VISION 360

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SEP 2020

EDITION 1

A TREASURY OF KEY TAX & REGULATORY DEVELOPMENTS!

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EDITORIAL

VISION 360: SETTING THE CONTEXT!

Recent times have undoubtedly been the toughest for businesses across the globe, and India is no exception. This being said, a journalist knows there is always some good news wrapped-up in a bad one, that is why the saying 'when it rains, look for rainbow, when its dark, look for stars!' Although age-old, the saying still holds well when we introspect closely!

Amidst all the recent difficulties, India's taxation and regulatory space has seen some interesting developments, be it technology driven ambitious platform of 'Transparent Taxation – Honoring the Honest!' to curb malpractices in tax assessment or Judiciary leveling up to strike down some restrictive provisions in tax refunds; it is definitely there, we just need to peek out and take note of it!

This inaugural issue has the pleasure to bring you the latest of Direct Tax – Indirect Tax, coupled with some significant regulatory developments in recent times as well as key tax events on international horizon.

The limelight of these events is grabbed by the 'Transparent Taxation – Honoring the Honest!' which pegs another attempt at "making every rule, law, policy people-centric and public friendly. This is the use of the new governance model and the country is getting its result" as the Hon'ble Prime Minister states. In the streak of developments is also the issuance of guidance on 'Mutual Agreement Procedure' which follows the Action Plan 14 of BEPS aimed at 'Making Dispute Resolution More Effective' – a development well received by the taxpayers.

Speaking of Indirect tax, the Gujarat High Court read down the restriction of refund qua input services in inverted duty structure treating it as 'ultra vires'. The decision is likely to lead to catena of disputes across many (almost all) High Courts in the country! As a matter of fact, Hon'ble Madras High Court has already expedited final hearing of all the petitions before it on identical issues and is on the verge of issuing its 'Final Order'.

It is rather also interesting to see how a relatively dormant and pro-revenue area of 'Anti-profiteering' has also made it to recent headlines when 'National Anti-Profiteering Authority' dropped penal action against the assessees stating that alleged contravention was committed before the insertion of penal provision and they cannot be punished retrospectively!

The 'Bureau of Indian Standards', a Government organ set-up to ensure quality, safety and reliability of the imported/domestically manufactured products, has also steadily made its presence felt, especially considering the quantum of imports from China. The certification was recently made applicable on toys, one of the major import articles from China and if our communication with government authorities is of any clue, the BIS is only going to firm its grasp on many more products, across sectors. Well, we couldn't help but take note of Reliance's move to acquire 100% stakes in Hamleys Global Holdings from Hong Kong based C. Banner International!

In a nutshell, while the businesses were busy staying afloat, tackling the lockdown measures and economic slowdown, much has developed since, be it policy decisions or procedural changes. So, in an attempt to provide you with all the important developments in one place, **TIOL**, in association with **Taxcraft Advisors LLP**, **GST Legal Services LLP** and **VMG & Associates** are pleased to bring to you our exclusive monthly magazine titled **'VISION 360'**.

We hope you will find it an informative and interesting read and keeping these issues 'close-at-hand' helps you have a quick bird's eye view on changing times.

We look forward to receiving your inputs, thoughts and feedback, in order to help us improve and serve you in the best possible fashion!

Happy Reading!

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

CONTENTS

CBDT'S GUIDANCE ON MUTUAL AGREEMENT PROCEDURE: A STEP CLOSER TO OECD'S BEPS PROJECT

The CBDT has recently issued a comprehensive guidance on MAP for the benefit of taxpayers, tax practitioners, tax authorities, the CAs and treaty partners. The Guidance is broadly categorized into four (4) parts viz., Part A to Part D – the same are summarized below:

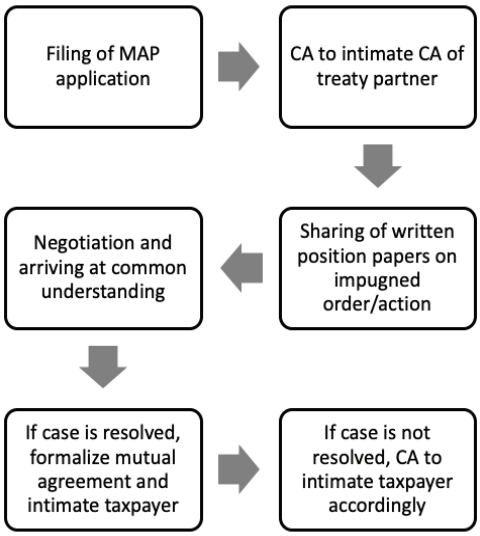
Part A: Introduction and Basic Information

MAP being an alternate tax dispute resolution mechanism is available to taxpayers under the DTAAs, in addition to dispute resolution mechanisms available to taxpayers under the domestic laws of India.

The Guidance highlights the independence of the CA as they are independent of the tax authorities, who audit taxpayers and ipso facto, take their own decisions.

The Guidance further expounds basic concepts such as juridical double taxation (which means same income being taxed twice in the hands of the same entity in two different countries) and economic double taxation (which means same income being taxed in the hands of two separate entities, who are Associated Enterprises, in two different countries).

The Guidance also elucidates the eligibility, process to apply for the MAP and related timelines. The same is depicted here-in-below:



Timeframe for resolving and implementing MAP

- ❖ India is committed to resolve MAP cases within an average timeframe of 24 months. The period of 24 months is to be computed from the "Start Date" of a MAP case.

- ❖ In case where MAP cases before the CAs of India arise from a MAP application made by a non-resident taxpayer before the CAs of other countries/territories, the "Start Date" shall be determined by the other CAs in accordance with the MAP Statistics Reporting Framework.

Part B: Access and Denial of Access to MAP

This part captures specific scenarios where access to MAP is allowed/denied by the CA.

The Guidance elucidates that the taxpayer is allowed to file MAP in below mentioned cases where double taxation may arise:

- ❖ Transfer Pricing adjustments;
- ❖ Existence of a Permanent Establishment;
- ❖ Attribution of profits to a Permanent Establishment; or
- ❖ Characterization or re-characterization of an income or expense.

Key take-aways:

1. MAP access is not available to a non-resident in case where obligation to deduct tax at source on the payment made by an Indian entity to the non-resident entity is enforced under the domestic law, unless the assessment order is passed in case of non-resident taxpayers.

2. MAP access shall be allowed in following circumstances; however, ***CA of India would not negotiate any other outcome than what has already been achieved in such circumstances.***

   - ❖ Where **APA** has already been entered into

between the taxpayer and the CBDT;

- Where taxpayer applies for **Safe Harbour provisions**, as applicable to its international transactions, and the return of income is accepted by the Indian tax authorities; or

- Where the **order is already passed by the ITAT**, the CAs of India shall not deviate from the orders of the ITAT for the relevant year where the dispute is decided on merits.

3. MAP access shall be allowed in following cases:

- Delayed filing of MAP;
- Objections raised by the taxpayer is not justified;
- Settlement order is issued by the Income Tax Settlement Commission; or
- Advance ruling is obtained from Authority of Advance Ruling.

Part C: Technical Issues

This part clarifies few technical aspects to be kept in mind by various stake-holders:

Sr No.	Technical Issues	Position of IT Department
1	Downward Adjustment	CAs cannot agree to adjustments leading to lower incomes than the one declared vide return of income in light of provisions of Section 92(3) of the IT Act
2	Resolution of Recurring Issues	CAs cannot resolve recurring issues in advance of an order/action by the tax authorities
3	Interest and Penalties	Cas of India do not have the mandate to consider such consequential issues and negotiate disputes arising from such issues. These are to be administered under the domestic laws
4	Secondary Adjustments	CAs of India would be obligated to make secondary adjustments part of the MAP resolution as per Section 92CE of the IT Act
5	Bilateral & Multilateral APAs	Applications qua issues covered under Bilateral/Multilateral APA shall not be admitted under MAP
6	Suspension of Tax Collection	Suspension of tax collection ought to be in accordance with terms and conditions in the MOU with treaty partner
7	Adjustment of taxes paid	TDS deducted and paid by the Indian taxpayer may be allowed to be adjusted against tax payable by non-resident taxpayer

Part D: Implementation of MAP Outcomes

The Guidance indicates that there are no legal or administrative impediments to implement MAP outcomes. However, outcome cannot be implemented in case wherein the ITAT has passed an order for the same issue and it comes to the knowledge of the CAs of India.

The CAs of India shall communicate such outcomes of the ITAT order and request CA of the foreign counterpart to provide correlative relief for the adjustments upheld by the ITAT.

In other cases, taxpayers are provided a time period of 30 days (from the date of receipt of a communication from the CAs of India) to convey its acceptance/rejection of the MAP resolution and to submit evidence of withdrawal of domestic

appeals. Similarly, the Assessing Officer has been provided a time period of one month (from the end of the month in which he receives the letter of the CA) to give effect to the MAP resolution.

Concluding Remarks…

The Guidance has been issued by the CBDT pursuant to the BEPS Action Plan 14 on 'Making Dispute Resolution More Effective' and is essentially a measured step towards 'ease of doing business' for multinational corporations operating out of India.

The CBDT notified the new Rule 44G (effective May 06, 2020) which in-turn substituted Rule 44G and Rule 44H dealing with the MAP. The said Guidance deals with umpteen critical aspects and clarifies on relevant procedure for MAP based on the newly inserted provisions.

The Guidance elucidates certain critical facets such as scenarios where the option to go for MAP may be denied and circumstances where the CAs cannot agree/negotiate other than ALP as determined in such circumstances. There exists a credible school of thought that general principle in case of domestic law vs. DTAA i.e. 'whichever is beneficial to the taxpayer' ought to be adopted in scenarios such as: (a) the ITAT has pronounced its order; (b) ALP under Safe Harbour provisions have been accepted; and (c) UAPA entered into by the taxpayer.

The overhauled schematic does make MAP, a more attractive option to resolve double taxation disputes. The MAP could thus be promoted as alternative dispute resolution by providing clear guidance to adopt resolutions in the assessment proceedings for the years (wherein the appeal is pending before authorities) which are not covered under MAP and for future years such resolution should be considered as a reference point on the identical facts/issues resolved under MAP.

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RoDTEP SCHEME: NEED OF THE HOUR

Background

In the cut-throat competition, economies all over the world tend to bolster their exports and race ahead in the world trade, which more often than not, involve attempts at eliminating the rivals.

Boosted by the Government of India's export incentivization, India posed a strong competition in global trade which is, possibly, one of the main reasons that the United States invoked Agreement on SCM amongst various WTO member countries including India.

These proceedings challenged the vires of India's export schemes (MEIS, SEIS, SEZ, EOU, etc.) which were linked with export performance, citing that India has crossed the GNI threshold of 1,000/- USD per capita and thus has exhausted its allowance to provide such schemes. This dispute was decided in favour of the USA and although India has approached appellate authorities, any relief is unlikely.

Now, in order to replace and compensate for the forgoing export subsidy schemes, the Government of India has devised the Remission of Duties and Taxes on Export Products Scheme - RoDTEP which are in line with the WTO norms.

The Scheme

The RoDTEP Scheme would be unlike the previous export schemes, in the sense that it would not be providing incentives based on export performance, but rather provide reimbursement of various non-refundable and non-creditable duties/taxes such as GST paid on goods/services restricted *vide* Section 17(5) of CGST Act, VAT on fuel used in transportation, mandi tax, stamp duty, electricity duty and royalties paid to central/state Governments etc. The benefit of this Scheme would be granted in the form of transferable duty credit scrips.

It would be pertinent to note that the Government of India has decided to introduce the RoDTEP in a phased manner, meaning, as and when an item is notified to be covered

under RoDTEP Scheme, it would, at the same time, be removed from coverage under MEIS. As a step further to the implementation of the RoDTEP Scheme, the Government of India has recently constituted a committee (viz., RoDTEP Committee) for determination of ceiling rates under the Scheme, with effect from July 30, 2020.

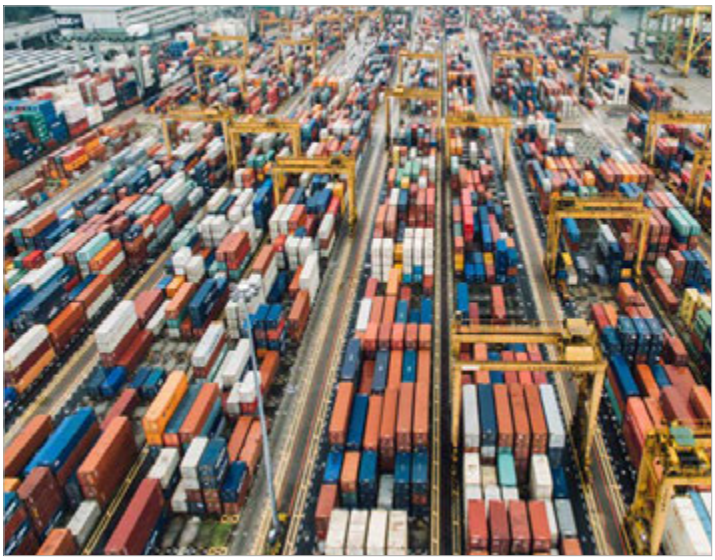
Recent Developments

The newly formed Committee has been tasked with developing a mechanism for calculation of duties at the central, state and local level which are borne by exporters so that they can be refunded all the taxes paid on goods and services used in export but are currently not being reimbursed under extant mechanisms. Among the terms of reference of the Committee, is the task of interacting with administrative ministries, export promotion councils, commodity boards, trade bodies and other stakeholders so as to put forth their views on the ceiling rates under the Scheme.

Further, the Department of Commerce has been tasked to decide and notify the sequence of introduction of the Scheme across sectors, prioritization of the sectors to be covered, degree of benefit to be given on various items within the rates set by the Committee.

Although the introduction of the RoDTEP Scheme had been approved by the Government of India in March 2020, the same could not be implemented in full force. One of the reasons for the delay, could be on account of the unprecedented COVID-19 pandemic. Moreover, complete roadmap of the Scheme has not been put to place as of yet. Rather, the information about the Scheme is only available in bits and pieces in the forms of trade notices, orders, press releases, etc.

Accordingly, in the midst of the replacement of the current export subsidy schemes by the RoDTEP, there have been certain speculations within the trade and industry that the new scheme may not be as beneficial. Notably, the said speculation may not be true for all businesses given that actual content of non-creditable taxes/duties in the overall costing of products to be exported would vary depending upon business sector, mix of supply chain and other relevant factors. Be that as it may, the new scheme is essentially aimed at providing a level playing field to the Indian exporters as it would be WTO compliant.



Way Forward

It can be seen that although the requisite committee has been set-up and their tasks have been defined, implementation of RoDTEP Scheme might still be afar. Moreover, as there is no certainty qua rates to be provided under the RoDTEP Scheme, it would be in the best interest of the exporters at this juncture, to file suitable representations before the Government of India substantiating their desired rates for the new scheme backed-up with corroborative data.

During this current transition of export schemes, it would be pertinent for all the stake-holders to remember a quote from a wise man named George Lichtenberg who once said *"I cannot say whether things will get better if we change; what I can say is they must change if they are to get better"*.

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INDERPAL SINGH AHLUWALIA

Head - C&TC, EXIM & Logistics for India & UAE,
Clariant India Limited

Mr. Inderpal Singh Ahluwalia, Head - C&TC, EXIM & Logistics for India & UAE, Clariant India Limited shares his thoughts and perspective on umpteen recent issues from an economic, tax and regulatory stand-point affecting the economies and businesses in particular

HOW DO YOU THINK THE COVID-19 HAS IMPACTED THE GLOBAL ECONOMIES AND BUSINESSES IN GENERAL AND CHEMICAL SECTOR IN PARTICULAR? DO YOU SEE ANY POSSIBILITIES OF RECOVERING FROM THE HORRORS OF PRESENT ECONOMIC SLOW-DOWN IN COMING MONTHS?

Undoubtedly the COVID-19 pandemic has adversely affected more or less every economy or industry across the globe in one or other way. The chemical sector is no different and in particular, there has been a significant impact on our industry as well. The severity of impact is mainly because the chemicals are majorly used as intermediary products for manufacture of other finished goods such as paints, PVC resins, FMCG foodstuffs, etc. Accordingly, as long as the demand for final products remains skews down, the demand for chemicals would also remain low.

As far as recovery from the horrors of COVID-19 is concerned, sure enough the momentum and demand in the market is picking up in last couple of months; however, at snail's pace. Some countries in Asia like Vietnam, Indonesia and some other African Countries which were not affected as badly as India, are turning out to be new consumption centers. From a supply chain perspective, definitely the customers are broad-basing their sourcing from regions outside china and therefore, India would have an opportunity to capitalize on.

GIVEN THE PRESENT SENTIMENTS WHICH PRESENTLY DO NOT SEEM TO BE FAVOURING CHINA CENTRIC BUSINESS APPROACH, IS THERE ANY RE-CONSIDERATION TO LOOK AT OTHER FAVOURABLE TERRITORIES QUA IMPORTATION OF RAW MATERIALS, WITH SPECIAL FOCUS ON CONCESSIONAL DUTY RATES?

The COVID-19 pandemic has adversely impacted China's trade with the rest of the world. Already, various companies have started to relocating their manufacturing units from China to other countries, including India. This move by the western countries seems to be well thought out as there would not be a huge impact on the costing qua logistics. China used to procure its raw materials from various East-Asian countries. Similarly, India too has trade agreement benefits with various East-Asian countries. Accordingly, India would be in a position to procure raw materials and inputs at a lower and reasonable cost for production here. The only caveat to this proposition would be China's USP of having a variety of supply options that may not be available yet with other Asian countries.

On a similar line, many big global chemical users in Western world are now de-risking China procurement strategy and broad basing suppliers in India or even with the US / EU for shorter and stable supply chain even at marginally higher prices.

CHEMICAL SECTOR (AMONG OTHERS) FOR QUITE A WHILE NOW SEEMS TO BE AT THE RECEIVING END QUA UMPTEEN TARIFF AND NON-TARIFF BARRIERS BEING IMPOSED BY THE GOI? HOW DO YOU VIEW THESE DEVELOPMENTS? ALSO, DO YOU SEE THIS AS A TREND

WHICH SHALL FURTHER PICK-UP GIVEN THE COLD TRADE WARS GOING IN BETWEEN WOULD SUPER POWERS?

The chemical sector has indeed been subjected to tariff barriers for a while now. Especially on the face of on-going India-China territorial disputes, the Government authorities have been imposing and extending Anti-dumping duties and other non-tariff barriers such as BIS restrictions on imports from overseas markets (including China). In addition, the authorities have also been rigorously scrutinizing the past imports of various players in the industry who have been trading with China.

This scrutinization and restrictions seem to be here for a long time. As for India capturing the market lost by China, there has been stiff competition from the East-Asian countries, especially Vietnam, which has attracted nearly every major player from China. Given the close proximity of Vietnam to China, cheap labour and autocratic communist Government, the western Companies have preferred to relocate to Vietnam and other East-Asian countries vis-à-vis India. Although there is a huge opportunity for India to capture the Asian market, there would surely be stiff competition from the East-Asian countries.

ON THE EXPORT SIDE, MEIS IS GIVING WAY TO RODTEP. HOW DO YOU VIEW THIS DEVELOPMENT FROM AN INDUSTRY STAND POINT?

The new scheme would surely pinch a number of entities due to the lower rates of benefit. However, as the RoDTEP scheme is WTO norms compliant, we expect that the same would bring more uniformity in the export schemes provided by the Government. Like many others, we are also contemplating and in process to represent the Government bodies on behalf of chemical sector and gain the maximum possible benefit out of the scheme. If one is not vigilant, one may lose out on a good opportunity.

At the same breath, I am of the firm view that for exports to be competitive Government needs to go beyond subsidies/rebates and focus on creating a world class manufacturing infrastructure (including power, land etc.) at par with China and also create a smooth and reliable/predictable and fast transport system and a professional port handling system like Singapore. Also, it would be advisable to create a simple structure with onus on all statutory compliances under one roof. Today, chemical industry has to deal with multiple Government agencies which are not synchronized and are perceived to be a demon rather than a friendly facilitator.

WHAT ARE THE OTHER RECENT DEVELOPMENTS IN TAX AND REGULATORY SPACE WHICH YOU FIND TO HAVE A SIGNIFICANT BEARING ON BUSINESS AND REASONS THEREOF?

Well first and foremost, the Faceless Assessment announced by the Hon'ble PM seems to have a huge impact on the industry. The introduction of such assessment system also seems to be a stepping stone in the right direction, especially during the current pandemic where the 'digitalization' or 'faceless' is the new normal. Being a law-abiding person, we surely hope that this change in law would achieve its objective of eliminating corruption.

AS FOR INDIA CAPTURING THE MARKET LOST BY CHINA, THERE HAS BEEN STIFF COMPETITION FROM THE EAST-ASIAN COUNTRIES, ESPECIALLY VIETNAM, WHICH HAS ATTRACTED NEARLY EVERY MAJOR PLAYER FROM CHINA.

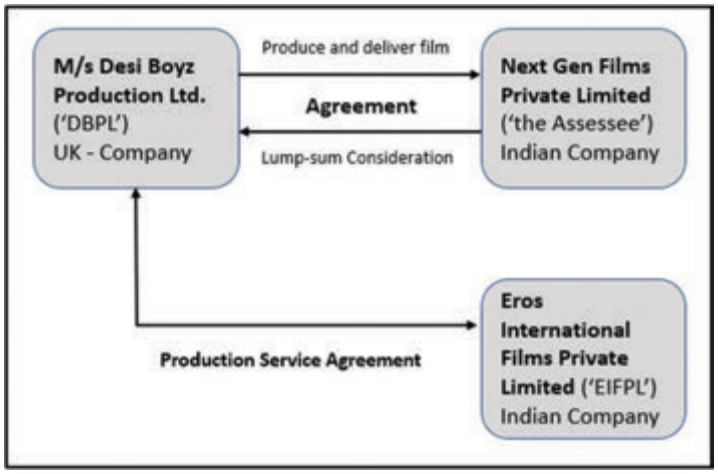
Apart from the Government, even the judiciary has kept busy and delivered some landmark judgements recently. Most notably, the Gujarat HC in the case of **VKC Footsteps India Private Limited vs. Union of India** has read down the provision which denies the refund of 'unutilized input tax' paid on 'input services' as part of ITC accumulated on account of inverted duty structure. This judgement is likely to be quite-beneficial to players in those industries where the tax rate of inputs is higher than the output side.

Similarly, in the recent NAA cases, the Authority has refrained from imposition of penalty where the period in dispute was before the insertion of penal provision. Such judgements assure the taxpayers about the independence of the judicial forums from the Revenue.

Payments made to UK Company for production & delivery of 'Desi Boyz' film not taxable in India; rejects departments contentions of AEs and PE

Next Gen Films Private Ltd.
2020-TII-119-ITAT-MUM-INTL

The Assessee (an Indian company) was engaged into film production. For the production of film 'Desi Boyz', the Assessee entered into an agreement with DBPL (as depicted below). DBPL (a UK based company) was responsible for entire production of the film and was required to ensure delivery of the film as per specifications. The entire responsibility to produce the film was on DBPL for a lump-sum consideration.



DBPL further entered into a separate agreement with EFIPL (an Indian company) to avail certain specific and limited production services at an agreed sum of INR 3 crores.

The ownership of the film was solely and exclusively with the Assessee including all the rights, title, interest in the film, all underlying literary material relating thereto, all original music, lyrics and physical material of any kind etc.

During FY 2010-11 and FY 2011-12, the Assessee paid an amount of INR 57.17 crores to DBPL without deducting applicable withholding taxes under Section 195 of the IT Act. The Assessee contended that DBPL did not have a PE in India and submitted that the underlying transaction was that of buying and selling of a feature film between two independent parties and therefore TDS provisions were not applicable.

The AO concluded that as EIFPL was undertaking the entire film production activities in India and UK locations, it did become a PE of DBPL in India. The AO also asserted that all three parties (viz., the Assessee, DBPL and EIFPL) became AEs by virtue of Article 10 of India-UK DTAA. In this backdrop, the AO concluded that the Assessee was mandated to deduct applicable withholding taxes under Section 195.

Aggrieved, the Assessee filed an appeal before the Hon'ble CIT(A). However, the CIT(A) upheld the action of the AO. Therefore, the subject matter travelled before the Hon'ble ITAT.

The Hon'ble ITAT, upon perusal of the terms of the agreement between the Assessee and DBPL, concluded that the subject agreement was primarily on principal-to-principal basis and thus, ruled that DBPL acted as an independent service provider having entire responsibility to produce the film.

The Hon'ble ITAT further noted that: (a) the Assessee was assessed u/s 143(3) on January 27, 2014 wherein its returned income was duly accepted by the revenue and there was no allegation of over/under payment to DBPL; and (b) DBPL reported a loss of 1.67 Mn Pounds and obtained a loan from bank on an independent basis. Accordingly, the ITAT ruled that DBPL could not be constituted as AE of the Assessee.

The ITAT also concluded that agreement between DBPL and EIFPL was primarily that of a principal and independent agent. Hence, EIFPL was ruled not to be a PE of DBPL. The said conclusion emanated from the fact that: (a) the subject service fee and reimbursement paid by DBPL to EIFPL was merely 10% of the total budget of the film; and (b) revenue of EIFPL (which was INR 133.55 crores for FY 2011-12 and INR 76.27 crores for FY 2012-13) was much higher than the total service fee of INR 3 crores received from DBPL, for the underlying project.

Conclusion

The Assessee and DBPL could not be said to be AEs as the underlying agreement was held to be on a principal-to-principal basis. Further, EIFPL was an independent agent and not a PE of DBPL. Therefore, no profits could be said to have accrued to DBPL in India, as alleged by the revenue.

Authors' Note:

Ruling is based on the factual aspects of each enterprises wherein the AO had held that DBPL had a PE in India and all three (3) enterprises are AEs within the meaning of Article 10 of India-UK DTAA.

Article 10 (supra) states that when enterprises become AEs, then any profits which would have accrued to one of the enterprises but have not so accrued owing to such a relationship, may be included in the profits of that enterprise and taxed accordingly. Thus, income of DBPL was initially held to be taxable in the hands of EIFPL and the Assessee was held to be liable to deduct applicable withholding taxes on the payments made to DBPL.

The AO failed to appreciate that in the Indian context two enterprises can be said to be AEs only as per the joint reading of Section 92A(1) and 92A(2) of the IT Act. Participation in management, control and capital is to be measured with the parameters as enshrined in sub-section (2) of Section 92A. Had the AO established that DBPL and EIFPL were AEs in line with the provisions of Section 92A, the ultimate conclusion would have been different.

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HC disposed of Mastercard's application seeking stay on payment of Equalisation Levy in its favour

Mastercard Asia Pacific PTE. LTD.
2020-TII-26-HC-DEL-INTL

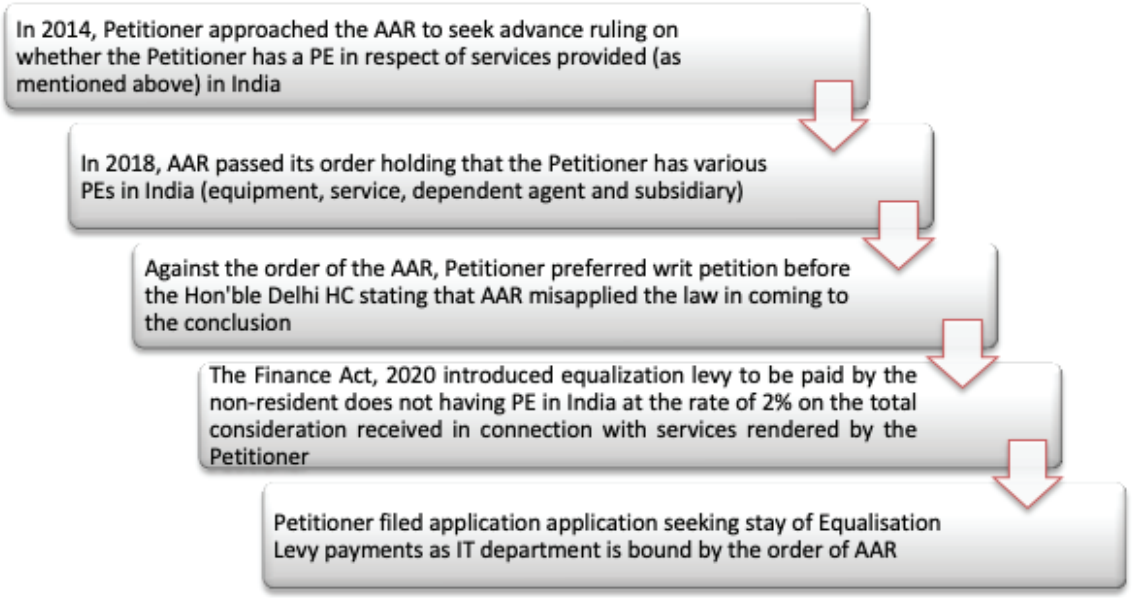
Master cards Asia Pacific Pte. Ltd ('the Petitioner') was a company incorporated under the laws of Singapore. It was WOS of Mastercard International Incorporated, USA. The Petitioner was engaged in provision of facilitating authorization, clearing and settlement in relation to the processing of card payment transactions for customer banks in India.

The Petitioner filed an application before the Hon'ble Delhi HC for grant of stay on applicability of the provisions of new equalisation levy.

In this regard, the Petitioner stated that IT department has been levying income tax on income earned which is attributable to a PE in India and further payment of equalisation levy thereon would in-fact result in double taxation. The Petitioner also submitted that in case it succeeds in the writ petition, it would be eligible to receive refund of income tax and interest thereon and would be liable to pay equalisation levy with interest or vice versa.

Based on the facts that department is bound by the decision of the AAR and afore-said logical arguments of the AR, that payment of equalisation levy as well as Income tax would result into additional financial burden on the Petitioner (and is in teeth of the settled principles of tax laws), the Hon'ble HC disposed of the application granting stay on applicability of the provisions of new equalisation levy.

Background of controversy:



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ITAT allowed deduction under Section 10AA citing that certain conditions are to be satisfied in initial year

IBM India Pvt. Ltd.
2020-TII-242-ITAT-BANG-TP

IBM India Pvt. Ltd ('IBM') was engaged in the business of trading, leasing and financing of computer hardware, maintenance of computer equipment and export of software services to AEs. For the year under consideration, IBM had filed its return of income and had paid taxes under MAT provisions.

During the assessment proceedings, the AO made certain additions to the income declared by the Assessee and passed draft order denying the corresponding deduction under Section 10AA. The DRP confirmed the draft order passed by the AO.

Aggrieved by the final order passed by the AO (in confirmation with DRP directions), IBM preferred an appeal before the Hon'ble ITAT. The ITAT observed that the AO rejected the deduction under Section 10AA on account of following reasons:

- Violation of SOFTEX regulations under the scheme of STPI;
- Violation of Section 10A(2), for not having submitted the software development agreement entered into by Assessee with STPI/SEZ authorities, without filing the statement of work as specified by CBDT in circular

dated January 17, 2013;

- Violation of Section 10A(3), for not obtaining approval of foreign currency account from RBI; and
- For not maintaining unit wise profit and loss account.

Against the contentions of the department, the AR submitted before the ITAT, that most of the objections of the AO have been addressed by co-ordinate bench of this ITAT in IBM's own case for AY 2008-09. The AR further submitted that certain eligibility criteria were to be tested in the 1st year of claim for which he relied upon various rulings. Below are the key issues (and related findings) dealt with by the Hon'ble ITAT:

Issues raised by the AO / DR	Observations of the Hon'ble Bench
MSA does not reveal any specific details regarding software development activity as required by the CBDT in circular dated January 17, 2013	SOFTEX forms filed by the Assessee specifically reveals export contract/purchase order, being filed with SEZ
No evidence of data transmission and export of software outside India	It does not have any relevance while determining the eligibility under Section 10AA
Assessee maintained bank account out of India without approval of RBI and accepted sale proceeds in same account	It is not a requirement to be fulfilled under Section 10AA of the IT Act. Further, Assessee has applied and obtained requisite RBI approval in future year
Analysis of books of account and unit wise P&L account	There was no requirement of maintenance of separate books of account for each units and books of account maintained by the Assessee is sufficient to enable computation of profits of various SEZ units and CBDT Circular No. 1 dated January 17, 2013 clarifies the same. ITAT places reliance in the Assessee's own case for AY 2008-09 and certain other rulings
Assessee continued existing business through SEZ by only changing the name of company from IBM Global Services India Pvt. Ltd.	ITAT held that the objection does not hold good for the year under consideration as the conditions in Section 10AA(4) are required to be satisfied in the first year of claim and same has been accepted by the IT department

Conclusion

The ITAT accordingly allowed the issue in favour of IBM and referred back to the AO for limited purpose of examination of documents/information qua receipts of sale proceeds from export of software development services.

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ITAT accepted Assessee's plea that seconded expats are real employees and TDS u/s 195 is inapplicable; distinguished Centrica India case

Boeing India Pvt. Ltd.
2020-TII-255-ITAT-DEL-TP

During the assessment proceedings, the AO enquired about the reimbursement of expenses paid to Boeing company USA, Boeing International Corporation Korea and Boeing Defense Australia. In response, the Assessee furnished necessary details and explained the nature of reimbursement as salary cost of expatriate employees.

The Assessee further mentioned the fact that it was a real and economic employer of expatriate employees, as these employees were under its control without any relation/connection with its AEs. All expenses on account of salary costs were borne by the Assessee on which the appropriate taxes were duly deducted and deposited u/s 192 of the IT Act.

However, the AO rejected information, documents and explanations provided by the Assessee and held that the same reimbursement is in the nature of FTS. Accordingly, the Assessee was required to deduct TDS u/s 195 of the Act and disallowed the amount of INR 56.58 Crores under Section 40(a)(i). Against the draft order of the AO, the Assessee filed objection with the Hon'ble DRP. However, the DRP upheld the addition made by the AO.

Before the Hon'ble ITAT, the AR relied upon the ruling of co-ordinate bench in the case of Neemrana Hotels Pvt Ltd **(2020-TIOL-1055-ITAT-DEL)** in which it was held that since tax has been deducted u/s 192 of the IT Act, provisions of section 195 will not apply. Also, the decision of co-ordinate bench in case of AT &T Communication Services Pvt Ltd **(2018-TII-604-ITAT-DEL-TP)** wherein the bench had distinguished the judgement of Centrica India Offshore India Ltd **(2014-TII-16-HC-DEL-INTL)** which is relied by the AO.

Based on the its facts, the Assessee also distinguished the judgement of Centrica India (supra) relied upon the AO and mentioned that, the Centrica India was a newly formed entity and did not have necessary trained human resources; unlike the Assessee. Further, the secondment agreement in case of Centrica India clearly shows that secondees were sent to India with the knowledge of various processes and practices. However, the Assessee company is in existence since 2003 and recruited outside India do not possess any specific skill set.

On the basis of above facts and salary reimbursement agreement, the Hon'ble ITAT cited that employees were working wholly under supervision, control and management of the Assessee. Further, AEs were paying salaries in home countries and therefore the Assessee was paying the same as reimbursement.

The ITAT agreed on the fact that Centrica India is clearly distinguishable in the current fact pattern and cited that there is no dispute on the fact that the Assessee has deducted TDS u/s 192 of the IT Act. Basis the above facts, the ITAT ruled that tax withholding under Section 195 is not mandated.

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Depreciation on goodwill on acquisition of business; allowed as deductible expenditure

Geodis Overseas Private Limited
2020-TII-286-ITAT-DEL-TP

Geodis overseas private limited ('Assessee') is a wholly owned subsidiary of Geodis international SA France. The Assessee is engaged in business of transportation of time sensitive packages documents and cargos. For the AY 2010-11, the Assessee filed its return of income and declared a loss of INR 4.27 crores.

During the assessment proceedings the AO/TPO made certain disallowances including disallowance on account of depreciation on goodwill amounting to INR 3.68 crores.

The Assessee objected the adjustment made by the AO filed its objections before the Hon'ble DRP. However, the DRP upheld the action of the AO. Aggrieved by the final order of AO, the Assessee preferred an appeal before the Hon'ble ITAT.

The ITAT observed that during the course of assessment proceedings the company has shown addition in goodwill of INR 14.72 crores and claim depreciation of INR 3.68 crores at the rate of 25%. Further, the Assessee had submitted that goodwill is on account of acquisition of IBM's internal global logistics operations. On acquisition, it became sole logistic service provider for IBM in India and will reap commercial benefits from the same.

Before the Hon'ble ITAT, the AR submitted multi-year outsourcing agreements dated March 31, 2009 with various entities of IBM Group to acquire the freight forwarding business for consideration of INR 14.78 crores out of which tangible assets which comprises of laptops of INR 5 lakhs and balance consideration of INR 14.72 crores represents sole right of the Assessee to provide services to IBM group entities for 15 years.

In addition to the factual arguments, the AR relied on the judgement of the Hon'ble Supreme court of India in case of Smifs Securities Limited **(2012-TIOL-53-SC-IT)** wherein the court had held that good will an asset under Section 32(1) and thus eligible for depreciation. The AR also referred to the judgment of Special bench of the Hon'ble Delhi ITAT in case of CLC & Sons Private Limited **(2018-TIOL-1113-ITAT-DEL-SB)** wherein the bench relied on the same judgement of the Hon'ble Supreme court in case of Smifs Securities (supra).

In addition to the same, the AR also relied on the judgement of the Hon'ble Delhi ITAT in case of Areva T&D India Limited vs. DCIT **(2012-TIOL-234-HC-DEL-IT)** wherein the court had held that business contracts, information, skilled employees, etc. amounts to 'goodwill' and held it to be eligible for depreciation.

The Hon'ble ITAT accordingly held that the goodwill was eligible for deduction.

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Draft assessment order u/s 144C with demand/penalty notice is void; quashed subsequent orders

Perfetti Van Melle (India) Private Limited
2020-TII-270-ITAT-DEL-TP

The Assessee had preferred an appeal before the Hon'ble ITAT covering umpteen issues such as AMP and corporate tax adjustment. During the proceedings, the Assessee extended an application for admitting an additional ground challenging validity of the draft assessment order passed by the AO.

The DR strongly objected against admission of the additional ground mentioning that it was never raised before any of the lower authorities and has been raised for the first time. Against the same, the AR reiterated his reliance on the decision of the Hon'ble Supreme Court in the case of NTPC **(2002-TIOL-279-SC-IT-LB)**. The ITAT accordingly admitted the additional ground of the Assessee.

The AR argued that the proceedings were concluded by the AO along with the draft order dated December 27, 2018 as he quantified the taxable income and determined tax payable by serving notice of demand u/s 156 of the IT Act and also initiated the penalty proceedings. Against which, the DR argued that the impugned order was draft order and even the Assessee believed the same and filed its objections before the Hon'ble DRP.

Further, the DR placed reliance on the decision of the Hon'ble Supreme Court in the case of Sun Engineering Works Pvt. Ltd. **(2002-TIOL-242-SC-IT)** and the decision of the Hon'ble Kolkata ITAT in the case of Price Water House Company **(2020-TIOL-640-ITAT-KOL)** wherein the bench had ruled the subject issue in favour of the department.

The ITAT noted that the Hon'ble Supreme Court in the case of Dipak Babaria **(3SCC 502)** had held that a particular thing should be done in a manner as prescribed by the statute and observed as below:

"If the law requires that a particular thing should be done in a particular manner, it must be done in that way and none other. State cannot ignore the policy intent and procedure contemplated by the statute"

The Hon'ble ITAT further relied upon the judgement of co-ordinate bench in the case of Nikon India Pvt. Ltd. **(2020-TII-178-ITAT-DEL-TP)** and mentioned that the principles laid down by the co-ordinate bench in this decision were approved by various High Courts like the Hon'ble High Court of Delhi in the case of Turner International Pvt. Ltd. **(2017-TII-37-HC-DEL-TP)** and JCB India Ltd. **(2017-TII-71-HC-DEL-TP)**.

Conclusion

Based on the afore-said arguments and the decisions relied upon, the Hon'ble ITAT held that draft assessment order was bad in law and therefore, all the subsequent proceedings and orders became non-est.

Authors' Note:

Department tends to argue that mistakes in draft order under Section 144C in the nature of computation of tax liability/issuance of demand notice/penalty notice are rectifiable in terms of Section 292B of the IT Act. Against which umpteen courts have held that such mistakes cannot be termed as a procedural irregularity, and therefore are not rectifiable under the said provisions.

In the present case, the department relied upon the decision of the Hon'ble Kolkata ITAT in case of Price Water House Company (supra) which is clearly rejected by the Hon'ble bench with the observation that the Kolkata ITAT did not follow the principle laid down by the Hon'ble Supreme Court in case of Dipak Babaria (supra).

Further, the series of orders in favour of taxpayers and dismissal of department's SLP by the Hon'ble Supreme Court of India on this particular issue in case of Nokia India Private Limited **(2018-TII-16-SC-TP)** and Control Risk India Private Limited have clearly indicated that such mistakes of issuance of demand notice/penalty notice are not rectifiable and hence, further proceedings become null/void.

ITAT remits TP adjustment on account of discount/rebate to the file of AO; directs to examine in light of evidences

Bureau Veritas Consumer Products Services (India) Private Limited
2020-TII-287-ITAT-DEL-TP

Bureau Veritas Consumer Products Services (India) Private Limited ('Assessee') is a wholly owned subsidiary of Bureau Veritas SA., France. It was engaged into provision of testing, inspection and audit services to clients for a full range of consumer products/softlines/textiles, toys and juvenile products, hardlines/hard goods and house hold products throughout the supply chain.

For the year under consideration, the Assessee provided testing services to various customers and raised invoices on such customers for which the Assessee paid rebates/discounts of INR 3.50 Crores to its AE which were extended by the AEs to its respective customers. The AO disallowed the same citing that there is no nexus between the customers and holding company. Further, the AO mentioned that expenditure is not wholly and exclusively for business purposes and a device to transfer the profit to AEs.

The AR submitted that entire transactions were done as per the agreements between the Assessee and its AEs and as per MOUs between the AEs and customers and explained the mechanism of the discount/rebate adopted by the Group. The AR further submitted agreements and MOUs before the ITAT as an additional evidence (as the same were not submitted before the lower authorities).

Conclusion

In light of the above facts & observations and additional evidences submitted by the Assessee, the Hon'ble ITAT restored the issue back to the file of the AO for verification of additional evidences. The ITAT directed the Assessee to demonstrate that discounts/rebates have ultimately been passed on to customers and directed AO to verify the same in light of underlined Agreements/MOUs.

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ITAT held - Provision for assets impairment is non-operating in nature; to be excluded while computation PLI

M/s Imsofer Manufacturing India Pvt. Ltd.
2018-TII-471-ITAT-DEL-TP

Imsofer Manufacturing India Pvt. Ltd ('the Assessee') is a wholly owned subsidiary of Ferrero S.P.A with the ultimate holding company being Ferrero International SA. The Assessee is engaged in the business of manufacturing chocolate and other confectionery products.

During the assessment proceedings, the AO/TPO considered the provision for impairment of assets amounting to INR 15.37 lakhs as operating expenses. The Assessee submitted to the AO that machinery purchased was lying in capital work in progress and accounting treatment given was in line with applicable accounting standard. However, the TPO disregarded the same and held impairment as operating in nature.

Before the Hon'ble ITAT, the AR reiterated the facts and submitted that provision for impairment of assets should be considered as non-operating in nature. Against which the DR supported the findings of the lower authorities.

The Hon'ble ITAT observed that: (a) provision for impairment of assets was neither a depreciation charge nor amortization of fixed assets; (b) treatment given by the Assessee was in line with the accounting standards; and (c) provision for impairment of assets was not regular business expenditure since it was not recurring in nature and was not related to normal business operations.

Conclusion

The Hon'ble ITAT accordingly held that the provision for impairment of assets was non-operating expenditure and directed the AO/TPO to exclude the same.

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Relaxation granted to non-resident from obtaining PAN

Notification No. 58/2020
August 10, 2020

Insertion of new Rule 114AAB to the Income Tax Rules, 1962:

CBDT vide its Notification No. 58/2020 dated August 10, 2020 has provided relaxation to non-residents (not being a company or foreign company) from obtaining PAN in case the below conditions are met:

- Non-resident has no other income, except the income from investment in the specified funds i.e. 'Category I' or 'Category II' Alternative Investment Fund (during PY);
- Tax has been deducted at source and paid by the specified fund at the rates specified in Section 194LBB of the IT Act; and
- Non-resident furnishes the requisite details and documents (such as Name, Email ID, Contact No., Permanent Address, Tax Identification Number/Unique Identification Number) to the specified fund.

Specified funds (as enumerated above) shall furnish a quarterly statement in Form No. 49BA to the Income-tax authorities providing details collected from the non-resident.

Consequential amendments in Rule 37BC - Relaxation from deduction of tax at higher rate under Section 206AA:

Further, the CBDT has amended Rule 37BC by inserting sub-rule (3) therein, which provides relaxation from deduction of TDS at higher rate in case where the non-resident has not obtained PAN as per Rule 114AAB. Below is the newly sub-rule (3) for ease of reference:

(3) The provisions of section 206AA shall not apply in respect of payments made to a person being a non-resident, not being a company, or a foreign company if the provisions of section 139A do not apply to such person on account of Rule 114AAB.

Authors' Note:

The said relaxation is sought to be granted to non-residents, who are earning income from specified funds set-up in the IFSC. This is indeed a welcome move given that non-residents should be offered a hassle-free compliance and procedural environment. Notably, consequential amendments have also been carried-out in order to avoid the risk of higher deduction of tax on income earned by the non-residents.

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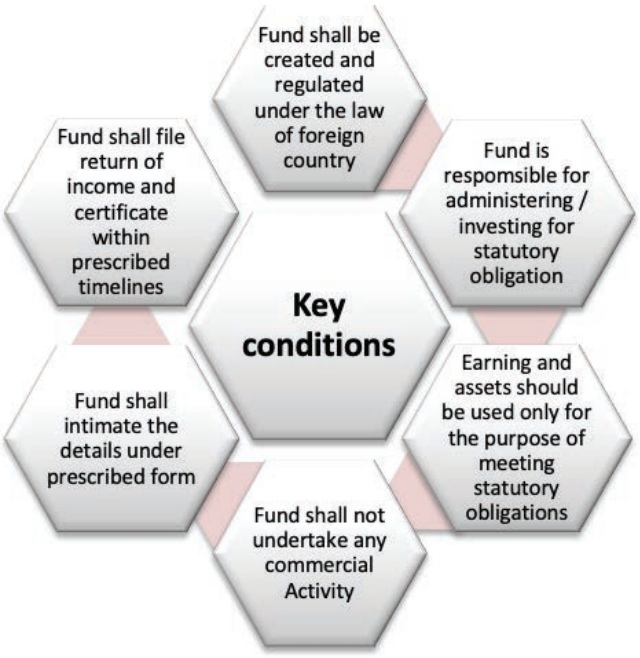
CBDT Notified eligibility conditions for Pension Funds to avail exemption for certain income u/s. 10(23FE)

Notification No. 67/2020
August 17, 2020

The CBDT has notified certain conditions under which pension funds can avail exemptions for the income (by way of dividend, interest or long-term capital gains) earned from certain entities investing into infrastructure activities as covered under Section 10(23FE).

The said Notification through a separate rule i.e. Rule 2DB, provides certain conditions basis which a pension funds will be allowed to avail benefits which are as follows:



Further, the said Notification has prescribed guidelines for availing such benefit under Rule 2DC of the IT Rules for filing application in Form No. 10BBA to avail the benefit, intimation to be filed with the AO in Form No. 10BBB and certificate from an accountant to be obtained in Form No. 10BBC.

Authors' Note:

The Finance Act, 2020 introduced a new provision in Section 10(23FE) of the Act that provides a tax exemption for income from dividends, interest, and long-term capital gains earned from certain investments made by foreign investors' wholly owned subsidiaries of the Abu Dhabi Investment Authority, SWFs and pension funds.

The exemption is available for income earned from qualifying investments in specified Indian infrastructure enterprises. This appears to be an attractive option both for foreign investors including SWFs (to earn tax free incomes) and for India in order to raise funds to be invested in key infrastructural projects.

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CBDT clarifies: Banks cannot levy any charges on payment/receipts through electronic modes

Circular No. 16/2020
August 30, 2020

The Central Government in line with its objective to promote digital transactions had introduced new Section 269SU which mandates every person having business turnover of more than INR 50 crores in preceding PY, to provide facility for accepting payment through prescribed electronic modes.

Further, Notification No. 105/2019 dated December 30, 2019 prescribed following three (3) modes as eligible under Section 269SU: (i) Debit Card powered by RuPay; (ii) Unified Payments Interface (UPI) (BHIM-UPI); and (iii) Unified Payments Interface Quick Response Code (UPI QR Code) (BHIM-UPI QR Code).

Further the CBDT had clarified that, as per Section 10A of the Payment and Settlement Systems Act 2007, which provides that no Bank/System shall impose any charge on payer or receiver making/receiving payments through electronic modes prescribed under Section 269SU.

However, the CBDT has received representations that some banks are imposing and collecting charges on transactions carried out through UPI (beyond certain number of transactions which are allowed as free). In this regard, the CBDT has clarified such breach attracts penal provisions and has advised Banks to refund the charges collected, if any, on or after January 01, 2020 on transactions carried out using the electronic modes prescribed under Section 269SU of the IT Act.

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Gujarat HC dismisses Petition challenging constitutional validity of 'intermediary service' provision under GST

Material Recycling Association of India vs. Union of India
2020-TIOL-1274-HC-AHM-GST

The Petitioner had preferred a Writ Petition challenging the constitutional validity of Section 13(8)(b) of the IGST Act which prescribes that in case of supply of intermediary service, the services are deemed to have been supplied at the location of the supplier.

It was observed by the Gujarat HC that there is no distinction between the intermediary services provided by a person in India or outside India. Merely because the invoices are raised on the person outside India with regard to the commission and foreign exchange received in India, it would not qualify as export of services. More particularly when the legislature itself has sought to consider the place of supply of services as place of person who provides such services in India. Accordingly, it was held that Section 13(8)(b) r/w. Section 2(13) of the IGST Act, are not ultra vires or unconstitutional in any manner.

Authors' Note

Although the constitutional validity of intermediary service provisions had not been challenged earlier, the taxability thereof has been a matter of intense litigation even under the erstwhile Service tax regime. In the case of GoDaddy India Web Services Private Limited **(2016-TIOL-08-ARA-ST)**, the New Delhi AAR had held that services of marketing provided by Indian entity to its parent company in the USA shall be regarded as 'export' as provision of services was on principal-to-principal basis.

The litigative nature of the matter also persisted in the GST era. Notably, the WB AAAR in the case of Global Reach Education Services Private Limited **(2018-TIOL-2-AAAR-GST)** had held that marketing and promotion of foreign university's courses and assistance in enrolment of students in India amounts to 'intermediary services'.

Similar to the view of WB AAAR, the Gujarat HC has taken a pro-Revenue view which is likely to be litigated further as genuine exporters providing various business services abroad are being considered as 'intermediary' for the purpose of collection of taxes. It would be interesting to see the fate of 'intermediary service' in time to come.

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Gujarat HC allows refund of input services in case of inverted duty structure

VKC Footsteps India Private Limited vs. Union of India
2020-TIOL-1273-HC-AHM-GST

The Petitioner engaged in the business of footwear attracting GST rate of 5%, procured various raw materials for the manufacture of footwear @ 12% and 18% GST. This resulted in accumulation of unutilized credit in electronic credit ledger of the Petitioners. Rule 89(5) of the CGST Rules, which provides the formula for determining the refund on account of inverted duty structure was amended to deny refund on the ITC availed on input services. The same provision was challenged by the Petitioner in the instant case.

The Gujarat HC observed that Section 54(3) of the CGST Act allowed refund in respect of 'any unutilized input tax' and therefore, Rule 89(5) of the CGST Rules cannot restrict the refund only to 'input' by excluding the 'input services' from the purview of ITC. Moreover, clause (ii) of proviso to Section 54(3) of the CGST Act refers to both, supply of goods and services and not only supply of goods as per amended Rule 89(5) of the CGST Rules.

Basis the above observations, the Gujarat HC held that framing of the rules restricting the statutory provision cannot be the intent of the legislature as has been interpreted in the Circular No.79/53/2018 – GST dated 31 December 2018 to deny the refund of tax paid on 'input services' which is part of unutilized ITC. Consequently, the HC opined that the Explanation (a) to Rule 89(5) which denies the refund of 'unutilized input tax' paid on 'input services' as part of ITC accumulated on account of inverted duty structure is ultra vires the provision of Section 54(3) of the CGST Act.

Authors' Note

In 2018, the CBIC vide Notification No. 21/2018 dated April 18, 2018 had amended the definition of 'Net ITC' [with reference to Rule 89(5) of the CGST Rules] to remove input services from its purview. Subsequently, the CBIC had issued another notification denying credit on input services with retrospective effect from July 01, 2017. This retrospective amendment had been challenged before various HCs vide Writ Petitions. The Quarry Owners Association **(2019-TIOL-1726-HC-AHM-GST)** had challenged the same before Patna HC, and AFCONS-SIBMOST Joint Venture **(Civil Writ Jurisdiction Case No.11470 of 2019)** before Gujarat HC, among others. However, the said HCs stayed the proceedings in the said matters. However, the Maharashtra AAR in the case of Daewoo-TPL JV **(2019-TIOL-233-AAR-GST)**, had gone ahead and held that the Applicant engaged in execution of construction of large projects is ineligible to claim refund of ITC on 'input services' with respect to transaction covered under inverted duty structure.

Accordingly, in a great relief to various taxpayers, especially those, executing turnkey projects, where often the entire project is classified as original works contract services, which in certain cases, are chargeable to GST@12% and involves procurement of several services which are taxable at 18%. It would now be interesting to see if the CBIC issues a clarification allowing the refund of unutilized ITC qua 'input services' involving inverted duty structure or negates the instant HC decision with a retrospective amendment in the law.

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ITC not available on lease premium charges and maintenance charges

Daicel Chiral Technologies (India) Private Limited
2020-TIOL-211-AAR-GST

The Applicant had acquired land on lease for a period of 33 years and executed a lease deed and availed the credit of GST on supply of leasing services provided by the Lessor for the land acquired on lease. It was submitted that the leased land would be used by them in rendering the Chromatography services from the laboratory to be constructed on the land and hence ITC in respect of the leasing services was available;

The Telangana AAR observed that in terms of Section 17(5) of the CGST Act, the definition of 'immovable property' is an inclusive definition and includes all the things attached to the earth or permanently fastened to anything attached to the earth. The AAR further observed that the 'building' constructed by the Applicant unquestionably falls within the ambit of 'immovable property' and cannot be treated as plant and machinery.

As the building after completion of construction would be utilized by the Applicant for their own utility to accommodate a laboratory, the Telangana AAR held that the Applicant is not eligible to avail ITC of GST paid on payment of one-time Lease Premium Charges towards land lease as well on the annual lease rentals and maintenance charges.

Authors' Note

This instant ruling of the Telangana AAR has traversed the same path as that in case of Shree Varalakshmi Mahaal LLP **(2020-TIOL-02-AAR-GST)** and GGL Hotel and Resort Company Limited **(2019-TIOL-42-AAAR-GST)** which had denied ITC on construction of Marriage hall used in furtherance of 'renting' business and during pre-operative period respectively. While the Odisha HC in the case of Safari Retreats Private Limited **(2019-TIOL-1088-HC-ORISSA-GST)** had allowed ITC on goods and services used for construction of immovable property as being used in the course or furtherance of business, the same has been challenged in the Supreme Court by the Revenue.

It appears that the provisions of Section 17(5) of CGST Act would need to be evaluated with greater scrutiny on a case to case basis, because a narrow interpretation, as can be seen in the instant case, defeats one of the very objectives of introducing the GST i.e. seamless flow of credit.

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NAA holds that PVR Cinemas profiteered on account of GST reduction, however refrains from imposing penal provisions

PVR Limited
2020-TIOL-53-NAA-GST

The DGAP had reported that the Respondent, PVR Limited, had profiteered by not passing on the benefit of GST rate reduction commensurately to the consumers. Taking into cognizance the report of the DGAP and various contentions put forth by the Respondent, the NAA observed that the Respondent continued to sell the tickets at the same price even after GST rate reduction from 28% to 18% w.e.f. January 1, 2019.

The NAA further observed that the DGAP had correctly computed the profiteered amount where average selling prices pre-rate reductions were compared with the actual selling prices post-rate reduction. The NAA dismissed the Respondent's contention that there were no specific guidelines or methodology prescribed for computation of the benefit to be passed on, by observing that Section 171 clearly stipulates that any reduction in the rate of tax or benefit of ITC has to be passed to the recipients.

Lastly, the NAA refrained from imposing penalty upon the recipient as the infringement pertained to the period from January 1, 2019 to January 6, 2019 and the penal provisions for anti-profiteering u/s 171(3A) came into effect only on January 1, 2020.

Authors' Note

In the recent judgments, the NAA has been withdrawing penalties imposed on assessees where the disputed period involved was prior to the introduction of penal provisions for anti-profiteering vide sub-clause (3A) to Section 171 of the CGST Act (which came into effect from January 1, 2020). Notably in the case of Varun Goel vs. Eldeco Infrastructure & Properties Limited **(2020-TIOL-43-NAA-GST)**, the assessee had been served with a notice imposing penalty u/s 122 of the CGST Act for anti-profiteering. However, the NAA while issuing the final order held that penalty was not imposable as sub-clause (3A) to Section 171 of the CGST Act was not in effect during the relevant period. A similar view has also been taken in the cases of Sun Infra Services Pvt. Ltd. **(2020-TIOL-39-NAA-GST)** and Harish Bakers and Confectioneries Private Limited **(2020-TIOL-45-NAA-GST)**.

In contrast, the SCN issued for imposition of penalty u/s 122(1) per se was withdrawn by the NAA (in the case of PVR Limited) for the reason that violation of the provisions of Section 171(1) were not covered under Section 122, as it did not provide penalty for not passing on the benefits of tax reduction and ITC.

It is indeed refreshing to see the NAA refraining from imposing penalty retrospectively. These judgments are in line with the principle laid down in Article 20 of the Constitution, which inter-alia forbids imposition of penalty retrospectively.

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AAR: Couplers for attaching railway bogies classifiable under HSN 8607

Prragathi Steel Castings Private Limited
2020-TIOL-216-AAR-GST

The Applicant, engaged in the business of manufacturing and supply of various steel castings, automobile parts, valves, etc. had filed an application before the Karnataka AAR to ascertain the correct classification of railway parts such as couplers, knuckles, lock, etc. which are supplied to a customer who in-turn supplies the same to the Indian railways.

The Karnataka AAR observed that HSN 8607 inter alia covers parts of railway or tramway locomotives, coupling devices, etc. Further, the HSN 8607 covers parts of railway, tramway locomotives or rolling stock subject to fulfilment of the following conditions:

- They must be identified as being suitable for use solely or principally with the above-mentioned vehicles;
- They must be identified as being suitable for use solely or principally with the above-mentioned vehicles;

The first condition seems to be fulfilled, as the goods are manufactured as per the pre-determined drawings of the Indian Railways on placement of order by the buyer, who has also given an affidavit that the said goods are ultimately supplied to the Indian Railways and are not useful for anyone else. The AAR further observed that Note 2 to Section XVII specifies that the expression 'parts and parts of accessories' do not apply to certain listed articles, whether or not they are identifiable as for the goods of Section XVII and the said goods are not covered under the articles specified in Note 2. Therefore, it was observed and held that the goods manufactured and supplied by the

applicant are not excluded by the provisions of Note 2 to Section XVII.

The AAR further referred to Note 3 to Section XVII wherein it has been provided that the term 'parts or accessories' do not apply to parts which are solely or principally with the articles of those chapters. Accordingly, the AAR observed that in the instant case as the parts of coupling devices are suitable solely for Indian Railways and also classifiable under specific entry of HSN 8607. Thus, the second condition is also fulfilled and therefore it was held that the coupling devices were correctly classifiable under HSN 8607.Basis the above, the AAR held that goods classifiable under HSN 8607 are chargeable to 12% GST in terms of Notification No. 14/2019 – Central Tax (Rate) dated 30.09.2019.

Authors' Note:

The tariff classification of railway products has always been a matter of immense litigation and dispute in light of the contradictory Section Notes. While the Revenue authorities generally wish to exclude the said goods from the purview of HSN 8607 (where the rate of GST is lower) in terms of Note 2 to Section XVII, the taxpayers look to classify such goods under HSN 8607 itself in terms of Note 3 thereto.

In the instant case, the Karnataka AAR has concluded the correct classification of couplers by subjecting the same to the conditions for general rules of interpretation and giving preference to the specific entry over general. However, there have been few judgments and rulings where classification under CTH 8607 has been denied, such as Diesel Locomotive Works vs. Commissioner of C. Ex., Allahabad **(2002-TIOL-559-CESTAT-DEL)** , Prag Industries vs. Collector of Central Excise **(2002-TIOL-560-CESTAT-DEL)** and therefore, the litigation with respect to the classification involving the railway product does not seem to end in near future.

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AAR: Contracts with distinct value for goods and services is not a Works Contract

Prasa Infocom & Power Solutions Private Limited
2020-TIOL-209-AAR-GST

The Applicant had entered into a contract for preparation and maintenance of Data center on sub-contracting basis. The contract involved a composite supply of goods and services that are naturally bundled in the course of setting up of data center and therefore a question was raised whether supply of goods and services by the Applicant qualify as a works contract.

The Maharashtra AAR observed that Schedule II to the CGST Act clearly mention that the following are supply of services:

- Construction of a complex, building, civil structure, or a part thereof;
- Works contract including transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contact

Hence, the works contract would be treated as a service and GST would be charged accordingly.

It was further observed by the Maharashtra AAR that the contract pricing is bifurcated for supply of Equipment/Materials as well for the services i.e. their installation and maintenance. The AAR also noted that the supply cannot be classifiable under Chapter 9954 as only those supplies which are mainly related to the construction service can be classified under CTH 9954. However, in the instant case, the data center is merely a space/room where the equipment/machinery/other various apparatus is installed. As a result, there is no case of construction.

Pursuant to the above, the AAR agreed with the Revenue that the supply of goods and services by the Applicant does not fall under the ambit of Works contract as the value of goods and services is clearly distinct from one another.

HC: Collection of Entertainment Tax by Municipality post introduction of GST permitted

Balaji Theatre
2019-TIOL-2637-HC-MAD-GST

The Puducherry Government collected Entertainment Tax @ 25% from the theatre owners, in addition to GST charged @ 18% and 28% depending upon ticket prices i.e. total 53% tax. Aggrieved, the Petitioners filed a Writ before the Madras HC challenging the levy of entertainment tax post introduction of GSTUpon perusal of Section 173 of the CGST Act, the Madras HC observed that the Legislature had consciously retained the power of the Municipal Council to collect tax on all other subjects except the collection of tax on advertisements other than advertisements published in the newspapers. The HC further observed that as Section 173(2) of the CGST Act states that collection of tax by such authorities shall stand annulled or rescinded or modified, the powers of Municipal Corporation are only modified and are neither totally annulled nor rescinded. Basis the above observations, the Madras HC held that the collection of the entertainment tax by Municipality is within their power as Entry 62 of the State List of the Seventh Schedule of the Constitution of India. Accordingly, the Madras HC dismissed the Writ filed by the Petitioner.

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CESTAT holds that cash refund of cesses is available where the same could not be availed vide TRAN-1

Bharat Heavy Electricals Limited
2020-TIOL-1341-CESTAT-DEL

The Appellant had huge amounts of accumulated credit for the reason that their products were exempted from payment of duty under Rule 6(6) of CENVAT Credit Rules which exempted the supplies to SEZ, EOU, etc. The Appellants had not availed refund of unutilized credit under Rule 5 of the CENVAT Credit Rules, on the expectation that they would be able to use the credits available with them on domestic clearances on the basis of their past clearances. The credit stood in the ER-1 Return of the Appellant as on 30 June 2017. Subsequently, the Appellant had filed a refund application for the same which had been rejected by the Respondent on the ground that since there was no provision to carry over the impugned cesses under the GST regime and there was no provision for refund of the same and thus such credits would lapse.

The CESTAT observed that as on 01 July 2017, the cesses credit validly stood in the accounts of the Appellant and very much utilizable under the existing provisions. It was held that the credits earned were a vested right in terms of the Hon'ble Apex Court judgement in Eicher Motors vs. Union of India **(2002-TIOL-149-SC-CX-LB)** case and will not extinguish with the change of law unless there was a specific provision which would debar such refund. As there is no provision in the GST law that such credits would lapse merely by change of legislation suddenly, the Appellants could not be put in a position to lose this valuable right. Accordingly, the CESTAT set aside the order passed by the Commissioner (A) upholding the rejection of refund claim.

Authors' Note:

It is pertinent to note that even as on date there are various taxpayers whose credit are lying in their books of accounts of the earlier regime. The Revenue authorities have denied

the refund claim of these taxpayers on the ground that there is no facility to avail cash refund of such credit accumulated in the erstwhile indirect tax regime. In the case of United Seamless Tubular Private Limited vs. Commissioner of Central Tax **(2019-TIOL-998-CESTAT-HYD)**, the Hyderabad Tribunal had held that CENVAT Credit which may have accrued prior to GST but not taken in the ER-1 return would not be available as cash refund.

The instant judgement comes as a great relief to the above-mentioned taxpayers, who now have a precedent allowing refund of such accumulated credit. It would now be interesting to see whether the Revenue would challenge this judgement or whether the CBIC would issue any clarification in this regard.

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HC directs Revenue to refund IGST already paid on ocean freight

Bharat Oman Refineries Limited
2020-TIOL-1458-HC-AHM-GST

The Petitioner had filed a writ petition before the Gujarat HC challenging applicability of GST on Ocean Freight and requested to grant refund of the amount of IGST already paid by pursuant to Entry No. 10 of RCM Notification along with appropriate interest on such refund. The HC held that the matter has already been settled in the case of Mohit Minerals Private Limited vs. Union of India **(2020-TIOL-164-HC-AHM-GST)** wherein it had been held that the Notification No. 8/2017-IGST (Rate) dated 28 June 2017 and Entry No. 10 of the RCM Notification was ultra vires the IGST Act, on the ground that the same lacked legislative competency.

Basis the above observations, the HC directed the Respondents to sanction the refund and refund the requisite amount of IGST already paid by the Petitioner pursuant to the Entry No. 10 of RCM Notification declared to be ultra vires by the HC.

Authors' Note:

Even under the Service tax regime, the Gujarat HC in the case of Sal Steel Limited **(2020-TIOL-163-HC-AHM-ST)** had struck down similar notifications which levied Service tax on ocean freight. The rationale for the said judgment was similar to the judgment of Mohit Minerals (supra), that levy of Service tax on ocean freight for import of goods is ultra vires to the provisions of the Finance Act, 1994 inasmuch as the subject transactions were being carried out beyond the territories of India.

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Valuation of Imported Goods

M/s Burberry International
2020-TIOL-1328-CESTAT-DEL

During investigation on declared value of 'Sealant tape' imported by the Appellant, the authorities observed deviation in the actual length of sealant length as declared in the BoE. The revenue initiated the proceedings for 'undervaluation'.

The Appellant made its submission that price of the sealant is dependent on the quality of the tape and not length of the tape. However, the adjudicating authorities as well as the Appellate authorities have noted that in absence of any cogent evidence, the submissions of Appellant lacked merit. The adjudication order thus confirmed the differential duty demand and Appellate authorities have upheld the same.

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Classification of Parts of Motor Vehicle

Shiroki Auto Components India Pvt. Ltd.
Ahmed CESTAT-2020-CUST

In yet another classification dispute surrounding 'motor vehicle parts', the Hon'ble CESTAT has allowed assessee's appeal and held that import of child part for its usage in motor vehicle seats are classifiable under heading 9401 as opposed to 8708, as alleged by revenue.

Heading 8708 generically covers within its fold 'motor vehicle parts' whereas 'parts of motor vehicle seats' are specifically covered under heading 9401 (more particularly sub-heading 9401 9000). With this framework, the CESTAT employed the rule of interpretation that harps on 'specific over general' and held that child parts to be used in motor vehicle seats are correctly classifiable under heading 9401.

Authors' Note:

Parts used in motor vehicle have always faced a classification dispute of being treated as a 'part' under heading 8708 or as an independent article elsewhere under the tariff. This dispute is identically applicable to parts of railways, tramways and aircrafts, all being covered under Section XVII of the Customs Tariff.

Despite catena of disputes on this issue which has transgressed from the erstwhile Excise regime, the revenue has consistently failed to set-out any clear directions. It appears this dispute is here to say.

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EX-COO, KPMG'S writ challenging SCN issued for FTP/SFIS violation was dismissed and considered "Premature"

Natrajh Ramakrishna
2020-TIOL-1436-HC-DEL

The Petitioner approached Writ Court challenging a SCN issued by Revenue on the grounds that neither there was any violation of the Foreign Trade Policy nor there was a misuse of SFIS scheme and the licenses were issued by DGFT which are valid even till today. It also contended that the Revenue do not have the Jurisdiction to issue the notice.

However, High Court concluded that the Revenue had the power, jurisdiction and authority to issue the SCN. It also held that the petition is premature and directed the Petitioner to give a reply to the SCN and adhere to the adjudication process itself.

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Gujarat HC: Services rendered by a 100% subsidiary to its Parent Company abroad, amounts to export of services

Linde Engineering India Private Limited
2020-TIOL-1285-HC-AHM-ST

The Petitioner, had provided various consulting engineering services to its parent/overseas related parties without payment of the Service Tax, under the bona fide belief that they were not liable to pay any service tax. However, the Petitioner received a SCN requiring them to pay the service tax on the premise that the Petitioner and its overseas related customers were mere establishments of the same legal entity. Aggrieved, the Petitioner preferred a Writ before the Gujarat HC.

The Gujarat HC observed that the Respondent assumed the jurisdiction on mere misinterpretation of Section 65B(44) of the Finance Act r/w. Rule 6A. By no stretch of imagination, it can be said that the rendering of services by the Petitioner to its Parent Company located outside India was service rendered to its other establishment so as to deem it as a distinct person as per explanation 3(b) of Section 65B(44) of the Finance Act. The Petitioner, an establishment in India, a taxable territory and its 100% holding Company, which is the other entity in non-taxable territory cannot be considered as mere establishments so as to treat as distinct persons for the purpose of rendering service. Consequently, the petition was ruled to be not maintainable under Article 226 of the Constitution of India.

Authors' Note:

Recently, the Maharashtra AAR in the case of Sabre Travel Network India Private Limited **(2019-TIOL-58-AAAR-GST)** had also held that where a taxpayer provides services to its parent Company abroad merely as facilitation, the same amounts to intermediary service and not export. There-

fore, the same would be liable to IGST. The said ruling had created a lot of chaos in the industry as Companies rendering services to its parent Companies abroad now faced an inherent risk of such transactions being taxed. The said ruling, however, was subsequently reversed partly by the AAAR stating that ascertainment of place of supply is beyond the scope of advance ruling.

Although the instant judgment, pertains to the erstwhile Service tax law, it would have a persuasive effect in GST, as the export of services definition is similar in GST era as well.

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SC holds that supply of SKID Equipment to Customer is chargeable under Service tax

Adani Gas Limited
2020-TIOL-143-SC-ST-LB

The Respondent, engaged in the business of distribution of natural gas, namely CNG, PNG, to industrial, commercial and domestic consumers, had installed 'skid units' at the customer's sites which consists of isolation valves, filters, regulators and electronic meters, etc. for facilitation of its distribution. The Skid equipment regulates the supply of PNG being distributed and records the quantity of PNG consumed by the customer, which is then used for billing purposes.

During the course of excise audit, it was observed that the Respondent had charged the customer for 'supply of pipes' while providing gas connection although the ownership of the equipment was retained by the Respondent. The Revenue authority held that the Respondent was not only selling gas to the customer but also the services of installation and maintenance of measurement equipment at the customers' premises, thereby taxable u/s. 65(105)(zzzzj) of the Finance Act, which levies service tax on the use of tangible goods.

The Apex Court observed that the introduction of Section 65(105)(zzzzj) in the Finance Act, was with the intention of taxing such activities that enable the customer's use of the service provider's goods without transfer of the right of possession and effective control and this provision created an element of taxation over a service, as opposed to a 'deemed sale' under Article 366(29-A)(d).

The SC held that the equipment was vital ingredient of the agreement towards protecting the mutual rights of the parties and in ensuring the fulfilment of their reciprocal obligations as seller and buyer in regulating the supply of gas. Therefore, the SC held that the supply of the pipelines and the SKID Equipment by the Respondent, was of use to the customers and is taxable under Section 65(105)(zzzzj) of the Finance Act.

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Amendment in the class of registered person who are eligible for e-invoicing

Notification No. 60 and 61/2020 – Central Tax
July 30, 2020

CBIC notified registered person whose aggregate turnover in a financial year exceeds 500 crore rupees excluding SEZ and those referred to in sub-rules (2), (3), (4), and (4A) of rule 54 of CGST rules as class of registered person who are applicable to prepare e-invoice. Further, the CBIC notified Form GST INV-01 for new Format/Scheme for e-invoice and clarified as to which line items on the invoice are mandatory or optional, and which can or cannot be repeated.

GSTN enables facility for authentication of Aadhar for registrations

Notification No. 62/2020 – Central Tax
August 20, 2020

The CBIC has recently notified the amendment to CGST Rules. Following are the key highlights of the amended Rules:

- Applicants shall undergo authentication of Aadhaar number and the date of submission of the application in such cases shall be the date of authentication of Aadhaar number, or 15 days from the submission of the application in Part B of FORM REG-01, whichever is earlier;
- Where a person, fails to undergo authentication of Aadhaar number or does not opt for authentication of Aadhaar number, the registration shall be granted only after physical verification of the place of business in the presence of the said person.

Amendment to Section 50 of the CGST Act for levying interest only on net cash liability upon delayed payment of GST

Notification No. 63/2020 – Central Tax
August 25, 2020

The CBIC has appoints 1 September 2020 as the date on which the amendment to Section 50 of the CGST Act shall come into force as introduced vide Section 100 of the Finance Act (No. 2), 2020.

As per the proviso inserted to Section 50 of the CGST Act, interest liability for delayed payment of GST is to be charged on the Net Cash Tax Liability.

Press Release dated August 26, 2020

Clarification w.r.t. applicability of NN 63/2020 – Interest on delayed payment of GST

It has been clarified that NN.63/2020 had been issued prospectively due to certain technical limitations. However, no recoveries shall be made for the past period by the Revenue authorities in accordance with the decision taken in the 39th GST Council Meeting. This would ensure full relief to taxpayers as decided by GST Council.

41st GST Council Meeting

held on August 27, 2020

The 41st GST Council Meeting had been held on 27 August 2020 to inter alia discuss the revenue shortage faced by the Central and State authorities on account of COVID-19 pandemic.

The Council discussed two options to meet the compensation gap of INR 2.35 lakh crores i.e.,

- INR 97,000 crores, being the shortfall due to COVID-19, could be given to states with reasonable rate of interest in consultation with RBI; or
- The entire gap can be met by borrowing facilitated by RBI.

The Council has assured to facilitate States by talking to RBI to ensure they get bi-monthly compensation & yields are not hard.

The States are anticipated to take a decision based on the compensation cess they can expect in the future periods.

Import data in GSTR-2A

PIB dated August 29, 2020

Two new tables have been inserted in GSTR-2A for displaying details of import of goods from overseas and inward supplies made from SEZ units / SEZ developers.

Taxpayers can now view their Bills of Entry data which are received by the GST System from ICEGATE System (Customs). The present data upload has been done on a trial basis to give a feel of the functionality and to get feedback from the taxpayers on the same.

Authors' Note:

Out of all the developments in GST in the past month, the most notable has been the announcement of the effective date of amendment to Section 50 of the CGST Act for levying interest only on 'net cash' liability upon delayed payment of GST. This amendment is in line with the precedent laid down by the Hon'ble Madras HC in the case of Refex Industries Limited vs. The Asst. Commissioner and Ors. **(2020-TIOL-382-HC-MAD-GST)**, wherein it had been held that interest could be demanded only on 'cash' component of tax remitted belatedly and not on 'ITC' component. Before the Madras HC passed an absolute and unequivocal judgement in Refex (supra), it had set aside the interest liability on ITC component on delayed payment in the case of Donsung Automotive Private Limited vs. The Superintendent of Central Taxes **(2019-TIOL-2041-HC-MAD-CX)**.

The Hon'ble Jharkhand HC in the case of Mahadeo Construction Co., Palamau vs. Union of India and Ors. **(2020-TIOL-850-HC-JHARKHAND-GST)** had stayed the order demanding interest upon delayed payment of GST. In another case of the Madras HC in The Assistant Commissioner of CGST & Central Excise and Anr. vs. Daejung Moparts Private Limited **(2020-TIOL-358-HC-MAD-GST)**, the Court had in detail discussed the interest liability upon delayed payment of GST. Most recently, in the saga of interest liability, the Orissa HC in the case of Prasanna Kumar Bisnoi vs. Union of India **(2020-TIOL-1424-HC-ORISSA-GST)** had dropped the interest recovery proceedings, in line with the decision of the 39th GST Council meeting.

Although there had been some confusion regarding the effective date of the notification, the Government was quick to clarify that the said amendment would be applicable retrospectively from July 1, 2017 as decided by the GST Council in its 39th meeting. In the past, the Government did effectuate retrospective amendments under the GST regime in few instances including under Section 140 to restrict the transitional credit pertaining to cesses. It is therefore difficult to comprehend as to what technical limitations could have been faced in introducing the amendment with retrospective effect. That said, the clarification provided should hopefully put to rest all litigations in this regard.

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Notification No. 75 /2020; 76/2020 and 77/2020Customs (N.T.) all dated August 17, 2020 Read with: Circular No. 36 /2020-Customs August 17, 2020

- The Manufacture and Other Operations in Special Warehouse Regulations, 2020 (MOOSWR) have been notified which provides for a multitude of benefits such as deferred duty liability, no specified export obligations, no time-limitation for exports, liberal policy for domestic supply, etc.

- The regulations are applicable to units which operate under Section 65 of the Customs Act (manufacturing or other operation on goods in a warehouse) in a special warehouse licensed under Section 58A the Customs Act (permits operation of Private Bonded Warehouse).

- These regulations are followed by Circular No. 36 /2020-Customs dated August 17, 2020 which clarifies the procedures and documentation requirements including application for seeking permission under Section 65, provision of execution of the bond and security by the licensee, receipt, storage and removal of goods, maintenance of accounts, conduct of audit etc.

- Previously, operations of Private Bonded Warehouse were regulated by the Special Warehouse (Custody and Handling of goods) Regulations, 2016; however, these regulations are also amended to exclude its applicability on those warehouses which are permitted to undertake operations under Section 65 of the Customs Act.

- Also, with introduction of MOOSWR w.r.t. Section 58A, application of erstwhile 'Manufacture and Other Operations in Warehouse (no.2) Regulations, 2019 are now restricted only to warehouses operating under Section 58 of the Customs Act.

Authors' Note:

Popularly known as 'Customs Bonded Warehouse', this Scheme has not only become an effective alternative to the SEZ/EOU over the period, but it has created independent significance and value of its own. Now with the significantly enhanced benefits, the scheme appears even more promising in terms of 'tax optimisation', 'improved cash flow' and 'ease of doing businesses!'

Notification No. 78/2020 - Customs (N.T.) August 19, 2020 Read with: Circular No. 37/2020-Customs August 19, 2020

- Notification No. 135/2016 is amended to extend the facility of deferred payment of Customs duty benefit to APU.

- The amending Notification is followed by Circular No. 37/2020 dated August 19, 2020 to clarify:

  i. The conditions applicable for an eligible Authorised Public Undertaking
  ii. The Modus of Application to avail deferment
  iii. The Due dates for making deferred payments

Notification No. 79/2020 - Customs (N.T.) August 19, 2020

- Rule 4 of Deferred Payment of Import Duty Rules, 2016, which required an eligible importer (AEO Tier 2/3 and approved APU) to intimate its intent to avail benefit of deferred duty payment is omitted.

Notification No. 81/2020 - Customs (N.T.) August 21, 2020 Read with: Circular No. 38/2020-Customs August 21, 2020

- The CBIC has notified Customs Administration of Rules of Origin under Trade Agreements Rules, 2020 (CAROTAR) which are aimed at setting up certification procedures required to be followed for import of goods as per the Rules of Origin, as prescribed under the respective trade agreements (FTA/PTA/CECA/CEPA).
- These rules *inter alia* cover:
  i. Procedure to claim preferential treatment in the BoE
  ii. Furnishing information e.g. origin, regional value addition
  iii. Powers of officer to requisition information from importer
  iv. Verification of certificate of origin
- These Rules are followed by Circular No. 38/2020 which clarifies the procedure for sending verification request to the Verification Authorities in exporting countries in terms of trade agreements.
- These Rules are to come into effect from September 21, 2020.

Notification No. 22/2020 to 27/2020-Cus (ADD), issued on various dates

By a series of notifications, ADD has been imposed on various products, summarized as under:

- Imports of "Acrylonitrile Butadeine Rubber" originating in or exported from Korea RP for a period of three months i.e. upto 3rd December, 2020.
- Imports of Phosphoric Acid of all grades and concentrations (excluding Agriculture or Fertilizer grade), originating in or exported from Korea RP for a period of five years.
- Imports of "Caustic Soda" originating in or exported from China PR and Korea RP, for a period of three months i.e. upto 17th November, 2020.
- Imports of Diketopyrrolo Pyrrole Pigment Red 254 (DPP Red 254) originating in or exported from China PR for a period of three months.
- Imports of Flax Fabrics imported from China and Hong Kong for a period of 3 months.
- Imports of Black Toner in powder form originating in or exported from China PR, Malaysia and Chinese Taipei for a period of six months.

E-office application launched in all the major customs houses in india

Public Notice: 98/2020
August 10, 2020

With an objective to initiate a paperless environment, increased efficiency and transparency, the National Informatics Centre has launched an E-Office Application for Chief Commissioner of Customs Unit (CCCU). The same has been replicated and adopted through various Public Notices at Commissionerate level across India.

Stakeholders are encouraged to use this facility for optimum utilization. The facility requires PDF versions of documents along with mobile number and e-mail ID. A Diary Number will be assigned to each document received for any further communication.

Refund of IGST on exports in case of invoice mis-match

Public Notice: 100/2020-JNCH
August 14, 2020

Previously, CBIC had prescribed an alternative mechanism for IGST refund in case of invoice mis-match issue vide its Circular No. 5/2018 dated 23.02.2018 and Circular No. 22/2020 dated 21.04.2020. In furtherance thereof, a Public Notice has been issued to inform the trade that a list of IECs and corresponding list of SBs identified for invoice mis-match is uploaded on JNCH website for review of exporters.

The Notice provides for a format in which the exporters are required to furnish a concordance of mapping between GST invoices and corresponding shipping bills along with the refund claim, for its further processing.

Specified Steel Products brought under the purview of BIS

Ministry of Steel Order
July 17, 2020

The Ministry of Steel had issued the Steel and Steel Products (Quality Control) Order, 2020 in supersession of the earlier order, after consulting the BIS. By virtue of the said order, the Ministry of Steel has brought various articles of steel within the purview of BIS. Following are the key highlights of the order:

- The said order shall not apply to steel and steel products manufactured domestically for export which conform to any other specification required by a foreign buyer;
- Specified steel and steel products shall bear the Standard Mark under a license from the Bureau as per Scheme–I of Schedule–II of the Bureau of Indian Standards (Conformity Assessment) Regulations, 2018;
- The Bureau shall be the certifying and enforcing authority in respect of the steel and steel products, goods and articles specified in the order; and
- Contravention of any provisions of the Order shall attract penal provisions under the Bureau of Indian Standards Act, 2016.

Notification No. 29/2015-2020-DGFT
August 25, 2020
Read with:
Trade Notice No. 25/2020-21
August 31, 2020

Notification No. 21 dated 28.07.2020 is amended to shift '2/3 Ply Surgical masks, medical coveralls of all classes and categories (including medical coveralls for COVID-19) from 'Restricted' to, 'Free' category, making them freely exportable.

The N-95/FFP2 masks or its equivalent masks are revised from "Prohibited" to the 'restricted category' with a monthly export quota of 50 lakh units.

A Trade Notice dated 31.08.2020 also specifies procedure and criteria for submission and approval of applications for export of N-95/FFP2 masks.

Trade Notice No. 26/2020-21
August 31, 2020

A Trade Notice has been issued on the revalidation of export authorizations for SCOMET items, where it has been decided to grant only one extension of six months as a one-time relief in all SCOMET export authorizations involving technology transfer which is going to expire on 30.09.2020. The extension would be granted after filing of an application in the prescribed proforma to DGFT.

Notification No. 30/2015-2020-DGFT
September 01, 2020

The DGFT has put a ceiling/cap on the MEIS benefits available to exporters on exports made from 01.09.2020 to 31.12.2020.

- The total MEIS rewards under MEIS shall not exceed INR 2 Crores per IEC on exports made in the period 01.09.2020 to 31.12.2020 (period based on LEO date and shipping bills);
- The benefit of MEIS would not be available to an IEC holder who has not made any export with the LEO date from 01.09.2019 to 31.08.2020 or new IEC has been obtained on or after 01.09.2020 for exports made w.e.f. 01.09.2020;
- Further, the above cap of INR 2 Crores per IEC is subject to a downward revision to ensure that the total claim for the period 01.09.2020 to 31.12.2020 should not exceed the fund of INR 5,000 Crores allocated by the Government of India;
- **The Benefits under MEIS shall not be available for exports made w.e.f. 01.01.2021**

Authors' Note:

Previously, owing to US-INDIA dispute before WTO, it was decided that MEIS scheme would be replaced by RoDTEP – a WTO compliant scheme. Consequently, the MEIS module was also blocked (on July 23, 2020) from accepting new applications having LEO of April 01, 2020.

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

Notification No. 28/2015-2020-DGFT
August 18, 2020

Amends Notification No. 18/2020 dated July 13, 2020 which restricted exports of Non-woven fabric of 25-70 GSM used in manufacture of masks and PPEs.

Non-woven fabric is now freely allowed to be exported irrespective of its measurement and specifications.

Notification No. 27/2015-2020-DGFT
August 11, 2020

Notifies essential commodities and its respective quantity that can be exported to Maldives for the period 2020-21 under the bilateral trade agreement between India and Maldives. It also specifies that exports of notified items shall remain free from any existing or future restriction/prohibitions in 2020-21.

The commodities include eggs, potatoes, onions, rice, wheat, flour, sugar, dal, stone aggregates and river sand.

Notification No. 26/2015-2020-DGFT
August 11, 2020

The Notification prescribes additional requirements for imports of various notified chemicals under Chapter 29 and 38 to furnish a copy of the Bill of Entry within 30 days to the Ozone cell, Ministry of Environment, Forest and Climate change, New Delhi.

It also restricts imports of HCFC-141b except when imported for feedstock application and completely restricts import of pre-blended polyol containing Group VI substances, including HCFC 141B.

Notification No. 25/2015-2020-DGFT
August 10, 2020

The Notification amends Para 4.37(d) of Foreign Trade Policy 2015-20 to restrict availability of Advance Authorisation Scheme, where export product is gold medallions and coins, gold jewellery/articles which are manufactured using a fully mechanized process.

Notification No. 24/2015-2020-DGFT
August 10, 2020

Amends policy conditions for export of rice to European countries. Exports to any European country other than EU member state and Iceland, Liechtenstein, Norway and Switzerland would now require certificate of inspection by Export Inspection Council/ Export Inspection Agency for all the exports from January 01, 2020 onwards.

Notification No. 23/2015-2020-DGFT
August 4, 2020

Export of ventilators including any artificial respiratory apparatus or oxygen therapy apparatus or any other breathing appliances or device is now free for export to any country and in any quantity.

Duty can be debited through duty scrip for 'project imports' Bills of Entry

Public Notice: 104/2020
August 5, 2020

Public Notice No. 54/2017 dated 14.06.2017, introduced online registration of project imports along with automatic debiting of the Project Import License. However, the system did not allow more than one license to be debited for one line item. Consequently, imports made against Project Import License could not be debited to any duty debit licenses such as SEIS, MEIS.

The Public Notice announces that necessary provisions have been made in the system to allow use of duty debit scrip for a Project Import Bill of Entry.

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NCLAT: Overturns NCLT's insolvency order passed without considering issue of limitation

Jayprakash Vyas vs. Prabhat Steel Traders Pvt. Ltd.
NCLAT-2020 (NDEL)

The M/s Prabhat Steel Traders Private Limited ('operational creditor' or 'the Applicant') filed an application under Section 9 of the IBC for initiation of corporate insolvency resolution process against the Shree Sai Industries India Private Limited ('corporate debtor' or 'the Appellant').

The total debt was amounting to INR 5.97 crores (includes the principal amount of INR 2.05 crores and interest INR 3.91 crores). The Applicant served the demand notice dated June 09, 2018. However, the corporate debtor did not repay the amount; leading to the present petition.

The Adjudicating Authority observed the following in the impugned order: 'considering the totality of the facts and circumstances of the case, it is now ascertained that the goods were supplied on demand, however, without any reason the value of the goods have not been paid by the debtor. The invoices raised remained unpaid. As per the ledger accounts along with the statement of account the outstanding debt in question was duly acknowledged by the corporate debtor. As a consequence, this bench of the view that this is a fit case of existence of debt and default in payment of the said debt; hence this petition deserves admission'.

The Appellant challenged the admission order mainly on the ground of limitation. The Appellant contended that the Applicant/operational creditor mentioned in its demand notice that January 12, 2012 is the date from which such debt fell due. The Appellant further contends that last part payment was made on May 30, 2015; after that, the corporate debtor confirmed the outstanding dues through balance confirmation letter dated April 01, 2017. The alleged claim of the operational creditor is relating to the invoice dated December 13, 2011.

Issues specifically dealt by the Hon'ble NCLAT

a) Whether a balance confirmation given by corporate debtor post expiry of limitation period could be used for computing fresh period of limitation?

As per Section 18 of the Limitation Act 1963 ('the LT Act'), an acknowledgement of liability made in writing in respect of any right claimed by the opposite party and signed by the party against whom such right is claimed made before the expiration of the prescribed period for a suit in respect of such right has the effect of commencing a fresh period of limitation from the date on which the acknowledgement was so signed. It is a settled principle that to amount to an acknowledgement of liability within the meaning of Section 18 of the LT Act; it need not be accompanied by a promise to pay either expressly or even by implication.

In the given case, the first date of default was January 12, 2012, and after a lapse of about five years, acknowledgement of liability was made on April 18, 2017. Therefore, in the instant case, a fresh period of limitation will not accrue w.e.f. April 01, 2017 as three years limitation period for realization of the amount was up to December 12, 2014. Thus, it is apparent that acknowledgement dated April 01, 2017 is not obtained within the limitation period. As a consequence thereof, the Applicant/operational creditor cannot claim the benefit of Section 18 of the LT Act , which provides that where, before the expiration of the prescribed period of limitation for a suit or application in respect of any property or right, an acknowledgement of liability in respect of such property or right has been made in writing, signed by the party against whom such property or right is claimed, then a fresh period of limitation shall be computed from the time when the acknowledgement was so signed.

b) Whether a part/final payment made post expiry of limitation period can be construed as basis for extension of limitation period?

Where payment on account of a debt or of interest on a legacy is made before the expiration of the prescribed period by the person liable to pay the debt or legacy or by his agent duly authorized in this behalf, a fresh period of limitation shall be computed from the time when the payment was made. In the instant case, the operational creditor claims that it has received last payment in lieu of debt from the corporate debtor on May 30, 2015. Alleged

liability is on account of invoice dated December 13, 2011. Therefore, the limitation period cannot be extended, given the statutory provision under Section 19 of the LT Act as the corporate debtor has made part payment after expiration of the period of limitation.

Based on the facts of the case, it is clear that operational creditor's claim is barred by limitation. Therefore, the Appeal succeeds, and the impugned order is set aside.

Authors' Note

It is a welcome decision by the Hon'ble NCLAT. In these difficult financial times, companies should not be allowed to take undue advantage of insolvency provisions which are primarily focused on helping companies, not able to recover their legitimate dues. These provisions should not enable a creditor who intentionally allowed the period of limitation to lapse and then claim extension of limitation period based on other relevant factors.

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SAT: Upholds SEBI order appointing independent CA for share valuation in takeover

Aurora UK Bidco Limited
SAT-2020(MUM)

The Appellant company entered into a Share Purchase Agreement with various entities. The transaction included acquiring 74.66% shares of a target company which was a listed entity in India and hence It mandated an open offer requirement. The Appellant was therefore required to make the mandatory open offer to acquire at least 26% of the outstanding equity share capital of the target company from its public shareholders at a price as determined according to the provisions of the SEBI SAST Regulations. The equity shares of the Target Company were not "frequently traded shares" on the Stock Exchanges, therefore, the Appellant was required to make an open offer at a price which would be the fair price of the equity shares of the Target Company.

As per the Regulations, the Manager of the Appellant appointed two independent Chartered Accountants and used the valuation as determined by them, however some shareholders complained that the price should be in the much higher range (i.e. INR 3,400 per share as against INR 944 as per valuation report). The shareholders alleged that company applied their own methodologies for valuation which is not acceptable. The SEBI sought some clarifications and information from the Manager and after getting detailed response from the Manager, SEBI conveyed its decision of appointing M/s. Varma & Varma for computing the fair price of the equity shares of the Target Company in accordance with the parameters specified under SAST Regulations. Aggrieved by the decision of SEBI, the present appeal was filed.

The SEBI can direct for appointment of independent valuer only when it suspects that the offer price does not truly represent the fair value of the shares. Merely because some shareholders had complained to SEBI cannot give rise to a suspicion that offer price arrived by the two independent valuers does not represent the fair price of the shares. Appellant further alleged that SEBI has passed a no reason order which is not valid.

Points considered by Securities Appellate Tribunal

SAT observed that the Appellant was already made aware of the shareholders' grievances, and moreover, holds that impugned decision cannot be faulted with merely on the grounds that the reasons were not explicitly recorded in the decision.

The inference was drawn from a decision of the Hon'ble Supreme Court in case of G.L. Sultania vs. SEBI, wherein the following was upheld:

a) *There is nothing in the Regulations which requires the SEBI to pass a reasoned order for all it does as a regulator. Being a regulator, the SEBI has to take various steps, issue directions from time to time and pass appropriate orders. While considering the offer price to be incorporated in the letter of offer the SEBI must apply its mind to the offer price proposed to be incorporated in the letter of offer and the basis thereof. If it finds that the offer price is reasonable and the valuation report is satisfactory it may approve the offer price to be incorporated in the letter of offer.*

b) *It cannot be lost sight of that the scheme of the Regulations is to permit an intending acquirer to make his offer to the shareholders whose shares are sought to be acquired. Despite the regulatory powers of the SEBI, the offer still remains that of the acquirer and not of the SEBI. The SEBI has only to be satisfied that the offer made is reasonable and fair and in the interest of the shareholders. In case of doubt it may seek the opinion of another expert valuer which impliedly supports the contention that it is not expected to act as an expert valuer.*

Based on the above judicial precedents, the Hon'ble SAT dismissed the appeal.

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FROM THE LEGISLATURE
MINISTRY OF CONSUMER AFFAIRS, FOOD AND PUBLIC DISTRIBUTION

E-Commerce Rules, 2020

Department of Consumer Affairs under Ministry of Consumer Affairs, Food and Public Distribution have issued Consumer Protection (E-Commerce) Rules 2020 on July 23, 2020 effective with immediate effect. The rules are intended to complement the CP Act by regulating all e-commerce activities and transactions. The Rules have sought to govern all such e-commerce activities by laying down duties and liabilities to be adhered by marketplace e-commerce entities, sellers on marketplace, and inventory ecommerce entities.

Applicability of the E-Commerce Rules

These rules apply to following:

(a) all goods and services bought or sold over digital or electronic network including digital products;

(b) all models of e-commerce, including marketplace and inventory models of e-commerce;

(c) all e-commerce retail, including multi-channel single brand retailers and single brand retailers in single or multiple formats; and

(d) all forms of unfair trade practices across all models of e-commerce

But shall not apply to any activity of a natural person carried out in a personal capacity not being part of any professional or commercial activity undertaken on a regular or systematic basis.

Salient features of the E-Commerce Rules

a) Information to be displayed:

- Details of e-commerce entity such as legal name, address of its headquarters and branches, website details and contact details of customer care;

- Details about the sellers offering goods and services, including the name of their business, whether registered or not, their geographic address, customer care number, any rating or other aggregated feedback about such seller, and any other information necessary for enabling consumers to make informed decisions at the pre-purchase stage;

- Information relating to return, refund, exchange, warranty and guarantee, delivery and shipment, modes of payment, and grievance redressal mechanism, and any other similar information; and

- Information in relation to available payment methods, the security of those payment methods, any fees or charges payable by users, the procedure to cancel regular payments under those methods, charge-back options, if any, and the contact information of the relevant payment service provider.

b) **Manipulation of Prices**: E-commerce entity shall not manipulate the price of the goods or services offered on its platform to gain unreasonable profit by imposing on consumers any unjustified price.

c) **Cancellation Charges**: E-commerce entity shall NOT impose cancellation charges on consumers cancelling after confirming purchase unless similar charges are also borne by the e-commerce entity.

d) **Sale through affirmative/explicit action**: E-commerce entity shall NOT record such consent automatically, including in the form of pre-ticked checkboxes. Sale should be through affirmative / explicit action.

e) **False Representation**: No seller shall adopt any unfair trade practice or falsely represent itself as a consumer and post reviews about goods or services or misrepresent the quality or the features of any goods or services.

f) **Information on Suppliers with IPR violation background**: Every marketplace e-commerce entity shall take reasonable efforts to maintain a record of relevant information allowing for the identification of all sellers who have repeatedly offered goods or services that have previously been removed or access to which has previously been disabled under the Copyright Act, 1957, the Trade Marks Act, 1999 or the Information Technology Act, 2000.

g) **Grievance Redressal Mechanism**: Every e-commerce entity shall have an adequate grievance redressal mechanism. Further entity shall appoint a grievance officer and shall display the name, contact details, and designation of such officer on its platform. Every e-commerce entity shall ensure that the grievance officer acknowledges the receipt of any consumer complaint within forty-eight hours and redresses the complaint within one month from the date of receipt of the complaint.

h) **Penalty for contravention of Rules**: The provisions of the Consumer Protection Act, 2019 are applicable for any violation of the provisions of these rules.

Authors' Note:

These E-commerce rules shall definitely give an impetus to India's growing need for strengthening of consumer rights protection and bring it at par with that in developed countries. There have been instances in past where companies have played double standards in dealing with Indian consumers vis-à-vis consumers for similar products in foreign jurisdictions. Interestingly, the new set of rules shall also apply to e-commerce players which are not established in India, but systematically offers goods or services to consumers in India. It may be noted that such e-commerce players must, also like any other e-commerce operator, appoint a nodal person of contact or an alternate senior designated functionary who is resident in India.

In this era where E-commerce industry is gaining lion's share, an overarching need has always been felt qua better regulated marketplaces where consumer rights are suitably protected. These rules appear to be a beginning in the right direction and one expects more regulatory framework would soon follow.

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Extension of Annual General Meeting for FY 2019-20

MCA vide General Circular No. 28/2020 dated August 17, 2020 has clarified that companies which are unable to hold their Annual General Meeting for FY ending March 31, 2020, shall seek extension of time in Form No. GNL-1 from concerned ROCs on or before September 29, 2020.

Consequently, MCA has advised all ROCs to consider all such applications liberally in view of hardship faced by companies and to grant extension for the period as applied by companies in such applications. It is further clarified that such extension may go up to three months (i.e. December 31, 2020).

Authors' Note:

It is noteworthy that MCA had already given relaxation to companies to hold their AGMs through video conferencing or other audio-visual means vide general circular number 20/2020 dated May 5, 2020. Thus, the above relaxation is another step of MCA to help the companies already reeling under the pressure of Covid-19 and resultant economic, financial and business pressure.

However it important to note that AGM is an important event from a company as well as shareholder standpoint and its once in a year opportunity for shareholders (specifically retail shareholders) to communicate with company management and to evaluate, understand and perceive company's business performance and future growth plans basis which the shareholders take their investment decisions.

Therefore, we believe that companies shall dutifully organize their AGMs in such a way (either through a robust audio-visual means or physically) where an effective communication can take place between management and shareholders.

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Companies (Corporate Social Responsibility Policy) Amendment Rules, 2020

MCA notifies the following activities as part of CSR Activity in the Companies (CSR Policy) Rules, 2014:

Company engaged in R&D activity of new vaccine, drugs and medical devices in their normal course of business may undertake research and development activity of new vaccine, drugs and medical devices related to COVID-19 for financial years 2020-21, 2021-22 and 2022-23 subject to the conditions:

(i) such R&D activities shall be carried out in collaboration with any of the institutes or organizations mentioned in item (ix) of Schedule VII to the Companies Act.

(ii) details of such activity shall be disclosed separately in the Annual Report on CSR included in the Board's Report".

MCA accordingly has amended Schedule VII to include the following entry:

(i) Contribution to incubators or research and development projects in the field of science, technology, engineering and medicine, funded by the Central Government or State Government or Public Sector Undertaking or any agency of the Central Government or State Government; and

(ii) Contributions to public funded Universities; Indian Institute of Technology; National Laboratories and autonomous bodies established under Department of Atomic Energy; Department of Biotechnology; Department of Science and Technology; Department of Pharmaceuticals; Ministry of Ayurveda, Yoga and Naturopathy, Unani, Siddha and Homoeopathy; Ministry of Electronics and Information Technology and other bodies, namely Defense Research and Development Organization; Indian Council of Agricultural Research; Indian Council of Medical Research and

Council of Scientific and Industrial Research, engaged in conducting research in science, technology, engineering and medicine aimed at promoting Sustainable Development Goals".

Authors' Note:

In this unprecedented economic situation caused by COVID-19 pandemic, the MCA has taken yet another step in emphasizing the role of corporate sector which they can play through CSR activities. It is proposed to allow companies engaged in research and development to classify the expenditure undertaken for research and development of new vaccine, drugs and medical devices related to COVID-19 as an expenditure incurred under their CSR Policy. This would surely act as an impetus to contribution of corporate sector towards fight against COVID-19.

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Companies to Place Annual Returns on their Website

According to Section 92(3) of the Companies Act every company shall place a copy of the annual return on the website of the company and the web-link of such annual return shall be disclosed in the Board's report. The MCA vide notification dated August 28, 2020 has notified that the Extract of Annual Return (in Form MGT 9) is not required to be enclosed with the Board Report, the Company is only required to disclose the web link in the Board Report where the annual return referred to in sub-section (3) of Section 92 is placed for FY ended March 31, 2020 & onwards.

It is noteworthy that this change was already proposed in Section 23(ii) of Companies (Amendment) Act 2017; however, the same was not effectuated. Now with this notification, the said Section has come into force.

Authors' Note:

It is a significant change for companies which are privately held and were not disclosing any financial information on their internet portals, now with this in force, all privately held companies would also be required to disclose their annual return on their website which would include information such as details of promoters, directors, shareholding pattern and so on and so forth. In our view, this would bring more transparency in corporate sector and people would be more and more cognizant of their corporate responsibilities.

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RBI Resolution Framework for Covid-19 related stress

The economic fallout on account of the Covid-19 pandemic has led to significant financial stress for borrowers across the board and also affected their cash flow generation abilities. Such wide spread impact could impair the entire recovery process, posing significant financial stability risks. Considering the above, with the intent to facilitate revival of real sector activities and mitigate the impact on the ultimate borrowers, it has been decided to provide a window under the Prudential Framework to enable the lenders to implement a resolution plan in respect of eligible corporate exposures without change in ownership, and personal loans, while classifying such exposures as standard, subject to specified conditions.

In this backdrop, on August 06, 2020, the RBI has issued a Circular No. RBI/2020-21/16 which provides a resolution framework for COVID-19 related stress. It has been decided to provide a window under the Prudential Framework to enable the lenders to implement a resolution plan in respect of eligible corporate exposures without a change in ownership, and personal loans, while classifying such exposures as Standard, subject to specified conditions.

The aforementioned circular is applicable only to eligible borrowers i.e. corporate persons or individuals, under stress 'on account of the Covid-19 pandemic'. It stipulates that only those borrowers whose accounts were classified as 'standard' but not in default for more than 30 days with the Lending Institution as on the reference date, (i.e. March 01, 2020) are eligible for resolution under the provisions of the said Circular. The eligible borrowers' account should be continued to be classified as 'standard' until invocation of the resolution i.e. the date when the parties agree to proceed with a resolution plan.

As per Circular the following persons shall be excluded from its scope:

- MSME borrowers whose aggregate exposure to lending institutions collectively, is INR 25 crores or less as on March 01, 2020;
- Farm credit listed under Master Direction - Priority Sector Lending – Targets and Classification dated July 07, 2016 or other relevant instructions as applicable to a specific category of Lending Institutions;
- Loans to Primary Agricultural Credit Societies (PACS), Farmers' Service Societies and Large-sized Adivasi Multi-Purpose Societies for on-lending to agriculture;
- Exposures of lending institutions to financial service providers;
- Exposures of lending institutions to Central and State Governments; Local Government bodies (Ex. Municipal Corporations); and, body corporates established by an Act of Parliament or State Legislature; and
- Exposures of housing finance companies where the account has been rescheduled.

The resolution framework has been divided into four categories:

A. Resolution of Stress in Personal Loans- This part shall be applicable to resolution of personal loans (except loans to their own personnel/staff) sanctioned to individual borrowers by lending institutions. The resolution plans may inter alia include rescheduling of payments, conversion of any interest accrued, or to be accrued, into another credit facility, or, granting of moratorium, based on an assessment of income streams of the borrower, subject to a maximum of two years.

B. Resolution of other exposures to all other eligible borrowers

This part shall be applicable to all other eligible exposures of lending institutions not covered in Part 'A'. Further, the accounts should continue to remain standard till the date of invocation. Resolution under this framework may be invoked not later than December 31, 2020 and must be implemented within 180 days from the date of invocation.

The circular has laid down requirement of executing an inter-creditor arrangement where there are more than one lending institution and have also specified minimum participation requirement, timelines and the process through which lending institutions shall agree on a resolution plan.

Circular also stipulates that the RBI shall constitute a Committee which shall recommend a list of financial

parameters which, in their opinion would be required to be factored into the assumptions that go into each resolution plan, and the sector specific benchmark ranges for such parameters. The Expert Committee shall submit such list of financial parameters and the sector-specific desirable ranges for such parameters to the Reserve Bank, which, in turn, will notify the same, along with modifications, if any, within 30 days. The Expert Committee shall also have the responsibility of vetting the resolution plans to be implemented under this window in respect of all accounts where the aggregate exposure of the lending institutions at the time of invocation of the resolution process is 1500 crore and above.

As per the said circular, the key features of a resolution plan would include an action plan / reorganization including regularization of the account by payment of all over dues by the borrower, sale of the exposures to other entities / investors, change in ownership, sanction of additional facilities and restructuring. The lending institutions may allow extension of the residual tenor of the loan, with or without payment moratorium, by a period not more than two years. The moratorium period, if granted, shall come into force immediately upon implementation of the resolution plan.

There are various other guidelines given on conversion of portion of a debt into other securities and involvement of a credit rating agency in case exposure at the time resolution invocation is more than a specified limit.

C. Asset Classification and provisioning

Additional finance to borrowers in respect of whom the resolution plan has been invoked, if sanctioned even before implementation of the plan in order to meet the interim liquidity requirements of the borrower, may be classified as 'standard asset' till implementation of the plan regardless of the actual performance of the borrower with respect to such facilities in the interim.

If the resolution plan is implemented in adherence to the provisions of this facility, the asset classification of borrowers' accounts classified as Standard may be retained as such upon implementation, whereas the borrowers' accounts which may have slipped into NPA between invocation and implementation may be upgraded as Standard, as on the date of implementation of the plan.

Apart from above guidelines on classification of assets, the circular provides the detailed norms for provisioning for loans considered for resolution plan. The objective of these guidelines is that provision shall be higher of amount specified under this circular or as per master circular on IRAC norms.

D. Disclosure and Credit reporting

The Lending Institutions are required to make adequate disclosures in the format provided in the August 6 Circular till all exposures pertaining to which resolution plan was implemented is either fully extinguished or completely slips into NPA, whichever is earlier. Further, the credit reporting of the borrowers where the resolution plan has been implemented under the August 6 Circular shall reflect as 'restructured'.

Authors' Note:

This circular is in furtherance to loan moratorium announcements made by Government in March, 2020 and provides a limited period window to individuals and corporate to work-out a resolution plan with lending institutions. However, it would be interesting to see how the requirements like less than 30 days default would be interpreted by various parties and how these guidelines would be implemented by lending institutions.

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Defence Ministry lays down the goals and objectives of Defence Production and Export Promotion Policy 2020

PIB Release
August 3, 2020

In order to provide impetus to self-reliance in defence manufacturing, multiple announcements were made under 'Atmanirbhar Bharat Package'. In order to position India amongst the leading countries of the world in defence and aerospace sectors, the MoD formulated a draft Defence Production and Export Promotion Policy 2020. The DPEPP 2020 is envisaged as overarching guiding document of MoD to provide a focused, structured and significant thrust to defence production capabilities of the country for self-reliance and exports. The policy has laid out following goals and objectives:

- To achieve a turnover of INR 1,75,000 Crores (US$ 25Bn) including export of INR 35,000 Crore (US$ 5 Billion) in Aerospace and Defence goods and services by 2025;
- To develop a dynamic, robust and competitive Defence industry, including Aerospace and Naval Shipbuilding industry to cater to the needs of Armed forces with quality products;
- To reduce dependence on imports and take forward 'Make in India' initiatives through domestic design and development and to promote export of defence products and become part of the global defence value chains;
- To create an environment that encourages R&D, rewards innovation, creates Indian IP ownership and promotes a robust and self-reliant defence industry.

Authors' Note:

Defense being a strategic sector has always played a key role in country's budget outlays as well as import bill. With this renewed focus of the Ministry on 'Make in India' initiative leading to building manufacturing capabilities in defense sector, the country would gain on multiple fronts such as decrease of import bill, increased foreign currency inflows from exports & FDI and self-reliance for country's defense needs.

This is in continuation of relaxed provisions for foreign direct inflows in defense sector which was announced by Government a short while ago, therefore with all these policies and initiatives in place, India's defence sector is well poised to make a significant contribution in Government's ambitious 'Make in India' initiative.

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Uniform Framework for Extended Producers Responsibility

(Guideline document – Uniform Framework for Extended Producers Responsibility)

The Ministry issued a Uniform Framework for Extended Producers Responsibility on June 26, 2020. The Government had earlier notified Plastic Waste Management Rule, 2016 which made Producers, Manufacturers, and Brand Owners responsible for collecting back the plastic waste generated due to their products under Extended Producers Responsibility.

Responsibility of waste collection from home to home and segregation rests solely with the Urban Local Bodies. Handing over this responsibility or even a part of this, to the producers would be very impractical and inefficient. Similarly, if the waste segregation were not done at source, it would be difficult to expect producers to implement EPR. The Rule states about collection of plastic waste but it is silent on allocating any responsibility to the producer/importer/brand owner for establishing other part of waste management system like transportation, material recovery, recycling and final disposal.

Therefore, for the overall implementation of the EPR framework, it is important that the producer/importer/brand owner should be involved in overall implementation of the projects and not only the collection. Further, a cost effective and suitable for all model is required for effective implementation.

Producers will be at liberty to decide options for establishing channels of collecting plastic credits with or without forming or linking with PROs. A producer with utilization of such mechanism would nevertheless secure plastic credits upon recycling or recovery of the collected plastic through an accredited processor/exporter.

In this backdrop, it can be inferred that the guiding principles in the proposed EPR framework aims to achieve increased collection and recycling rates while creating a roadmap for cost-efficiency, value chain optimization, and a transparent and well-functioning waste management ecosystem.

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Recalibration of threshold of Minimum Public shareholding norms, enhanced disclosures in Corporate Insolvency Resolution process cases

Recalibration of threshold of MPS norms, enhanced disclosures in CIRP cases

The SEBI has released a consultation paper seeking comments/views from the public and market intermediaries on recalibration of the threshold for MPS in companies that undergo CIRP under the IBC and seek relisting of its shares pursuant to implementation of the approved resolution plan.

Background

a) In order to ensure sufficient float in a listed entity, in terms of the SCRR, the minimum public shareholding is mandated to 25 per cent of total shareholding.

b) In view of governance of a listed entity during CIRP, a necessity was felt for providing a suitable framework of compliance with securities laws. Accordingly, certain relaxations have been granted to such listed companies under various SEBI Regulations and under SCRR as well relating to minimum public shareholding norms.

c) Few relaxations are provided from all the provisions such as:

- SEBI (Issuer of Capital and Disclosure) Requirements. 2018 (ICDR Regulations) pertaining to preferential issue;
- SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 (Takeover Regulations); and
- Applicability of delisting regulations in case of delisting arising out of resolution plan approved under the IBC, 2016.

In view of the above it is possible that post CIRP, the public shareholding in such companies may drop to abysmally low levels. Such low public shareholding raises multiple concerns like failure of fair discovery of price of the scrip, need for increased surveillance measures etc. Low float also hinders the healthy participation in trading of such companies. Considering all this, the Primary Market Advisory Committee (PMAC), has recommended certain options for MPS norms the details of which are as follows:

1. Options for meeting MPS Norms

Option 1: Post-CIRP companies may be mandated to achieve at least 10 percent public shareholding within six months and 25 percent within 3 years from the date of breach of MPS norm

It is proposed that post-CIRP, companies may be mandated to achieve at least 10% MPS within 6 months and 25% MPS within 3 years from the date of breach of MPS norms. Currently, in case public shareholding of a listed company falls below 10% MPS as a result of implementation of resolution plan under IBC, then the same shall be increased to at least 10% MPS within 18 months from the date of fall and 25% MPS within 3 years from the date of fall.

Option 2: Post-CIRP companies may be mandated to have at least 5 percent public shareholding at the time of relisting

It is proposed that post-CIRP, companies may be mandated to have at least 5% MPS at the time of relisting. Such companies may be provided 12 months to achieve MPS of 10% and further 24 months to achieve MPS of 25%.

Option 3: Post-CIRP companies may be mandated to have at least 10 percent public shareholding at the time of relisting

It is proposed that post-CIRP, companies may be mandated to have at least 10% MPS at the time of relisting. Such companies may be provided 3 years to achieve MPS of 25%.

2. Lock-in requirements

Typically, in view of preferential issuance of shares to the incoming investor/promoter under the resolution plan, such shares would be under lock-in for at least 1 year in terms of ICDR Regulations. Thus, achieving MPS compliance through means involving off-loading of shares by the incoming investor/promoter within one year is not possible. Therefore, it may be permitted to free such shares from lock-in so as to help achieve MPS (only to the extent to enable MPS compliance).

3. To introduce a standardized reporting framework pursuant to approval of resolution plan

Some of the disclosure requirements could be as follows:

- Pre and Post net-worth of the company
- Detailed pre and post shareholding pattern assuming 100% conversion
- Details of funds infused, creditors paid-off.
- Additional liability on the incoming investors due to the transaction/source of funding etc.
- Impact on the investor — revised P/E. RONVV ratios etc.
- Names of the new promoters, key managerial persons(s) if any. Past experience in the business or employment. In case where promoter are companies, history of such company and names of natural persons in control.
- Brief description of business strategy
- Resolution plan (excluding confidential information, Commercial secrets etc.)

Authors' Note:

It is a welcome move to make these changes in minimum public shareholding for companies having gone through CIRP process, this would not only support revival of the companies but would support the incoming investors to plan their efficient exits post recovery of companies and to take benefits of listing gains at the time of relisting.

One should keep in mind that while it is imperative to give such relaxations for revival of companies which had gone through CIRP process; however, allowing continued listing of companies with miniscule public float may therefore be counterproductive in providing opportunity to other investors. Thus, any option which is finalized by SEBI should strike a right balance between need for providing support to companies recovering from effects of CIRP process and maintaining market integrity.

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Dutch Court adopted profit split method in case of a taxpayer; held 72% is taxable in its hand

The Taxpayer in the Netherland had transferred its major business to its related party (outside the Netherland) and converted itself to cost plus entity (benchmarking using TNMM Method) earning routine margins.

Tax authorities alleged and raised tax demand. The court of appeal reaches a compromise with taxpayer and revenue. The court held that profit split method should be adopted as most appropriate method for determining the remuneration for the functions and activities of the taxpayer.

The court further held that:

(i) Post transfer, FAR of taxpayer represents a reward of 72% of the total profits achieved with the joint activities of taxpayer and its related party;

(ii) FAR left by the related party after the transfer include more than that of a pure wage producer and it does not include merely routine activities;

(iii) Adoption of 28% of future expected combined profit (of taxpayer and its related party) as value of the partial transfer made by the assesses is justified. Further, the court has held that the

Authors' Note:

Transfer pricing authorities throughout the world tend to focus on not only the documented FAR analysis but also the actual conduct of the parties involved in the international transaction under review. It is very important to align FAR analysis in documentation with an actual conduct.

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Dutch Court adopted profit split method in case of a taxpayer; held 72% is taxable in its hand

The Australian Tax Office has issued detailed guidance on the issue of thin capitalization (i.e. allowability of debt/interest) on August 12, 2020. The rules are issued considering the various approaches adopted by the countries worldwide and the suggestions of OECD under Action 4 of BEPS projects.

Under the new rules, the debt will be allowed higher of: (i) safe harbor debt (60% of the total assets), (ii) a worldwide gearing debt amount (as computed under the operative provisions) or (iii) an arm's length debt amount.

The guidance further suggests to perform borrower's test (Determining the proportion of debt which the entity would reasonably borrow), lender's test (determining the expected proportion which an independent would lend in an arm's length scenario).

With this guidance in place, the multinationals are mandated to determine and document debt to equity ratio which should ideally satisfy the ATO's thin capitalization rules. In addition to this, maintenance of documentation and benchmarking interest rates considering arm's length approach would continue to form part of MNEs compliances.

UAE's FTA issues VAT Guide on 'E-commerce'

The FTA issues a comprehensive VAT Guide (VATGEC1) to provide guidance on how VAT affects businesses which operate within the e-commerce sector. The guidance clarifies that all goods and services purchased through online shopping sites are subject to VAT@5% if the place of supply is in the UAE, like any other purchases made by traditional means.

The guide expounds that in traditional trade transactions, goods and services are usually supplied from a physical location such as a store or representative office, with the supplier or recipient present at the same site. For e-commerce, however, it generally refers to the supply of goods and services that take place on the internet or similar electronic networks, where goods and services are obtained or supplied through electronic means such as computers or mobile phones via websites or electronic applications.

The guide also provides guidance on the VAT treatment of goods purchased through electronic platforms and services supplied through electronic means, indicating that taxable persons should charge VAT to customers when supplying taxable goods or services (generally, at the standards rate of 5%, or where the VAT Law permits, at a rate of 0%). If the supplies are exempt from tax, these supplies are not treated as taxable supplies and therefore no VAT needs to be charged on these supplies.

The FTA clarifies vide the said guide that different conditions and requirements may apply to mandatory or voluntary registration, depending on whether a person has a place of residence in the UAE. A person has a place of residence within in the UAE for the purposes of VAT registration if he has a place of establishment in the UAE. The guide also deals with the legal prescriptions for compulsory and voluntary registration, noting that a non-resident may not register voluntarily for VAT on the basis of his 'taxable expenses. Furthermore, the guide sets-out the criteria for determining the place of supply (whether it is inside or outside the UAE), the VAT treatment for supplies of goods through online platforms where the suppliers are UAE residents who are subject to tax, and for suppliers who are not resident in the UAE.

The guide also provides elaborate guidance qua procedures for recovering input tax on e-commerce transactions and application of 'reverse-charge mechanism'. The reverse-charge mechanism aims to reduce burden of compliance and the administrative burden related to collecting VAT from non-resident suppliers. It levels the playing field between the supply of services or goods from a supplier outside the UAE and by a local supplier. This ensures that local UAE suppliers are not prejudiced as a consequence of consumers purchasing online from foreign suppliers.

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FACELESS ASSESSMENT IN INCOME TAX – A PARADIGM SHIFT!

Recently, the Hon'ble Prime Minister of India, Shri Narendra Modi, unveiled a slew of tax reforms in India, including faceless assessments and appeals and announced the adoption of a taxpayers' charter by the Income Tax Department. During the launch of the Transparent Taxation – *Honouring the Honest Platform*, the Hon'ble PM assured that these reforms would reduce the scope for corruption and overreach by officials thereby ensuring a free, fair and transparent tax environment.

The newly introduced scheme intends to eliminate the interplay between taxpayers and offcials of the Income Tax Department. Under the e-assessment scheme, the NeAC and other eight Regional e-assessment centres would be involved in the faceless assessment proceedings. The NeAC would be the sole gateway for all such functions and flow of information to taxpayer and also within different units under the Scheme.

Following are the major limbs of the e-assessment scheme:

Faceless Assessment

Under the faceless assessment, a central computer would pick up tax returns for scrutiny based on risk parameters and mismatch and then allots them randomly to a team of officers. This allocation would be reviewed by the officers at another randomly selected location and only if concurred, a notice would be sent by the centralized computer system. All such notices would require to be responded electronically, both by the Department and the assessee.

The Income tax surveys to collect information for scrutiny assessment would be undertaken only by the investigation wing. Exceptions would be made in cases of serious fraud, major tax evasion, sensitive and search matters, international tax charges, Black Money Act and Benami property cases.

THE CBDT IS LIKELY TO LAUNCH FACELESS APPEALS FROM SEPTEMBER 25, 2020 AS PART OF THE PROCESS TO REDUCE PHYSICAL INTERFACE BETWEEN TAX OFFICERS AND TAXPAYERS.

However, the scheme has not provided any road map for the cases involving transfer pricing which is to be adjudicated by the Dispute Resolution Panel under Section 144C of the IT Act, if the taxpayer wishes to opt for it.

Faceless Appeal

The CBDT is likely to launch faceless appeals from September 25, 2020 as part of the process to reduce physical interface between tax officers and taxpayers. Among its key features, the Appeals would be allotted at random to officers, the taxpayers would not be required to visit offices or meet any officials, the identities of the officers deciding the appeal will remain unknown, the appellate decision will be team-based and reviewed.

Taxpayer Charter

The charter to be introduced would list the Income Tax Departments' duties to taxpayers and in turn would highlight the taxpayers' responsibilities and commit to provide a fair and reasonable treatment, treating the taxpayer as honest, setting up a mechanism for appeal and review, reducing cost of compliance and making timely decisions.

The Hon'ble Finance Minister, Smt. Nirmala Sitharaman, during Union Budget 2020, had stated that this charter was being developed and the scheme would help ease the compliance burden of taxpayers and increase fairness and objectivity in the tax system.

Authors' Note:

Although, the introduction of the e-assessment scheme had been on agenda of the present Government for a long time, the sudden introduction seems to have been triggered by the COVID-19 pandemic, where going digital has become necessity more than a luxury. This scheme had been long awaited by the taxpayers, as the same seems to be in the interest of the taxpayers more

than the Department. It is expected that the said scheme would streamline the assessment procedures under the Income Tax Act and in-turn would reduce unnecessary litigation, which has been a serious concern for the Department, quasi-judicial forums and the Courts.

The Government has set-up National Judicial Reference System which will act as a knowledge repository that will enable the Assessing Officers to be consistent in framing assessment orders. This step could really work in favour of the taxpayer as in most of the cases the positions taken by the department would be same subject to similarity in facts of the cases.

As the saying goes, *"If you don't like something, change it. If you can't change it, change your attitude"*. The said idiom seems to be apt for the present situation where taxpayers would also be required to evolve with the assessment procedure as the assessment will be more time sensitive and facts specific. The taxpayers are required to be prepared for the assessments well in advance based on their litigation history and issues challenged by the department. The submissions against notices are required to be meticulous, self-explanatory and should be followed by the appropriate back-up workings.

All in all, it is a bold move from the traditional 'Inspector rule' to a completely new era wherein the taxpayers' honesty would be respected.

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GLOSSARY

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

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FIRM INTRODUCTION

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

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

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