs shall be prepared in accordance with IND AS.

Salient Features	
Applicability	AMCs and MFSs shall prepare the financial statements in accordance with IND AS w.e.f. April 01,2023.
Requirements	• MFSs should prepare the opening Balance Sheet as on the date of transition and its comparatives as per IND AS requirements. • MFSs should disclose scheme wise per unit statistics for the last 3 years.

Requirements	• MFSs should disclose the nature of adjustments that would be required to comply the financial statements with IND As. • All disclosures required by IND AS are applicable to financial statements of MFSs. • Accounting policy for recognition of revenue and income from investment shall be disclosed by way of a note. • Accounting policy of valuation of investment shall be disclosed. • The total income and expenditure expressed as a percentage of average net assets, calculated on a daily Average Net Assets Basis should be indicated. • Contingent liabilities should be made of all contingent liabilities showing separately: ◊ Underwriting commitments ◊ Uncalled liability on partly paid shares ◊ Other commitments ◊ Others (if any) • Disclosure as required by the regulation or as may be prescribed by board from time to time shall form part of notes to accounts.

Clarification provided by RBI on Prudential Norms on Income Recognition, Assets Classification and provisioning issued on November 12,2021 vide circular no. RBI/2021-2022/125

RBI has provided the following clarifications vide circular no. RBI/2021-2022/158 dated February 15,2022.

Prudential Norms on Income Recognition, Assets Classification and provisioning issued on November 12,2021 vide circular no. RBI/2021-2022/125	Clarifications provided vide circular no. RBI/2021-2022/158 dated February 15,2022
Cash credits/overdraft (CC/OD) shall be treated as NPA if it is out of order. An account shall be treated as out of order if: • The outstanding balance in the CC/OD account remain continuously in excess of the sanctioned limit/drawing power for 90 days or • The o/s balance in the CC/OC account is less than the sanctioned limit/drawing power but no credits continuously for 90 days or not enough to cover the interest debited during the previous 90 days period.	Now, it is clarified vide circular no. RBI/2021-2022/158 that definition of out of order as clarified in circular no. RBI/2021-2022/125 shall be applicable to all loan products being offered as an overdraft facility, including those which are not meant for business purpose and/or which entails interest repayments as only credits.

Prudential Norms on Income Recognition, Assets Classification and provisioning issued on November 12,2021 vide circular no. RBI/2021-2022/125	Clarifications provided vide circular no. RBI/2021-2022/158 dated February 15,2022
Loan accounts classified as NPAs can be upgraded as 'Standard' asset only if entire arrears of interest and principal amount are paid by the borrower rather than on the basis of only interest and partial overdue payment.	Vide circular no. RBI/2021-2022/158, it is clarified that if any borrower is having more than one credit facility from a lending institution, loan accounts shall be upgraded to standard asset only upon the repayment of entire arrear of interest and principal pertaining to all credit facilities.

AUTHORS' NOTES :

This move will motivate the Banks and NBFCs to recover all the dues from a borrower to change status of borrower from NPA to standard assets in their financial statements.

INTERNATIONAL DESK

Republican Senators raise additional concerns over 'alarming developments' on Pillar 2 before US Treasury Secretary

The Republican party members of the Committee of Finance in the US Senate ('The Republican party members') wrote to US Secretary of the Treasury Janet Yellen on the 'alarming developments' regarding the effect of the OECD Agreement on US competitiveness and tax revenue.

The Republican party members observed that Pillar 2 Model Rules would permit the foreign countries to impose tax on US companies' profits in the US, while some countries such as the UK, negotiated to protect their domestic tax laws and companies as per the UK Pillar 2 Consultation Document. The subject document ensures that the benefit of the UK's R&D credit would not be eliminated or reduced, which is in stark contrast to the US' situation as its R&D credit would neither receive the same preferential treatment nor would the low-income housing tax credit, new markets tax credit, or foreign derived intangible income.

Further, The Republican party members expressed concern that the Model Rules may open the door to another form of tax competition i.e., further reduction of corporate tax rates and provide exemptions for tax subsidies in an effort to remain internationally competitive while still operating within the confines of the Model Rules. The Republican party members referred to a recent Oxford University Policy Brief, as per which the countries would reduce the corporation tax liability by more than what they would have in the absence of Pillar 2 to improve their competitive position. Thus, there is a fear that China and other aggressive economic competitors will leverage this opportunity and there is an increased probability that some countries will bring down the corporation tax, perhaps even all the way to zero.

Reference: https://home.treasury.gov/news/press-releases/jy0568

OECD releases Draft Model Rules on Nexus & Revenue Sourcing, was open for public comments upto February 18, 2022

OECD/G20 BEPS IF has released the Draft Rules for Nexus & Revenue Sourcing as a part of multi-stage public consultation for Amount A of Pillar One. It has been clarified that the draft rules do not reflect consensus regarding the substance of the document and public comments in writing were invited upto February 18, 2022.

OECD/G20 BEPS IF states that the Inclusive Framework's subsidiary body - Task Force on the Digital Economy (TFDE) was mandated to advance the work for the implementation of Amount A. TFDE was supposed to develop the Multilateral Convention (MLC) and its Explanatory Statement and the Model Rules for Domestic Legislation (Model Rules) along with the related Commentary for the implementation of Amount A.

The OECD/G20 BEPS IF believes that the Model Rules shall reflect the substantive agreement on the

functioning of Amount A and would serve as the basis for the MLC. The Model Rules for Nexus explicates the agreement of the Inclusive Framework on new special purpose rule for Amount A where the thresholds for the Amount A had been designed to limit the compliance costs for taxpayers and tax administration and to ensure that the nexus test was only satisfied when the revenue of a Covered Group derived from a jurisdiction was material.

Further, OECD/G20 BEPS IF states that the new special purpose Nexus Rule would solely apply for determining whether a jurisdiction qualifies for profit re-allocation under Amount A and would not alter the nexus for any other tax or non-tax purpose. Thus, the Nexus Rule would be a stand-alone provision to limit any unintended spill-over effects on other existing tax or non-tax rules.

In addition to the above, OECD/G20 BEPS IF observes that these Rules would be supported by detailed record-keeping requirements, based on a systemic-level review of the approach taken to revenue sourcing instead of requiring retention and supply of information on every transaction to tax administrations.

OECD/G20 BEPS IF also notifies that a public consultation document will be issued in mid-2022 with regard to Amount B of Pillar One. Further, OECD/G20 BEPS IF clarifies that for the Subject to Tax Rule (STTR) of Pillar Two, the draft model provision and its commentary would be released in March 2022 with a defined set of questions set for input. The multilateral instrument to facilitate the implementation of the STTR would also be released for comment at the same time.

Reference:

https://www.oecd.org/tax/beps/oecd-invites-public-input-on-the-draft-rules-for-nexus-and-revenue-sourcing-under-pillar-one-amount-a.htm

https://www.oecd.org/tax/beps/oecd-launches-public-consultation-on-the-tax-challenges-of-digitalisation-with-the-release-of-a-first-building-block-under-pillar-one.htm

India-UAE signed the historic Comprehensive Economic Partnership Agreement on February 18, 2022

India and United Arab Emirates have signed the historic Comprehensive Economic Partnership Agreement ('CEPA') with an aim to boost the merchandise trade between the two countries to US$ 100 billion over the next five years.

The agreement was signed during the virtual summit meeting between Hon'ble Prime Minister of India, Shri Narendra Modi, and H.E. Sheikh Mohammed bin Zayed Al Nahyan, Crown Prince of Abu Dhabi. The Hon'ble Minister of Trade and Commerce, Shri Piyush Goyal emphasized that the Agreement was a complete and comprehensive economic partnership finalized in the shortest possible time in history. The Agreement includes a possible array of subjects from free trade to digital economy to government procurement and several other strategic areas of mutual interest. It is likely that CEPA would generate 10 lakh jobs across the multiple labour-intensive sectors like gems and jewellery, textiles, leather, footwear, furniture, agriculture, food products, plastics, engineering goods, pharmaceuticals, medical devices, sports goods, etc.

The Hon'ble Minister of Economy, UAE, H.E. Touq Al-Marri termed this CEPA as a milestone between the two nations and has been built on decades of enterprise and aspires to establish a new era of progress and prosperity for the people of both nations. The Agreement is likely to come into effect from May 1, 2022.

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
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
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
CIT	Commissioners of Income Tax
Cus	Customs Act, 1962
CVD	Countervailing Duty
DDT	Dividend Distribution Tax
DRC	Dispute Resolution Committee
DRI	Directorate of Revenue Intelligence
DTAA	Double Taxation Avoidance Agreement
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
G2B	Government to Business
GST	Goods and Services Tax
H&EC	Health and Education Cess
HFC	Housing Finance Company
HNI	High Net Worth Individual
HUF	Hindu Undivided Family
IBC	Insolvency and Bankruptcy Code
IFSC	International Financial System Code
IFSCA	International Financial Services Centres Authority Act, 2019

Abbreviation	Meaning
IGST	Integrated Goods and Services Tax
IIM	Indian Institute of Management
IMC	Indian Medical Council Act, 1956
Ind AS	Indian Accounting Standards
InvITs	Infrastructure Investment Trusts
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
LTC	Long-Term Capital Gains
MAT	Minimum Alternate Tax
MoF	Ministry of Finance
MSME	Micro Small and Medium Enterprises
NaFAC	National Faceless Assessment Centre
NBFC	Non-Banking Finance Company
NCCD	National Calamity Contingent Duty
NCLT	National Company Law Tribunal
NFT	Non-Fuungible Tokens
NELP	New Exploration Licensing Policy
NHB	National Housing Bank
NPA	Non-Performing Assets
NPS	National Pension System
OBU	Offshore Banking Unit
OEC	Organization for Economic Co-operation and Development
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
RIC	Road and Infrastructure Cess
RTGS	Real Time Gross Settlement
RU	Review Unit
SAD	Special Additional Duty
SAED	Special Additional Excise Duty

GLOSSARY

Abbreviation	Meaning
SCGT	State Goods and Services Tax
SCN	Show Cause Notice
SCRA	Securities Contracts (Regulation) Act, 1956
SEBI	Securities and Exchange Board of India
SFT	Statement of Financial Transaction
SPF	Specific Pathogen Free
SWS	Social Welfare Surcharge
TAN	Tax Deduction Account Number
TCS	Tax Collected at Source
TDS	Taxes Deducted at Source
TPO	Transfer Pricing Officer
u/s	Under Section

Abbreviation	Meaning
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.

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

GST Legal Services LLP ('GLS') is a consortium of professionals offering services with seamless cross practice areas and top of the line expertise to its clients/business partners. Instituted in 2011 by eminent professionals from diverse -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.

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.

VMG & Associates ('VMG') is a multi-disciplinary consulting and tax firm. It brings unique experience amongst consulting firms with its partners having experience of Big 4 environment, big accounting, tax and law firms as coupled with significant industry experience. VMG offers comprehensive services across the entire spectrum of transaction support, business and risk advisory, financial reporting, corporate & allied laws, Direct & Indirect tax and trade related matters.

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

VMG team brings to the table a comprehensive and practical approach which helps clients to implement solutions in most efficient manner. With a team of experienced professionals and multiple offices, we offer long standing professional relationship through value advice and timely solutions to corporate sectors across varied Industry segments.

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