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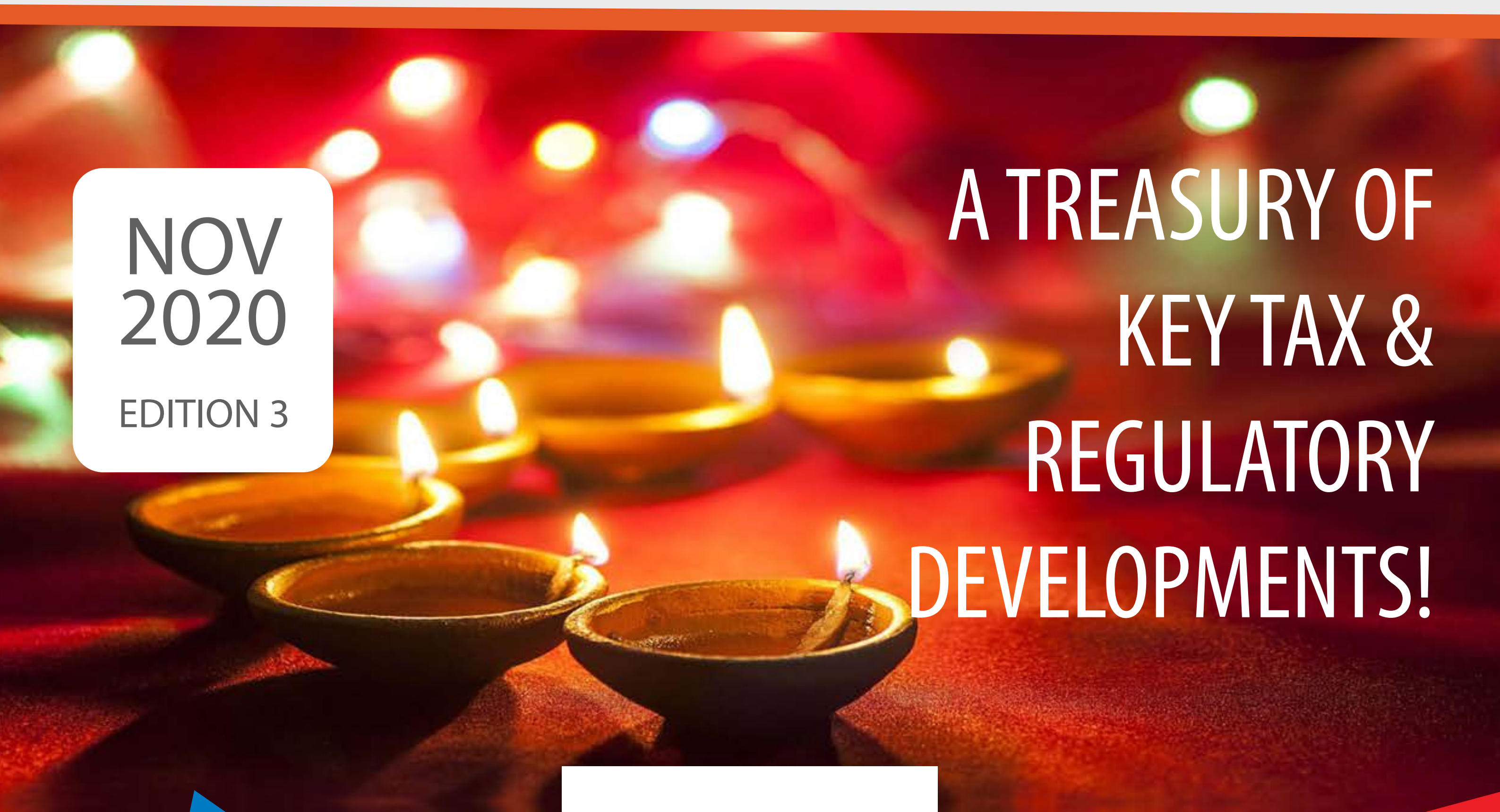

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EDITION 3

A TREASURY OF KEY TAX & REGULATORY DEVELOPMENTS!

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VISION 360: Let us all light the lamp of knowledge this Diwali...

It is festival time. The present month seems to leverage for once the excitement and hubbub in these post lockdown times, as stock markets too inch closer to the mark where it was tumbled by COVID-19 earlier this year.

The GST collection figures have surged since July, August and September. In fact, October witnessed GST collections of nearly INR 1.05 lakh crore which is about 10% YOY growth and also the first-time post lockdown that it crossed the INR 1 lakh crore mark. In all, the economy appears to be well on its way to recovery, albeit it is no time to be complacent as some of the sectors in India continue to struggle, some for profitability, some for sheer survival!

The renewable energy sector in particular is going through an uncertain phase. Presently, India's solar power sector is largely dependent on imports from China which has since July 2018 attracted 25% of safeguard duty for a period of two years. Presently, said duty continues to be leviable at 15% as extended till July, 2021. In order to promote domestic manufacturing, the Government is also considering imposition of Basic Customs duty as high as 40% – which is also going to impact Solar module manufacturers housed in SEZs which represent India's 63% cell manufacturing and 43% of module manufacturing capacities. Although, the move may be sparked by recent world experiences with China, it may result in a 'closed door' approach for the Indian economy with its bordering country.

Speaking of conservative approach, it is also noteworthy that Hon'ble Madras High Court's decision by its single member relating to allowing taxpayers the transitional credit of Education Cess and Higher Education Cess is reversed by its own divisional bench citing that these cases continue to be restricted under the GST law. The strict interpretation of law by the Madras High Court is clearly in contradiction with Supreme Court's decision in Eicher Motors and Dai Ichi Karkaria which held that tax credit is an indefeasible right and cannot be curtailed for want of machinery provisions. Notably, these decisions have been followed in numerous other disputes by the Apex Court and various High Courts. Given this history, its time to wait and watch the fate of said decision pronounced by the divisional bench.

Another sensitive area that grabbed many eyeballs is Foreign Direct Investment in sectors involved in 'Uploading/Streaming of News & Current Affairs through Digital Media'. The clarification boasts of liberalising this sector by allowing FDI upto 26%, however in reality, in absence of any policy or restriction the sector already has FDI more than 26%! It is wonderous whether the clarification paves way for FDI or it is only a means to provide capping and thus control one of the fastest means of disseminating news and information in India!

Globally, the last few weeks were all about OECD's blueprints on the digitalisation/globalisation project. This project is about 'Reforming the international tax system to address the tax challenges arising from the digitalisation of the economy, restore stability to the international tax framework and prevent further uncoordinated unilateral tax measures' – as OECD's cover statement reads. The blue print provides for a bi-pillar framework. Pillar one focuses on international income tax system, allocation of profits based on nexus rule, taxing rights of market jurisdictions and innovative dispute resolution. Pillar two is focused on global minimum tax.

In all, before we enter the festivities a lot of preparatory work to tie the loose end remain. As the age-old villanelle goes:

The woods are lovely, dark and deep,
But I have promises to keep,
And miles to go before I sleep,
And miles to go before I sleep!

Yet again, in order to provide you with all key tax and regulatory developments in one place, **TIOL**, in association with **Taxcraft Advisors LLP**, **GST Legal Services LLP** and **VMG & Associates**, is elated to publish the third edition of its exclusive monthly magazine **'VISION 360'**.

We hope that, as always, you will find it an informative and interesting read. We look forward to receiving your inputs, thoughts and feedback, in order to help us improve and serve you better. **The VISION 360 team wishes you and your loved ones a happy, safe and affluent Diwali!**

Happy Reading!

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

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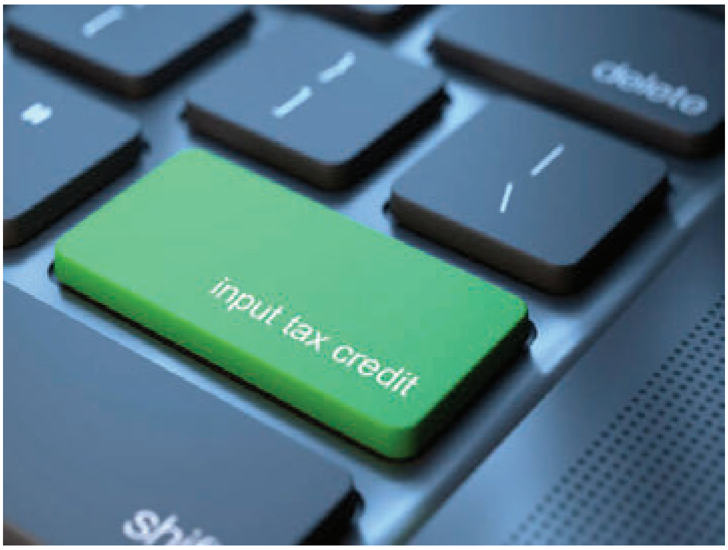
Input Tax Credit Restriction – A hinderance in the success of GST

Background

Although advent of GST was expected to be 'Good and Simple tax' – it is still far from 'simple' even after three years have passed. As a matter fact, system of Input Tax Credit ('ITC') which is supposed to be the key in bringing fungibility of tax credit system – one of the most talked about functionality of GST law itself is struggling with multitude of contentious issues.

Most notably, the Central Board of Indirect Taxes and Customs ('CBIC') amended Rule 36 of the CGST Rules, which dealt with documentary evidence and conditions for availing ITC. With amended sub-rule (4) was inserted which restricted availment of ITC w.r.t. unreported invoices to 20% of the reported invoices. The restriction was further enhanced by reducing availability of credit from 20% to 10%.

The amendment resulted in ineligibility of a recipient to avail credit if the supplier has faltered in furnishing its returns appropriately – building the precarious liability of recipient without its consent! The scheme eventually resulted in loss of ITC to a great extent to almost every assessee including genuine tax payer.



Needless to say, the, amendment that arbitrarily restricts the ITC for no definite fault on part of recipient falls short of legislative validation, spurred a catena of legal disputes where vires of the amended provision itself was challenged.

Article 14 of the Constitution of India promises equality to every person before the law. Further, Art. 300A provides that no person shall be deprived of his property save by authority of law. However, the instant Rule 36(4) denies the benefit of ITC to a bona fide taxpayer on account of default of the supplier.

The provision is thus arbitrary, unreasonable and ultra vires to various provision of the Constitution of India and therefore has no legal validation.

Pre-GST Scenario

It would be pertinent to note that the under the erstwhile VAT regime, the Government had inserted a similar condition to that of Rule 36(4) of the CGST Rules. In terms of the said restriction under the VAT regime, restricted the credit of taxpayer if the tax had not been deposited by supplier, although paid by taxpayer.

These provisions had been challenged before various High Courts, being arbitrary and unconstitutional. The Punjab and Haryana HC in the case of Gheru Lal Bal Chand vs. the State of Haryana (2011) **45 VST 195** had held that such impossible eventuality is not admissible. Similarly, in In Larsen & Toubro vs. CCE **(2001 (127) ELT (807)**, it was held that the assessee should not be penalized by denial of Input credit for the mistake of the recipient of goods.

Exceeding the scope of source provision

Section 16(1) of the CGST Act provides ITC to be availed subject to such restrictions and limitations as may be prescribed. Further, sub-section (2) of Section 16 of the CGST Act provides the conditions required for availment of ITC. Sub-clause (c) of Section 16(2) refers to Section 41 and Section 43A of the CGST to provide that ITC would be available only if the tax charged in respect of such supply has been actually paid to the Government.

In light of the above provision, it can be inferred that the condition of matching credit is mentioned u/s. 43A of the CGST and not u/s 16 of the CGST Act. Therefore, it can be said that the restriction u/r. 36(4) does not flow from Section 16 of the CGST Act. Further, Section 43A is yet to be notified and therefore, such restriction cannot be imposed by way of insertion of a Rule.

Unreasonableness and Arbitrary

It would be pertinent to note that the restriction to the extent of 10% as envisaged u/r. 36(4) of the CGST Rules has no basis. The provision of the CGST Act nowhere provide the extent to which the credit can be restricted vis-à-vis that reported by the suppliers or vendors. Therefore, such arbitrary restriction without any legal backing cannot have the force of law.

Given the legal positions above, validity of Rule 36(4) is likely to be disputed for a long time. Presently, it is challenged before Delhi HC in the case of **Bharti Airtel Limited vs. Union of India and Ors**; **Bharti Telemedia Limited [W.P.(C) 6895/2020]**, **Sales Tax Bar Association [W.P.(C) 13097/2019] Himanshu Mohta and Associates [W.P.(C) 13154/2019]** while Punjab and Haryana HC is also addressing identical dispute in **HSIL Limited [CWP-9861-2020]**, Gujarat HC in **Society for Tax Analysis and Research [R/Special Civil Application No. 19529 Of 2019]**.

It would not be completely wrong to state that restriction u/r. 36(4) of the CGST Rules acts as a hindrance to the primary objective of the GST Law. While the Central Government on one end has been improving and promising 'Ease of Doing Business' in India, the legislature on the other end, has been subjecting bona fide taxpayers to such unnecessary ITC restriction and consequent litigation. It is about time that the Judiciary passes a reasoned and unequivocal judgement in this regard and settles the matter once and for all.

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Foreign Direct Investment: An Economic Growth Opportunity or a threat to National Integrity & Sovereignty

Over the last few decades, India has always pondered upon its policies on foreign investments as to whether it shall open its economic and geographical frontiers to foreign investment or not! There are people with two varied school of thoughts, where one still dates back to 18th century which feels that East India company also came as a foreign investment and acquired into its clutches not only the economy of India but also the whole geo-political system of the country. The other group, which is often called as modern school of thought, having a more liberalized and forward-looking approach believe that in today's world of technological advancement with digital/artificial intelligence environment, no economy can survive on its own and hence, there should be freedom to make and receive investments in any country.

The question that arises is then why countries like the United States and China are institutionalizing umpteen barriers to imports and foreign capital influence on their economies? Is this just an incidence of hypocrisy or they are being less inclined to globalization? Recently, the Government of India also brought in policy changes mandating compulsory Government approval for investment coming in from foreign neighboring countries or from companies where neighboring countries or their resident have direct or indirect interests. So was this move to protect some economic interests of the country or there are larger political reasons behind it. One would have to agree that these are largest economies of the world and have augmented their growth in recent past through globalization only.

The global economic environment is incredibly complex and entails conditions and activities taking place in an array of key market places as well as the policies implemented by various countries across the globe. If we look at global investment environment, countries can largely be divided into two categories, one which have surplus capital to investment and other which is eager to host investment from such countries for development of their economies and human capital. However one way to look at investment is that their objective is to earn a return on capital whereas other can be to exercise geo-political control or influence over sources of energy or information. Therefore, it is pertinent for any host country to evaluate such investments by formulating policies and guidelines which meet their overall objectives.

India has been an attractive destination for foreign investments and has seen foreign direct inflows of $470 billion over the last 20 years out of which $ 140 billion (approx.) were invested from FY 2017-18 to FY 2019-20 itself. It has a target of achieving annual FDI inflows of $75 billion over the next five years. Then why we brought in certain restrictions on investment from neighboring countries through Press Note 3 dated April 17, 2020. The primary reason for this appears to be the protection of Indian economy/corporations from hostile influence of foreign investors specifically during challenging times of COVID-19. It is pertinent to note that though an investment may be coming through a neutral tax heaven such as Mauritius or Cayman Island, but it is crucial to evaluate as to who is eventually controlling the organization which is making the investment. It may be a difficult task to ascertain the same as these investments are generally structured through a complex web of cross holding structure between companies across multiple jurisdictions, but our policy makers believe that they can at least make an attempt while evaluating such investment proposals through Government policy framework.

The question which still remains unanswered is that what kind of policy outlook should a country like India have? As on one hand we are promoting foreign investments by allowing more investments in sector such as Defence and Retail, whereas on the other hand we are bringing in more restrictions on sectors such as News and Digital Media and investment from neighboring countries. If one were to take a pragmatic view, India needs to implement a very balanced and vigilant approach and aim to attract foreign investments in sectors such as manufacturing and infrastructure which would not only augment economic growth but would also contribute towards 'Make in India' vision and nation building activities. We should also focus on development of manufacturing and technological capabilities to reduce import dependence and to earn foreign currency through increased exports. Moreover, we ought to formulate policies in more constructive way to attract more and more investments besides ensuring protection of our integrity and sovereignty as a country.

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Parag Sharma

Chief Executive Officer,
O2 Power

Mr. Sharma shares his outlook and perspective on renewable sector amid dynamic regulatory, business and ever-changing investment environment...

Renewable industry has been going through considerable ups and downs over the past few years. In your view, has COVID-19 also impacted the sector? How do you see the growth prospects in the sector in near future?

The Renewable sector has witnessed a paradigm shift over the past few years in terms of its overall contribution to power generation pie, average cost of power and competitive tariffs offerings when compared to conventional sources of energy. Renewable is the cheapest source of power currently in India. The sector has seen substantial installations over last ten years and now stands at 23.5% of India's overall power installations. The sector has undoubtedly been impacted by the disruptions caused by COVID-19 lockdowns; however, the activities resumed as early as June 2020. Moreover, producing power plants across industries was never stopped as power is an essential commodity. In my view, the sector would see a robust growth in near future riding on the back of stable Government policies, advanced technological developments and cohesive investment environment in India.

How do you see Government policies shaping up for solar sector? On one hand, renewable sector is on priority list of Government whereas on the other hand, there are lot of challenges in the form of tariff and non-tariff barriers on import of key components?

The solar power sector in India is going through regulatory uncertainty to a certain extent. Presently, India's solar power sector is largely dependent on imports from China which has since July 2018 attracted 25% of safeguard duty for a period of two years. Presently, said duty continues to be leviable at approximately 15% as extended till July, 2021.

As there is no long term clarity given by GoI on basic customs duty/safeguard duty it is not serving any purpose. Neither new investments/domestic manufacturing is getting promoted nor IPPs are happy- as they have to go through a long process of implementation of change in law clause of PPA.

Another factor to take note of is the rapid growth of technology which also results in lower returns on investment for the manufacturers. This phenomenon has prevented most of the local manufacturers to invest much in research and development for offering upgraded products to meet global standards. Besides, global manufacturers offer a much-refined technology already at a much competitive price, which are further coming down owing to oversupply and fall in global demand.

The Government is also considering imposition of 40% basic customs duty in a stabilised state (it might happen in two phases) to promote domestic manufacturing. Solar module manufacturers have pointed that nearly 63% cell manufacturing and 43% of module manufacturing capacities are set-up under SEZ, and imposition of basic customs duty would equally be applicable to them, unless a specific exemption is introduced. Such levy shall not serve the purpose of supporting domestic manufacturing, thus an alternative of 'equalisation levy' also appears to be under consideration by the authorities.

Mr. Parag Sharma shares his outlook and perspective on renewable sector

DISCOMs have been going through a rough patch inasmuch as many of them have been unable to honour their payment commitments, despite lot of efforts being made by the Government in the past such introduction of UDAY Scheme. What is your view on this, and do you feel that IPPs are able to manage their working capital requirement in these trying times?

The Government has been taking various actions to improve the health of DISCOMs such as Ujwal DISCOM Assurance Yojana ('UDAY'), Integrated Power Development Scheme ('IPDS') and Deen Dayal Upadhyaya Gram Jyoti Yojana ('DDUGJY'). These schemes have indeed helped DISCOMs to reduce their losses and improve liquidity. Even during COVID-19, the Government announced INR 90,000 crore PFC-REC loan package to support cash flows of DISCOMs. The Government is planning to introduce a new scheme which aims to cut their losses by 12% to 15% and eliminate gaps between average purchase cost and average revenue realisation. As per said scheme, every DISCOM would present their loss reduction plans and Government would provide financial support in the form of loans and grants on the basis of DISCOM performance and plans. The IPPs in certain states are facing working capital issues on account of significant delays in their revenue realisation from DISCOMs. Having said that, I do believe that with improved sector demands and considering expected improvement in DISCOM financials, the IPPs shall be able to manage their working capital requirements better in the near future. But the long term solution of this problem is privatisation of discoms and that will only bring the long term sustainability of distribution sector.

THE SECTOR WOULD SEE A ROBUST GROWTH IN NEAR FUTURE RIDING ON THE BACK OF STABLE GOVERNMENT POLICIES, ADVANCED TECHNOLOGICAL DEVELOPMENTS AND COHESIVE INVESTMENT ENVIRONMENT IN INDIA.

In the past, there were various tax incentives extended to renewable sector such as Accelerated Depreciation, Generation Based Incentives and Section 80IA benefits etc. Does the sector still need these SOPs for a long-term sustainability or can we say that the sector has now matured enough to sustain without these benefits.

The Government provided various tax incentives to support renewable sector when the sector was in initial stages of growth. However over last few years, the sector has seen significant developments on account of technological innovations, cost reduction through value re-engineering and availability of capital at competitive prices. My view, therefore, is that the sector is at a cusp of self-sustainability and it does not need any financial assistance or special tax incentives to survive. It is pertinent to note that it definitely needs a stable policy environment and Government's thrust to increase its green energy footprints. There might also be a requirement to support small scale renewable projects, as it leads to significant employment generation.

The industry has witnessed a series of successful bids over the past 12 months. Is the appetite of renewable players still there or people would participate only on tariff increase in a short term scenario?

The sector has seen bids to the tune of 10 GW over the last 12 months where tariffs were discovered by reverse bidding process (leaving the large bid of manufacturing tender). The tariffs have more or less stabilised in the range of INR 2.35-2.45 Rs per unit. While the Government still has very aggressive plans for renewable installations of 175 GW by 2022 and 450 GW by 2030, however the IPPs are also closely monitoring their IRR expectations. It is to be noted that while the RBI has decreased MCLR rates, it is not passed on to IPPs and hence, interest rates also play a key role in arriving at net return of IPPs. Having said the above, the tariff in near future will depend upon module prices and changes in interest rate; and its slightly difficult to predict.

Discussions are on for reducing 'import dependence' for key components and promoting domestic manufacturing which is coupled with few key players announcing their investments in creating manufacturing capacities. What do you make of these developments?

We completely support development of strong local manufacturing capacity in India for solar value chain. This adds-up well with Government's 'Make in India' initiative as well as targeted reduction in import dependence. However, one has to keep in mind that it is a very dynamic and fast technology evolving sector and thus, Indian manufacturers would have to keep-up pace with the ever-changing technology and low-cost variants available in Chinese market. The Government may support the domestic manufacturers in the short term by providing incentives and by bringing in tariff-based restrictions on imports, but in the longer run, they need to achieve scalability in manufacturing and have to become cost competitive to meet domestic demands.

From the perspective of IPPs, we are looking forward to policy stability and any transition should be carefully handled by GoI, making sure that the current investment are not impacted.

The Indian Government has an aggressive target of 175 GW of renewable energy by 2022. Is it possible given the current capacities at the level of 88 GW? Also, what exactly is the status of power evacuation infrastructure?

I believe the 175 GW by 2022 target can't be achieved and we might reach to 110-125 GW. The power evacuation infrastructure has been a challenge for the entire sector over the last few years. There have been multiple instances of power generation loss and delay in commissioning of projects due to grid curtailment. Though PGCIL has put in tremendous efforts in developing evacuation capacities across states, we need to go a long way to match evacuation capacities commensurate with the pace of development of power generation installations. However, the Government has lined-up 14 transmission projects under tariff based competitive bidding route for developing transmission infrastructure for 25 GW projects. In addition, it has announced six projects in intra-state segment as well. Over the last 5 years, the transmission sector has seen average annual capex of more than 50,000 crores and many newer private sector players are in pursuit of investing into power infrastructure projects. Therefore, during next few years we should witness a coordinated sector growth (other things being equal), wherein power generation installations and development of power evacuation infrastructure would go hand in hand.

From corporate tax rate perspective, the Government extended benefits of lower corporate tax regime u/s 115BAB to power generation companies. What is your view on this benefit given the fact that it is available in contrast with Section 80IA benefit and has a sunset clause in near future?

It was a great step taken by the Government to categorise power sector as manufacturing sector for the purposes of said income tax benefit. The lower corporate tax rate has always been an ask by foreign institutional investors looking for investments into India's power sector. However, one of the key aspects to note here is that this benefit is available as substitution for other tax benefits such as Section 80IA and additional depreciation benefits, therefore one has to do a thorough analysis of costs and benefits of the said provision before taking a decision.

Moreover, this has a sunset clause wherein the projects commissioned post March, 2023 would not be eligible for lower tax rate benefit. The Government should consider an extension of this sunset clause especially when the projects are somewhat delayed by COVID-19 disruptions as well as delays on account of non-readiness of power evacuation infrastructure.

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

AO to prove that expenditure is incurred for earning tax-free income to attract Section 14A

Celebrity Fashion Ltd
2020-TIOL-1821-HC-MAD-IT

The Assessee company incurred interest expenditure of INR 12.93 Cr. towards the term loan and working capital facility. The Assessee had also invested in SBI Magnum Insta Cash Fund to the tune of INR 7.25 Cr. Considering these facts, the AO made disallowance under Section 14A of the IT Act. Aggrieved by the action of the AO, the Assessee had preferred appeal before the CIT(A), who decided the issue in favour of the Assessee. The CIT(A) noted that the investments were in growth funds and not dividend funds and therefore, did not constitute tax free income.

Against the order of the CIT(A), revenue preferred an appeal before the Tribunal. The Tribunal took note of the decision of the Hon'ble Madras High Court in the case of Redington India Ltd and dismissed the appeal filed by the Revenue. Against which the revenue filed an appeal before the Hon'ble Madras HC.

The Hon'ble Court noted the fact that the Assessee invested on March 30, 2011. The HC further noted that the Assessee neither incurred any expenditure in making such investment nor earned any tax-free income from such investments.

In light of the above facts, the HC held that only expenditure, which was proved to be incurred in relation to earning of tax-free income, could be disallowed and such provision could not be extended to disallow the expenditure, which was assumed to have been incurred for earning tax free income. The Hon'ble HC also noted that *'the AO should have recorded a finding as to how sub-section (1) of Section 14A of the IT Act would stand attracted. In the absence of any such finding, the disallowance made was not justifiable'.*

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HC held that substitution has the effect of deleting the old rule and making the new rule operative; allows benefit of reduced rate of 10%

Autodesk Asia Pvt. Ltd.
2020-TII-33-HC-KAR-INTL

The Assessee company was based in Singapore and engaged in the business of marketing and sale of software. The Assessee filed a return of income for the AY 2006-07 on November 08, 2006 by declaring the taxable income as 'NIL'. During the assessment proceedings, the AO held that software supplied is chargeable to income tax as royalty and technical services. The Assessee preferred an appeal before the CIT(A), which confirmed the action of the AO.

Aggrieved by the order of CIT(A), the Assessee preferred an appeal before the Hon'ble ITAT which decided the issue in favour of the Assessee.

Against the order of the Tribunal, revenue filed an appeal before the Hon'ble Karnataka HC.

Issue under consideration before the Hon'ble HC was - whether the Tribunal was correct in holding that the Assessee was liable to be taxed at 10% in view of replacement of 12% with 10% of tax in Article 12 of the DTAA without taking into consideration that the modification of rate of tax by way of Notification dated July 18, 2005 was with effect from August 01, 2005.

The Hon'ble HC noted that it is well settled rule of interpretation that the substitution of a provision results in repeal of earlier provision and its replacement by new provision. Further the Hon'ble HC referred to the Notification dated July 18, 2005 which is worded as below:

"Article 4: Paragraph 2 of Article 12 (Royalties and Fees for Technical Services) of the agreement shall be deleted and replaced by the following paragraph:

"2. However, such royalties and fees for technical services may also be taxed in the Contracting State in which they arise and according to the laws of that Contracting State, but if the recipient is the beneficial owner of the royalties or fees for technical services, the tax charged shall not exceed 10%."

With the above observations, the Hon'ble HC noted that it was evident from the Notification that Paragraph 2 of Article 12, which provided the rate of 12% had been deleted and replaced with new Paragraph 2 which provided the rate of 10%.

Therefore, the Hon'ble HC concluded that the substitution had the effect of deleting the old rule and making the new rule operative. Accordingly, it was held that the Tribunal had rightly ruled that the rate of tax as substituted by the Notification was for the entire FY and income was liable to be taxed at 10%.

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ITAT rules that 'allotment of shares' is the event which trigger applicability of Section 56(2)(viib)

Taaq Music Pvt. Ltd
2020-TIOL-1304-ITAT-BANG

The Assessee company was engaged in the business of providing education in music. The Assessee entered into a share allotment agreement December 11, 2011 and received amount of INR 82 lakhs on March 31, 2012 as application money. During the PY under consideration, the Assessee issued and allotted 146 shares of INR 100 each at a premium of INR 92.47 lakhs.

During the assessment proceedings, the Assessee took plea that consideration for issue of shares was received in AY 2012-13 whereas the provisions of Section 56(2)(viib) of the IT Act were introduced by the Finance Act, 2012 w.e.f. 1.4.2013 (i.e. for AY 2013-14 onwards). Therefore, the said provisions were not applicable to the Assessee's share issue transaction. The AO rejected the Assessee's contentions and made addition to the income.

Aggrieved by the action of the AO, the Assessee preferred an appeal before the Hon'ble CIT(A) which upheld the action of the AO. Against the order of the CIT(A), the Assessee filed an appeal before the Hon'ble ITAT.

The Hon'ble ITAT supported the view of the AO. The ITAT observed that words *"...any consideration for issue of shares"* denotes that share issuance is the point of time which attracts Section 56(2)(viib). Therefore, ruled against the Assessee and upheld the applicability of said Section on the impugned transaction.

Authors' Note:

In the instant case, the issue before the ITAT was to decide whether 'receipt of share application money' triggers applicability of Section 56(2)(viib) or the 'allotment of shares'. The ITAT held that it is allotment of shares which triggers the said provision as the Section reads out *"...any consideration for issue of shares".*

This being said, it is relevant to note that there are rulings wherein it was held that receipt of share-application money and not share allotment was relevant for invocation of Section 56(2)(viib). Considering the same, the underlying issue is yet to attain finality.

ITAT held that TV channel distribution revenue is not a 'royalty'

Turner Broadcasting System Asia Pacific Inc
2020-TII-143-ITAT-DEL-INTL

The Assessee company was incorporated under the laws of the United States ('USA') and was a tax resident of the USA during AY 2009-10, AY 2010-11, AY 2012-13 and AY 2013-14 ('AYs under consideration). During the AYs under consideration, the Assessee earned advertisement and distribution revenue from grant of exclusive rights to Turner International India Private Limited ('TIIPL'), an Indian Company. TIIPL earned revenue from advertisement and distribution of the products such as 'Cartoon Network', 'TCM Turner Classic Movies', 'POGO' and 'Boomerang'.

For AY 2001-02 to AY 2004-05, the Assessee opted for the MAP and the competent authorities had agreed that 10% of the advertising and subscription revenue received in India were to be deemed profit taxable in India. Accordingly, the Assessee filed the returns for AY 2007-08 to AY 2013-14.

During the assessment proceedings for AYs under consideration, the AO concluded the nature of income as Royalty as defined u/s 9 of the IT Act. The DRP confirmed the order of the AO. Pursuant to the DRP directions, the AO passed the final order concluding the revenue earned by the Assessee as 'Royalty'.

In this regard, the Assessee placed strong reliance on the decision of the Hon'ble ITAT, Mumbai in the case of Set India (P.) Ltd. **[2012-TII-283-ITAT-MUM-INTL]** wherein the ITAT had held that Broadcasting Reproduction Right was not covered under the definition of Royalty under Section 9(1) (vi) of the IT Act. The Assessee also relied upon the decision of Mumbai ITAT in case of MSM Satellite (Singapore) Pte Limited vs. Dy DIT **[2016-TII-184-ITAT-MUM-INTL]**.

The Assessee also relied upon Circular No. 6/2001 (Taxation of foreign telecasting companies - Guidelines for computation of income-tax, etc.) dated March 05, 2001 wherein the CBDT had mentioned ***'where an FTC is a resident of a country with whom India has a Double Taxation Avoidance Agreement (DTAA), its business income (including receipts from advertisement) can be taxed only if it has a Permanent Establishment in India.'***

In light of the above facts, the Hon'ble ITAT held that distribution revenue earned by the Assessee could not be taxed as royalty. Accordingly, the additions made by the AO stood deleted.

Authors' Note:

In the present case, issue under consideration was whether TV broadcasting revenue could be considered as Royalty or not? The authorities contended that the Assessee has given exclusive right to its subsidiary to display its products in India and also the same is very well covered within the ambit of Section 9.

However, the ITAT analyzed the facts and noted that ownership remains with the Assessee and also the Indian counterpart could not make any modification to the contents created by the Assessee. Accordingly, the ITAT held that the Assessee granted the commercial right to broadcast / display the contents.

A similar view has taken by the Hon'ble Bombay HC in case of MSM Satellite (Singapore) Pte. Ltd. and Taj TV Ltd. wherein the Court had held that same was not taxable in absence of PE.

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ITAT allows depreciation on goodwill arising on amalgamation

Urmin Marketing P. Ltd (currently known as Unicorn Packaging LLP)
2020-TII-146-ITAT-AHM-INTL

The Assessee, a private limited company, acquired another company namely M/s Unicorn Packers Private Limited ('UPPL') in a scheme of amalgamation from April 01, 2014. While acquiring the UPPL, the Assessee recorded goodwill of INR 487 Cr. and thereby claimed depreciation at the rate of 25% on such goodwill amounting to INR 117 Cr.

During the assessment proceedings, the AO observed that (i) both companies belong to the same group of companies known as 'Urmin Group'; (ii) there was no business in amalgamated company i.e. the Assessee as on the date of amalgamation as there was no vendor or customers in its books of accounts; and (iii) there was no goodwill recorded in the books of accounts of both companies prior to the amalgamation. Accordingly, the AO disallowed the depreciation on goodwill.

Aggrieved by the order of the AO, the Assessee preferred an appeal before learned CIT (A) who confirmed the finding of the AO. Against which the Assessee filed an appeal before the Hon'ble tribunal.

The AR submitted that (i) purchase consideration was decided as per the valuation report prepared by a qualified valuer and certified by the SEBI; (ii) purchase consideration was part of the amalgamation scheme which was approved by the Hon'ble Gujarat High Court; and (iii) the department did not raise any type of objection before the Hon'ble HC despite having the specific opportunity during amalgamation.

Based on the above facts, the ITAT held that depreciation was allowable on the goodwill as it was an asset generated in the scheme of amalgamation and also department did not raise any objection with respect to the scheme of amalgamation.

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ITAT held that outstanding receivables is a separate international transaction and requires compensation

Bharti Airtel Services Ltd
2020-TII-341-ITAT-DEL-TP

The Assessee Company was engaged in the business of selling of hardware for Internet and satellite business and also in the field of providing training services. During the year under consideration, the Assessee reported three international transactions.

During the transfer pricing proceedings, the TPO observed that the receivables have not been received within the stipulated time of 15 days as provided in the service agreement with the AE. Therefore, the TPO / AO proceeded to compute interest at the rate of 11.69% (i.e. SBI rate + 300 BPS).

Before the TPO / AO, the Assessee contended that working capital adjustment margin of the taxpayer is higher than the working capital adjusted margin of the comparable companies and thereby demonstrating that the overall profitability of the taxpayer adequately compensates for outstanding receivable.

The TPO / AO rejected the contentions of the Assessee and proceeded to make an adjustment considering the receivables as separate international transaction. Aggrieved by the order of the AO, the Assessee preferred an appeal before the CIT(A). However, CIT(A) upheld the order of the AO and directed him to use LIBOR + 300 basis points instead of SBI rate.

Aggrieved by the order of the CIT(A), the Assessee filed an appeal before the Hon'ble ITAT. The ITAT observed that (i) service agreement clearly states that the payment was to be made within 15 days; (ii) such payment was not received by the Assessee within the period as specified in the agreement; and (iii) it was apparent that in the present case working capital adjustment was not factored into by determining the arm's-length price of the international transaction of provision of the services.

On the basis of the above observations, the Hon'ble ITAT held that outstanding debtors beyond an agreed period was a separate international transaction of providing funds to its associated enterprise for which the Assessee must have been compensated in the form of interest.

Authors' Note:

There are numerous judgements pronounced by various Courts which have held that the 'outstanding receivables' is not a separate international transaction and need not be benchmarked separately. The Courts tend to take a view that working capital adjustment is an appropriate way to decide whether the outstanding receivables have impacted the profitability or not. However, there are few judgements on the other side of the weighing scale as well.

In the present case, the ITAT ruled the issue against the Assessee considering the fact that intercompany agreement of the Assessee was very clear about the credit period of 15 days within which consideration from AEs should have been recovered. Further the Assessee has not carried out working capital adjustment in the transfer pricing study report demonstrating the fact that delay in receipt of consideration did not affect the profitability of the Assessee.

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Extended time limit u/s 144C inapplicable for the cases before AY 2010-11

Truetzschler India Pvt Ltd
2020-TII-355-ITAT-MUM-TP

The Assessee was in appeal for AY 2009-10 before the Hon'ble ITAT. During the assessment proceedings, the Assessee by way of additional ground, raised a legal issue on the validity of the assessment order passed by the AO. The Assessee contended that the AO was required to pass final assessment order within the limitation period provided u/s.153(1) of the IT Act. However, the AO passed the draft assessment order on March 27, 2013 and final order on May 13, 2013 i.e. after the expiry of limitation period. As the provisions of Section 144C were not applicable for AY 2009-10, the AO's draft order as well as final order are invalid in law.

Noting the fact that the additional ground raised is purely legal in nature and did not require any fresh evidence, the ITAT admitted the same. Issue under consideration was applicability of Section 144C for AY 2009-10. In this regard, the ITAT relied on the decision of the Hon'ble Madras High Court in the case of Vedanta Ltd. vs. ACIT (Writ Petition No. 1729 of 2011) wherein the Court held that the amendment being substantive in nature would apply prospectively from AY 2011-12 onwards.

In view of the above facts and decision of the Hon'ble Madras HC, the Hon'ble ITAT decided the issue in favour of the Assessee and quashed the assessment order passed by the AO.

Authors' Note:

Section 144C provides the option to the taxpayer to file objections before the Dispute Resolution Panel, vide amendments introduced by the Finance Act, 2009. Various High Courts have held that the said change is not 'procedural' in nature, rather is a 'substantive' change which should be applicable prospectively from FY 2009-10 i.e. AY 2010-11. However, the AOs tend to use the extended time limits as provided vide the said Section and hence, the same are held to be void in nature.

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ITAT confirms penalty levied on non-resident company for non-maintenance of transfer pricing documents

Convergys Customer Management Group Inc
2020-TII-354-ITAT-DEL-TP

The Assessee was non-resident company incorporated under the laws of the United States . It provides outsourced customer, employee and marketing support services as well as comprehensive Customer Management Services. The Assessee procured services from its Indian subsidiary *viz.,* Convergys India Services Pvt. Ltd. which were in the nature of IT enabled call centre/back office support services.

During the assessment proceedings, the AO alleged that the Assessee had PE in India and attributed certain profits to its PE. Further the AO made certain disallowances for non-deduction of TDS. The Assessee filed an appeal before the Hon'ble ITAT. The ITAT decided the matter partly in favour of the Assessee and reduced adjustment to the profit to the extent of INR 57 Lakhs.

Against the order of the ITAT, the Assessee preferred an appeal before the Hon'ble Delhi HC wherein the appeal was admitted.

The AO further levied penalty u/s 271AA of the IT Act vide its order dated January 03, 2014 to the tune of INR 10.37 Cr. which is 2% of the value of international transactions of INR 518.73 Cr. Aggrieved by the penalty u/s 271AA, the Assessee preferred an appeal before the CIT(A). The CIT(A) allowed the appeal in favour of the Assessee. Aggrieved by the order of CIT(A), the revenue filed an appeal with the Hon'ble ITAT.

The DR argued that the Assessee had not maintained documents as per the requirements of Section 92D wherein every person has to maintain the prescribed documents. The DR also relied upon Section 92D and Section 2(31) which defines the term "person". The DR submitted that CIT(A) without stating any reasonable cause for not maintaining documents/information u/s 273B could not have decided the matter in favour of the Assessee.

The Hon'ble ITAT held that

(i) It is mandatory for all taxpayers to obtain an independent accountant's report in respect of all international transactions between associated enterprises or specified domestic transactions;

(ii) Even if it is submitted that there is no international transaction, it cannot escape the Assessee at least to obtain independent accountant's report for specified domestic transactions; and

(iii) Non-maintaining documents with the reason that there is no international transaction and merely relying on the supporting documents of AE, cannot be termed as reasonable cause for not maintaining the documents on its own under Section 273B of the IT Act.

With the aforesaid observations, the ITAT upheld the action of the AO and reversed the order passed by the CIT(A).

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CBDT amends tax audit report (Form No. 3CD) and transfer pricing certification (Form No. 3CEB)

Notification No. 82/2020
October 01, 2020

The CBDT has recently issued a notification proposing certain changes to the Tax Audit Report (Form No. 3CD) and Transfer Pricing Certification (Form No. 3CEB). It has also notified certain new forms in relation to Section 115BAC and 115BAD dealing with options for new regime of taxations for Individuals and Corporates. The key highlights of the changes are as follows:

A. Changes in Tax Audit Report

- New form contains Clause 8a to declare whether taxpayer has opted for Section 115BA/115BAA/115BAB;
- In Clause 18, sub-clauses (ca) and (cb) are inserted for adjustment in WDV, if opted for Section 115BAA; and
- Change in Clause 32(a) which deals with carried forward of losses is updated for declaring adjustments in depreciation loss on account exercising option under Section 115BAA.

B. Changes in Form No. 3CEB

- A part in respect of specified domestic transactions with any person referred to in Section 40A(2)(b) is omitted by the notification; and
- Insertion of Serial No. 24 for declaring Specified Domestic Transaction with persons specified in Section 115BAB (i.e. companies opting for the lower tax regime).

C. Notified new forms i.e. Form. No. 10-IE and Form No. 10-IF

CBDT has also notified Form No. 10-IE and Form No. 10-IF for application to exercise options under Sections 115BAC and 115BAD which provide tax slabs for the new and optional income tax regime both for HUFs and Individuals respectively.

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CBDT notifies the tolerance range for transfer pricing benchmarking

Notification No. 83/2020
October 19, 2020

The CBDT notified the variation between the arm's length price determined under section 92C of the IT Act and the price at which the international transaction or specified domestic transaction has actually been undertaken does not exceed 1% in respect of wholesale trading and 3% in all other cases.

It is pertinent to note that the same remains unchanged as compared to Previous FY.

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CBDT extends due date for payment under 'Vivad se Viswas Scheme'

Notification No. 85/2020
October 27, 2020

CBDT has extended due dates under the Direct Tax Vivad se Vishwas Act 2020 vide Notification No. 85 dated October 27, 2020 as below:

1. The due date for filing declaration under the Scheme has been extended to December 31, 2020; and

2. The due date for paying the amount under the Scheme has been extended to March 31, 2021 (without additional amount of 10%)

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CBDT amends the Equalisation Levy Rules

Notification No. 87/2020
October 28, 2020

The CBDT has notified the Equalisation Levy (Amendment) Rules, 2020 to give effect to Equalisation Levy 2.0 provisions. These rules amend Rule 4 and Rule 5 of the Equalisation Levy Rules, 2016 which dealt with 'payment 'and 'procedure for furnishing of return' for Equalisation Levy. Additionally, new formats have also been prescribed for Forms specified below:

A. Form No. 1 - Statement of Specified Services or E-Commerce Supply or Services

B. Form No. 3 - Appeal to the Commissioner of Income-tax (Appeals)

C. Form No. 4 - Form of Appeal to the Appellate Tribunal

These amendments have become effective from October 28, 2020.

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CBDT extends due dates for Tax Audits and Income Tax Returns

Press Release
October 24, 2020

CBDT extended due dates of submission of tax audits, transfer pricing audits and income tax return for FY 2019-20.

Extended due-dates are tabulated below

Due Date	Compliances
31 December 2020	‣ Filing of Tax Audits; ‣ Transfer Pricing report; and ‣ Filing of Income Tax return (for non-audit taxpayers)
31 January 2021	‣ Filing of Income Tax return for taxpayers who are required to get their accounts audited / furnish report in respect of international/specified domestic transactions

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CBDT extends LTC Cash Voucher Scheme to non-government employees

Press Release
October 29, 2020

The Ministry of Finance had announced the LTC Cash Voucher Scheme for Central Government employees on October 12, 2020. The CBDT extended the same scheme to all category of employees vide press release dated October 29, 2020.

The Scheme provides exemption for the payment of cash equivalent of deemed LTC fare by the employer to its employees for the current block of 4 years (i.e. 2018-2021) subject to maximum of INR 36,000 per person.

The said exemption shall be subject to the conditions as below:

i. Employees are required to spend a sum equal to three times of the value of the deemed LTC fare on purchase of goods / services (which are liable to GST at the rate of 12% or more);

ii. Amount should be spent within period starting from October 12, 2020 to March 31, 2021;

iii. Benefit shall be proportionately reduced if the employees are unable to spend full amount as required to be spent under the scheme; and

iv. Benefit shall NOT be available to employees who have exercised an option to pay tax under concessional tax regime u/s 115BAC.

* * * * * * * * * *

AAAR reverses its own order and holds that penal interest collected on instalments is exempted

Bajaj Finance Limited
2019-TIOL-54-AAAR-GST

The Applicant, a NBFC, had entered into agreements with borrowers for providing loans to them. In case of delays in repayment via EMIs, the Applicant collected penal interest as an additional interest for the number of days of delay as per the terms of the agreement. The Applicant had contended that penal charges collected stood exempted vide Notification No. 12/2017 – C.T. (Rate) dated 28 June 2017.

The AAAR had rejected the application by holding that the above-mentioned collection of penal charges would amount to tolerating an act and therefore would be considered as 'supply'. Aggrieved, the Applicant had filed an application for rectification of the order.

The AAAR observed that the earlier ruling passed was in contravention of Circular No. 102/21/2019 – GST dated 28.06.2019 which had clarified that transaction of levy of penal interest does not qualify as 'tolerating an act'. Accordingly, the AAAR conceded its earlier ruling and rectified the same by holding that the penal charges collected from customers were exempted vide the above-mentioned notification. The AAAR further applied the above-mentioned beneficial Circular retrospectively.

Authors' Note

Last year, the Maharashtra AAR had created an uproar in the NBFC and ancillary industries by pronouncing its ruling in Bajaj Finance Limited **[2019-TIOL-53-AAAR-GST]** inter alia holding that imposition of penal charges is nothing but tolerating an act and therefore liable to GST. The said Ruling was however, nullified by Circular No. 102/2019 later that year. In this regard, it would be pertinent to note that the Maharashtra AAR had grossly failed to analyse the applicable provisions of law, refer to erstwhile laws and to understand the intent of the lawmakers. It would be pertinent to note that even under the erstwhile Service Tax regime, charging penal interest upon delayed payments was outside the purview of tax.

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AAAR upholds AAR by holding that mere renting of vehicles does not amount to GTA services

Liberty Translines
2020-TIOL-55-AAAR-GST

The Appellant, registered as a 'Goods Transport Agent', had propounded to enter into agreement with M/s. POSCO ISDC Private Limited for providing GTA services, who had opted to pay GST @12% on forward charge basis by claiming ITC. In terms of the proposed agreement, POSCO would be sub-contracting GTA related work as POSCO does not have enough fleet of its own. Thus, the Applicant would be issuing a Consignment Note in their capacity of GTA to POSCO, who would in-turn issue a 2nd consignment note to their ultimate clients for the transportation of the same goods, for the same vehicle of the Applicant. The e-way bill would be prepared by POSCO.

In view of the afore-stated background, the Applicant wished to ascertain whether they could also act as a GTA in terms of Notification No. 20/2017 – C.T. (Rate) dated 22.08.2017 and issue consignment note and charge GST @12% to POSCO on forward charge basis, thereby resulting into two GTAs in a single transportation.

Referring to the meaning of the term 'GTA', the AAAR observed that issuance of consignment note is an essential condition for acting as a GTA. It was further observed that the term 'consignment note' is a document on which the details of the goods received by the GTA from either consignor or the consignee are mentioned along with the description of the goods. However, in the instant case, the Applicant would receive the goods from POSCO and not directly from the consignor / consignee. Further, the e-way bill would also be generated by POSCO in the instant case.

It was further observed that Applicant would merely be hiring their vehicles to POSCO for a consideration, which would be classifiable as 'rental services of transport vehicles'. Basis the above observations, the AAAR upheld the AAR ruling which held that the services provided by the Applicant does not amount to GTA services.

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AAR holds lease of plot for 99 years as taxable and not as 'sale of land' being exempt

Jinmangal Corporation
2020-TIOL-282-AAR-GST

The Applicant had secured a bid for lease of a certain plot of land for a period of 99 years. The Applicant was required to pay a one-time lease premium as long-term premium, being the consideration. Further, the Applicant was required to pay annual lease premium of Rs. 5 per sq. mtr. of each year for 99 years. The Applicant opined that the long-term lease for a period exceeding 30 years tantamount to sale of immovable property since the lessor is deprived of the right to use, enjoy and possess the property once the lease has been granted. It was argued by the Applicant that the above-mentioned transaction falls under Schedule III of the CGST Act and therefore is neither treated as a supply of goods or services and accordingly, not liable to GST.

The Gujarat AAR observed that Schedule II of the CGST Act specifies that lease of an industrial land or building is the activity to be treated as a supply. Further, the AAR observed that as per the definition of the term 'lease' as per Transfer of Property Act, lease can be of perpetuity and quantum of time has no relation in determination of lease or sale. It was also noted that as per the terms of the lease, the Applicant is not permitted to mortgage or transfer the premises.

In view of the above observations, the AAR ruled that lease of plot of land for 99 years is not 'sale of land' but lease of property and therefore cannot be covered under Clause 5 of Schedule III of the CGST Act. Therefore, the same is not covered under Section 7 of the CGST Act r/w. Clause 2 of Schedule II of the CGST Act. Basis the above observations, the AAR ruled that the above activity is classifiable as 'Rental or leasing services involving own or leased non-residential property' and the Applicant would be liable to pay GST under RCM basis in terms of Notification No. 05/2019 – C.T. (Rate) dated 29 March 2020.

Authors' Note

Whether lease and tenancy rights are covered under 'sale of land' or not has been a matter of perpetual litigation. While the AAAR ruling seems to be in order inasmuch as leasing of property has been specifically covered under Schedule II, the moot question of law still survives. It would be pertinent to note that the SC in the case of Ananda Behera and Ors. vs. The State of Orissa and Ors. **[AIR 1956 SC 17]** had held that any profit arising out of immovable property is sale of land. Therefore, it might be interesting to contemplate whether the profits / benefits arising to a lessee can be considered as 'sale of immovable property'.

It would further be pertinent to note that post the introduction of GST, the Bombay HC in the case of Builders Association of Navi Mumbai **[2018- TIOL- 2767- HC-MUM- GST]** had held that GST would be applicable on one-time allotment of lease premium amount as the same amounts to supply u/s. 7 of the CGST Act. It shall further be pertinent to note the said matter is now pending before the Apex Court.

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Larger Bench of Madras HC disallows carry forward of credit of cesses into GST

Sutherland Global Services Private Limited 2020-TIOL-1739-HC-MAD-GST

In another twist in the tale of transitional credit, the division bench of the Madras HC has reversed the single judge order in the case of Sutherland Global Services Private Limited [2019-TIOL-2516-HC-MAD-GST]. While the single judge had held in the favour of the Assessee by allowing carry forward of the accumulated credits of Education Cess, Secondary Higher Education Cess and Krishi Kalyan Cess ('Cesses') into GST, the division bench has held otherwise. The rationale of the division bench for arriving at the decision to disallow the credit of cesses into GST has been summarised hereunder:

Cess vs. Tax

Albeit the imposition and collection of Cess may be loosely termed as Tax or Duty, the collection of Cess remains distinct, inasmuch as Cess amount collected by the Government is liable to be spent for the avowed and dedicated purpose for which such imposition was made which is usually reflected in the name of the imposition itself like Education Cess, Secondary and Higher Education Cess etc.

Mere facility of taking credit of Input Cess paid on Input goods or services just to avoid the cascading effect on the multiple transactions in the series does not militate or alter the character of the imposition of Cess itself.

Explanation 1 to Section 140 of the CGST Act confines the term 'eligible duties' to 7 specific duties. Only those specified the said explanation can be considered as eligible duties. As the cesses are absent from the seven categories in Explanation 1, the same cannot be considered as an eligible duty u/s. 140.

Explanation 2 to Section 140 refers covers the 'eligible duties and taxes.' While the first seven duties are same as mention in Explanation 1, the eight one was added, being service tax to be set off and carry forward under the CGST Act.

The only distinction between the two explanations are that while Explanation 1 covers eligible duties of goods held in stock as on 01 July 2017, Explanation 2 covered specified 8 duties and taxes in respect of inputs and services received on or after 01 July 2017. The addition of words 'and Taxes' with 'Eligible Duties' in Explanation 2 appears to be only on account of addition of 'Service Tax' in Explanation 2 which specifies eight duties and taxes for set off.

The Legislature took further care by inserting Explanation 3 which clarified that eligible duties and taxes will exclude Cesses which have not been specified in Explanations 1 and 2.

Spoilt Fruit

Merely because the Assessee had 'taken' the amount of education cesses, it does not entitle him to utilize the same against the Output GST Liability. The 'taking' of credit education cesses after 2015, after the levy of Cess itself ceased and stopped, therefore, it cannot be called an 'input CENVAT Credit' and accordingly, mere such accounting entry will not give any vested right to the Assessee to claim such transition and set off against such Output GST Liability.

The Hon'ble Madras HC compared the Input Credit to a Fruit, which if found to be spoilt or unfit for consumption, it has to be thrown and if it is still fresh and worthy of being kept and used, it has to be so used. The Fruit of Input Credit of education cesses became a spoilt fruit in 2015 itself and was not fit to be carried forward and consumed (adjusted) after 01 July 2017.

101st Constitutional Amendment Act

During the introduction of GST Law, it did not include within its ambit six commodities which were left out and continued to be covered by the earlier existing laws of Excise Duty and VAT Law. For that purpose, Entry 54 of the State List and Entry 84 of the Union List were also suitably amended by 101st Constitutional Amendment Act. Except for those 16 taxes and duties specified in different enactments, no other tax or duty were subsumed under the new GST Regime with effect from 01 July 2017.

The transition of unutilised ITC could be allowed only in respect of taxes and duties which were subsumed in the new GST Law. Admittedly, the cesses were not subsumed in the new GST Laws, either by the Parliament or by the States. Therefore, the question of transitioning them into the GST Regime and giving them credit under against Output GST Liability cannot arise.

In light of the above reasons, the Madras HC allowed the Appeal of the Revenue and set aside the judgement of the single judge and held that the Assessee was not entitled to carry forward and set off of unutilised cesses against the GST Output Liability with reference to Section 140 of the CGST Act.

Authors' Note

The question relating to transitional credit of cesses has enjoyed its fair share of litigation right from the introduction of GST in July 2017. With the ingredients of so much as a FAQ to the judgements of various HCs, all have added the complexity of the matter while in search of a solution. While the LB of Madras HC has issued a rather reasoned judgement, the same is likely to be challenged.
It would be pertinent to note that the Madras HC in this judgement has not quite explained the constitutional validity of a retrospective amendment which essentially curtails the credit of taxpayers. Therefore, it seems that the subject judgement may further be subjected to litigation at the SC level.

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TN AAR holds that Concessional Rate of GST would be available to sub-contractor providing services to Chennai Metro

ST Engineering Electronics Limited
2020-TIOL-280-AAR-GST

The Applicant, a sub-contractor of SIEMENS Limited, providing works contract services to the Chennai Metro Rail Project, had sought a ruling before the Tamil Nadu AAR to ascertain whether the benefit of concessional rate of GST for above-mentioned service would be available to them in light of **Notification No. 11/2017 dated 28 June 2017**.

The Tamil Nadu AAR observed that the benefit of concessional rate of GST is only applicable if certain conditions are met, namely, the services should be supplied under SAC 9954, the supply should be 'composite supply', the supply should be 'works contract' pertaining to railways, including metro. Since Notification No. 11/2017 does not specify the class of service providers to whom it applies, it was also observed that all the conditions were being fulfilled in the instant case and the Applicant would be eligible for the concessional rate in terms of Notification No 11/2017.

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TN AAR holds that reimbursement of credit card expense to Foreign Holding Company is taxable under GST

ICU Medical India LLP
2020-TIOL-273-AAR-GST

The Foreign Holding Company of the Applicant had entered into an agreement with a foreign bank to provide credit cards to the employees of the foreign holding company and its subsidiaries globally, one of which is the Applicant. The Applicant settles the credit card liability paid by holding Company to the bank in the form of reimbursement of expenses at actual. In this regard, the Applicant had sought an advance ruling before the Tamil Nadu AAR to ascertain whether GST is applicable on reimbursement of expenses paid by Subsidiary Company to its ultimate holding Company located outside India.

Upon perusal of the Travel and Expense Policy documents, the AAR observed that the cards are issued to specific employee to meet the business-related expenses and while the employee is responsible for the admissible charges he makes using the card and to adherence of the related procedures of substantiating such charges as incurred during the course of business, the liability to settle the payment of such charges is with the Foreign Holding Company.

It was further observed basis the balance sheet, that the card payments made to the Ultimate Holding Company are accounted as Travel and conveyance, Miscellaneous expenses under Administration and Other expenses. Further, the Statement of Credit Card Transaction shows the expenses under GL Descriptions- 'Entertainment & Meal', Office Supplies, Vehicle/Transportation, Utilities-gas, electricity, Airline Expenses, etc. These are shown as expenses against the Holding Company. It was further noted that there is a separate transaction between the Applicant and the Holding Company for the services of providing the credit cards to the employees of the Applicant which are to be used only for business related activities, for which a payment is made in response to the service of providing cards.

Basis the above observations, the AAR held that the transaction undertaken falls under the definition of 'service' having 'consideration' under the CGST Act. The AAR further rejected the claim that the Holding Company is an 'intermediary' between them and the Foreign Bank, as the Applicant does not come into the picture with the Bank in any transaction. Accordingly, it was ruled that the above transaction of reimbursement of expenses is a service classifiable as 'Credit granting service' and therefore taxable @18%.

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Maharashtra AAAR denies ITC on lift installation charges

Las Palmas Co-Operative Housing Society Limited
2020-TIOL-53-AAAR-GST

The Applicant, a co-operative housing society, was under the process of replacing the existing lift of the society, for which a contract had been given to a contractor. Apart from the regular maintenance charges, the Applicant had been recovering separate amounts for replacement of the lifts, charging GST @18%. In respect thereto, the Applicant wished to ascertain whether the Applicant is eligible for ITC of lift installation charges paid to the contractor, if the same is booked as capital expenditure without availing depreciation.

In line with the findings of the AAR, the AAAR also observed that lift would be construed as an integral part of immovable property i.e., the building in which the lift is being installed in view of the judgement of the Apex Court in the case of Triveni Engineering Industries Limited [2002-TIOL-14-SC-CX-LB]. It was further observed that lifts become a part of the building, which is an immovable property, therefore, would be excluded from the definition of 'plant and machinery' as envisaged u/s. 17(5) of the CGST Act. Lastly, the AAAR noted that the Applicant cannot be said to be providing works contract services as it does not fulfil the condition of the said service being in the furtherance of business.

Basis the above observations, the AAAR upheld the AAR and ruled that the Applicant would not be eligible to avail ITC in respect of GST paid on lift installation charges in terms of Section 16(2) r/w. Section 17(5) of the CGST Act.

Authors' Note:

As far as the Advance Ruling Authorities under GST are concerned, it would be pertinent to note that the Karnataka AAR in the case of Tarun Realtors **[2019-TIOL-411-AAR-GST]** and the MP AAR in the case of Jabalpur Hotels Private Limited **[2020-TIOL-196-AAR-GST]** have disallowed ITC in respect of lifts / elevators as they become part of immovable property. These rulings show the intent of the Authorities in providing pro-revenue rulings when it comes to ITC.

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NAA: Alton Buildtech guilty of profiteering, entire amount of ITC available post GST-period amounts to additional ITC benefit

Alton Buildtech India Private Limited
2020-TIOL-65-NAA-GST

The DGAP had conducted an investigation and reported that the Respondent had not passed on the additional ITC benefit to buyers by way of commensurate price reduction, in the Project Aangan which was being constructed by the Applicant in three phases.

The NAA observed that as the Respondent was not eligible to claim CENVAT credit on the service tax and ITC on the VAT during the pre-GST era, entire amount of ITC available to the Respondent during the post-GST period amounts to additional benefit which is liable to be passed on to the buyers. It was further observed that basis the Affordable Housing Project ('AHP') scheme of the Haryana Government, the maximum allotment rate of Rs. 4000 per sq. ft. on carpet area was fixed for Gurgaon area, and this rate was not revised after grant of service-tax exemption or coming into force of GST regime. However, the Respondent started availing ITC on all inputs and input services w.e.f. 01 July 1 2017 which it was not entitled during pre-GST period.

The NAA further remarked that the Respondent cannot force the buyers to wait for the benefit of ITC till the number of unsold flats is known at the time of the issue of the Completion Certificate / Occupation Certificate and further cannot adopt different yardsticks while availing the benefit of ITC themselves. It was also noted that the Respondent was availing full benefit of ITC on the GST paid by him to its sub-contractor and not paying it from their own account.

Basis the above observations, the NAA determines profiteering by the Appellant in contravention of Section 171(1) of the CGST Act r/w. Rule 133(1) of the CGST Rules. However, the NAA refrains from imposing penalty as penal provision u/s. 171(3A) came into force in January 2020, which was after the relevant date.

Authors' Note:

Although the NAA has passed a reasoned order, it would be pertinent to see whether the same holds good in the coming days as the constitutional validity of Anti-Profiteering Authority and its provisions under the CGST Act as well as the Rules have been challenged before the Delhi HC by a batch of 37 Writ Petitioners. These Petitions will be heard by the Hon'ble HC in December 2020.

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Extension in limitation to initiation adjudication owing to COVID – 19 and effect of Taxation and Other Laws (Relaxation of Certain Provisions) Ordinance, 2020

Sajid Muhammad Maulavi
2020-TIOL-1694-HC-MUM-CUS

A conjoint reading of Sections 110(2) and 124 of the Customs Act would make it clear that a show-cause notice has to be issued to the person from whom the goods were seized within six months of seizure, failing which the goods shall be returned to the person from whose possession the goods were seized. However, it is provided under the first proviso that the said period of six months can be extended for a further period not exceeding six months by the higher authority for reasons to be recorded in writing with intimation to the person concerned within the extended period.

In the present facts, goods were seized on October 04, 2019 and period of six month would have expired on April 05, 2020, this period was however duly extended by another 6 month under Section 110(2) i.e. upto September 05, 2020, whereas a Show Cause Notice was issued on September 21, 2020, which is challenged as being time barred.

However, in the interim, the Taxation and Other Laws (Relaxation of Certain Provisions) Ordinance, 2020 was promulgated which extended all the due dates to September 30, 2020. Owing to said Ordinance the Show Cause Notice continued to be within the limitation and such position also stands supported by Hon'ble Supreme Court's Order dated 23.03.2020 passed in Writ Petition (Suo Motu) No. 3 of 2020, wherein it allowed extension of limitation on account of practical difficulties faced during pandemic of COVID – 19.

Resultantly, Petition was dismissed and the Petitioner was directed to adhere to the adjudication process

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Seizure of goods is arbitrary in absence of bona fide 'reasons to believe'

Jaymatajee Enterprise
2020-TIOL-1777-HC-ALL-CUS

Goods were seized by authorities from Gorakhpur based on allegation that these were clandestinely imported without payment of duty, and thus were liable to be confiscated. The allegations of import, although the goods were not seized anywhere from port or customs area were based on the Panchanama which recorded that packing material were inscribed with foreign language and that some of the local traders, upon visual verification of the goods believed it to be of overseas origin.

Court noted that reasoning for confiscation fail the test of "wednesbury principles" as no reasonable person can reach to conclusion of the country of origin by mere perusal from naked eye as well as the opinion of the traders. Consequently, citing absence of bona fide 'reason to believe', the Court ordered release of goods

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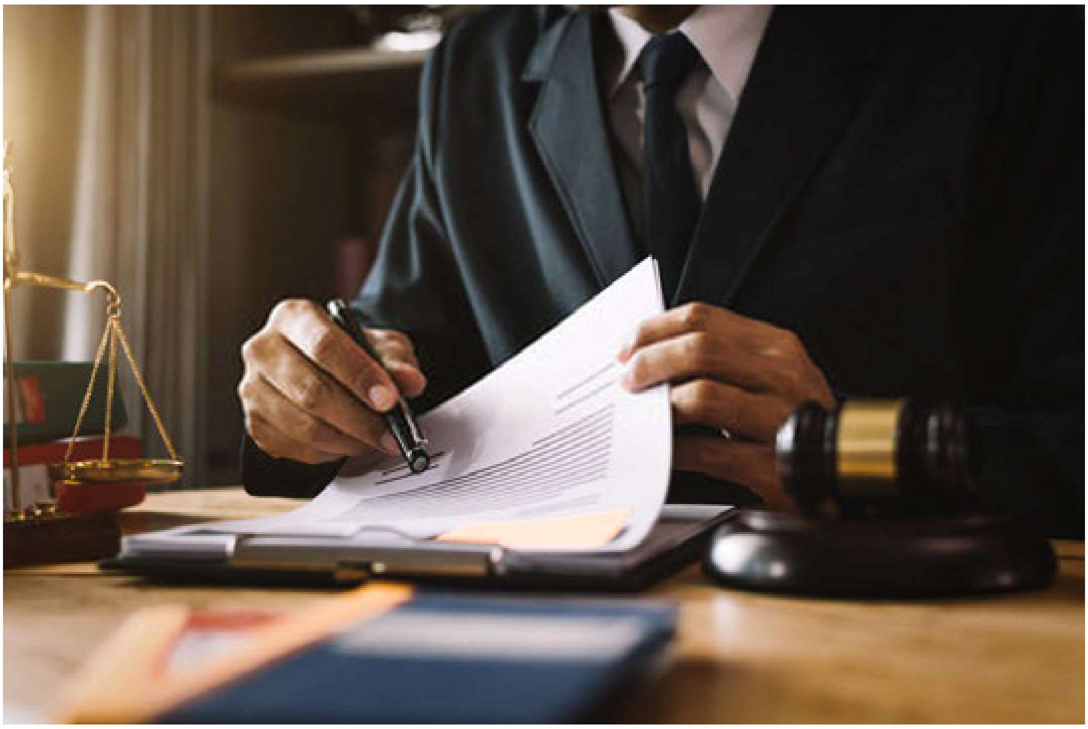
Court directs the authorities to allow the Petitioner to record its statement in present of its Counsel

Avinash Kumar Dwivedi
2020-TIOL-1874-HC-ALL-CUS

The Petitioner having faced practical challenges to be accompanied by its counsel for recording its statement before authorities, approached 'Writ Jurisdiction' of High Court.

Hon'ble High Court Ordered that Petitioner may move appropriate application before the authority concerned seeking the benefit of Section 108 (3) Customs Act which enables the assessee to appear along with his agent i.e., his Lawyer

The Court also directed the authorities to expeditiously consider and decide the Application in accordance with law.



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CESTAT Mumbai holds that 'Railways' includes 'Metros'

Hindustan Construction Company Limited
2020-TIOL-1493-CESTAT-MUM

The Appellant had undertaken work for Mumbai Metro Rail Corporation and Delhi Metro Rail Corporation as provider of 'commercial or industrial construction service'. The Appellant had argued that the services provided by them were covered under the Mega Exemption Notification which inter alia exempted works pertaining to railways. However, the Respondent had fastened a Service Tax liability upon the Appellant along with applicable interest and penalty on the allegation that the services provided by them were not covered under the said Notification as the projects undertaken were commercial whereas the intent of the Government was to exempt only Government Railway projects.

The CESTAT observed that the operations, or its popular designation as 'Indian Railways', of Government-run Railways is not stripped of its commercial mantle. It was further observed that a stray reference to the statute governing railway operations does not establish the postulate of such definition to be applicable in every special dispensation. It was further noted that in the absence of any qualification for the 'railway' incorporated in the exclusion component of the taxable service, any railway, irrespective of ownership, is covered.

The CESTAT further relied upon the decision of the Mumbai Tribunal in the case of Afcons Infrastructure Limited **[2013-TIOL-1225-CESTAT-MUM]** and held that DMRC and MMRC are in fact are 'Railways'. In view of the above observations, it was held that the specific escapement afforded for services rendered in connection with construction of railways is by inclusion, extended to construction of monorail and metro. Accordingly, the CESTAT set aside the order of the Respondent

Authors' Note:

Generally, the exemptions to Government's rail or metro projects are given under the name of 'Railways'. Therefore, the Revenue more often than not objects when taxpayers providing service in a metro project claim any sort of exemption or benefit. This question, as to whether metro and railway are the same thing, had come up before the Apex Court in Jagjit Cotton Textile Mills vs. Chief Commercial Superintendent **[AIR 1998 SC 1959]**. It was held that Delhi Metro Rail is a Government Railway as defined under the Railways Act. It was further held that since Railway also is meant to run on commercial basis, DMRC cannot be distinguished from being called as railways merely on the ground that it involves a commercial angle.

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Notification/Circular	Key Updates
Press Release dated 24 October 2020	**Extension of GSTR-9 and GSTR-9C for the FY 2018-19** In light of the difficulties faced by the taxpayers on account of the COVID-19 pandemic, the CBIC has further extended the due date for filing Annual Return in Form GSTR-9 and Reconciliation Statement in Form GSTR-9C for the FY 2018-19 till 31 December 2020.
Notification No. 04/2020 dated 30 September 2020	**Exemption on ocean freight transactions** Extends the GST exemption on services by way of transportation of goods by air or by sea from customs station of clearance in India to a place outside India, by one year i.e. upto 30 September 2021.
Press Release dated 09 October 2020	**Values in Annual Return for FY 2018-19** Taxpayers are required to report only the values pertaining to FY 2018-19 and the values pertaining to FY 2017-18 which may have already been reported or adjusted are to be ignored. No adverse view would be taken in cases where there are variations in returns for taxpayers who have already filed their GSTR-9 of FY 2018-19 by including the details of supplies and ITC pertaining to FY 2017-18 in the Annual return for FY 2018-19.
Circular No. 142/12/2020 – GST dated 09 October 2020	**Rule 36(4) of CGST Rules** Taxpayers shall reconcile the ITC availed in their GSTR-3Bs for the period February to August 2020 with the details of invoices uploaded by their suppliers of the said months, till the due date of furnishing GSTR-1 for the month of September 2020. The cumulative amount of ITC availed for the said months in GSTR-3B should not exceed 110% of the cumulative value of the eligible credit available in respect of invoices or debit notes the details of which have been uploaded by the suppliers till the due date of furnishing of the statements in GSTR-1 for the month of September 2020. It has further been clarified that the excess ITC availed arising out of reconciliation during the said period, if any, shall be required to be reversed in GSTR-3B, for the month of September 2020 and failure to do so would be treated as availment of ineligible ITC during the month of September 2020.
Press Release dated 13 October 2020	**LTC stimulus and its benefits** The Finance Ministry had recently Clarified that the Government employees opting for the scheme will have to spend the travel fare/ ticket fare component three times more on GST items. The Finance Ministry had recently Clarified that the Government employees opting for the scheme will have to spend the travel fare/ ticket fare component three times more on GST items which fall in the slab of 12% or more by 31 March 2021. It was further specified that for purchase of such items, a GST invoice will be issued and payment is to be made only in digital mode to encourage 'Digital India'.

Notification/Circular	Key Updates
	Certain people had been of the view that LTC voucher scheme for Government employees may not be attractive. In respect thereto, the MoF vide Press Release dated 13 October 2020 has clarified that LTC is quite different from Leave Travel Allowance in the corporate sector. A person claiming LTC is not eligible unless he actually travels; if he fails to travel the amount is deducted from his pay and he may be liable for disciplinary action. He does not have the option of keeping the money and paying income tax.
Notification No. 76/2020 – C.T. dated 15 October 2020	**Prescribes due dates for furnishing of Form GSTR-3B for various states** Form GSTR-3B for each of the months from October 2020 to March 2021 shall be furnished electronically through the common portal, on or before the 20th day of the succeeding month. However, it has been provided that for taxpayers, having aggregate turnover of upto Rs. 5 crores, in the previous FY, whose principal place of business is in the States of Chhattisgarh, Madhya Pradesh, Gujarat, Maharashtra, Karnataka, Goa, Kerala, Tamil Nadu, Telangana, Andhra Pradesh, the Union territories of Daman and Diu and Dadra and Nagar Haveli, Puducherry, Andaman, and the Nicobar Islands or Lakshadweep, the due date for filing GSTR-3B shall be filed on or before 22nd of the succeeding month. It has been further provided that for taxpayers having an aggregate turnover of up to Rs. 5 crore in the previous FY, whose principal place of business is in the States of Himachal Pradesh, Punjab, Uttarakhand, Haryana, Rajasthan, Uttar Pradesh, etc. the return in FORM GSTR-3B shall be furnished electronically through the common portal, on or before the 24th of the succeeding month. Furthermore, registered persons filing Form GSTR-3B, shall discharge their liability towards tax by debiting the electronic cash ledger or electronic credit ledger, and the liability towards interest, penalty, fees or any other amount payable, by debiting the electronic cash ledger, not later than the last date on which Form GSTR-3B is due.

Authors' Note:

After hundreds of daily requests via tweets, mails, representations, etc. the CBIC finally took cognizance of the difficulties faced by the taxpayers and GST professionals alike and extended the due date for furnishing Annual Return and Reconciliation Statement for FY 2018-19. The Confederation of GST Professionals had preferred a Writ before the Bombay HC seeking extension for the due date till 31 December 2020.

While this extension surely has been welcomed by all, it would be pertinent to note that CBDT too has extended the due date of Statutory Audit and Tax Audit till 31 December 2020. Therefore, in order to avoid any last-minute rush, it would be advisable for professionals to plan their audit executions well in advance.

Another move of the CBIC which has been welcomed by all is the staggered due date for filing of GST returns. It would be pertinent to note that major challange faced by taxpayers in filing of returns was due to heavy load on the GST portal. It is expected that the new due dates would ease some of that load so as to avoid any technical complication.

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Notifications/Circulars clarifying key aspects

Notifications	Key Updates
Notification No.36/2020-Customs dated October 05, 2020	**Extension in the scheme of RoSCTL** Seeks to amend notification No.13/2020-Customs dated 14.02.2020 for extending the RoSCTL scheme validity from 31.03.2020 to 31.03.2021 or until such date the RoSCTL scheme is merged with RoDTEP scheme, whichever is earlier. **Authors' Note:** Announced by the Ministry of Textiles on 7th March, 2019, RoSCTL was offered for state and central duties and taxes that are not refunded through GST. It is available only for garments and made up articles and is expected to make the textile sector competitive.
Notification No.96/2020 Customs (NT) dated October 12, 2020	**Assigning functions to Customs officer under faceless assessment of Bill of Entry** Empowers Superintendent of Customs, GST and Central Excise or Appraiser to undertake the functions under Section 149 of the Customs Act i.e. discretion to authorise amendment in document presented to him, for the purpose of faceless assessment under Section 46 of the Customs Act.
Notification No.30/2020 – Customs (ADD) dated October 13, 2020	**Extension in levy of ADD on fibre board from China, Malaysia, Sri lanka & Thailand** Extension in the levy of ADD on imports of "Plain Medium Density Fibre Board of thickness 6mm and above" originating in or exported from China PR, Malaysia, Sri Lanka & Thailand, for a period of three months i.e. upto 20th January, 2021.
Notification No.02/2020 – Customs (CVD) dated October 09, 2020	**Countervailing Duty on flat rolled products imported from Indonesia** Imposition of provisional countervailing duty on import of Flat rolled products of stainless steel, originating in, or exported from Indonesia.
Notification No.35/2015- 2020; October 01, 2020	**Duty Drawback benefit extended to supply of steel from service centres, distributors, etc** Chapter 7 of the FTP is amended to include sub-paragraph 7.07 (iv) to extend benefit of drawback for supplies made to Advance Authorisation holder through manufacturers Service centre, Distributors, Dealers, stock yards. An invoice will be issued by such other places in the steel manufacturer and steel manufacturer would in turn raise its invoice on the Advance Authorisation holder. **Authors' Note:** A welcome amendment that reduced the logistical burden of the manufacturer supplier. Earlier, the steel would need to be brought to manufacturers premise before being supplied to Advance Authorisation holder so as to avail benefit of duty drawback.

Notifications	Key Updates
Notification No.37/2015- 2020; October 06, 2020	**Implementation of Rebate of State Levies by DGFT by issuance of Scrip** Amendments are made in Paragraph 4 of the FTP to enable DGFT to implement the Rebate of State levies (RoSL) scheme as notified by Ministry of Textiles. Now DGFT can issue scrips under the said RoSL.
Notification No.38/2020-Customs dated October 21, 2020	**Duty exemption for goods imported against RoSL scrips** Imports made against RoSL scrip are exempted from whole of duty of Customs, as well as additional duties leviable under sub-section (1), (3) and (5) of Section 3 of Customs Tariff Act. The Notification also provides for conditions of registering the scrip and restriction to avail the scrip for exports made against Advance Authorisation. The Notification also prescribes certain benefits, such as scrip will be transferrable and that importer will be eligible to avail duty drawback. **Authors' Note:** Even though utilisation of Scrip is treated as an 'Exemption', given the availability of duty drawback it indeed functions equivalent to 'payment of duty'. It appears that utility of RoSL scrip is at par with MEIS/SEIS scrips.
Notification No. 37/2020 - Customs dated October 21, 2020	**Duty exemption under India-Korea Comprehensive Economic Partnership Agreement** Imports of Polybutadiene Rubber of titanium and lithium grade is exempted when imported from Republic of Korea under the India-Korea Comprehensive Economic Partnership Agreement.
Notification No. 102/2020 - Customs dated October 23, 2020	**Appointment of Customs Authority for Advance Ruling at Delhi and Mumbai** Commissioner of Customs as specified in the Notification at Mumbai and Delhi is hereby notified to act as Customs Authority for Advance Ruling at Mumbai and Delhi respectively.
Notification No. 41/2015-2020 dated October 15, 2020	**Restriction on import of AC with refrigerants** The DGFT has amended the import policy for Air Conditioners to prohibit import of 'Air Conditioners with refrigerants'. **Authors' Note:** As such, import of 'Air Conditioners without refrigerants' remain unrestricted, however, given the processes it would require to undergo post importation to make it saleable makes such import financially unviable against manufacturing these in India. This move is in line with Government's Make in India initiative. Presently, nearly half the annual requirement of India's AC market is fulfilled by imports, and a restriction referred above would create opportunities for domestic manufacturers.

Notification	Key Updates
Notification No. GSR 678(E) dated October 23, 2020	**Drawback benefit for supplies made to foreign Supplier in Free Trade and Warehousing Zone** The Special Economic Zones Rules, 2006 are amended to insert sub-rule (3) to Rule 24 which allows benefit of duty draw back where supplies are made from domestic tariff area to foreign suppliers located in Free Trade and Warehousing Zones where the payments are made in foreign currency by the foreign supplier to Domestic Tariff Area.

Circulars	Key Clarifications
Circular No. 44/2020 dated October 08, 2020	**Directions to conduct inspection of Inland Container Depots and Container Freight Depot** Based on Audit Report 16 of 2018 which noted several deficiencies at Inland Container Depot ('ICD') and Container Freight Stations ('CFS'). These deficiencies related to land area requirement, infrastructure, demarcation for imported/exported goods, fumigation, adequate measures for hazardous goods, etc. To address these deficiencies, the board has issued the present circular directing Jurisdictional Commissioners to undertake inspection of the ICD and CFS along with a proforma of inspection reports.
Circular No. 45/2020 dated October 12, 2020	**Faceless Assessment: Measures for timely assessment** In order to expedite the faceless assessment process, the board has identified certain measures for continuous assessment of BoE such as: (i) All Saturdays (except second Saturday) to be a working day based on roster system. (ii) The Port of Import should monitor clearance of time-sensitive/urgent consignments such as lifesaving drugs, security/defence related consignments etc. (iii) One of the five Working Groups established under the NACs is responsible for timely assessments including resolving related IT issues. In the event of increase in the pendency for a particular NAC/FAG, the NAC Commissioners heading this Working Group shall take urgent measures for co-ordination with other NAC Commissioners/DG Systems for early disposal and/or resolution of the issues. In addition, the circular provides detailed guidelines on following: - Raising of queries by FAG and its redressal - Resorting to First checks - Role of RMCC/LRM - Re-assessment of BoE - Certificate of Origin - Grievance Redressal
Circular No. 46/2020 dated October 15, 2020	**Testing of samples by revenue laboratories** Pursuant to upgradation of revenue laboratories with state-of-the-art equipment and additional manpower, these are now capable to test samples for FSSAI, CDSCO as well as textile committee. It is therefore directed that all the samples be tested at these Customs Revenue Controlled Laboratories for optimal utilisation.

Instruction	Key Clarifications
Circular No. 44/2020 dated October 08, 2020	**Appointment of Directorate General of Audit as a Nodal Directorate for Customs Post Clearance Audit** CBIC introduced Customs post clearance Audit which was found in need of being effectively monitored. Accordingly, the board has directed that Directorate General of Audit will act as Nodal Directorate for Customs Post Clearance Audit. Some of the key roles of Nodal Directorate would include (i) Effective and sufficient implementation of Customs Post Clearance Audit (ii) to co-ordinate with director general of systems and data management (iii) interact with National Academy of Customs, Indirect taxes and Narcotics to develop Audit strategies (iv) To evolve mechanism for assessing and ensuring audit quality assurance, etc. Provides for detailed roll-out plan in phases covering different Customs Zones and Chapters of the Customs Tariff Act, 1975, including the existing Phases I and II, is given in Annexure I. Also provides for constitution of 11 National Assessment Centres The National Assessment Centres are organized commodity-wise according to the First Schedule to the Customs Tariff Act, 1975.

Public Notices	Key Clarifications
Public Notice No. 25/2015-2020 dated October 13, 20200	**Procedure for application and issuance of Scrips under Scheme for Rebate of State Levies (RoSCTL)** The DGFT has laid down its procedure for application and issuance of scrips under Rebate of State and Central Taxes and Levies ('RoSCTL'). The key highlights of the said public notice have been summarized hereunder: **Procedural Aspects** ▸ The RoSCTL scrips shall be issued only for such old Shipping Bills of Scheme for RoSCTL, for which RoSCTL amount could not be disbursed earlier due to budget limitations; ▸ The application for claiming RoSCTL is to be filed online in Form AND-4SL using digital signature. The applicant would be required to link the relevant EDI Shipping Bills and e-BRCs and submit the application through online mode only. Maximum of 50 Shipping Bills can be attached in the online application; ▸ The rebate would be admissible only for shipping bills for which Drawback has been disbursed and RoSCTL amount has not been disbursed. The applicant would be required to ensure that no application is filed against the Shipping Bill for which RoSCTL claim has been received from the Customs Authorities along with Drawback; ▸ The facility of split scrips shall be the same as applicable to MEIS and SEIS; ▸ The Applicants shall ensure that they are applying only to the concerned Jurisdictional RA, as per the prescribed provisions of the Handbook of Procedures for

getting the scrip and shall submit a declaration to that effect while applying for the scrip online;

- While making an online application, the applicant may choose the Port of registration from any one of the EDI ports from where export has been made for the Shipping Bills in that online application. Duty Credit Scrip (including splits) shall be issued with that single EDI port of registration;

- Subsequent to the approval of the final rebate amount, the scrips shall be issued by RAs in a paperless mode;

- Duty credit scrip shall be registered at the port mentioned on the scrip, prior to allowing usage of duty credit;

- Duty Credit Scrip shall be valid for a period of 24 months from the date of issue and must be valid on the date on which actual debit of duty is made. Revalidation of Duty Credit Scrip shall not be permitted unless validity has expired while in custody of Customs Authority / RA;

- The Applications containing Shipping Bills with Let Export Order (LEO) date between 01 October 2017 and 06 March 2019 are required to be submitted separately. Similarly, separate application containing shipping bills with LEO date before 01 October 2017 needs to be submitted. Last date for submitting applications containing shipping bills with LEO date from 01 October 2017 to 06 March 2019 is 30 June 2021. Further, the last date for filing applications containing Shipping Bills with LEO date before 01 October 2017 would be notified at a later date;

- No application shall be allowed to be submitted post the deadlines. There is no provision for late fee under RoSCTL;

- All exporters are eligible for making a claim under the RoSCTL, except the entities / IEC which are in the Denied Entity List of the DGFT.

Procedural Aspects

- The record of Shipping Bills and other documents related to export on which RoCSTL is claimed, is required to be maintained by the Applicant for a period of 3 years from the date of issuance of scrip for post issue scrutiny and recovery purposes. The RA may call upon such details within a period of 3 years from the date of issuance of scrips. In case of failure to provide the requisite details, the Applicant shall be liable to refund the rebate granted along with the applicable interest;

- In case, excess payment is made due to error or miscalculation, the exporter shall be liable to refund the same within 30 days from the date of demand raised by the concerned RA of DGFT. The Applicant shall be liable to pay 15% interest or as prescribed under Section 28AA of Customs Act, whichever is higher. In case the exporter fails to refund the amount so demanded by RA within the prescribed time limit, recovery proceedings shall be initiated;

- In case, the rebate is claimed on the basis of mis-declaration or suppression of facts or

	by submitting fabricated export documents, the exporter shall be liable for penal action under the provisions of Foreign Trade (Development and Regulation).
Public Notice No. 26/2015-2020 dated October 16, 2020	**Extension in filing documents for Export Obligation Discharge Certificate** Paragraph 4.44 is amended in the wake of COVID situation to allow extension in the date of submission of documents for EO fulfilment up to 31.12.2020 for all Advance Authorisations, wherever, Export Obligation period is expiring/has expired between 01.02.2020 and 31.10.2020. **Authors' Note:** It must be noted that extension is allowed only to furnish documentation in support of Export Obligation and not for Export Obligation per se vide this Notice.

Public Notice	Key Clarification
Trade Notice No. 30/2020-2021 dated October 13, 2020	**Extension in filing documents for Export Obligation Discharge Certificate** The E-platform accessible at https://coo.dgft.gov.in has been designed as a single-point access for all FTAs/PTAs, all designated Certificate of Origin (CoO) issuing agencies and for all export products. Presently, this platform caters to the CoO requirement under 8 FTA's/PTA's viz. India Chile Preferential Trade Agreement, South Asia Free Trade Agreement, SAARC Preferential Trade Agreement, India Korea Comprehensive Economic Partnership Agreement, India Japan Comprehensive Economic Partnership Agreement, ASEAN India Free Trade Agreement, India Sri Lanka Free Trade Agreement, Asia Pacific Trade Agreement. In addition to the above, the E-platform is now being expanded to cater the needs of CoO for exports made under following Agreements/Arrangements - Generalized System of Preferences - Global System of Trade Preferences - India Malaysia Comprehensive Economic Cooperation Agreement - India Singapore Comprehensive Economic Cooperation Agreement

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NCLAT holds that Balance sheet entries to be treated as acknowledgment of debt for Insolvency proceedings thereby bringing fresh period of limitation under Section 18 of the Limitation Act

Bishal Jaiswal vs. Asset Reconstruction Company (India) Ltd.
2020-TIOLCORP-108-NCLAT

The Corporate Debtor (Corporate Power Ltd.) had availed loan from Consortium Lenders for setting up 1080 MW coal-based plant in the State of Jharkhand and later failed to repay the dues under the facilities granted by the lenders. Lenders thus recalled the loan in 2015 and assigned their credit facilities to Asset Reconstruction Company (India) Limited ('ARCIL').

On failure to recover debts, ARCIL filed application before NCLT Kolkata for initiation of corporate insolvency proceedings ('CIRP'). While Corporate Debtor contended that its accounts were declared NPA by lenders in 2014 and thus application under section 7 filed in 2018 after a delay of around five years shall be barred by limitation. On the other hand, the NCLT admitted application on the ground that Corporate Debtor admitted the debt in its balance sheet in 2017 and hence application is filed within limitation period.

The NCLAT has examined various important facts in this case such as it is a well settled fact that entries in the balance sheet are acknowledgement of debt under section 18 of Limitation Act and same has been consistently upheld by various courts. NCLAT also observed that the decision made in V. Padamakumar vs. Stressed Assests Stabilization (which is referred by Corporate Debtor in his plea) has earlier been rejected in other matters as it was established that balance sheet contains an admission of liability and representatives of the company who make and sign the balance sheet are indeed the people responsible or accustomed to manage the affairs of the company.

It was also observed that Corporate Debtor has given reference to another matter (Babulal Vardharji Gurjar vs. Veer Gurjar Aluminium Industries Pvt Ltd) wherein Supreme Court had held that section 18 is not applicable to insolvency cases, however NCLAT observed that question of limitation is a question of law and facts which needs to be evaluated on a case to case basis, moreover in this matter, the appellant did not asked for acknowledgement of debt and hence facts of this matter were different from the present matter at hand.

Being aggrieved, Corporate Debtor filed its Appeal before NCLAT. Three members bench of NCLAT noted that a similar matter has been decided by a 5 members bench of NCLAT and in normal course, judgement of larger bench is binding on smaller bench, Accordingly, the three members bench is of the view that the matter be referred to five member bench of Appellate Tribunal.

Authors' Note:

This is indeed a crucial matter and has a bearing on lot of matters pending with insolvency courts. As a standard practice the liabilities are accounted for on balance sheets of companies and they can't be reversed as such as per generally accepted accounting practices. Therefore, if we look at it from recognition of liability in balance sheet perspective then no cases would fall under the purview of Limitation Act except where debt is already restructured or written off. This judgment has opened a can of worms as if similar decisions are upheld at higher courts then people would continue to rake up old issues which they willfully decided not to contest during limitation period.

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SEBI holds Inter-se promoter transfers to be within the ambit of insider trading, finds Kirloskar Brothers guilty

Kirloskar Brothers Ltd.

Various complaints of insider trading and bad corporate governance practices were made against Kirloskar Brothers Limited ('KBL') to SEBI. Accordingly, SEBI conducted investigation during the period from March 1, 2010 to April 30, 2011.

Investigation revealed that promoters and directors of KBL had traded in scrip of KBL while in possession of unpublished price sensitive information ('UPSI') and made wrongful gains by avoiding losses; and promoters and directors of KBL had submitted incorrect undertaking /declaration to KBL. Thereafter show cause notices were issued to promoters and related entities.
SEBI examined the following issues:

a) Whether Inter se promoter transfers fall within the ambit of insider trading thus leading to wrongful/illegal profits/ gains?

Regulation 3 of PIT Regulations, 1992 do not exempt any inter-se transfer between promoters or transactions between buyer and seller, who have the same UPSI. The said exemptions from violation of insider trading i.e. inter-se transfer between promoters and transactions between buyer and seller, who have the same UPSI is given under the PIT Regulations, 2015 subject to certain conditions, however as the transaction in question happened in the year 2010, the provisions of PIT Regulations, 1992 will be applicable in the present case.

b) Whether failing to disclose the decision taken in the Board Meeting to invest upto Rs. 275 Cr in the purchase of shares of KBL by KIL was material and price sensitive information?

The decision taken in the Board Meeting to invest an amount of upto Rs. 275 Cr. in buying shares of KBL was indeed material and price sensitive information, and was expected to have bearing on KIL's performance, thereby failure to disclose the same was in violation of the provisions of Clause 36 of the Equity Listing Agreement read with section 21 of the Securities Contracts (Regulation) Act and so a penalty of Rs. 5 lakh shall be imposed on Kirloskar Industries Ltd. ('KIL').

Authors' Note:

SEBI barred Promoters of KBL from dealing in securities market for 3 months and they were asked to pay financial penalties to violate insider trading regulations. SEBI's stern approach against insider trading is essential to prevent such malpractices. With this order, SEBI has set an example for their competitors to prevent such malfeasance. In this investment environment, it is imperative that those charged with governance shall discharge their duties in good faith and shall protect the interest of shareholders. These people are often in possession of UPSI which overlay them with an added responsibility and they need to act with more responsibility and precision.

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Relaxation for inability to meet minimum residency period of a director

Section 149(3) of the Companies Act provides that- "Every company shall have at least one director who stays in India for a total period of not less than one hundred and eighty-two days during the financial year."

Further, Proviso to section 149(3) provides that- "Provided that in case of a newly incorporated company the requirement under this sub-section shall apply proportionately at the end of the financial year in which it is incorporated."

Vide General Circular No. 11/2020 dated March 24, 2020, In order to support and enable Companies in India to focus on taking necessary measures to address the COVID-19 threat, including the economic disruptions caused by it, Non-compliance of above mentioned requirement of staying in India for a total minimum period of 182 days has been relaxed by not treating it as non-compliance for FY 2019-20.

In continuation to General Circular No. 11/2020 dated March 24, 2020, the relaxation has now been extended for FY 2020-21 vide General Circular No. 36/2020 dated October 20, 2020.

Authors' Note:

This circular has nullified the effect of Section 149(3) for FY 2020-21. This relaxation was evident as MCA has already provided relief to attend various meetings through VC. Practically, it was not possible for companies to comply with this requirement as lockdown conditions still persists in various countries due to COVID-19.

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Strengthening of Debenture trustee's role to protect the interest of Debenture holders

Background

On 29th September, 2020, SEBI approved proposal of strengthening the role of Debenture Trustees (DTs) to give them more powers for them to ensure protection of debenture holder's interests. Accordingly, responsibilities of issuer have been increased to avoid practices prejudicial to interest of Debenture holders.

This was notified on 8th October, 2020 vide Gazette Notification No. SEBI/ LAD-NRO/GN/2020/35 and relevant amendment were brought in SEBI (Debenture Trustee) Regulations, 1993, SEBI (Issue and Listing of Debt Securities) Regulations, 2008 and SEBI (Listing Obligations and Disclosure Requirements), 2015.

By virtue of these amendments, the DTs shall exercise independent due diligence and monitor assets on which charge is created. They shall also have the powers to create funds in the company earmarked for use in meeting legal expenses in case of default. The key amendments are as follows:

1. **Structuring of Trust Deed**

   As per revised guidelines, Trust deed needs to be drafted in a more structured manner and it shall have two parts, the first part shall contain statutory/standard information of the debt issue and second part shall have details specific to the particular debt issue.

2. **Implementation of recovery expenses fund**

   The regulation requires the DTs to ensure the implementation of expenses recovery fund in addition to Debenture Redemption Reserve. Obligation of the issuer has also been increased to create a recovery expenses fund in the manner as maybe specified by the Board from time to time. This fund shall be used by DTs to meet legal expenses in case of a default by issuer.

3. **Security Creation, Due diligence and monitoring**

   As per regulations, DTs are not only required to ensure creation of charge on security, but also carry out an independent due diligence on quality and coverage of assets. In addition, DTs are also required to obtain comfort on compliances of covenants (as per terms of debenture deed) by obtaining necessary certificates from statutory auditors of company on a half yearly basis.

4. **Additional reasons for 'meeting of Debenture Holders'**

   These regulations have given specific emphasis to the compliance of covenants of the Offer Document/Information Memorandum and breach of covenants (as specified in the Offer Document/ Information Memorandum and/or debenture trust deed) has been provided as additional ground to call for meeting of debenture holders.

5. **Monitoring Security coverage**

   While it is the duty of the Debenture Trustee to monitor that the security is maintained, however, the recovery of 100% of the amount shall depend on the market scenario prevalent at the time of enforcement of the security. As per amended law, In respect of its listed non-convertible debt securities, the listed entity shall maintain 100% asset cover or asset cover as per the terms of offer document/Information Memorandum and/or Debenture Trust Deed, sufficient to discharge the principal amount at all times for the non-convertible debt securities issued.

6. **Intimation to Debenture trustees by Listed Companies**

   The Listed Companies shall intimate to DTs on a half yearly basis on all covenants of the issue (including side letters, accelerated payment clause, etc.). After amendment, now it is the duty of the issuer to obtain a half-yearly certificate regarding maintenance of 100% asset cover as per the terms of offer document/Information Memorandum and/or Debenture Trust Deed, including compliance with all the covenants in respect of listed non-convertible debt securities, by the statutory auditor (instead of any practicing Chartered Accountant or Company Secretary as prescribed under earlier law), along with the half-yearly financial results.

7. **Additional Disclosure**

   The disclosure requirements have been prescribed for issuers in respect of compliance with covenants, events of defaults, creation of recovery expense fund, security creation and risk factors etc.

Authors' Note:

The debentures issue have largely been seen in past as private funding arrangements between two parties, however with increase in corporate sector debenture issues to large number of people , a need was felt to strengthen the role of debenture trustee and give them more governing powers so that they can protect the interest of debenture holders. These regulations are definitely a positive step in that direction though one has to see how far the practical implementation of this goes. However the assessment of underlying security is a critical factor and more structured guidance shall be provided to implement the same.

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SEBI regulations-Disclosure of Events includes intimation of Forensic Audit

SEBI has amended LODR regulations to include following insertion regarding the intimation of initiation of forensic audit to the stock exchanges by listed entities. In Schedule III of SEBI (LODR), 2015, the list of events are specified which needs to be disclosed to stock exchange without applying any materiality factor. In recent amendment, a new sub-clause 17 has been inserted with respect to initiation of forensic audit.

In case of initiation of forensic audit (by whatever name called) the following disclosure shall be made to stock exchanges by listed entities:

a) The fact of initiation of forensic audit along-with name of entity initiating the audit and reasons for the same, if available;

b) Final forensic audit report (other than for forensic audit initiated by regulatory / enforcement agencies) on receipt by the listed entity along with comments of the management, if any

Authors' Note:

In current era of stepped up corporate governance, these events must be reported to stock exchanges so that shareholders are apprised of the developments in the Company. At present, listed companies usually do not make forensic audits public, mainly for fears of negative impact on the stock price and the company's brand. However this excludes the disclosure of forensic audits initiated by regulatory or enforcement agencies which fails the purpose of the amendment to a significant extent. On the other hand, stock markets as well as investors also needs to absorb such information with more responsibility as every such audit may not result into findings of wrong doing, therefore till the time results of such audits are finalized, one shall not form a negative view about company.

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Clarification on the FDI Policy for Uploading/Streaming News and Current Affairs through Digital Media

The Department for Promotion of Industry and Internal Trade, Ministry of Commerce & Industry, Government of India (DPIIT) vide Press Note No. 4 dated 18.09.2019 allowed FDI up to 26% under Government Route in sector involved in Uploading/Streaming of News & Current Affairs through Digital Media.

"FDI under Government Route" means company requires a prior approval of government before accepting the FDI from Non-resident investor.

There were various confusions due to undefined scope of 'Digital Media' and the 'time limit', within which the compliance with 26% shareholding threshold was to be ensured. Upon receipt of various industry representations DPIIT has issued a clarification on 16.10.2020. Through this clarification, it is highlighted that Vide PN 4 (2019 series) dated 18.09.2019, **the Central Government had decided to liberalize the FDI regime for entities engaged in the News Digital Media Sector**. The summary of clarification is as follows:

Categories of Indian entities: Following Indian entities, registered or located in India, will be considered as the entities engaged in News Digital Media Sector, where PN 4 (of 2019) will be applicable.

- Digital media entities streaming/uploading news and current affairs on websites, apps or other platforms;
- News agency which gathers, writes and distributes/transmits news, directly or indirectly, to digital media entities and/or news aggregators; and
- News aggregator, being an entity which, using software of web application, aggregates news content from various sources, such as news websites, blogs, podcasts, video blogs, user submitted links, etc in one location.

Time-Limit for compliance: Entities covered under above categories would be required to align their shareholding to the FDI cap of 26% with the approval of the Central Government, within a year from the date of issue of this clarification. Hence, companies have time till 15.10.2021 to comply with these shareholding requirements.

Additional requirement for the investee company:

The following additional conditions would need to be complied with by the companies:

(a) The majority of Directors on the Board of the company shall be Indian citizens;

(b) The Chief Executive Officer shall be an Indian Citizen;

(c) The investee company is required to obtain security clearance of all foreign personnel likely to be deployed for more than 60 (sixty) days in a year by way of appointment, contract or consultancy or in any other capacity for functioning of the entity prior to their deployment. In the event of the security clearance of any foreign personnel being denied or withdrawn for any reasons whatsoever, the investee entity needs to ensure that the concerned person resigns or his/her services are terminated forthwith after receiving such directives from the government.

Authors' Note:

These clarifications seems to have a dual impact on the sector, while on one hand, these rules are intended to check foreign influence and interference in India's domestic affairs, check Chinese and other overseas funding in news sites. It will provide a level- playing field for news media where a 26% FDI cap already existed. Also the requirement of mandating Indian citizenship of majority of directors and the CEO will help the government seek accountability from the news portal. However on the other hand there are umpteen challenges in implementation and to cop up with its ground effect in current world of globalization. In todays' era, where most of the Indian news medias have a digital segment in their business and have foreign investment of well above 26% , will have to struggle for finding Indian buyers to replace their foreign investors. Moreover to plan such kind of capital outflows would be a herculean tasks considering strict FEMA and tax laws. This will actually end up hurting the Indian news aggregating ecosystem.

The FDI cap on digital media being equated to print media may be viewed as restricting rather than easing the norms. As many players in the digital media space are startups the FDI cap of 26% may be considered a setback to India's emerging digital media industry and inconsistent with the Start-up India and Digital India campaigns.

Further, while the government has allowed this grace period of 1 (one) year. However, Government should ensure the quick response to the approval application from digital media entities with existing FDI.

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The Companies (Amendment) Act, 2020

On 17 March 2020, the Companies (Amendment) Bill 2020 (hereinafter referred to as 'CAB 2020') was introduced in the Lok Sabha, which proposed certain amendments to the Companies Act 2013. In the aftermath of the outbreak of the COVID-19 pandemic, on 23 March 2020, Parliament has adjourned sine die and then finally, CAB 2020 has been passed by Lok Sabha on 19th September, 2020 and by Rajya Sabha on 22nd September, 2020 and final assent has been given by the President of India as on 28th September, 2020. The amendments are largely focused on strengthening corporate governance, decriminalization of offences and to ensure ease of compliances to the extent possible. Some of the important amendments are summarized below:

Amendments related to 'Ease of listing for Companies'

Exclusion and exemption for listed entities - Central Government has been given power to exclude certain companies which have listed or intend to list certain securities from the definition of listed company u/s 2(52). Also vide Section 23, Central Government has been empowered to exempt, certain class of public companies from the applicability of various provision relating to prospectus and allotment of securities, Share Capital and Debentures, Declaration in respect of beneficial interest in any share etc. This is primarily done with an objective of allowing companies to list their debt securities on stock exchange without having the burden of carrying out all compliances applicable to listed companies.

Amendments related to 'Ease of Compliances'

Right Issue - The minimum time limit u/s 62 for acceptance of right issue can be less than 15 days as prescribed by Central Government on a case to case basis, this would help to speed up the process of right issue to existing shareholders.

Corporate Social Responsibility - The requirements with respect to CSR spending and monitoring u/s 135 has been eased out as now companies with a CSR obligation of less than 50% are not required to form a CSR committee and this responsibility can be discharged by the board of directors itself. Moreover any amount spent in excess of prescribed limit in any given year can be carried forward and set off against the subsequent year obligation.

Others - Various relaxations have been given under section 16, 89 and 117 with respect to allotment of new name to companies having name similar to an existing trade mark, compliances with provisions of beneficial interest in shares and filing of resolutions by NBFCs and HFCs in ordinary course of business.

Amendments related to 'strengthening the corporate governance':

Remuneration to Non-Executive Directors in case of losses - The Act currently deals with a situation where remuneration can be provided to Executive Directors as prescribed under schedule V in case company is having no profits or inadequate profits in a given financial year. A limited amendment has been made to Section 149 and 197 of the act wherein independent directors and non-executive directors have been brought in the ambit of schedule V provisions and remuneration can be discharged to them in case of no profit or inadequate profits. This change has been brought in as role of independent director and non-executive directors is gaining importance with increased levels of corporate governance and oversight and keeping in view their crucial role in ensuring these, it was felt that they shall be appropriately compensated in case of inadequacy of profits.

Amendments related to 'De-criminalization of offences'

This Companies (Amendment) Act, 2020 has made changes in around 49 penalties by omitting some penal provisions, by reclassifying from compoundable offences to in-house adjudication framework and limiting some of compoundable offences to fine only. Amendments relating to offences can be categorized into 4 parts as follows:

(a) Reduction in monetary amount of penalty

(b) Removing imprisonment from penal provisions

(c) Reclassification of offences from compoundable offences to in-house adjudication framework:

(d) Removal of Penal Provisions relating to rectification of name of company, register of members, etc.

Other Amendments

A series of other amendments are also proposed to deal with provisions related to winding up of companies, powers of company liquidator and power of tribunal to declare dissolution void. In addition to this special powers have been given to Central Government to exempt specific class of companies from provisions under Section 89 for declaration of beneficial ownership or provisions of Section 393A with respect to compliances with chapter XXII. These powers are to be used by Government in specific cases to promote ease of doing business.

Authors' Note:

These amendments are a move towards liberalizing the stringent laws, widening the scope of law and strengthening the Corporate Governance. More emphasis in these amendments has been given to the draconian penal provisions which were levied on a businessman on account of small lapses due to various daily business practices. It further aims to promote ease of doing business by giving special powers to central government to exempt companies from long drawn compliance procedures for listing, declaration of beneficial ownership and registration of foreign companies, the government can use these powers in specific cases to promote Indian economy and corporate sector. These amendments would help in reducing the burden of courts by decriminalization of various routine offences. Moreover in this current scenario where companies are financially stressed by Covid-19 effects, it becomes all the more important to bring in some flexibility in compliance management system.

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Scheme for grant of ex-gratia payment of difference between compound interest and simple interest for six months to borrowers in specified loan accounts

In view of the unprecedented and extreme COVID-19 situation, vide F. No. 2/12/2020-BOA.I Department of Financial Services, Government of India, Ministry of Finance has approved "Scheme for grant of ex-gratia payment" to the borrowers. This Scheme has been rolled out after the Supreme Court directed the Centre to implement the relief as soon as possible and ahead of upcoming festival season after months long proceedings over the interest charged by the RBI during the period covered under Moratorium scheme. The salient features of the scheme are as follows:

Eligible borrower

Borrowers having their loan accounts having sanctioned limits and/or outstanding amounts not exceeding INR 2 crore as on 29th February 2020 are eligible for benefit under the scheme. To reckon the limit of Rs. 2 crore, all the facilities of the borrower with any lending institutions will be considered including even credit card dues. However if for any reason an account was categorized as "Non-Performing Assets" on or before 29th February 2020, the same shall not be eligible for the benefit. It is further clarified in the scheme that it covers both category of borrowers the one who had availed benefit of moratorium and the other who had not availed the benefit.

Benefit under the Scheme

Benefit under this scheme, would be given in the form of ex-gratia, which will be credited with the borrowers' account. This ex-gratia amount is the difference amount of simple interest and compound interest calculated on the outstanding amount as on 29th February 2020 for the period to be reckoned.

Period to be reckoned would be of 6 months which would start from 1st March 2020 to 31st August 2020. The same shall be credited to borrowers account before 5th November 2020.

The loans covered under this benefit includes housing loan, consumer durable loan, credit card dues, auto loans, personal loans, term loans, demand loans, overdraft facility and cash credit facility. The scheme further stipulates the formula for calculation of benefit under different category of loans which is primarily the difference between the simple interest and compounded interest during this period.

Claim Processing and Grievance Redressal Mechanism

Once the benefit is credited and a borrower is not in agreement with the amount of benefit, they can lodge their claims to lending institutions and all lending institutions are instructed to create a grievance redressal mechanism.

Authors' Note:

This move is to provide a relief to the borrower who had availed of moratorium scheme but still he had to pay the interest on interest during the moratorium period. But to maintain the uniformity for all the borrower, this scheme covers all the borrowers irrespective of the fact that if borrower had availed of moratorium scheme or not. But still, Government is expected to come back with a clarification that whether ex-gratia on credit card will be available on outstanding as on that date or on the amount rolled over.

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Oman Introduces Country-By-Country Reporting Requirements

Background

Oman has introduced Country-by-Country Reporting ('CbCR') requirements vide Ministerial Decision 79/2020. Oman became a member of the OECD Base Erosion and Profit Shifting ('BEPS') Inclusive Framework. All the members are committed to implement minimum standards action plans.

Further, CbCR covered by Action Plan 13 of BEPS is also a minimum standard which country have to implement as part of inclusive framework.

Applicability of CbCR

The CbCR rules will be applicable to MNE groups having consolidated revenue of at least Rial Omani 300 Million (approx. 780 Million USD) in the FY immediately preceding the reporting period reflected in the consolidated financial statements for such preceding year.

Filings of notification and CbCR

CbCR is effective for FY beginning on or after 1 January 2020. Constituent entity (Subsidiary, Branch, PE, etc.) / Reporting entity of MNE groups in Oman are required to comply with CbCR and file notification before the last day of the fiscal year. MNE groups whose has FY ending on December 31, 2020 fiscal year end, the first notification deadline will be December 31, 2020.

Further, reporting entity of MNEs based on Oman (i.e., Ultimate Parent Entity / Surrogate Parent Entity) must file its CbCR on or before 12 months from last day of the reporting FY of the MNE group. Therefore, due date of first CbCR report to be filed by the MNE reporting entity will be December 31, 2021.

Use of CbCR

Article 8 of the Ministerial Decision 79/2020 specifies that the Authority shall use the Country-by-Country Reports for purposes of assessing high-level transfer pricing risks and other base erosion and profit shifting related risks in Sultanate of Oman. Transfer pricing adjustments by the Authority shall not be based on the Country-by-Country Report.

Penalties:

Ministerial Decision 79/2020 does not stipulate any fines or penalties for non-compliance. However, it is expected to be notified in the due course.

Authors' Note:

MNE Groups having presence in Oman through its subsidiaries / branch(es) / PE will be required to assess the applicability of CbC regulations comply with the same. MNE Groups headquartered in Oman may require to file detailed CbC report subject to the threshold of OMR 300 million as prescribed in the Ministerial Decision.

Constituent entities of the MNE groups are required to file notification on or before the last of the FY. Which means, the due date of filing of notification would be based on the reporting fiscal year followed by the MNE Group.

Reporting Fiscal Year of MNE	Due date of filing notification
From January 01, 2020 to December 31, 2020	**December 31, 2020**
From April 01, 2020 to March 31, 2021	**March 31, 2021**

The MNEs would also require to more cautious and compliant with Oman transfer pricing provisions as the CbC reporting / notification would be used to identify the non-compliances by the members of the MNE groups qua the transfer pricing provisions of Oman.

Federal Court of Australia held that Backpacker's tax is 'non-discriminatory' for foreign residents working on holiday VISA

Australian law mandates the working holiday maker (i.e. foreign residents working on holiday VISA) to pay tax at the rate of 15% from the first dollar of income up to AUD 37,000. This is popularly known as 'Backpacker Tax' / 'Holiday Maker' tax.

During the assessment, the commissioner assessed Mr. Addy UK Citizen (taxpayer) as liable to pay tax. He preferred an appeal against the order of the Commissioner in court. Australian Federal Court (Full Bench) upholds the Revenue's finding that a UK Citizen (taxpayer) in Australia on a Working Holiday Visa (WHV) passed the '183 day test' or 'ordinary concepts test' of residency under Income Tax Assessment Act, 1936.

The Taxpayer filed the cross appeal that it is discrimination under the DTAA as the Australian resident are not liable to pay tax till the tax-free threshold of AUD 18,200. The Court further rejected taxpayer's cross appeal and held that taxpayer is not eligible to claim the benefit of Non-Discrimination Clause ('NDC') under the Income Tax Rates Amendments (Working Holiday Maker Reform) Act, 2017.

The Court Observed that the Australian national would never be in a situation comparable to that of a backpacker in Australia on WHV and Clarified that NDC applies to discrimination between an Australian national and a foreigner and not between an Australian national and a backpacker with WHV.

In view of the above observations. The court held that the taxpayer liable to tax at a special rate of 15% on the income sourced from Australia.

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Features of Omani VAT Law effective April, 2021

A unified Value Added Tax ('VAT') Agreement was signed by the six Gulf Co-operation Council ('GCC') countries in November, 2016, vide which the member countries were to introduce their own national VAT legislation based on an agreed VAT framework. This measure aimed at ensuring certain uniformity in implementation of VAT across GCC region and in the parallel giving its member nations enough freedom to implement VAT in the way most suitable to them.

As per the GCC VAT Agreement, His Majesty Sultan Haitham Bin Tarik issued a Royal Decree 121/2020 to implement VAT in Oman effective April, 2021 giving taxpayers 180 days of preparation time. Few of the key salient features of the Omani VAT Law are captured here-in-below:

- Omani VAT Law is a concise law which connotes that many details are likely to be covered in the Executive Regulations (expected to be issued in December, 2020)
- VAT shall be applicable at the standard rate of 5%. However, certain supplies of strategic nature are to be treated as exempt or zero-rated supply
- VAT registrations are expected to open from January, 2021
- Threshold for mandatory VAT registration in Oman is OMR 38,500 (equivalent to USD 100,000/-) and taxpayer needs to have turnover above OMR 19,250 (USD 50,000) to apply for voluntary registration
- Multiple entities of a corporate business group shall be eligible to register under a single VAT group registration and inter-company transactions shall not be treated as supplies for the purpose of VAT

- Non-resident businesses shall be required register for VAT purposes from the initial supply without availing threshold benefit. Registration can be done directly or through a tax representative (jointly liable)

- VAT return needs to be furnished within 30 days from the end of relevant tax period. Tax period is expected to be a month/quarter based on the type of assessee

- On failure to submit VAT return, the Tax Authorities have a right to estimate the tax due

- Special economic zones have been granted with VAT exemptions under Omani VAT Law – details shall be known once Executive Regulations are issued

- Special VAT refund scheme shall be in place to enable refund of VAT to visitors, tourists, diplomats, businesses registered in other GCC countries, embassies, consulates, etc.

- Transitional VAT provisions have been introduced to ensure effective implementation of VAT

- VAT Law borrows the concept as prevalent in the Omani Income Tax Law qua the role of the 'Responsible Person' wherein the Responsible Person usually is an owner, manager, partner or employee appointed by the enterprise

- Responsible Person cannot be out of Oman during more than ninety (90) days during the year and shall be subjected to penalties, fines and/or imprisonment, if the Company fail to comply with certain reporting obligations

- Supplies which are accorded exempt or zero-rating status are tabulated here-in-below:

Exemption	Zero-rating
Financial services	Cross - border goods and passenger transportation
Imports of zero-rate or exempted goods	Goods exported outside GCC Territory
Provision of health care, and associated goods and services	Certain transactions in gold, silver and platinum
Provision of education, and associated goods and services	Certain food items (e.g., water, milk, cheese, bakery products, wheat, rice, etc) – to be finalized
Undeveloped land (Bare land)	Crude oil, oil derivatives, and natural gas
Local passenger transport	Sea, air, and land means of transportation for commercial purposes, and related goods and services
Renting or resale of residential property	Rescue aircrafts, rescue boats and auxiliary ships

Authors' Note:

Omani VAT Law is quite similar to the UAE VAT Law in umpteen aspects such as rate of tax, registration threshold, and special refund scheme etc. However, Omani VAT Law entails more stringent provisions to ensure proper compliance and to hold Responsible Person liable for VAT non-compliance, if any.

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OECD's Pillar One Approach – A quick glance

Background

Globalization of major economies turned whole world into one market with some minor exceptions. Further, with the digitalization of the economies, the developed nations could their command on the developing economies and achieve higher growth. With this the technological innovations gained more value and resulted high growth for the big business houses. However, it was time to worry for the economies which were not getting the fair share of taxes due to remote participation of businesses.

OECD in its cover statement to blueprints of the Pillar 1 and Pillar 2 mentioned that:

> "……Reforming the international tax system to address the tax challenges arising from the digitalisation of the economy, restore stability to the international tax framework and prevent further uncoordinated unilateral tax measures has therefore been a priority of the international community for several years, with commitments to deliver a consensus-based solution by the end of 2020."

The aforementioned statement shows that the consensus on the inclusive framework is the need of an hour to resolve double taxation issues resulting from unilateral tax measures of the jurisdictions.

Origin of Pillars of the Inclusive Framework

In 2015 Report on Action Plan 1 of the BEPS Project, it was found that the whole economy was digitalising, and therefore it would be difficult to ring-fence the digital economy. Therefore, a Task Force on Digital Economy ('TFDE') was formed. In March 2018, TFDE had issued Tax Challenges Arising from Digitalisation – Interim Report 2018 which talked about the Inclusive Framework which was based on a 2 Pillar approach.

From a bird's eye view, one can see that Pillar One is focused on Nexus rule and profit allocation between the MNEs. Whereas Pillar Two is focused on a global minimum tax intended to address remaining BEPS issues.

Blue Print of Pillar One

Pillar One focus on the international income tax system to the covered business models and allocation of the profits based on the nexus rule. Further it expands the taxing right of market jurisdictions (where the users of businesses are located). Furthermore, it focuses on the innovative dispute prevention and resolution mechanisms.

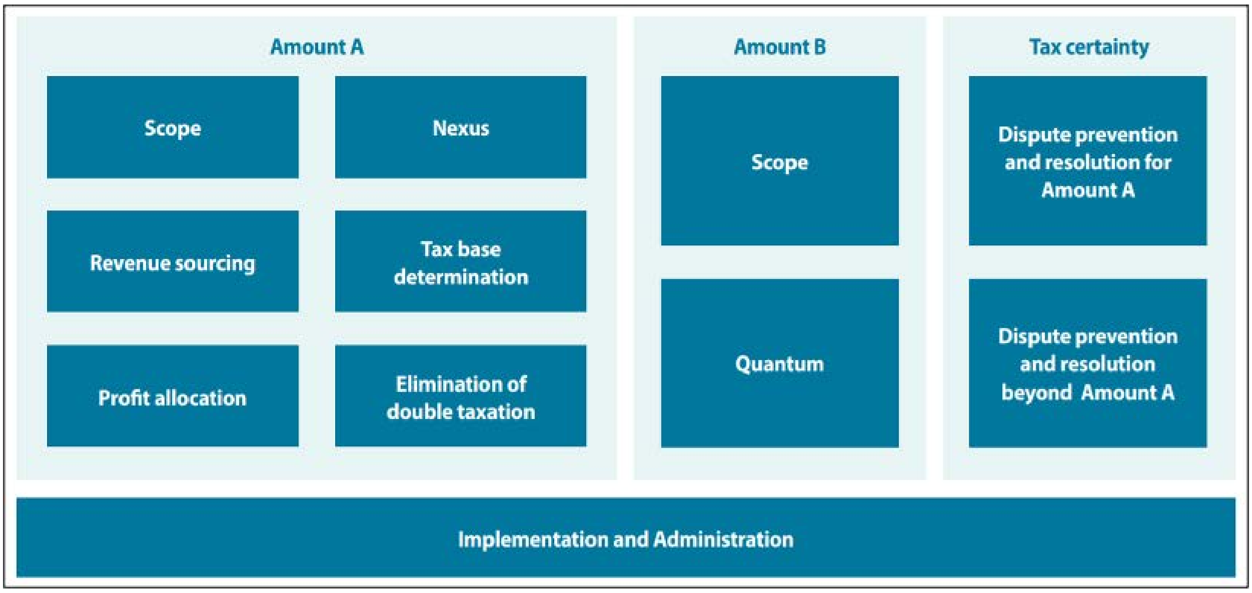
Pillar 1 is based on the eleven building blocks as pictorially represented below which could be categorized into 3 major parts:

A. Amount A – A new taxing right of the market jurisdictions over residual profit calculated at group / segment level;

B. Amount B – An ALP return marketing and distribution activities taking place physically in a market jurisdiction;

C. Processes to improve tax certainty through effective dispute prevention and resolution mechanisms.

Building Blocks of Pillar One



Amount A:

1. **Scope –** Deals with coverage of digital business models under the ambit of the inclusive framework. Blueprint propose to include Automated Digital Services ('ADS') and Consumer Facing Businesses ('CFB'). However, the political agreement has not been reached on the inclusion of these categories. Further, phased inclusion could be probable solution of the same.

   Certain sectors are excluded from the scope of the Amount A and also higher economic thresholds could be defined for exclusion from Amount A to minimize the compliance cost and enable the jurisdictions to manage tax administration.

2. **Nexus –** Nexus rules are concerned with identification of the markets eligible to receive Amount A and benefitting from the new taxing right.

3. **Revenue Sourcing –** Sourcing rules deals with identification of the revenue from the covered services ADS and CFB based on certain indicators and its accuracy. MNEs would be required to maintain certain documents justifying the revenue earned from covered services.

4. **Tax base determination –** Deals with determination of the profits to be allocated. Computation will be based on published consolidated financial accounts with book to tax adjustments.

   A loss carry-forward regime will ensure that there is no Amount A allocation where the relevant business is not profitable over the time.

5. **Profit Allocation –** Report provides for approach for reallocating residual profit. Eligible market jurisdictions will receive a portion of (X%) of residual profit. Residual profit will be income earned exceeding an agreed level of profitability of (Y%) using a formula approach.

   Amount A computation will also require to consider the profit parked in the jurisdiction as ALP so called **a marketing and distribution profits**.

6. **Elimination of double taxation –** The mechanism to eliminate double taxation will have two components: (i) identification of the paying entities – Entities which will bear Amount A and to ensure these entities have the ability to pay Amount A; and (ii) the methods to eliminate double taxation – Once the entity or entities that would bear an Amount A tax liability is identified, a residence jurisdiction would then use the exemption or credit method to relieve such entity from double taxation.

Amount B:

7. **Scope –** Amount B is to be paid by the entities carrying out baseline marketing and distribution activities. These entities would be distributors that (i) buy from related parties and resell to unrelated parties; and (ii) have a routine distributor functionality profile.

8. **Quantum –** Remuneration is to be received by such entities should be at ALP as per domestic transfer pricing rules and therefore would be based on comparable company benchmarking analyses under the TNMM. Intend behind Amount B is to have a simplified transfer pricing rules by tax administrations which will result into lower compliance costs for taxpayers.

Improved tax certainty processes:

9. **Dispute prevention & Resolution (Amount A) -** Blueprint embeds a mechanism to ensure that the application of the new taxing right to a particular MNE group is agreed among all interested jurisdictions. Therefore, jurisdictions would have panels within tax administrations which will be working with the relevant MNEs and agree on (i) the tax base to be allocated for Amount A; (ii) Assist and monitor result of the implementation of the formula; and (iii) any other feature of the new taxing right, including the paying entities and elimination of double taxation.

In case of disputes on the Amount A, the jurisdictions are mandated to have dispute resolution mechanisms and binding timely dispute resolution in place. However, agreements on the scope of mandatory binding dispute resolution beyond Amount A is still pending.

10. **Dispute prevention & Resolution (Beyond Amount A) -** Amount B is intended to enhance tax certainty and reduce controversy between tax administration and taxpayers. Disputes can be prevented by standardising the remuneration of related party distributors that perform 'baseline marketing and distribution activities.

Implementation & Administration:

11. **Implementation and Administration -** The measures of Pillar One shall be implemented in the consensus-based jurisdiction through a multilateral instrument. The implementation would result into the corresponding changes in the domestic laws of the jurisdiction. The administrations would be mandated to take appropriate actions for the smooth implementation of the rules agreed by the Inclusive Framework.

Guidance would be welcomed by the jurisdictions for many aspects of Pillar One to support and supplement domestic legislation and provisions in public international law instruments.

THE JURISDICTIONS ARE REQUIRED TO BE DETERMINED QUA UNIFIED APPROACH AS GAIN BY THE MARKET JURISDICTIONS WOULD RESULT INTO LOSS TO RESIDENT JURISDICTIONS WHERE BUSINESSES ARE CURRENTLY BEING TAXED

The Sparkle...

Pillar One approach is based on the Nexus rule wherein the market jurisdictions are given an additional right to tax the covered ADS and CFB businesses. Though consensus has been reached around umpteen key issues, the political disagreement and technical difficulties are bound to arise. The countries would need to follow the action items along with safeguarding the interest of its big business houses with digital business model.

The jurisdictions are required to be determined qua unified approach as gain by the market jurisdictions would result into loss to resident jurisdictions where businesses are currently being taxed. Further, it would be interesting to wait and watch the implementation phase of the Pillar One approach as the actions suggested by the OECD may not be in sync with the local laws of all 137 jurisdictions.

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	The IT Rules	The Income-tax Rules, 1962
DGAP	Directorate General of Anti-Profiting	TPO	Transfer Pricing Officer
DGFT	Directorate General of Foreign Trade	UN TP Manual	United Nations Practice Manual on Transfer Pricing
DRP	Dispute Resolution Panel	VAT	Value Added Tax
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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ONE-STOP DESTINATION FOR TAXMAN AND TAXPAYER

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FIRM INTRODUCTION

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

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

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

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

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

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

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

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

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

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