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EDITORIAL

Vision 360 : Welcome 2021; a Year of Expectations, Opportunities and Preparedness

2021 has undoubtedly begun with a lot of expectations and hopes to bring back pre-COVID times. This entire past year the private sector and Government have spent their time in trying to address the challenges, but in 2021 they will be poised for executing longer-term strategies that will position themselves for growth and profitability, though it's easier said than done!

The Government, in so many words, seems to have already announced its approach while addressing the demand for extensions in various tax compliances, compulsion of discharging 1% of tax liability in cash irrespective of availability of ITC, further restriction to 5% from earlier 10% on availment of ITC w.r.t. unreported invoices and the rush to replace MEIS with RoDTEP!

So far as implementation of RoDTEP is concerned there is also a word that RoDTEP rate would be about meager 0.75% to 1% unless supporting data for higher rate is presented, which also means the exporters must rush to the RoDTEP Committee before its too late, or else they themselves are to be blamed for losing out of export benefits.

Having said that If there is anything between the line the Hon'ble Finance Minister intends to convey its 'pay your taxes at the earliest and don't expect anything easy!' Whispers from North block are also that Government is considering to impose an additional Cess or Surcharge for COVID 19 to fund additional spending due to the pandemic! With this, it is now clear that taxpayers have to be even more vigilant and sitting ducks would not only cost them dearly but may question their survival itself.

On the other hand, OECD has recently released guidance on the Transfer Pricing implications of Covid-19. The guidance is broadly divided into 4 parts: (i) Comparability analysis; (ii) Losses and the allocation of COVID-19 specific costs; (iii) Government Assistance Programs; and (iv) APAs. The Guideline will certainly bring clarity on numerous issues on comparability analysis to arrive at ALP as well as be useful to the taxpayers in India while conducting benchmarking for FY 2020-21.

Another noteworthy development on international horizon is guidance issued by Omani Tax Authorities specifying timelines for mandatory registration under Omani VAT Laws. Omani Tax Authorities have followed the footsteps of Saudi Arabia and Bahrain by rolling-out VAT in a phased manner wherein big tax payers shall be required to register earlier and smaller businesses shall follow. With introduction of VAT, a new indirect tax regime shall begin in Oman. As indirect tax is relatively a new concept for businesses in Oman it will be critical for businesses to assess the impact of VAT on its standard operation procedures, costs, working capital requirements, information systems, and documentations, etc.

Tightening the rope on regulatory front, the Hon'ble Delhi High Court recently held that relief under RBI's COVID 19 regulatory packages would not be applicable to defaults made pre-pandemic. The decision provides broader understanding of the delineation of eligibility under COVID 19 reliefs provided by RBI and to avoid its misuse. On the other hand, to provide a bit of sigh of relief to the corporates, the provisions relating to decriminalisation of offences are brought into effect. The much-needed legislative change addresses those instances of small errors or omissions which were being treated as criminal offence.

To sum up, the rush to bring back the business to routine continues in 2021 and there is no room for being complacent. As we all embark on this new year with new challenges in true sense, the entire team of **TIOL**, in association with **Taxcraft Advisors LLP**, **GST Legal Services LLP** and **VMG & Associates**, wish you all a very happy new year and all the best for a fresh start! Our team is glad to publish the fifth edition of its exclusive monthly magazine '**VISION 360**'.

We hope that, as always, you will find it an informative and interesting read. We look forward to receiving your inputs, thoughts and feedback, in order to help us improve and serve you better!

Happy Reading!

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

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RULE 86A: Another hurdle in seamless flow of credit

Introduction

Although the GST law is rather new and far from being settled, these wrongdoers were quick in finding ways to fraudulently avail ITC on the basis of fake invoices and other such mediums. In order to curb the menace, the Government Departments had been exercising their powers rigorously, and rather excessively in some cases.

In this battle between the Departments and the fraudulent wrongdoers, it was the honest taxpayer, who was being subjected to excessive, arbitrary and unnecessary difficulties in ITC availement and utilization and carrying on their business activities. Such excessive use of power by the Departments was contrary to the settled principle of law that the power granted to the tax authorities shall be used judicially and shall not result in harassment of the honest tax payers.

Even before the completion of three years of GST, the industry had witnessed various instances where the Department has exceeded their authority in the form of attachment of bank accounts, blocking of Credit Ledgers, etc.

A breakthrough in this regard had come with the judgement of the Gujarat HC in case of Alfa Enterprise vs. State of Gujarat **[2019-TIOL-2335-HC-AHM-GST]** wherein the HC had has set aside an order of the Department attaching the bank account of an assessee and blocking their Electronic Credit Ledger. The HC had remarked that the Departments shall exercise their power with extreme care and caution.

The provision

It seems that in order to nullify the judgement of the Gujarat HC, the Government vide Notification No. 75/2019 - CT dated 26 December 2019 had introduced Rule 86A which inter alia empowers the Department to disallow the debit of any amount from the electronic credit ledger for discharge of any liability or for claim of any refund of any unutilized amount. The said Rule can be invoked in the following cases:

a. The Department has reasons to believe that ITC has been fraudulently availed or is ineligible;

b. The document basis which ITC has been availed are issued by registered person who is found non-existent or ITC has been availed without receipt of goods or services or both;

c. The amount of tax charged on the subject document has not been paid to the Government;

d. The registered person availing ITC is found non-existent; or

e. The registered person availing ITC does not possess a tax invoice or debit note or any other document prescribed.

On perusal of the above Rule, it can be construed that the Rule empowers the Department to exercise such power at the discretion of the officer without issuing any notice granting opportunity of being heard. The said Rule also empowers the Department to block the ITC of the recipient even in case the tax charged in the invoice by the supplier is not deposited with the Government. Therefore, it becomes all the more important for the Department to exercise their power with due application of mind and basis the cogent material and facts.

Recent Developments

It would be pertinent to note that recently, the Gujarat HC in the case of S. S. Industries vs. Union of India **[2020-TIOL-2228-HC-AHM-GST]**, had observed that Rule 86A is based on 'reasons to believe' and the same must have a rational connection with or relevant bearing on the formation of the belief. It was further observed that the power under Rule 86A of the Rules should neither be used as a tool to harass the assessee nor should it be used in a manner which may have an irreversible detrimental effect on the business of the assessee. Accordingly, it was urged by the HC to the Revenue to apply its mind for the purpose of laying down some guidelines or procedure for the purpose of invoking Rule 86A of the Rules.

Similarly, the Karnataka HC in the case of Aryan Trade Link had directed the Revenue to pass a detailed and reasoned order as required under Rule 86A of the CGST Rules, while bearing in mind that for the purposes of Rule 86A(3) which stipulates that the blockage shall cease to have effect after the expiry of a period of 1 year from the date of blocking.

On perusal of the above, it can be understood that the Department ought to exercise the power under rule 86A on the basis of some reasonable belief which should be backed by cogent material and facts on records. In absence of the proper reasons, the action taken under Rule 86A shall become invalid and liable to be quashed.

Constitutional Validity

It would be pertinent to note that the constitutional validity of the Rule 86A has been challenged in various jurisdictional High Courts. The relevant cases are as follows:

- **Surat Mercantile Association vs. Union of India [2020-TIOL-2178-HC-AHM-GST]**
- **Kalpsutra Gujarat vs. The Union of India [2020-TIOL-1558-HC-AHM-GST]**
- **Balachandra Yallappa Salabhavi vs. Assistant Commissioner of Commercial Tax**

The principal arguments put forth by the writ applicant are as follows:

a. Rule 86A is violative of principles of natural justice and Section 74 of the CGST Act as much as it allows blocking of the ITC ledger without issue of Show Cause Notice and without giving an opportunity of fair hearing;

b. Such Rule is a draconian, arbitrary, irrational and unduly harsh provision and therefore violative of article 14 of the Constitution of India;

c. Such Rule is ultra-vires to the Section 75(4) of the CGST Act; and

d. Such Rule also seeks to deny the right of appeal under Section 107 of the CGST Act.

As far as blocking of ITC on suppliers' default, it would be pertinent to note that in absence of any mechanism to determine that whether the supplier has paid the tax to the Government, the ITC to the buyer shall not be denied. Rule 86A fails to create distinction between the fraudulent buyers and suppliers with the genuine one. Therefore, to that extent such Rule may be considered as in violative of the Article 14 of the constitution of India.

Conclusion

The HCs have rightly held that the power under Rule 86A should neither be used as a tool to harass the assessee nor should it be used in a manner which may have an irreversible detrimental effect on the business of the assessee. Even in the pre-GST regime, the Government had issued guidelines and had also laid down a procedure for provisional attachment to protect the interest of the revenue in certain cases.

Therefore, it is expected that the Government would provide certain guidelines for invocation of Rule 86A so that such provisions are not misused by the Authorities. The Government further ought to note that the trade and industry would rather welcome other measures to curb tax evasions, such as e-invoicing, etc. instead of introducing provisions such as Rule 86A, which is nothing but a road-block in the pathway of seamless flow of credit.

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Taxability of Corporate Gift of shares – An Analysis

Background

In common parlance, gift is assumed to be a 'present without consideration' as a gesture of love and affection. As on date, the IT Act provides rules for exemption/taxability of such gifts linked with satisfaction of certain conditions. However, the issue under consideration is taxability of shares gifted a corporate to other corporates.

The captioned issue has its root older than a decade, wherein Goodyear Tire and Rubber Company based in USA, transferred its 74% shareholding in Goodyear India Limited (a listed entity) to its Singapore based subsidiary as 'Gift'. The AAR had decided the issue in favor of the taxpayer and the decision was affirmed by the Hon'ble Delhi High Court citing that transfer of listed shares was exempt u/s 10(38) of IT Act.

Recent ruling by Madras HC in case of Redington India **[2020-TII-45-HC-MAD-TP]**

In 2008, Redington India had rolled out subsidiary in Mauritius and step-down subsidiary in Cayman. Redington India had transferred its share of Redington Gulf to Cayman entity without any consideration and this transaction was tagged as 'gift of shares'.

The Hon'ble Madras HC in its recent decision on December 10, 2020 has reversed 7 years old order of the Chennai ITAT. HC held that transfer of shares by Redington India to its step-down subsidiary in Cayman Islands in FY 2008-09 is not a 'gift' in terms of Section 47(iii) and upheld the application of transfer pricing provisions to the impugned transaction of transfer of shares without any consideration.

Critical Aspect

The issue of corporate gifting of shares involves certain critical aspects to be discussed/analyzed in order to understand the issue holistically and draw certain opinion. Below discussed are those critical aspects:

1. Whether transfer of shares is a valid 'gift' u/s 47(iii)?

The first point of argument is whether transfer of shares within group companies for restructuring satisfies the pre-requisites to be a 'gift', if yes then only the issue arises in respect of taxability of such transfer as per Section 45 of the IT Act.

In this regard, there are rulings for and against the issue. The Hon'ble Bombay HC in case of Asian Satellite Broadcast Pvt. Ltd **[2020-TIOL-1799-HC-MUM-IT]** has held that transfer of shares pursuant to internal restructuring tantamount to gift and is exempt u/s 47(iii).

The judgement against the issue is of the Hon'ble Madras HC in case of Redington India (Supra) has done a deep dive into prerequisite of a transaction to be concluded as a 'gift'. HC observed that transfer on account of internal restructuring lack the essential ingredient of voluntariness as the investment of PE investor worth USD 65 million in Redington Cayman entity has compelled / enforced to do so. Accordingly, HC has held that transfer of shares is not a gift.

It is pertinent to note that, issue under consideration before the both HCs were different, in case of Asian

Satellite Broadcast Pvt. Ltd (Supra) the writ petition was filed against the notice for reassessment of transaction of transfer of shares which earlier was accepted as gift to AE. On the issue, HC held that mere change of opinion cannot be reason for reassessment. The conclusion of HC that transfer of shares as gift was just an obiter dictum. Therefore, may not hold good while deciding the question whether transfer of shares is a valid gift or not!

Furthermore, the judgement in case of Redington India (Supra) is based on the fact that ultimate goal of the Redington group was to get PE investment and conclusion of HC that transfer lacked voluntariness. Therefore, the above both judgements cannot be blindly followed.

2. Taxable as Long-Term Capital Gain

With regards to the taxability of transaction of transfer of shares without consideration, if the same is concluded as gift it falls under exemptions u/s Section 47 given to transactions for being 'transfer'. Various courts have held that gift of shares is exempt from taxation by virtue of sub-section (iii) of Section 47.

Once the transaction of transfer of shares is rejected to be a valid 'gift' for Section 47. The foremost question arises that whether the stand for non-taxability of transfer of shares can be taken in light of the judgement by the Hon'ble Supreme Court in case of B. C. Srinivas Setty wherein the had held that Section 45 must be read with Section 48 and if the computation provision viz. Section 48 cannot be given effect to for any reason, the charge under Section 45 fails.

Further, under Section 50CA (introduced by the FA 2017 w.e.f. AY 2018-19), there is a concept of substituting fair market value for the consideration received for transfer of unquoted shares which is deemed to be the full value of consideration for computation Section 48. In light of the above, transaction of transfer of shares from AY 2018-19 onwards can be very well taxed.

3. Applicability of Transfer Pricing provisions

Definition of "International Transaction" u/s 92B was extended through explanations inserted by the FA, 2012 retrospectively from April 01, 2002. This extended definition covers a transaction of business restructuring or reorganization irrespective of the fact that it has bearing on the profit, income, losses or assets.

However, once the transaction falls under Section 47, the same is not regarded as 'transfer' for computation of capital gains. Therefore, it escapes from the definition of Income u/s 2(24). Further, it is well settled principle that 'income' is sin qua non to apply provisions of Chapter X. Therefore, one may argue in light of the famous judgement of the Hon'ble Bombay HC in case of Vodafone India Services Private Limited **[Writ Petition No. 871 of 2014]** that TP provisions will not be appliable in case of non-taxable transactions.

Conclusion

In light of the above discussion, it is still questionable whether the AO/TPO was justified in case of Redington India (supra) in disregarding the 'NIL' consideration and holding applicability of TP for AY 2009-10. It would be interesting to see the further course of action contemplated and taken by the taxpayer and tax authorities.

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Manoj Agarwal

Chief Financial Officer ,
Gujarat Flourochemicals Limited

Mr. Agarwal shares his thoughts and perspective on key tax and regulatory issues affecting the businesses…

Do you feel economy in general is on recovery mode? What impact COVID has left on your industry?

The impact of COVID-19 on the people, economy and industry is yet to be contemplated in its entirety. While all sectors have had their share of hardships, the manufacturing sector in India has been the most deeply affected.

The Indian chemical industry is the 6th largest in the world and 3rd largest in Asia and is one of the oldest industries in our country. Over the years, it has served as the pillar of India's industrial and agricultural development. For the past couple of decades, the industry has consistently delivered higher growth in comparison to India's GDP and therefore will play a major role in the country's economic revival in a post COVID-19 world.

The chemical industry also serves as a feeder for many other industries, which may play an important role in our economic revival. The industry is adapting to changing needs and modifying supply chains, catering to new demands.

Though India's economic recovery is expected to be slow and steady. It is well within the chemical Industry's reach to regain its growth momentum and contribute to all other industries to put the Indian economy back on its growth path.

Indian economy is showing decisive signs of a 'V-shaped' recovery in 2021 with the return of consumer confidence, robust financial markets, an uptick in manufacturing, and exporters braving it out in the global market with never-say-die spirit.

What strategy you have adopted to transition from MEIS to RODTEP to ensure sufficiency of benefit and related cash flow issues?

MEIS provided export incentives upto 7% of the FOB value. For many who continued exports on marginal profits, MEIS played a key role in its survival.

On the other hand, given the framework announced for computing RoDTEP benefit, current state of economy as well as overarching WTO framework to which India is signatory, it is most certain that there will be a shortfall in the export incentivisation and thus on cash flow too.

Introduction of RoDTEP has now come to 'minimising the shortfall' rather than 'leveraging on incentivisation'. The only way to go about it is through Government Advocacy to strategically depict tax costs in line with WTO/RoDTEP framework, expounding importance of a particular industry in global supply chain its contribution to Indian economy. It is also important to see that collective efforts are being put-forth so the voice is heard at higher up.

Given the recent press release which affirmed

implementation of RoDTEP w.e.f. January 01, 2021 for which Department of Commerce is to declare the rate soon, it is just the time for exporters to accelerate their efforts for fixation of better RoDTEP rate.

That apart, it is also necessary to be vigilant on development of online systems to cater this new scheme and taking necessary steps to preserve the benefit right from January 01, 2021 itself, after all *a stich in time saves nine!*

Do you feel the taxpayers-exchequer are prepared to adapt E-invoicing system? Any key comments on this area?

It wouldn't surprise me if India's shift to e-invoicing will create more problems than it solves, given the past experiences of many with the authority's and system's preparedness.

Globally, major economies of the world have accepted a similar system which helped them maximise revenue collection and also allowed businesses to reduce costs, increase speed and eased invoice processing. But all of this became possible only due to a robust, flexible and transparent implementation. E-invoicing in India is no exception and its success largely depend on how well the system is implemented. If not, it would be yet another empty formality.

What will be the future of automation in tax compliance? Will it increase efficiency or simply be an alternative to the manual work-force?

Because tax compliance is becoming more complicated, many leaders believe technology will assist them in being tax compliant. Investigating solutions is a good first step, but executives need to maintain a vigilant and strategic approach to implement these keeping in line with business sensitivities.

Although automation in tax compliance would ease the burden, its accuracy cannot be guaranteed all the time especially when the law itself is evolving every now and then. It's (automation) like a double-edged sword, we have often seen a single error turning to be catastrophe.

A technology is only that, it is meant for providing assistance and not substitution, and most certainly it cannot be used to completely replace a manual workforce.

Given the global competition, whether Anti-Dumping Duty will suffice to support Indian manufacturers from frequent dumping practices from China, Korea?

While ADD offsets the dumping practices, it is not something a manufacturer can bank on for its survivability. The survival must depend on business fundamentals itself. However, restrictions on imports always creates an opportunity for domestic manufacturers, especially the new ones.

INDIAN ECONOMY IS SHOWING DECISIVE SIGNS OF A 'V-SHAPED' RECOVERY IN 2021 WITH THE RETURN OF CONSUMER CONFIDENCE, ROBUST FINANCIAL MARKETS, AN UPTICK IN MANUFACTURING, AND EXPORTERS BRAVING IT OUT IN THE GLOBAL MARKET WITH NEVER-SAY-DIE SPIRIT.

It is also important to analyse the supply chain positioning, if domestic industry does not have enough supply chain integration domestically, its viability is dependent on imports. Indian Pharmaceuticals is a classic example which is largely dependent on China for its Active Ingredient. Likewise, is the wind operated renewable energy sector which relies on imports from Korea, Europe and China for cost efficiency.

Levy of ADD is more of a cost benefit analysis and ought to be dynamic enough to address the changing paradigms in domestic industry as well as be cognizant of dumping practices of exporting countries.

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.*

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Karnataka HC holds filing of declaration u/s 10B(8) by due date of return to be directory in nature, allows Wipro to carry-forward losses despite belated filing

Wipro Limited
2020-TIOL-2219-HC-MAD-IT

The Assessee, a software company, had filed return for AY 2001-2002 on the due date prescribed u/s 139(1) of the IT Act and claimed exemption under Section 10B. The exemption however was withdrawn before completion of the assessment by March 31, 2004 vide a communication to the AO dated September 24, 2002. In the revised return filed on December 23, 2002, the Assessee did not claim the exemption under Section 10B and declared a loss to be carried forward. The case was selected for scrutiny and notice under Section 143(2) was issued and an order of assessment was passed with numerous additions, one being the denial of claim for carry forward of losses under Section 72 of the IT Act inasmuch as the Assessee did not furnish declaration u/s 10B of the IT Act to opt out.

An appeal was filed before the CIT(A) qua denial of the claim which was partly allowed. An appeal was thus preferred by both the Assessee as well as the Revenue before the Hon'ble Tribunal. The Tribunal partly allowed the Appeals and granted relief to the Assessee qua its claim for carrying forward of losses under Section 72 of the IT Act.

Aggrieved by this, the Revenue approached the Jurisdictional High Court. The Hon'ble HC upheld the decision of the Tribunal holding that the requirement for submission of declaration as per Section 10B(8) is mandatory in nature and the time limit given for the submission is directory in nature. Accordingly, it held that the Assessee had complied with the requirement of submission of declaration before completion of the assessment, and thus the Assessee was eligible to carry forward the loss under Section 72 of the IT Act.

Authors' Note:

Section 10B(8) of the IT Act requires the Assessee to furnish a declaration before the due date of filing of return u/s 139(1) for opting out of deduction u/s 10B. However, umpteen courts have ruled that though the requirement of filing declaration is mandatory but the prescribed time limits are directory. Considering the said conflicting views, one hopes that the Government addresses the subject issue by issuing a suitable clarification and settles the issue one and for all.

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HC allows pro-rata deductions qua partly compliant housing project, dismisses ITAT order

Models Construction Pvt. Ltd.
2020-TIOL-2236-HC-MUM-IT

During the year under consideration, the Assessee was eligible for deduction under Section 80IB. However, during the assessment proceedings, the AO disallowed deductions to the Assessee qua whole housing project on the ground of breach of the provisions of Section 80IB(10)(e) in respect of five (5) of the residential units out of total three hundred fifty two (352) residential units.

Aggrieved by the same, the Assessee went in appeal before the CIT(A), which held that the Assessee was entitled to pro-rata deductions under Section 80IB(10). The Revenue thus appealed to the ITAT against the order of the

CIT(A). The Assessee also filed cross objections urging that deductions qua all the 352 residential units ought to have been granted. The ITAT set aside the CIT(A) order and restored the AO's order. The Assessee thus came before the HC challenging the order of the ITAT.

The HC held that the reasoning provided by the ITAT that 'exclusion of the 5 residential units from out of the 352 residential units in the entire housing project might affect the condition about the size of the plot which is required to have a minimum area of 1 Acre' was not acceptable. The Hon'ble HC held that exclusion of the 5 residential units would not reduce the size of the plot below 1 Acre. Therefore, this was held not to be a valid ground to deny pro-rata deduction under Section 80IB(10).

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Payment of Royalty for technical know-how/license for manufacturing which includes intellectual property, a Capital Expenditure

Telco Construction Co. Ltd.
2021-TIOL-88-HC-KAR-IT

The Assessee company was engaged in the business of manufacture, purchase and sale of hydraulic excavators, loaders, mechanical shovels, cranes and spare parts. During the year under consideration, the Assessee claimed deduction on account of payment of royalty for technical know-how and grant of license made by it to M/s Hitachi Construction Machinery Company Private Limited, Japan @ 1% of the net factory selling price under Section 37(1) of the IT Act.

During the assessment proceedings, the AO was of the opinion that subject payment was made for acquiring a right, which provided enduring benefit and held that it was a capital expenditure in nature. Accordingly, deduction was disallowed under Section 37(1).

The Assessee thus approached the CIT(A), who held that the very fact that royalty payment was a percentage of sales clarified that the nature of expenses was revenue given its linkage to the actual sales – the CIT(A) thus allowed the expenditure.

The Revenue thereupon filed an appeal before ITAT. The Tribunal held that the rights obtained for manufacture of license products, user of technical know-how and intellectual property [provided to the Assessee] would give an enduring benefit to the Assessee - therefore, the related expenditure ought to be held as capital in nature. The Assessee thereby preferred an appeal before the Hon'ble Karnataka High Court. The Hon'ble Court upheld the findings of the AO / Tribunal and ruled that the Assessee had incurred an expenditure which gave him enduring benefits - therefore, the same ought to be treated as capital expenditure and could not be a permissible deduction under Section 37(1).

Authors' Note:

It is a generally accepted fact that licensed manufacturers are allowed deduction for the cost of royalty paid for brand name, technical know how as revenue deduction u/s 37 of the IT Act. However, based on the facts in the current scenario, the Hon'ble HC held that the expenditure incurred by the Assessee gives enduring benefit, therefore, the same should be treated as capital expenditure.

This conclusion was based on the fact that the Assessee was entitled to continue sale/ manufacture of Hitachi licensed products beyond the period mentioned in the agreement. Therefore, it emerges that examination of the covenants enumerated in the underlying agreement is a must for determination of nature of expense and its consequent tax treatment.

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HC holds expenditure on research & development made from capital government grant to be revenue in nature

Hindustan Aeronautics Limited
ITA. No. 404 of 2016 c/w ITA. No. 468 of 2016

The Assessee was a public sector undertaking that undertook designing, developing, manufacturing and maintenance of aircrafts and avionics systems. Out of grant received from the Central Government, it carried out numerous R&D activities. The grant received by the Assessee in terms of an earlier order of the ITAT in its own case, was treated as capital receipts. The Assessee claimed the expenditure incurred on the said activities to be revenue in nature.

The Revenue and CIT(A) disallowed such claim holding it to be capital in nature. Aggrieved by their orders, the Assessee approached the ITAT, which upheld the revenue's order, but allowed deduction under Section 35(1)(iv) considering the expenditure incurred by the Assessee was capital in nature.

Both the Assessee and revenue accordingly went in appeal before the HC. The Assessee on treatment of expenditure as capital and the revenue on allowing deduction under Section 35(1)(iv).

The Hon'ble HC, taking note of the SC's verdict in a similar case, held the subject expenditure incurred by the Assessee to be revenue in nature inasmuch as the expenditure incurred by the Assessee included expenses towards raw materials, direct expenses, salaries, interest, depreciation and other expenses which were revenue in nature, despite being made out of government grants. The HC ruled that the expenditure incurred by the Assessee was in furtherance to its business and therefore was revenue expenditure. Accordingly, the HC overturned the disallowance of the CIT(A) holding that as the given expenditure was revenue in nature, deduction would be allowed under Section 37 instead of Section 35(1)(iv).

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ITAT holds appeal for TDS on CCD interest by the revenue under Section 195 without substance

Coffeeday Enterprises Ltd.
2021-TII-05-ITAT-BANG-INTL

The Assessee issued CCD to a Cyprus based company. The Cyprus based company transferred the CCDs to a company in Mauritius at appreciated value.

During the assessment proceedings, the Assessee submitted that interest is waived by the Cyprus Company and hence no TDS was deducted. The Revenue believed that no such waiver agreement was received by the Assessee and held it liable for the non-deduction of TDS.

Aggrieved, the Assessee approached the CIT(A) appeals who found that the Assessee had not claimed interest expenditure on such CCDs, the Assessee had voluntarily agreed to pay the benefit accrued i.e. the amount was not treated as chargeable to tax in the hands of the non-resident entity. Therefore, the liability to deduct tax did not arise.

The Revenue thus went in appeal before the ITAT. The ITAT observed that since the payment of interest had been waived, no interest had been paid by the Assessee to the Cyprus based Company and therefore deduction in the form of TDS does not arise.

It also observed that the expression 'paid' used in DTAA is to be interpreted as intended to be taxed on 'paid' basis and not on accrual basis, therefore, the issue of deduction of tax at source on accrual basis does not arise.

ITAT dismissing the revenue's appeal held that the purpose of deduction of tax at source is not to collect a sum which is not a tax levied under the IT Act, rather it is to facilitate the collection of tax lawfully leviable under the IT Act.

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HC upholds share-transfer to subsidiary as not amounting to gift, but a measure to avoid tax in India

Redington (India) Limited
2020-TII-45-HC-MAD-TP

The Assessee filed its return of income for the assessment year under consideration (AY 2009-10) on September 28, 2009. The return was processed and the case was selected for scrutiny on the ground that the Assessee had international transactions exceeding INR 15 Crores and the case was referred to the TPO for computation of ALP.

After hearing the Assessee, the draft assessment order was passed on March 31, 2013 proposing disallowance on account of various adjustments along with a LTCG on transfer of shares to step-down subsidiary based out of Cayman Islands. Aggrieved by the draft assessment order the Assessee filed an objection before the DRP who deleted certain adjustments.

The Assessee thus preferred an appeal before the Tribunal. The Tribunal held that the transfer of shares made by the Assessee without consideration was a valid gift and the transfer of shares cannot be regarded as transfer for capital gains taxation and would be eligible for exemption.

The Revenue aggrieved by this appealed to the Hon'ble Madras High Court. The HC noted that the Assessee had transferred its entire shareholding in its subsidiary in Dubai to the step-down subsidiary in Cayman Islands. Further, HC observed that the transfer of shares was not a gratuitous transfer and lacked voluntary consent. HC also observed that the sole intention of the Assessee was corporate restructuring and therefore it cannot be considered as a valid gift.

While referring to the chain of events, the Hon'ble HC referred to the incorporation of the subsidiary in Mauritius and Cayman Islands and concluded that it took place just before the share-transfer and thus was a means to avoid taxation in India. Therefore, the disallowance of LTCG is just in law.

In relation to the benchmarking, the HC upheld the CUP method adopted by the TPO comparing the price at which third party investor purchased 27% shares in the Cayman entity.

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ITAT disregards re-characterization of OCD/CCD as shareholder activity

Kolte Patil Developers Ltd.
2021-TII-08-ITAT-PUNE-TP

The Assessee, is a real estate developer. The Assessee reported certain international transactions and specified domestic transaction in its return. The Assessee had issued certain CCD's and OCD's to its AEs in India and abroad on which it had paid interest. It had applied CUP method to demonstrate that payment of interest was at ALP. The AO referred to the TPO to determine their ALP.

During the assessment proceedings, the TPO held that the payment of interest by the Assessee was in the nature of shareholder activity and the investment of individual third parties in the convertible debentures was for participation in equity. Thus, TPO placing reliance on the thin capitalization principle, held that the amount raised by Assessee through the issuance of debentures had a

substance of equity and therefore no interest was payable on it. The TPO therefore, recharacterized the issuance of debentures into Equity Capital and determined Nil ALP thus proposing a TP adjustment equal to the amount of interest paid by the Assessee.

The CIT(A) reversed the TPO's findings. However, the CIT(A) did not agree with the ALP determined by the Assessee. Thus, both the Assessee and the TPO filed the appeal with the Hon'ble ITAT. The ITAT held that the action of re-characterization by the TPO was meritless and ultra vires in the absence of any law prescribing the same in that point in time, rejected the TPO's stand of recharacterizing the payment of interest as shareholder activity and asked the TPO to re-determine the ALP.

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ITAT holds that mere submission of accountant's report is not sufficient TP compliance; rejects Assessee's Miscellaneous Application to review its own order

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

The Assessee, a non-resident company, had entered into certain international transactions with its Indian AE and disclosed them in Form 3CEB.

During the assessment proceedings, the TPO/AO found the transactions to be at arm's length and therefore did not make any transfer pricing adjustment. However, levied penalty for non-maintenance of TP documents. Aggrieved, the Assessee approached the CIT(A), which deleted the said penalty.

The revenue thus preferred an appeal to the Hon'ble ITAT which in-turn upheld the action of the revenue and levied penalty for non-maintenance of TP documents. The ITAT held that mere submission of accountant's report in Form 3CEB was not akin to TP compliance under the law.

Subsequently, the Assessee filed miscellaneous application before the Hon'ble ITAT which it rejected with an observation that *'….at this juncture, the Ld. AR is seeking review of the order dated 13.10.2020 by the Tribunal without pointing out any mistake apparent on record as per Section 254 of the Income Tax Act, 1961 and therefore, the same is not permissible under the provisions of Income Tax Act'.*

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CBDT further clarifies umpteen aspects of VsV scheme through FAQs

Circular No. 21/2020
December 4, 2020

The CBDT has issued Circular No. 21 of 2020 with a view to provide further clarifications on Vivad Se Vishwas Scheme. Previously, the CBDT had issued its Circular No. 9 of 2020 dated April 22, 2020 wherein 55 Questions were addressed. In the current circular, the CBDT has addressed 34 additional questions, serially numbered from 56 to 89.

In the current circular, the CBDT clarifies certain ambiguous issues such as applicability of VsV scheme to Miscellaneous Applications under Section 254 of the IT Act and Cross-objects thereon, proceedings before Settlement Commissioner or a Writ Petition against an order of the Settlement Commissioner, and cases where prosecution is launched by the department etc.

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CBDT further extends due date of filing of tax audit reports and income tax returns

Press Release
December 30, 2020

Due to hardship faced by the businesses in COVID pandemic, the CBDT had extended various due dates for compliances to be done under IT Act.

Further, the CBDT received numerous representations for extension of due dates of tax audit and Income Tax Returns. In response thereto, the CBDT vide its Press release dated December 30, 2020 and Notification No. 93/2020 dated December 31, 2020 has further extended various due dates. Tabulated below are the extended due dates:

Compliance Event	Extended Due Date
ITR Filing for taxpayers not required to get accounts audited	January 10, 2021
Taxpayer's required to get accounts audited	February 15,2021
Master File in Form 3CEAA	February 15, 2021
▸ Tax Audit report in Form 3CD ▸ Transfer Pricing Audit in Form 3CEB	January 15, 2021
Designation for Master File – Form 3CEAB	January 16, 2021
Safe Harbour – 3CEFA	February 15, 2021

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HC admits Writ challenging denial of ITC-refund in 'business transfer' case

Indorama India Private Limited
W.P.A. 4629 OF 2020

The Petitioner has filed a Writ before the Calcutta HC challenging an order denying refund of unutilized ITC on goods u/s. 54(3) in case of an inverted duty structure. The Respondent argued that the ITC claimed as refund pertained to those that were availed by Tata Chemicals and thereafter transferred to Indorama pursuant to business transfer agreement.

It was further argued by the Revenue that Section 54(3) r/w. Rule 89(5) is permissible only on those ITC which has been directly availed by a claimant and not on those that are accrued via transfer of credit under a business sale agreement.

The Calcutta HC has admitted the matter and listed it for hearing on 14 January 2021.

Authors' Note

In what was perceived to be a landmark judgement, the Gujarat HC in the case of VKC Footsteps India Private Limited **[2020-TIOL-1273-HC-AHM-GST]** had struck down Rule 89(5) by holding that 'input' and 'input service' are both part of the 'input tax' and ITC. Accordingly, such a claim of the refund cannot be restricted.

However, pursuant thereto, the Madras HC in the case of Transtonnelstroy Afcons Joint Venture **[2020-TIOL-1599-HC-MAD-GST]** nullified the Gujarat HC ruling by holding that Section 54(3) of the CGST Act does not infringe Art. 14 of the Constitution and therefore, Rule 89(5) is intra vires to the CGST Act.

Another question of law in relation to Rule 89(5) has now been raised by this Writ as to whether refund of ITC in case of inverted duty structure be availed in a business transfer scenario as the language used in the CGST Rules is restrictive in nature.

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Petitioner challenges GST provision denying ITC to 'innocent' buyer for supplier's default

Surat Mercantile Association
2020-TIOL-2178-HC-AHM-GST

The Petitioner is an association formed for the purpose of welfare of traders in general and textile traders. The Petitioner has challenged the constitutional validity of Section 16(2)(c) of CGST Act which seeks to deny ITC to a buyer on goods or services, if tax is charged in respect of supply of goods or services has not been paid to the Government by the supplier of goods or services.

The Petitioner argues that denying ITC to buyer of goods or services for default of the supplier or services would tantamount to shifting the incidence of tax from the supplier to the buyer which is arbitrary and irrational. It would also clearly frustrate the objective of removal of cascading effect of tax.

The Petitioner has further challenged the demand of reversal of ITC along with interest on mere allegation that registration has been obtained by the supplier on the basis

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The Petitioner has further challenged the demand of reversal of ITC along with interest on mere allegation that registration has been obtained by the supplier on the basis of fake identity proofs. Petitioner argues that no liability can be imposed on it on the principle of vicarious liability on account of fraudulent conduct of the supplier.

The Petitioner sought to hold and declare section 16(2)(c) of the CGST Act to be unconstitutional and against the scheme of the Act.

In response, the HC has issued notice to the Attorney General of India along with the Union of India.

Authors' Note

The constitutional validity of the provisions which restrict the ITC availment of an assessee, for no apparent fault of their own has been in question even during the VAT period which contained similar restrictions. Most notably, the Madras High Court in case of Sri Ranganathar Valves (Private) Limited vs. Assistant Commissioner (CT) **[2020-TIOL-1611-HC-MAD-VAT]** held that ITC could not be disallowed on the ground that the supplier did not pay tax to the Government, when the purchaser could demostrate that the supplier had indeed collected tax and issued invoices to the purchaser. As such, restriction of ITC on this ground, could not be sustained. Likewise, the Hon'ble Delhi High Court in case of Arise India Limited vs. Commissioner of Trade & Taxes **[2018-TIOL-11-SC-VAT]** held that disallowance of ITC to the purchaser owing to default of selling dealer in depositing tax, as violative of Articles 14 and 19(1)(g) of the Constitution. It would be pertinent to note that a similar Writ Petition has been filed before the Hon'ble Delhi HC in Bharti Telemedia Limited vs. Union of India and Ors. **[W.P.(C) 6293/2019]**, wherein notices have been issued.

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Constitutional validity of Rule 86A empowering GST-officer to block ITC-ledger challenged before Gujarat HC

Surat Mercantile Association
R/Special Civil Application No. 15329 of 2020

The Petitioner has preferred a Writ before the Gujarat HC challenging the constitutional validity of Rule 86A of the CGST Rules. The said Rule inter alia empowers the Revenue to block the electronic credit ledger without issue of SCN and without giving an opportunity of fair hearing as violative of principles of natural justice.

The Petitioner has argued that Rule 86A is a draconian law, which is rather harsh to the Taxpayers and therefore, violative of Article 14 of the Constitution of India. It was further argued that the said Rule is in contravention of Section 74 of the CGST Act which mandates issuance of SCN for demand of ineligible or fraudulently availed ITC.

Taking cognizance of the submissions put forth by the Petitioner, the HC has issued a notice to the Revenue returnable on 21 January 2021.

Authors' Note

It would be pertinent to note that the law everywhere is well settled that Rules cannot over-ride the provisions of the Principal Act. The Apex Court has also time and again held so, most notably in the case of Commissioner of IT vs. Taj Mahal Hotel **[2002-TIOL-642-SC-IT]**. Similarly, in the case of Babaji Kondaji Garad and Ors. vs. Nasik Merchants Co-operative Bank Limited [MANU/SC/0367/1984], the SC had held that if the Rules are not in conformity with the Statute, such rules or bye-laws are to be ignored.

Moreover, the deferment from the practice of providing an opportunity of Hearing would also be violative of the principles of natural justice. It would be interesting to see the developments in this case.

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Rule 96(10) restricting IGST refund challenged before Madras HC

Comstar Automotive Technologies Private Limited

The Petitioner, a 100% EOU, had imported capital goods and input for manufacturing its products and availed exemption of BCD and IGST paid on such imports under the relevant notifications. Invoking the extended period of limitation, the DRI initiated investigations against the Petitioner seeking to deny refund of IGST in light of restrictions envisaged u/r. 96(10) of the CGST Rules.

Aggrieved, the Petitioner preferred a Writ before the Madras HC challenging the vires of Rule 96(10). The said Rule inter alia provides that the claimant shall not have availed the benefit of IGST exemption in terms of certain customs notifications. The Petitioner contended that the said Rule violates the provisions in the parent statute because the only prescription in Section 16 of IGST Act and Section 54 of CGST Act was to the extent of outlining the form and manner for claiming refund and not for restricting refund.

It was further argued by the Petitioner that the only intent was to block IGST refund for exporters who had imported inputs under Advance Authorisation Scheme. However, in the process, amended Rule 96(10) has disentitled exporters who do not import inputs under Advance Authorisation scheme which was never the intent.

Basis the above arguments, the Writ has been admitted by the Madras HC.

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SC stays Delhi HC judgment granting relief to Bharti Airtel in GST refund matter

Bharti Airtel Limited
2020-TIOL-179-SC-GST-LB

The Delhi HC in an important judgement, in the case of Bharti Airtel Limited vs. Union of India **[2020-TIOL-901-HC-DEL-GST]**, had read down Circular No. 26/2017 – GST dated 29 December 2020 to the extent that it restricted the rectification of GSTR 3B in respect of the period in which the error had occurred. It had been observed by the HC that circular issued by the Board cannot be contrary to the Act and the Government cannot impose conditions that go against the scheme of the statutory provisions contained in the principal Act.

Aggrieved by the judgment, the Revenue authorities had

preferred a Special Leave Petition before the SC inter alia on the grounds that Section 39(9) of the CGST Act expressly provides for rectification of return, subject to the provisions of interest. Accordingly, the observation of the HC that there is no statutory provision permitting rectification of errors only in the return with respect to the month in which such error is noticed and not in the return with respect to the month in which the error relates, is unsustainable;

The Delhi HC did not take cognizance of the Revenue's submissions with respect to the rationale behind not permitting rectification of the Return for the period to which an error relates.

The Apex Court has now stayed the judgement of the Delhi HC.

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Provisions under the GST Law limiting eligibility of credit on construction and works contract challenged before Calcutta HC

Instakart Services Private Limited
W.P.A. 8205 of 2020

The Petitioner has challenged the constitutional validity of Section 17(5)(d) of the CGST Act to the extent it denies the benefit of ITC to the Petitioner. The Petitioner has submitted that it has not availed ITC during the pendency of the writ petition and prayed that in the event the writ Petitioner succeeds, then it may be allowed to avail the benefits.

The Calcutta HC has requested the Additional Solicitor General of India and the Additional Advocate General of State of West Bengal to file their affidavits in this matter. The HC has further listed the matter to be heard in January 2021.

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Apex Court upholds levy of GST on lottery

Skill Lotto Solutions Private Limited vs Union of India and Ors.
2020-TIOL-176-SC-GST-LB

The Petitioner, an authorised agent for sale of lotteries in the state of Punjab had filed a Write before the SC challenging the definition of the term 'goods' under Section 2(52) of CGST Act and the notifications to the extent it levies tax on lotteries, being ultra vires to various Arts. of Constitution of India.

The SC observed that the definition of goods as contained under the Sale of Goods Act, mean every kind of movable property other than actionable claims and money. Further, the definition of goods in Section 2(52) in the CGST Act, it means every kind of movable property other than money and securities 'but includes actionable claim.

The SC further observed that the definition of goods as per Article 366(12) did not intend to give a restrictive meaning of goods. The SC further observed that Article 366(12) contains an inclusive definition and the definition given in Section 2(52) of CGST Act, is not in conflict with definition given in Article 366(12).

Basis the above observations, the SC held that held that lottery, gambling and betting are well known concepts and have been regulated and taxed by different legislations. As the Parliament had included such activities for the purpose of imposing GST and not taxed other actionable claims, it cannot be said that there is no rationale or reason for taxing above three and leaving others.

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Tripura HC disallows GSTR-3B rectification for wrongful ITC utilization while holding that Limitation Act would not apply to Local Statute

Kiran Enterprises
WP(C)No.114 of 2020

Kiran Enterprises, the Petitioner is a distributer of Bharati Hexacom Limited. While filling tax invoices, Bharati Hexacom Limited had mentioned the name of Kiran Enterprise, however, the GSTIN had been inadvertently mentioned of New Kiran Enterprise, which is another sole proprietorship firm of the Petitioner dealing in the same products with same PAN.

The Petitioner wrongfully utilised the excess ITC against discharge of its GST liabilities. Thereafter, the Respondent sought to demand of tax and impose penalty for availing wrongful ITC. Aggrieved, the Petitioner had filed an application for rectification of error in the tax invoice. However, the Application came to be rejected as being time-barred.

The Tripura HC observed that in terms of Section 161 of the CGST Act, any error which is apparent on the face of the record in the decision or the order or the notice or the certificate or any other documents issued by any authority, the said authority can rectify such error, within a period of 3 months from the date of such decision, or order or notice or certificate or any other documents as the case may be. It had been further observed that Section 161 of the CGST Act is a complete code within itself and it has impliedly excluded the Limitation Act. The Tripura HC further noted that the rectification as sought by the Petitioner is not covered by Section 161 of the CGST Act. Accordingly, the HC dismissed the Writ Petition.

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Odisha AAR holds that Consultancy services by Japan based company does not amount to 'Import'

Tokyo Electric Power Company
2020-TIOL-299-AAR-GST

The Applicant, a Japan based company had sought a ruling before the Odisha AAR to ascertain whether the Applicant is required to be registered under the CGST Act for the consultancy services provided to Odisha Power Transmission Corporation Limited ('OPTCL').

Upon perusal of the agreement between the Applicant It was observed by the Odisha AAR that the scope of the services is Technology transfer for the outdoor GIS O&M and GIS operation Manual preparation. The applicant would carry out the services through its expert belonging / sub-station Engineer. It was further observed that OPTCL had provided an office to the consultant and the office operation and maintenance charge etc. were to be borne by OPTCL.

It was further observed that the Applicant maintained suitable structures in terms of human and technical resources at the sites of OPTCL which are fixed establishments indicating sufficient degree of permanence and thus, the 'location of supplier' should be in India. Accordingly, it was held that the consultancy services to OPTCL was not import of services and the experts belonging to the Applicant were to be treated as supplier located in India and made liable to pay applicable GST, and obtain registration.

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Allahabad HC mandates quoting HSN codes in railway tenders

Bharat Forge Limited
2020-TIOL-2209-HC-ALL-GST

The Diesel Locomotive Works had invited e-tender for certain Railway Assembly. In terms of the tender documents, the commercial compliance conditions, the bidders including the Petitioner, were required to specify the percentage of local content in the material being offered in accordance with the Make in India Policy.

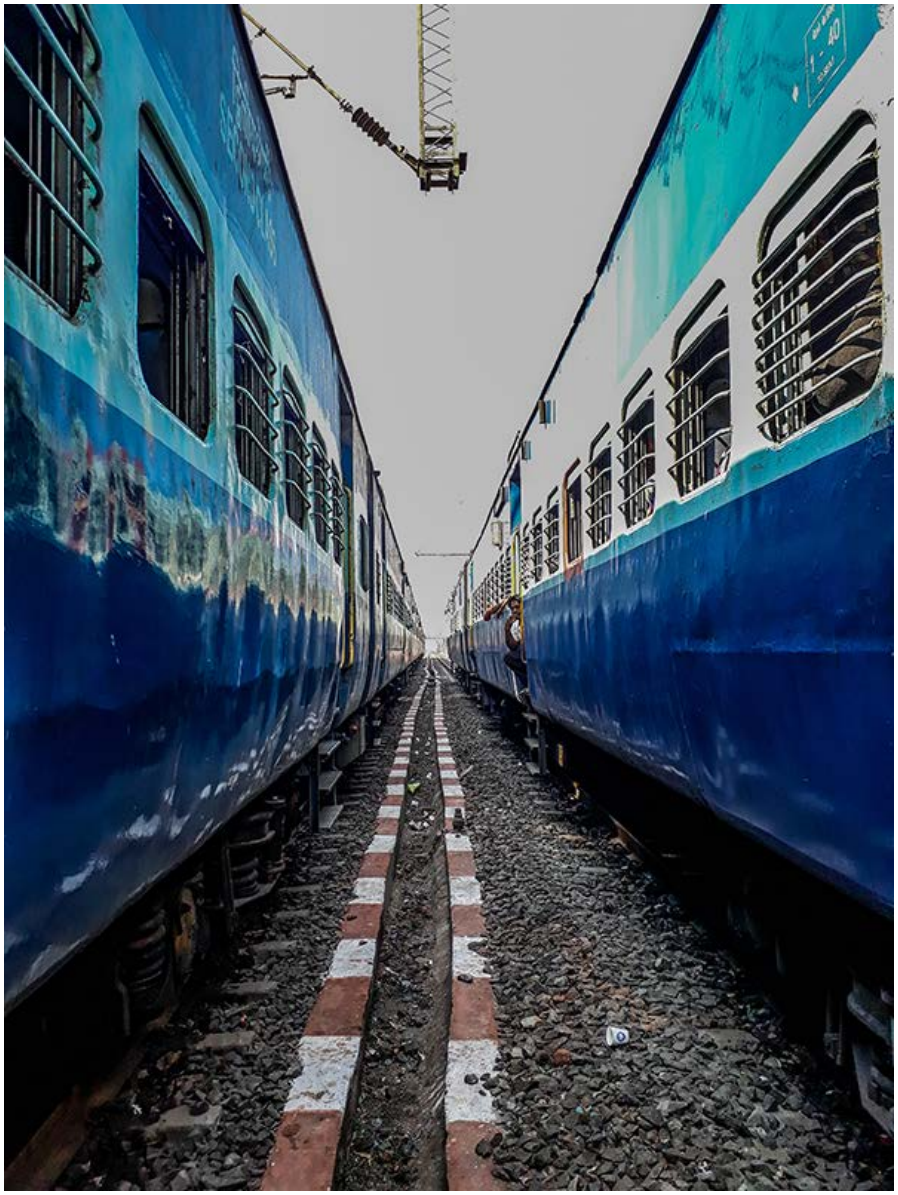
The Petitioner contended that one of the Respondent had included GST at the rate of 5% in the basic rate whereas the Petitioner, and other bidders had quoted payment of GST at the specified rate of 18% on the basic rate of the procurement product. The Petitioner further contended that though there is difference of about 17.1% in the base price offered, but because of difference in the GST rates, the difference in the total price quoted became about 31.6%. The petitioner has quoted the correct GST rate as 18% whereas the Respondent incorporated wrong rate of 5% for payment towards GST.

The Allahabad held that in cases of Tenders / Bids, if the GST value is to be added in the base price to arrive at the total price of offer for the procurement of products in a tender and is used to determine inter se ranking in the selection process, the relevant Department / Authority would be required to clarify the issue, if any, with the GST authorities relating to the applicability of correct HSN Code of the procurement product. It was further held that the Department would be required to mention the same in the tender notice, so as to ensure uniform bidding from all participants and to provide all tenderers / bidders a 'Level Playing Field'.

Authors' Note

The HSN classification of railway products has been a perpetual issue right from the Excise days, which has re-ignited under the GST regime as well. Where inconsistencies and scope for multiple interpretations in the applicability of HSN codes to products sold in the same industry will exist, possibility of different price bids are will remain.

While such clarification in the Bids / Tenders may ensure level playing field to all the bidders as observed by the Allahabad High Court, it shifts the responsibility of classification of the goods from the seller to the buyer, which may not be feasible or practical in all cases. It should be the responsibility of the seller to ultimately determine the classification of its products as any liability arising on any misclassification would have to be borne by the seller himself. Even if any clarification is provided by the recipient, it should be indicative and not binding on the seller, otherwise it is likely to result in chaos and further litigations on the subject of classification.



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Delhi CESTAT sets aside ST on liquidated damages for breach of contract

South Eastern Coalfields Limited
2020-TIOL-1711-CESTAT-DEL

The Appellant had entered into various commercial agreements, whereby certain clauses were provided for penalty for non-observance / breach of terms of contract, in order to safeguard the interests of the Appellant.

The Respondent had demanded the payment of service tax on the amount charged by the Appellant as penalty / compensation for breach of terms of contract holding such penalty / compensation for breach of terms of contract was taxable as declared services under Section 66(E) (e) of the Finance Act.

The Delhi CESTAT observed that service tax is chargeable on any taxable service with reference to its value, then such value shall be determined in the manner provided for in (i), (ii) or (iii) of subsection (1) of Section 67. In relation thereto, it was observed that what needs to be noted is that each of these refer to where the provision of service is for a consideration, whether it be in the form of money, or not wholly or partly consisting of money, or where it is not ascertainable. In either of the cases, there has to be a consideration for the provision of such service.

It was further observed that the Explanation to Section 67(1) clearly provides that only an amount that is payable for the taxable service will be considered as consideration. It was observed that apart from this, what is important to note is that the term consideration is couched in an inclusive definition. Basis the above observations, the CESTAT allowed the appeal and set aside the order passed by the Respondent.

Authors' Note:

Although various judicial forums have time and again held that penalty for breach of contract cannot be construed as a service u/s. 66E(e) of the Finance Act, it has been seen that the Revenue does not shy away from demanding such tax. In this regard, it would be pertinent to note the Allahabad CESTAT in the case of K. N. Food Industries Private Limited **[Service Tax Appeal No.70737 of 2018]** had held that an agreement should have an express concurrence of toleration of an act / situation to attract levy of Service Tax.

It had been further held that the amount paid should be in the nature of 'consideration' and not 'compensation'. Going by the principle laid down in K.N. Foods (supra), it can be said that as the amount received by the assessee is in the form of compensation vis-a-vis consideration, the same cannot be bought under the purview of Service Tax. However, it would be pertinent to note that there are various contradictory judgements in this front and therefore the matter is yet to be settled.

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CESTAT: Quashes demand against Maruti dealer on incentives received for carrying-out promotional activities

Rohan Motors Limited
2020-TIOL-1676-CESTAT-DEL

The Appellant, a dealer of Maruti Udhyog Limited ('MUL'), supplied vehicles by virtue of a dealership agreement with Maruti Suzuki Limited. Under the said agreement, the Appellant received discounts, referred to as 'incentives.' The Respondent has sought to levy service tax on the incentives received by the appellant under the category of

business auxiliary service.

Upon perusal of the agreement, the Tribunal observed that the Appellant works on a principal-to-principal basis and not as an agent of MUL. Further, the said agreement provided that the Appellant had to undertake certain sales promotion activities as well. Accordingly, it was noted that the carrying out of such activities by the Appellant is for the mutual benefit of their business as well as the business of MUL. Basis the said observations, it was held that consideration for such activities could not be termed as taxed under the heading of 'Business Auxiliary Services'.

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Delhi CESTAT holds that the liability of Demerged Undertakings cannot be fastened

Jayaswal Neco Industries Limited
2021-TIOL-20-CESTAT-DEL

The Appellant had taken a manufacturing plant of M/s. Abhijeet Limited and M/s. Corporate Limited on lease, which were mentioned in the Appellant's Excise registration. The Appellant manufactured various goods which were sold to Abhijeet Limited and Corporate Limited, who further sold these goods to independent buyers at the same price as they were sister concerns of the Appellant. The Appellant claimed to have shared the profits with its sister concerns by way of discounts and incentives.

The plants of Abhijeet Limited and Corporate Limited were demerged from the legal entities of Abhijeet Limited and Corporate Limited and were merged into the assessee in terms of an order passed by the Bombay HC. The Appellant contended that Abhijeet Limited and Corporate Limited continued to exist and operate as separate legal entities and only their manufacturing unit plants merged with the Appellant.

In relation to above, a SCN had been issued to the Appellant proposing service tax on commission / discounts paid to Abhijeet Ltd. and Corporate Ltd., alleging that they acted as commission agents of the assessee and received commission from the Appellant, which was taxable under the heading business auxiliary service.

Upon perusal of the Scheme of Arrangement for merger of Abhijeet Limited and Corporate Limited with the Appellant, the Delhi CESTAT observed that the Demerged Undertakings are the Sponge Iron and Power Plant of the Demerged Company, namely Abhijeet Limited and Corporate Limited It was further observed that the Scheme of Arrangement inter alia, envisages 'Demerger' of 'Demerged Undertakings' of the 'Demerged Company' and transfer and vesting of the 'Demerged Undertakings' in the 'Resulting Company,' i.e., the Appellant.

Basis the above, the CESTAT noted that Demerged Companies, namely Abhijeet Limited and Corporate Limited continue to operate as going concerns and therefore, their liabilities could not have been fastened upon Appellant. Accordingly, it was held by the CESTAT that SCN could have been issued to Abhijeet Limited and Corporate Limited and not to the assessee, which is a service recipient and not "a person" liable to pay service tax.

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Bombay HC decides detention of goods beyond twelve months without issuance of Show Cause Notice to be illegal

Exim Incorporation
2020-TIOL-2124-HC-MUM-CUS

The Petitioner had imported two consignments, both of which were sent by the customs authorities for testing and not released for home consumption stating that detailed examination of the goods was required for which presence of the proprietor of the petitioner himself was essential. Presence of Petitioner's legal representative was denied access to the examination proceedings.

Several summons were issued to the proprietor of the petitioner for the same by DRI, Kolkata but the proprietor failed to comply with them as he was a resident of Delhi. Thereby, the DRI, Kolkata filed a criminal complaint for issuance of warrant of arrest for failure to comply with summons. The proprietor of the petitioner moved the Calcutta High Court against the criminal complaint. As the petitioner was also aggrieved by the illegal detention of the imported goods and non-examination of the same for want of the proprietor's presence, the petitioner approached the Bombay High Court.

The Bombay High Court held that there is no provision in the Customs Act authorizing detention of goods but there is a provision for seizure. However, the two cannot be used interchangeably. If no show-cause notice under law is issued, customs authorities cannot retain the seized goods for more than a period of twelve months. There cannot be any detention of goods even in the case of seizure without issuance of such show cause notice.

Therefore, directing the release of the imported goods, the HC held that even if the detention is to be construed as seizure, the respondents have illegally detained goods beyond a period of twelve months in such circumstances, the impugned action cannot at all be justified and is liable to be appropriately interfered with.

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CESTAT – Ahmedabad allows DFIA benefits for import of wheat gluten

Unibourne Food Ingredients LLP
2020-TIOL-1710-CESTAT-AHM

The appellant imported wheat gluten and claimed DFIA benefits on the strength of Two Transferable Duty Free Import Authorizations (DFIA) under the Foreign Trade Policy for the period (2015-2020) against export of Biscuits from the open market. Joint Commissioner of Customs (Preventive) with the approval of Commissioner of Customs (Preventive) informed the appellant that DFIA benefit cannot be extended and further directed the appellant to pay applicable duty for clearance of goods. The Commissioner of Customs (P) confirmed the benefit of duty against said DFIA cannot be allowed in present case of imports and further directed to clear import cargo against applicable customs duty.

The contention of revenue was that there is no legal obligation to follow decision of higher authorities while discharging quasi-judicial powers vested in the Act. Therefore, the Commissioner decided to reject claim of DFIA benefits because of which, appellant came before Tribunal.

The Tribunal held that DFIA's are issued for import of wheat flour against Export of Biscuits as per SION E5. As per the provision of Para 4.27 (ii) of FTP- 2015-20, DFIA is issued for

products for which Standard Input Output Norms are notified - It is settled law that a DFIA is governed by SION which is notified for the relevant export product. There is no provision either in the Policy or in the Hand book to say that DFIA benefits can be claimed on the basis of ITC (HS) numbers. Even SION does not prescribe any ITC (HS) Numbers so long as the export goods and the import items corresponds to the description given in the SION, it cannot be held to be invalid by adding something else which is not in the policy.

It cannot be said that if the specific name of input in the present case 'wheat gluten' is not mentioned in the license or in the export shipping bill, benefit of DFIA cannot be extended particularly when the broad description as wheat flour is specified in SION as well as in the annexure to the DFIA license.

Thus allowing the appeal the Tribunal held that the appellant was entitled for the benefit of DFIA for import clearance of wheat gluten.

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HC – Bombay holds seizure by proper officer illegal for want of reason

Nikom Copper And Conductors Pvt. Ltd.
2020-TIOL-2073-HC-MUM-CUS

The petitioner is a company engaged in the business of import and export of copper rods, bare wires, ferrous and non-ferrous metal, etc. The petitioner imported copper wire rods and contemplated high sea sales to an importer based on an oral agreement. The importer filed two bills of entries in respect of the imported consignment, however refused to make payment for the high sea sale and requested cancellation giving an assurance that they would help in substituting their name to the petitioner's as importer. Thus, the petitioner was now the importer for the above-mentioned two bills of entries.

The petitioner thereafter approached the revenue for clearance of goods but it was seized by the Revenue. Aggrieved the petitioner filed a Writ Petition before the Bombay HC alleging that seizure memo does not comply with the requirements of law and that it is illegal.

The HC held that the law makes it abundantly clear that if the proper officer has reason to believe that the goods in question are liable to confiscation under the Customs Act, he may seize such goods. Therefore, formation of reason to believe by proper officer that the goods in question are liable to confiscation under the custom act is the condition precedent for invoking the jurisdiction under law to seize such goods. It cannot be that seizure is made by one officer and reason to believe is recorded by another officer.

In the given case, no reason was recorded either in Panchnama or in Seizure Memo. Thus, allowing the petition the HC held that since there being no reason to believe by the proper officer that the goods seized were liable to confiscation, the very action of seizure is devoid of jurisdiction and hence illegal.

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HC releases the seized goods provisionally on funishing the appropriate bank guarantee

ITS MY NAME PVT. LTD.
2020-TIOL-2226-HC-DEL-CUS

The petitioner is a business establishment registered with the Customs Department, DGFT, Income Tax, GST, etc. Due to seizure of its goods, raw material and all the W.I.P material, which collectively accounted for almost whole working capital, for over 6 months, the petitioner faced difficulty of livelihood and was incurring regular fixed cost or establishment cost, unable to fulfil its time-bound export obligation, there was irreparable loss to the petitioner.

At this juncture the CESTAT ordered the release of certain goods to be provisionally released to the petitioner within four working days on the payment of bond for the full value of seized goods backed by a bank guarantee of INR 1.25 Crores.

However, despite having furnished the bank guarantee in excess of what was ordered by the CESTAT (INR 3.16 crore) goods were not released. For the alleged non-compliance of this order, the petitioner filed this contempt petition before the Delhi High Court, on the other hand aggrieved by the order of the CESTAT, the Respondent filed an appeal before the Delhi High Court which enhanced the bank guarantee to INR 10 Crores. Being aggrieved by such enhancement of bank guarantee, the Petitioner approached Supreme Court, however, to its unfortune, the requirement of bank guarantee was further enhanced to INR 15 crores.

Accordingly, the Petitioner before Hon'ble Delhi High Court submitted that on discharge of the bank guarantee of INR 3.16 Crores, that has already been furnished to the Respondents, it would furnish a bank guarantee of INR 15 crores as directed by Supreme Court.

Accordingly, the Delhi High Court disposed of the contempt petition requiring the Respondent to comply with the order of the CESTAT and release the seized goods provisionally to the Petitioner on its furnishing of bank guarantee to the tune of INR 15 crores as directed by the Supreme Court to the satisfaction of the Competent Authority and also furnish the requisite bond as ordered by the CESTAT.

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Madras HC holds that order traversing beyond proposals in SCN is violative of 'natural-justice'

R. Ramadas
2020-TIOL-1867-HC-MAD-ST

The Respondent had issued a Show Cause Notice to demand Service Tax on manpower recruitment or supply agency, management, maintenance or repair services, works contract and commercial or industrial construction services executed by the Petitioner. The demand proposed in the SCN was later confirmed by an order. The Petitioner contended that the demand was raised on the grounds relied upon in the impugned order was not in conformity with the proposals made in the SCN and that the notice was vague and without any details.

The Madras HC noted that it is a settled position in law that SCN is the foundation on which demand is raised and therefore, it should not only be specific but also give details regarding the proposal to demand. The HC further observed that the demand of service tax was not specifically proposed in the SCN, rendering the assessee unable to raise objections on SCN. Basis the said observations, the Madras HC held that the impugned order could not be sustained since it traversed beyond the scope of the SCN and was vague without any details.

Authors' Note

It is a settled principle of law that an order passed by the Revenue cannot go beyond the allegations made in the show cause notice. In other words, the order being passed by the Adjudicating authorities cannot traverse beyond the scope of SCN. Notably, the Mumbai Tribunal in the case of Manjit Singh vs. Commissioner of Customs **[2013-TIOL-989-CESTAT-MUM]** had held that Adjudicating authority cannot go beyond allegations levelled in SCN.

It would be pertinent to note that even the Legislature vide Circular No. 1053/2/2017-CX., dated 10 March 2017 had clarified in this regard by expressly stating that at any cost, the findings and discussions should not go beyond the scope and grounds of the show cause notice.

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Notification/Circular	Key Updates
GSTN Update	**GSTN makes available facility for E-way Bill unblocking application & restoration of EWB facility** In cases where the taxpayer fails to file returns in Form GSTR-3B or Form CMP-08 for two or more consecutive tax period, the E-way Bill generation facility is blocked. For unblocking of this facility, the taxpayer needed to apply manually to jurisdictional Tax Official in Form GST-EWB-05. However, from 28 November 2020 GSTN makes available facility for online application for unblocking of EWB generation facility.
GSTN Update	**GSTN launches taxpayer communication facility on Portal** GSTN's new functionality will provide communication platform for taxpayers wherein a recipient/purchaser can ask his supplier/s to upload any particular invoice/s that has not been uploaded but is required by the recipient to avail input tax credit (ITC).
GSTN Advisory	**Taxpayers advised to proceed with filing of GSTR-1, not to wait for auto-populated data of e-invoices** Due to some unanticipated issues, there has been a delay in the auto-population of e-invoices in GSTR-1. GSTN advises taxpayers to not wait for auto-population of data and proceed with the preparation and filing of GSTR-1 for the months of Nov'20 (before due date) and for Oct'20 (in case not yet filed, as on date)
Notification No. 91/2020 – Central Tax dated 14 December 2020	**CBIC extends time-limit for completion/compliance of action by Authorities u/s 171** Amid the COVID-19 outbreak, the CBIC had earlier extended the time-limit for compliance of passing any order or issuance of any notice, intimation, notification or such other actions by the authorities. The CBIC has now further notified extension in the time limit for completion or compliance u/s 171 of CGST Act (Anti-profiteering measure) by authorities of any action falling during the period 20 March 2020 to 30 March 2021 upto 31 March 2021.
Notification No. 94/2020 – Central Tax dated 22 December 2020	**CBIC notifies 14th Amendment of the GST Rules** **Aadhar Based Verification** ▸ Biometric-based Aadhaar authentication and taking photograph has been mandated for GST registration unless the said requirement has been exempted; ▸ The time-limit for approval of grant of GST registration has been extended from 3 to 7 working days of the date of application. It has been further provided that where the Applicant fails to undergo authentication of Aadhar, that the GST registration shall be granted within 30 days of the submission of application after physical verification;

	Key Updates
	GST Registration Cancellation ▸ GST Registration shall be cancelled if the taxpayer has availed ITC in violation of the prescribed provision of availing ITC i.e., Section 16 of the CGST Act; ▸ GST registration shall be suspended, where upon comparison of GSTR-3B and GSTR-1 indicate that there are significant differences or anomalies indicating contravention of the provisions of the Act or the Rules; **ITC Restriction** ▸ The restriction of availment of ITC in respect of unreported invoices or debit notes have been limited to 5% of eligible ITC; **Return Filing Restriction** ▸ The taxpayers shall not be allowed to file GSTR-1 unless the return in GSTR-3B has been filed for the preceding two months; ▸ Taxpayers required to furnish return for every quarter shall not be allowed to furnish GSTR-1 or using the invoice furnishing facility, if he has not furnished the return in GSTR-3B for preceding tax period; ▸ Taxpayers restricted from using the amount available in electronic credit ledger to discharge liability towards tax in excess of 99% of such tax liability under rule 86B, shall not be allowed to furnish GSTR-1 or using the invoice furnishing facility, if he has not furnished GSTR-3B for preceding tax period; ▸ Rule 86B has been inserted which provides that taxpayers shall not use the amount available in electronic credit ledger to discharge liability towards output tax in excess of 99% of such tax liability, in cases where the value of taxable supply other than exempt supply and zero-rated supply, in a month exceeds fifty lakh rupees, unless: – The said person has paid more than Rs. 1 lakh as income tax under the Income-tax Act, 1961, in each of the last two financial years; or – Such person has received a refund of more than Rs. 1 lakh in the preceding financial year on account of unutilised ITC in respect of zero rate supplies or inverted duty structure; or – Such person has discharged the liability towards output tax through the electronic cash ledger for an amount which is in excess of 1% of the total output tax liability, applied cumulatively, up to the relevant month in the current F.Y.

Notifications/Circulars clarifying key aspects

Notifications	Key Updates	
Notification No. 92/2020 – Central Tax dated 22 December 2020	**Appoints 01 January 2021 to bring into effect certain CGST Act amendments**	
	Clause of Finance Act	**Summary**
	119	Under the provisions of composite supply u/s. 10 of the CGST Act, the eligibility conditions have also been extended to supply of services
	120	Amendment in Section 16 of the CGST Act to remove the term 'invoice relating to debit note'
	121	Under the provisions for cancellation of registration, registrations obtained voluntarily can also be cancelled by the proper officer
	122	Under the provisions for issuance of tax invoice, the Government may specify documents in respect of supply of services which shall be deemed to be tax invoices or done away with the requirement completely
	123	Under the provisions for issuance of tax invoice, the Government may specify documents in respect of supply of services which shall be deemed to be tax invoices or done away with the requirement completely
	124	A certificate of tax deduction at source shall be issued by the Deductor to the Deductee in such form and in such manner as may be prescribed, penalty for failure to furnish certificate has been done away with
	125	Provisions for constitution of Appellate Tribunals and Benches extended to the state of Jammu and Kashmir
	126	Provisions for punishment shall extend to ITC being availed on the basis of invoices issued without supply of any goods or services or credit is availed fraudulently without any invoice or bill
	127	Under the provisions for punishment, liability has been extended to any person who causes the commission or retains the benefit out arising out of commission of offence
	131	The term 'whether or not for consideration' has been omitted retrospectively w.e.f. 01 July 2017 in cases of transfer of business assets

Notifications	Key Updates
Notification No. 95/2020 – Central Tax dated 30 December, 2020	**Appoints 01 January 2021 to bring into effect certain CGST Act amendments** Taking cognizance of the difficulties faced by the taxpayers on account of the COVID-19 pandemic, the CBIC has extended the due date for filing Annual Return for F.Y. 2019-20 to 28 February 2021

Authors' Note

Notification No. 94/2020

Recently, a number of cases have surfaced wherein the taxpayers had fraudulently availed ITC in contravention of Section 16 of the CGST Act. The new provisions would significantly limit such wrongful availment of ITC. However, whether such direct cancellation / suspension of registrations might also be considered as rather harsh for taxpayers who might have contravened the provisions of ITC availment in a bona fide manner.

As for the restriction of unmatched ITC u/r. 36(4) of the CGST Rules, it is seen that the Government had initially restricted the availment of unmatched ITC to 20%, which was later reduced to 10% and now being further reduced to 5%. Such a trend shows that the Government intends to gradually restrict the entire unreported ITC. In this regard, it would be pertinent to see whether such restriction would be made effective in entirety w.e.f. 01 April 2021 i.e., introduction of new return filing system. It would further be pertinent to see whether the Government introduced any new provision or provides any clarification in cases where the mis-match in ITC occurs on account of the vendors being quarterly taxpayers.

Lastly, and quite possibly being the most important amendment, vide the instant notification is the introduction of Rule 86B. The said Rule inter alia provides that at least 1% of the output tax liability shall be discharged from the electronic cash ledger where the value of taxable supplies, other than zero rated and exempt supplies is more than Rs. 50 lakhs. In this regard, it would be pertinent to note that as a settled principle of law, the Rules always flow from the Principal Act. Any Rule which does not flow from the Principal Act is ultra vires and consequently void. Accordingly, it would be interesting to ascertain that whether such restriction of using electronic credit ledger for output tax liability is valid or not. This might ensue litigations in the future.

Notification No. 95/2020

As the due date for filing Annual Return and Reconciliation Statement for F.Y. 2018-19 has just ended on 31 December 2020, the extension for filing the same return for F.Y. 2019-20 merely by 2 months, seem rather unreasonable and harsh. Instead of giving multiple extensions every now and then, the Government should look to give one reasonable extension which would be sufficient to complete the GST Audit.

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Circulars/Instructions	Key Updates
Circular No. 53/2020-Customs dated December 8,2020	**Third party invoicing in case of Preferential Certificates of Origin (COO) issued in terms of DFTP for "wholly obtained goods" allowed** The limitation in accepting the third party invoices along with COO in terms of Notification 29/2015-Cus (N.T.) is hereby removed and by virtue of this circular, third party invoices along with COO for wholly obtained goods in terms of DFTP has been permitted provided that the goods referred to in the COO and the invoice correspond to each other and the goods satisfy the relevant rules of origin.
Circular No. 54/2020-Customs dated December 15,2020	**Relaxation in compliance and security requirements for AEO Accreditation of MSME's** The compliance and security requirements for AEO accreditation have been relaxed as follows: ▸ Minimum 10 documents (minimum 5 documents in each half year) are required to be handled during the last financial year as opposed to 25 documents. ▸ Qualifying period for legal and financial compliance along with the requirement to have business activities have been revised to at least two years instead of three years preceding the date of application. ▸ Previous annexures A, B, C, D, E.1-E.4 have been replaced with Annexures 1 and 2. ▸ For AEO T2 certification, Annexures E.5.1 – E.5.7 have been replaced with Annexure 3. ▸ Time limit for processing T1 application has been reduced to 15 days from 1 month and for T2 application, 3 months from 6 months. ▸ Relaxation in terms of furnishing of Bank Guarantee for AEO further reduced to 25% from 50% for MSME AEO T1 and 10% from 25% for MSME AEO T2 by an importer who is not an AEO certificate holder.
Instruction No. 21/2020-Customs dated December 16, 2020	**Instruction to reduce pendency and achieve speedy disposal of Drawback Claims:** The compliance and security requirements for AEO accreditation have been relaxed as follows: ▸ As per CBIC's Action plan all pending drawback claims are to be disposed off by 31.03.2021, simultaneously with the target of disposing other drawback claims within 7 days. ▸ However, the National Committee on Trade Facilitation has now directed to credit 90% of duty drawback claims within a period of 3 days, a further instruction of its strict compliance is also issued to all the zones and a report on action taken is to be submitted to board ▸ Authorised banks are instructed to credit/refund the amount on the same day or next day of it receiving the Computerised Customs Drawback Advice

Circulars/Instructions	Key Updates
Instruction No. 20/2020-Customs dated December 17, 2020	**Instructions for verification of Preferential Certificate of Origin (COO) in terms of CAROTAR Rules, 2020** The CBIC has issued instructions to address the delays in verification process, being caused by following repetitive deficiencies in verification requests: ▸ The scanned documents are found to be illegible; ▸ The certificates are being signed and sent without requisite covering letter to indicate the nature of request or approval of jurisdictional Principal Commissioner or commissioner; and ▸ The bulk COOs are sent rather than representative COOs as required in terms of Board's Circular no. 38/2020 dated August 21, 2020. Further directs that a reference for verification of COO made to the Board in terms of Rule 6 of CAROTAR, 2020, should be complete in terms of following the established standard operating procedures, prescribed format. Further, Officers are suggested to ensure that enquiry on origin of the imported goods is initiated only when there are sufficient grounds to suspect origin of a goods or where the same has been identified as a 'risky' by Risk Management System.

FTP

Notifications/Public Notices/Circulars	Key Updates
Notification No. 49/2015-20 dated December 22,2020	**Compulsory Registration under Coal Import Monitoring System (CIMS) for the free import of Coal** ▸ Importers of Coal are required to register under CIMS by paying registration fee of INR 1 per thousand, subject to a minimum of INR 500 and maximum 1 lakh on CIF value. ▸ Registration to be done within 60 days (not later than 15 days) of the expected date of the arrival of import consignment. Validity of registration is 75 days. ▸ Registration Number and expiry date of Registration would have to be entered by the importer in the Bill of Entry for custom clearance. ▸ CIMS will be effective from February, 01, 2020 and Registration can be done under the same from December 31, 2020
Public No. 34/2015-2020 dated December 24, 2020	**Amendment in Para 2.14 (Modification of IEC) of Chapter-2 of Handbook of Procedures, 2015-2020** ▸ In case of change in the constitution of the entity, provisions for availing IEC against new PAN or linkage of old IEC to PAN of new entity has been introduced. ▸ Obligations of previous IEC may be linked to the new entity based on The RA's approval of the application after which the previous IEC will be treated as surrendered.

NCLAT holds that misstating amount in Demand Notice does not make it defective; Does not cause a reason to drop insolvency proceedings

Rajendra Bhai Panchal vs. Jay Manak Steels and Anr.
2020-TIOLCORP-128-NCLAT

The corporate debtor entered into a works contract with Indian Oil Corporation for the construction of a compound wall around the Gujarat Refinery Township. The operational creditor/ respondent used to supply the corporate debtor with MS Angle for the purposes of construction. Total amount outstanding as mentioned in the application before NCLT was INR 27,17,818 out of which INR 17,74,977 was paid and only INR 9,42,841 was due.

The Demand Notice served showed a total debt of INR 18,63,840 which was different from the total debt mentioned in the application. Going by the amount mentioned in the Demand Notice only INR 88,863 was due from the corporate debtor which was below the threshold of INR 1 lac required for the initiation of insolvency proceedings. Therefore, due to such variation in amounts the Appellant contends that the order of NCLT should be set aside.

On the contrary, The NCLAT held that a mistake in a Demand Notice does not necessarily mean that it is defective. If there is a mistake in the demand but the creditor is clearly owed the statutory minimum figure or more, the fact that the debt is misstated may not automatically invalidate the demand. Further, the Court will take into account whether any injustice was caused to the 'Debtor' and even a grossly overstated statutory demand may not automatically be set aside.

Also held that to initiate an insolvency proceeding an operational creditor has to show the inability of the corporate debtor to pay its debt in spite of a statutory notice to that effect. As no reply was filed against the Demand Notice by the corporate debtor, it clearly shows its inability to pay.

In Law, an 'Adjudicating Authority' is safely and surely to admit the Application, if the 'debt' is proved and the default took place, the only rider being, that the Application must be complete as per Court prescribed format. The outstanding amount as per the application filed before the NCLT was INR 9,42,841 and the application does not suffer from any material irregularity or patent illegality in the eye of Law. Hence, the appeal is dismissed.

Authors' Note:

This is an important judgment which provides that a mere defect in demand notice would not render the initiation of insolvency proceedings void. This one ensures that justice is not obstructed by mere trivial errors in legal claims.

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HC hold that Relief under RBI's COVID-19 Regulatory Package not applicable to defaults made pre – pandemic

Amit Khaneja and Ors. vs. IL & FS Financial Services
2020-TIOLCORP-183-HC-DEL-MISC

The Petitioners had availed various loans from the Respondent and failure to repay them caused their account to be classified as NPA, thereafter, Petitioners approached the Respondent with a One Time Settlement,

but due to spread of COVID-19 and the subsequent lockdown, the settlement proposal was revoked by the respondent.

Petitioners contended their entitlement to relief under the said RBI Circulars which are meant to provide grace to the borrowers and that OTS revocation by Respondents would be in contrast to these Circulars, however, the Respondent submitted that the RBI Circulars are not a shield against prior defaults under the pretext of the pandemic, Perusing the said RBI Circulars and Guidelines,

HC affirmed that these are meant for mitigating the burden of debt which may have been brought about due to the COVID-19 pandemic, but, the present case is not one wherein any disruption took place due to the COVID-19 pandemic. Also believed the circulars and policy guidelines to not be of any support to the Petitioners' case where the defaults are prior to the outbreak of the pandemic itself. Further, stated that the legality of the revocation of OTS in May, 2020, can't be tested on the benchmark of the recent RBI circulars and the policy guidelines.

Authors' Note:

This judgment clarifies on applicability of the COVID-19 Regulatory Package provided by the RBI by giving a broader understanding of the delineation of eligibility. It also paves the way to facilitate banks to stop misuse of RBI circulars by the defaulters who have not honored their loan commitment in regular course and are just trying to take shelter of benefits induced by government during Covid-19 situation.

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NCLAT holds that correctness of the five-member bench judgment in V. Padmakumar cannot be questioned by referral bench

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

While hearing an appeal against NCLT order admitting the Sec. 7 application, the referral bench rejected Corporate Debtor's argument that Sec. 18 of Limitation Act is not applicable to insolvency cases and proceeded to record its reasons for reconsideration of V. Padmakumar judgment.

The Appellant (Corporate Debtor's ex-director) submitted that the order of the referral bench created uncertainty as it failed to notice that the law laid down in V. Padmakumar has been followed and applied by NCLAT in subsequent judgments.

On perusing the five-member bench judgment in detail the NCLAT observed that the findings of the five-member bench were based on the latest judgments of the Apex Court wherein remedies available within the ambit of I&B Code were distinguished from the ones found in the recovery mechanism in civil jurisdiction which the referral bench had failed to distinguish.

The referral bench failed to take note of the fact that the five-member bench judgment was delivered to remove uncertainty arising out of 2 conflicting verdicts of benches of co-equal strength.

In the light of the above, NCLAT thereby dismissed the order of the referral bench requiring reconsideration of the judgment rendered by a five member NCLAT bench in the matter of V. Padmakumar, finding it to be incompetent, and requiring the referral bench to exhibit more serious attitude towards adherence of the binding judicial precedents and not venture to cross the red line. Also held preposterous, the view of the referral bench regarding the judgment of five-member bench to be so incorrect that the same can in no circumstances be followed.

Stating itself to not be a Constitutional court, NCLAT asserted that the referral bench ought to have followed the

judgment of the five-member bench in 'V. Padmakumar's Case' as a binding precedent and not question the correctness of the judgment as matter of judicial discipline.

Also stated that the judgment of the five-member bench is not sitting in appeal before the referral bench to hold the judgment to be erroneous.

Authors' Note:

Through this judgment NCLAT not only demarcated the authority of the referral bench but also highlighted the difference between an appeal and a reference to the bench. As discussed in our previous edition as well, it is important to note that in V. Padmakumar, a very critical matter was settled by larger bench wherein it was upheld that a recognition of liability in balance sheet of a company can't be referred to for the purposes of calculation of limitation period under the I&B Act. The Tribunal while referring it back for reconsideration not only challenged the judgment passed by a larger bench, rather it once again opened a can of worms, as if balance sheet liability is referred for drawing conclusions under the I&B Act, same would uproot the basic principle of limitation. It is important to note that principle of limitation is so very different from principle of prudence which is used for preparation of balance sheet of a company under generally accepted accounting practices.

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SC upholds SAT's quashing of SEBI's ex parte interim order on grounds of lack of urgency

Securities and Exchange Board of India vs. Udayant Malhoutra
Civil Appeal Nos 2981-2982 of 2020

An allegation was made against the respondent who was the CEO and MD of the Company that he sold 51,000 shares of the Company having inside knowledge of price senstive information and by doing so had made a notional gain or averted a notional loss. The sales made by the respondent were thus subject to an investigation and an ex parte order was passed against the respondent.

It was urged by the respondent before the Tribunal that there was no urgency in passing an ex parte order during the pandemic. The appellant urged that ex parte order was passed to avoid diversion of notional gain made by the respondent. The Tribunal held in this case that the SEBI's power to pass ex parte orders exists but only in extreme cases of urgency. The present case according to the Tribunal was not an extreme case of urgency.

Aggrieved by this, the Appellant appealed to the SC, which affirmed the Tribunal's decision.

Authors' Note:

It is noteworthy that SC has not interfered with the proceedings of SAT thereby upholding the natural justice principle of audi alteram partem – the right to a fair hearing, by affirming the Tribunal's decision to quash the ex parte order of SEBI. The matter was pending under investigation since 2017 and is related to certain sale of shares during October 2016 and more importantly the investigating authority has called for information during November 2019, thus it clearly indicates that ex-parte order passed during pandemic is an unusual act and SAT has rightly given the chance of fair hearing to respondent.

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SEBI slaps a fine of INR 45 Lakhs on KMP's for IPO fund diversion and prospectus misstatement

Paramount Packaging Ltd
Adjudication Order No. PM/NR/2020-21/9599-9601

SEBI conducted an investigation in the IPO of Paramount Printpackaging Ltd. to analyze and examine the trading pattern, bidding data and disclosure violations if any with regards to the IPO proceeds. The investigation revealed that the Company had utilized only INR 357 lakhs towards objects stated in the prospectus and the balance INR 4,225 lakhs was not utilized for the said objects, further, out of INR 4,225 lakhs, INR 3,887 lakhs were diverted to different entities in the guise of making payments towards the objects stated in prospectus.

It was observed that the Managing Director and 2 Whole-Time Directors of the Company ('Noticees') had no intention of utilizing the IPO proceeds towards the objects of the issue disclosed in the prospectus, as they took no action to ensure performance of contracts against vendors for three years. The Noticees had also failed to show any prudence before the transfer of funds to the recipient entities. It was also observed that the Noticees failed to disclose material information (regarding the vendors being pre-determined to whom IPO proceeds were transferred), which would be true and adequate to enable the applicants of IPO to take an informed investment decision, thereby misleading and defrauding the investors by making reckless and careless representation and manipulative disclosures in the prospectus, the Noticees misled the investors and induced them to subscribe to the shares in the IPO.

Therefore, for diverting proceeds from Company's IPO and making wrong disclosures in violation of PFUTP Regulations and ICDR Regulations, SEBI imposed a penalty of Rs. 45 lakh on the Noticees who were responsible for managing the affairs of the Company stating that the corporate veil can be lifted in cases of fraud of the Company and the directors can be held liable.

SEBI also denounced the Noticees for impairing the integrity of the securities market by defrauding and misleading investors with wrong disclosures in the prospectus.

Authors' Note:

The SEBI has taken a proactive step in curbing instances of IPO fraud by KMP's of Companies. However, the penalty levied is a paltry sum in comparison to the magnitude of the fraud. Also, such a fraud cannot take place by the actions of three individuals, a lot more people are involved in this fraud and all of them should be penalized. It is also important to note that SEBI shall also introspect what due diligence was carried out by merchant bankers while framing the objects of IPO as they simply can't wash away their hands from this overall context. This is a typical case of abuse of power by certain individuals while others responsible for enduring governance and due diligence followed a mooted approach.

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SC upholds the transfer of winding up proceedings to NCLT at any stage

Action Ispat and Power Pvt. Ltd. vs. Shyam Metalics and Energy Ltd. 2020-TIOLCORP-12-SC-CA-LB

A winding up petition was filed before the HC by Respondent No.1, seeking winding up of the Appellant company for the debt owed by it to Respondent No.1. The Court passed an order for winding up in August 2018. Later, an application was then filed by Respondent No. 2, a secured creditor of the Appellant Company, seeking transfer of the winding up petition to the NCLT in view of the fact that they had filed an application under section 7 of the IBC which was pending before the NCLT. As a result of which, the Company Court transferred the petition NCLT through its order dated January 2019.

Aggrieved by this transfer, the Appellant Company approached the Division Bench of the High Court which affirmed the transfer. Thereafter, the Appellant Company went in appeal before the Supreme Court which upheld the order passed by High Court to enable transfer of proceedings from company court to NCLT.

The Supreme Court noted that this Court has unequivocally laid down that the 5th proviso to section 434(1)(c) of the Companies Act, 2013 now makes it clear that a discretion is vested in the Company Court to transfer winding up proceedings to the NCLT without reference to the stage of winding up.

Even post admission, if no irreversible steps have been taken, then a combined reading of the 5th proviso to section 434(1)(c) and section 238 of the Code would lead to the result that the winding up proceeding be transferred to the NCLT, as not only is the Code a special enactment with a non-obstante clause which would, in cases of conflict, do away with the Companies Act, 2013, but also that, given the judgment of this Court in Swiss Ribbons Pvt. Ltd. & Anr. v. Union of India & Ors., (2019) 4 SCC 17 ["Swiss Ribbons"], winding up is a last resort after all efforts to revive a company fail. Accordingly, the discretion exercised by the Company Court and the Division Bench has been judiciously and correctly exercised, warranting no interference at our hands.

As is discernible, the Preamble gives an insight into what is sought to be achieved by the Code. The Code is first and foremost, a Code for reorganization and insolvency resolution of corporate debtors. Unless such reorganization is effected in a time-bound manner, the value of the assets of such persons will deplete. Therefore, maximization of value of the assets of such persons so that they are efficiently run as going concerns is another very important objective of the Code.

SC thus, dismissed the appeal, opining that the Company Court has correctly exercised the discretion vested in it by the fifth provision to section 434 (1)(c).

Authors' Note:

The transfer of the winding up proceedings under the fifth proviso prevents parallel proceedings in both the forums. Parallel proceedings against a corporate debtor in both forums would be a recipe for conflict. The clarification of the Supreme Court on the scope of this provision was much needed and a welcome step, however in various practical cases, it would be a hardship for companies which has already reached an advance stage of winding up before the Company Court to start the process afresh. The same would not only result into additional costs but would also delay the process. However as rightly mentioned by the Hon'ble Supreme Court that Company Court shall use its discretion to decide on transfer which one shall believe that, it's been used judiciously considering all facts and circumstances of the case.

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Procedure for acquisition of shareholding of minority shareholders held in dematerialized form

Central Government amends the Companies (Compromises, Arrangements and Amalgamations) Rules, 2016 and these rules may be called as Companies (Compromises, Arrangements and Amalgamations) Second Amendment Rules, 2020. Through this amendment notification, the MCA has laid down the procedure for acquisition of shares held by minority shareholders in dematerialized form under Section 236 of the Companies Act, 2013. Section 236 provides for a mechanism which stipulates that majority shareholders holding 90% or more shareholding shall notify the company of its intention to acquire shares of minority shareholders and majority shareholder shall deposit the amount equal to value of shares to be acquired by them in a designated account.

These said rules provides following stipulated procedure:

- The company shall verify the details of minority shareholders holding shares in dematerialized form, within two weeks of receipt of amount equal to value of shares to be acquired by majority shareholders.

- After due verification as specified above, the company shall send a notice specifying a cut-off date, not earlier than one month of sending notice, to such minority shareholders by registered post or by speed post or by courier or by email. Cut-off date is a date on which shares of minority shareholders shall be debited from their account and credited to the designated DEMAT account of the company.

- Simultaneously, a copy of such notice shall be published in two widely circulated newspapers (one in English and one in vernacular language) in the district in which the registered office of the company is situated and shall also be uploaded on the website of the company, if any.

- The company shall inform the depository immediately after publication of the notice specifying cut-off date and submit the following declarations stating that.

  - the corporate action is being effected under the provisions of Section 236
  - a notice containing cut-off date and information about corporate action, has been served upon the minority shareholders holding shares in demat form;
  - the minority shareholders shall be paid by the company immediately after completion of corporate action;
  - any dispute or complaints arising out of such corporate action shall be the sole responsibility of the company.

  For the purpose of effecting corporate action and informing depository, board shall authorize Company Secretary, or in his absence any other person.

- Upon receipt of information, the depository shall ensure that all the shares of minority have been transferred to the designated DEMAT of the company in favour of acquirer on the cut-off date.

- Where there is a specific order of Court or Tribunal, or statutory authority restraining any transfer of such shares and payment of dividend, or where such shares are pledged or hypothecated under the provisions of the Depositories Act, 1996, the depository

shall not transfer such shares of the minority shareholders to the designated DEMAT account of the company.

- After receiving the intimation from the depository, the company shall immediately pay the price of shares so transferred, to each of the minority shareholders after deducting the applicable stamp duty.

- After successful payment to the minority shareholders, the company shall inform the depository to transfer the shares kept in designated DEMAT account of the company, to the DEMAT of the acquirer.

Authors' Note:

The 'Rule of Majority' principle was recognized in a landmark case Foss v. Harbottle, where it was held that minority shareholders are bound by the decision of the majority shareholders and the Courts do not interfere in the internal matters of the Company. To avoid the misuse of same principle and protect the interest of minorities, Section 236 was inserted to provide an option to minorities to offer the shares held by them at fair value to the majority shareholders. Drawback of Section 236 was that it provides for the acquisition of shares held by shareholder in physical form.

Therefore, the intent of the law behind the enforcement of Section 236 remains unfulfilled in case of shares held in dematerialized form. To fulfill this intent of the law, Rule 9A was added to provide the procedure for acquisition of shares of minority shareholder holding in DEMAT form.

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Applicability of certain provisions of Companies Amendment Act, 2020

Companies Amendment Act, 2020 ('CAA, 2020') was introduced in September month of 2020. Some of the key changes introduced by this amendment Act were related to decriminalization of offences and underlying penalties under the Companies Act. Section 1 of CAA, 2020 provides that the Central Government may announce an appointed date by notification for applicability of respective provisions as introduced in Amendment Act.

Consequently, the Government has notified various sections of Companies Amendment Act 2020 by an official notification dated 21st December 2020. The significant part of sections notified pertains to penalties which have been decriminalized under the amendments.

Authors' Note:

In our previous edition of Vision 360, we have deliberated upon the essence of decimalization of offences under Companies Act, which was much needed as there has been various instances where small errors or omissions were being treated as criminal offence. The notification of such changes by Government is a welcome move and re-emphasizes the fact that government is focused on better corporate governance.

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Relaxation for passing online proficiency self-assessment test by independent directors

Rule 6(4) of Companies (Appointment and Qualifications of Directors) Rules, 2014 requires the independent directors to pass online proficiency self-assessment test (OPST) for inclusion of their name in the data bank of independent directors being maintained by Indian Institute of Corporate Affairs. Through the amendment notification dated 8th December, 2020, Central Government has relaxed these provisions to some extent.

Salient features of these amendments

Increased time period to pass online test: Earlier, every individual whose name was included in the data bank of of institute, was required to clear the online proficiency test within one year time period, otherwise name was excluded from the data bank.

Now this time limit of one year has been extended to two years.

Relaxation from passing online proficiency test: Earlier, there were certain relaxations from online test only in cases where a person had served as a director or KMP for at least 10 years in a listed company or a unlisted company meeting the minimum paid up share capital criteria. The same has been relaxed to 3 years and various other eligibility criteria has been added with above amendment. The revised criteria for relaxation from test are as follows:

An individual shall not be required to pass the online proficiency test if he has served for a total period of not less than 3 years as on the date of inclusion of his name in the data bank,

- **as a Director or KMP**, in one or more of the following body corporate, namely:

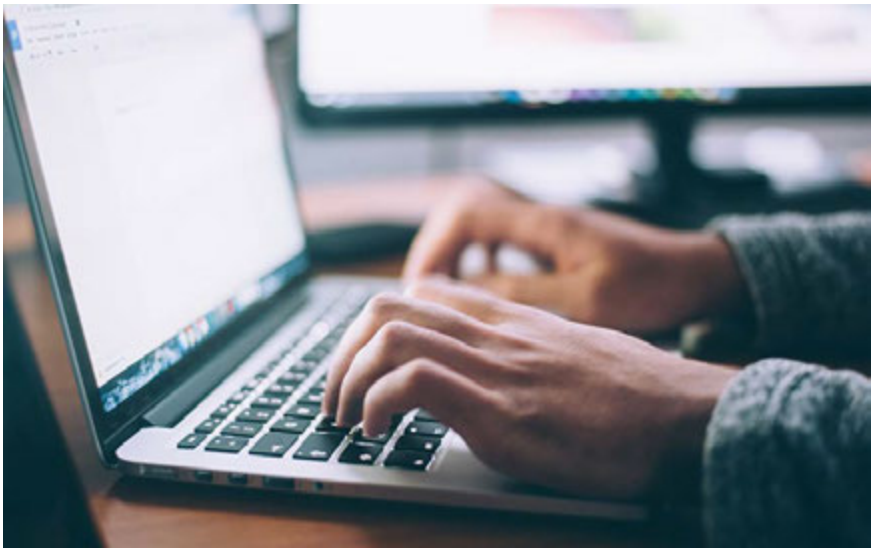
(a) listed public company; or

(b) unlisted public company having a paid up share capital of rupees ten crore or more; or

(c) body corporate listed on any recognized stock exchange or in a country which is a member State of the Financial Action Task Force on Money Laundering and the regulator of the securities market in such member State is a member of the International Organization of Securities Commissions; or

(d) bodies corporate incorporated outside india having paid-up share capital of US$ 2 Miilion or more; or

(e) statutory corporations set up under an Act of Parliament or any State Legislature carrying on commercial activities; or



- **Associated with Central Government**: in the pay scale of Director or above in the MCA or the Ministry of Finance or Ministry of Commerce and Industry or the Ministry of Heavy Industries and Public Enterprises and having experience in handling the matters relating to corporate laws or securities laws or economic laws; or:

- **Associated with Various Regulators**: in the pay scale of Chief General Manager or above in the Securities and Exchange Board (SEBI) or the Reserve Bank of India (RBI) or the Insurance Regulatory and Development Authority of India (IRDAI) or the Pension Fund Regulatory and Development Authority (PFRDA) and having experience in handling the matters relating to corporate laws or securities laws or economic laws

- For the purpose of reckoning the period of 3 years mentioned above, period for which an individual has served as director or KMP of two or more companies or body corporates or statutory corporations at the same time, shall be counted only once.

Reduced Passing Score in Online Proficiency Test: An individual has to obtain 50% score in online proficiency test to pass such test. Earlier it was 60% to pass such test.

Authors' Note:

This relaxation will simplify the process of inclusion of name of independent director into the data bank of Indian Institute of Corporate Affairs. With the widening of definition for directors and KMP, the number of eligible people (without online proficiency test) would increase and same would help companies to have eminent and experienced people on their board which would further strengthen corporate governance.

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Amendments to FEMA (NDI) Rules, 2020 with regards to increase in FDI in Defence Sector

These amended rules may be called the Foreign Exchange Management (Non-Debt Instrument) (Fourth Amendment) Rules, 2020. Through Press Note 4 dated 17th September, 2020 issued by DPIIT, FDI limit in Defence sector (new entities) under automatic entry route was increased to 74% from 49%. Through PN 4, changes to sectoral conditions for FDI in Defence sector has already been introduced. To give effects to these changes, following changes have been made to Foreign Exchange Management Act (Non-Debt instruments) Rules, 2019.

Sector/Activity	Sectoral Cap	Entry Route
Defence Defence Industry subject to Industrial license under the Industries (Development and Regulation) Act, 1951 and Manufacturing of small arms and ammunition under the Arms Act, 1959	100%	**Up to 74% (Under Automatic Route)** Government route beyond 74% wherever it is likely to result in access to modern technology or for other reasons to be recorded

Changes in Sectoral Conditions for FDI

- FDI up to 74% under automatic route shall be allowed for companies requiring new industrial licenses.
- A company not requiring industrial license or which already has Government approval for FDI in Defence, shall submit a declaration, within 30 days, with Ministry of Defence in case of:
  - Infusion of fresh foreign investment up to 49%
  - Change in equity/shareholding pattern or transfer of stake to new foreign investor for FDI up to 49%.
- A company not requiring industrial license or which already has Government approval for FDI in Defence, shall obtain Government Approval for raising FDI beyond 49%.
- License applications will be considered by the DPIIT, Ministry of Commerce and Industry, in consultation with Ministry of Defence and Ministry of External Affairs.
- Foreign investment in the sector shall be subject to security clearance by the Ministry of Home Affairs and as per guidelines of the Ministry of Defence.
- Foreign investments in the Defence sector shall be subject to scrutiny on grounds of national security and Government reserves the right to review any foreign investment in the Defence sector that affects or may affect national security.
- Investee company shall be structured to be self-sufficient in the areas of product design and development and the investee or joint venture company along with the manufacturing facility, shall also have maintenance and life cycle support facility of the product being manufactured in India.

Exemption from restriction against FDI from countries sharing border with India

Through Press Note 3 dated 17th April, 2020 issued by DPIIT, Government approval was required to obtain for FDI or investment from non-resident entities or entities whose beneficial owners belong to such countries sharing border with India for both primary and secondary acquisition. Changes to said effect have already been made to FEMA (NDI) Rules, 2019.

Such requirement has now been relaxed for Multilateral Bank or Fund through this notification dated 8th December, 2020 which provides that a Multilateral Bank or Fund, of which India is a member, shall not be treated as an entity of a particular country nor shall any country be treated as the beneficial owner of the investments of such Bank or Fund in India.

Authors' Note:

These changes were expected to be made to the FEMA Rules after DPIIT has issued the press note 4 dated 17th September, 2020 regarding the increase in sectoral cap for Defence Sector. Prime Minister Narendra Modi on August 27 had announced the Centre's plan to allow 74 percent FDI in the defence sector through the automatic route. He pointed out that the move may prove a major push for 'Aatmanirbhar Bharat' in defence manufacturing.

Press Note 3 dated 17th April, 2020 issued for DPIIT for putting the FDI from countries sharing border with India under Government Surveillance, has not clarified the nature of investors covered under its purview and the beneficial owner threshold which led to lot of confusion. However, this notification has clarified that Multilateral Bank or Fund will not be covered under such restrictions.

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Extension of applicability of IBC for further three months

Vide notification no. S.O. 4638(E) dated 22nd December, 2020, Central Government has suspended the applicability of the Insolvency and Bankruptcy Code, 2016 for further period of three months from the 25th December, 2020 in exercise of power conferred by section 10A of the Insolvency and Bankruptcy Code, 2016.

Authors' Note:

Suspension of insolvency cases against fresh Covid-related defaults has been extended by another three months from December 25 2020. The government has already obtained Parliamentary apporval, through the Insolvency and Bankruptcy Code (Second Amendment) Bill, 2020, for a suspension of the initiation of insolvency proceedings for fresh defaults from March 25 2020, for a period up to one year. Initially, the suspension was kept valid for six months, which was later extended by three months.

The idea behind the suspension is to help thousands of cash-strapped firms tide over the Covid impact without the fears of getting dragged to the NCLT.

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Extension of applicability of Companies Auditors' Report Order, 2020

Companies Auditors' Report Order, 2020 ('CARO') has been notified in February, 2020 month for audit of financial statements of eligible companies for the financial years commencing on or after the 1st April, 2019 which later on extended to be applicable from 1st April, 2020.

Now, vide notification no. S.O. 4588(E) dated 17th December, 2020, applicability of CARO, 2020 is further extended to the financial year commencing on or after 1st April, 2021.

Authors' Note:

This move is to provide a relief to auditors to comply with new CARO requirement due to COVID disruption in the whole world. The new version of CARO report requires auditors to do detailed reporting on various financial aspects of company such as borrowings, compliances of loan covenants, benami transactions etc. While the corporate world is going through a stressed time, these additional compliances would have resulted into lot of additional effort at both company as well as auditor's end. Therefore, extension of applicability by 1 more year is a welcome move and shall provide much needed relief to auditors as well as auditees.

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OCED declares peer review results on Automatic Exchange of Information

The OECD has declared its Peer Review Results on implementation of New International Standards of Automatic Exchange of Information ('AEOI'). The Peer Review of AEOI reports 88% of jurisdictions engaged in AEOI to have a satisfactory legal structure in place, which is a key indicator of effective implementation. In 2019, information on 84 million financial accounts was automatically exchanged between countries worldwide, covering total assets of USD 10 Trillion.

[Ref: http://www.oecd.org/tax/international-community-reaches-important-milestone-in-fight-against-tax-evasion.htm]

The second stage of the monitoring process will assess the effectiveness of AEOI in more than 100 jurisdictions.

Authors' Note:

With continuous efforts by the OECD and increased co-operation by jurisdictional powers, the financial numbers can now be closely monitored to unearth tax evasions. This also implies that a carefully represented global arrangement by the MNEs is a pre-requisite in order to avoid any gap in reporting across jurisdictions.

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TRANSFER PRICING

OECD releases guidance on TP implications *qua* COVID-19 pandemic

The OECD has recently release guidance on the Transfer Pricing implications of Covid-19. The guidance is broadly divided into 4 parts: (i) Comparability analysis; (ii) Losses and the allocation of COVID-19 specific costs; (iii) Government Assistance Programs; and (iv) APAs.

The OECD guidance focuses on resolving practical problems due to unique and unprecedented economic conditions created by COVID-19 for the application of the ALP in respect of controlled transactions. Further the guidance also answers the practical questions in relation to information deficiencies and use of budgeted financial statements to support setting of ALP.

In relation to APAs, guidance elucidates that mere change in the economic circumstances may not tantamount to breach of a critical assumption and therefore neither taxpayer nor government can disregard the existing APAs. Further provides way forward for tax administrations for revision, cancellation and revocation of APAs in case change in the economic circumstances due to COVID-19 is considered as breach of critical assumptions under APA under local tax provisions.

The Guidance also encourages adoption of a flexible and collaborative approach for APAs under negotiations which intends to cover FY 2020 as covered period.

Authors' Note:

The Guidance provides clarity on numerous issues on comparability analysis to arrive ALP. This will be useful to the taxpayers in India while conducting benchmarking for FY 2020-21. Further, the Guidance focuses on contemporaneous documentation taking into account the changes in economic circumstances by COVID-19 and use of appropriate comparability adjustments to eliminate the differences while computing a profit level indicator.

The Guidance is also focused on APAs, which are widely used as effective dispute resolution mechanism. It is advisable to evaluate further actions towards APAs considering commercial aspects and guidance by the OECD.

Oman announces VAT Registration & Implementation timelines

Omani Tax Authorities have recently issued a guidance specifying the timelines for mandatory registration under Omani VAT Laws. Oman has decided to implement VAT in a phased manner wherein VAT registration timelines for various categories of tax payers shall be different. The subject timelines are summarized in the ensuing table

Cateogry	Threshold for Annual Taxable Supplies (In OMR)	Mandatory Registration Timelines	Effective Date of VAT Registration
A	More than 1 Million	February 1, 2021 to March 15, 2021	April 16, 2021
B	500,000 to 999,999	April 1, 2021 to May 31, 2021	July 1, 2021
C	250,000 to 499,999	July 1, 2021 to August 31, 2021	October 1, 2021
D	38,500 to 249,999	December 1, 2021 to February 28, 2022	April 1, 2022

It may be noted that there is no restriction on tax payers to opt for voluntarily registration before the said timelines. However, the threshold for voluntary registration is above OMR 19,250 and the same ought to be adhered to.

Authors' Note:

Omani Tax Authorities have followed the footsteps of Saudi Arabia and Bahrain by rolling-out VAT in a phased manner wherein big tax payers shall be required to register earlier and smaller businesses shall follow.

With introduction of VAT, a new indirect tax regime shall begin in Oman. As indirect tax is relatively a new concept for businesses in Oman it will be critical for businesses to assess the impact of VAT on its standard operation procedures, costs, working capital requirements, information systems, and documentations, etc. On evaluation of impact of VAT, the businesses will have to take proper steps to address these concerns, fix gaps in systems, test the software and IT infrastructure, and train the employees before implementation of VAT in order to ensure they are VAT compliant prior to VAT rollout. Notably, personal liability is placed on responsible persons viz. Manager or Director to ensure correct implementation of VAT laws.

As the timelines for registration and VAT roll-out are fast approaching, it is advisable for tax payers operating in Oman to be prepared well in advance for smooth VAT implementation.

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RoDTEP: Rush implementation & Exporter's inaction to co-operate with the authorities could cost them dearly!

Dusk of year-end eve and dawn of new-year brought with it a lot of hustle for tax professionals. With mixed reactions on extension of various due dates for key compliances such as tax audits, return filing, etc. the professionals, especially the ones engaged in export of goods, were also caught unguarded with announcement qua implementation of Remission of Duties and Taxes on Export of Products ***('RoDTEP')***..

Though RoDTEP is being portrayed as benevolent scheme, an exporter knows well, it also means end of erstwhile export promotion viz. Merchandise Export from India Scheme ***('MEIS')***, which many hoped to have extended at least till March 31, 2021 not only because it is only logical to change over a policy with change of financial year, but also because MEIS provided for incentivisation that is hard for RoDTEP to match up with.

As a matter of fact, introducing RoDTEP on April 01, 2021 would also have provided additional buffer time for the exporters a well as the authorities to outline the entire scheme with clarity and put in place the necessary system to operate the same. It would be no surprise if a series of Writ Petitions are filed by exporters suffering from lack of clarity and loss of export incentives. The haphazard manner with which introduction of RoDTEP is announced is an indicator that Government haven't learned its lessons from implementing GST!

The year 2020 has been nothing but a difficult one to keep up the routine chores itself. In these, expecting the exporters to have prepared themselves well for transitioning from MEIS to embracing RoDTEP at such a short notice is over ambitious. This brings a prudent tax payer to wonder why the rush for implementing RoDTEP? What could be the underlined approach?

The answer could be found in many recent statutory and policy changes. To name a few: Capping MEIS benefit to INR 2 crore per exporter, continued silence on availability of SEIS for year 2020-21 and applicability of rate for 2019-20, compulsion to discharging 1% of tax liability in cash irrespective of availability of ITC, further restriction to 5% from earlier 10% on availment of ITC w.r.t. unreported invoices, stringent policies for cancellation of registration, imposition of penalties, etc. If one is able to connect the dots, a larger picture depicts conservative approach of the Government in allowing tax benefits.

If this is to be true, then WTO's framework and decisions by its dispute panel is only an artifice that Government is pointing its fingers to reduce the incentivisation and restrict its monetary outflows; and if this is any indication then sufficiency of the RoDTEP benefit to be announced soon would only be a mirage. By now it has become clear that RoDTEP is not about 'leveraging on incentivisation' but 'minimising the shortfall'!

The Sparkle...

The given circumstances thus demand a strategic approach from exporters to depict tax costs in line with WTO/RoDTEP framework which broadly refers to a variety of tax costs such as non-creditable GST, taxes and duties paid on fuel, stamp duty, electricity duty, fuel and tax costs embedded in freight, etc. Interestingly the authorities have also shown an inclination to cover the

prior stage tax incidence i.e. tax cost suffered by vendor and its supply chain to beef-up the RoDTEP benefit, after all a 'drowning man will clutch at a straw'!

The overall framework of RoDTEP is also likely to subsume Advance Authorisation and Duty Drawback in near future so as to simplify the overall export benefits. The basic RoDTEP rate as may be introduced initially is thus likely to be enhanced to compensate the tax incidence of Basic Customs Duty.

WHISPERS FROM RoDTEP COMMITTEE'S CORRIDOR ARE ALSO THAT RoDTEP RATE COULD BE AS MEAGRE AS 0.75% TO 1% UNLESS SUPPORTING DATA FOR HIGHER RATE IS PRESENTED.

Apart from sufficiency, scope of RoDTEP to cover exports made from EOU, EHTP, BTP, STP is also an area of debate that has carried on from erstwhile MEIS regime. Despite being an incentive to offset infrastructural inefficiencies, MEIS was not made applicable to exports from EOU, EHTP, BTP, STP. The distinction made for EOU, EHTP, BTP, STP was highly debated and seen as erroneous. If such a distinction is not done away with, RoDTEP would continue to fall short of its intent of supporting exporters. It is noteworthy, that post implementation of GST, the only benefit an EOU, EHTP, BTP, STP attracts is that of Basic Customs Duty exemption and as such these units stand at par with any other DTA unit availing benefits of Advance Authorisation or Duty Drawback, in such a case, it is even more necessary to extend the RoDTEP benefit to these units.

Given that authorities are about to announce the rate for various priority sectors such as textile, iron and steel, automobile to be followed by other sectors, it is just the right time to make these efforts to safeguard the maximum benefit, any delay would only make the exporters to miss the boat. Whispers from RoDTEP committee's corridor are also that RoDTEP rate could be as meagre as 0.75% to 1% unless supporting data for higher rate is presented. So industry alone is to be blamed for losing out on higher RoDTEP for sitting ducks at the mercy of officials to provide a benevolent rate!

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GLOSSARY

Abbreviation	Meaning	Abbreviation	Meaning
AAAR	Appellate Authority of Advanced Ruling	IRP	Invoice Registration Portal
AAR	Authority of Advance Ruling	ITA	Interactive Tax Assistant
ACIT	Assistant Commissioner of Income Tax	ITAT	Hon'ble Income Tax Appellate Tribunal
AE	Associated Enterprise	ITC	Input Tax Credit
ALP	Arm's Length Price	ITES	Information Technology Enabled Services
AMP	Advertisement Marketing and Promotion	MAT	Minimum Alternate Tax
AO	Assessing Officer	MRP	Maximum Retail Price
APA	Advance Pricing Agreement	NAA	National Anti-Profiteering Authority
APU	Authorized Public Undertaking	NCLAT	National Company Law Appallete Tribunal
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	RoDTEP	Remission of Duties and Taxes on Export of Products
CESTAT	Custom Excise and Service Tax Appellate Tribunal	SC	Hon'ble Supreme Court
CGST Act	Central Goods and Services Tax Act, 2017	SCM	Subsidies and Countervailing Measures
CIRP	Corporate Insolvency Resolution Process	SCRR	Securities Contracts (Regulation) Rules, 1957
CIT(A)	Commissioner of Income Tax (Appeal)	SLP	Special Leave Petition
CLU	Changing Land Use	TCS	Tax Collected at Source
CSD	Canteen Stores Department	TDS	Tax Deducted at Source
CWF	Consumer Welfare Fund	The CP Act	The Consumer Protection Act, 2019
DCIT	Deputy Commissioner of Income Tax	The IT Act	The Income-tax Act, 1961
DGAP	Directorate General of Anti-Profiting	The IT Rules	The Income-tax Rules, 1962
DGFT	Directorate General of Foreign Trade	TPO	Transfer Pricing Officer
DRP	Dispute Resolution Panel	UN TP Manual	United Nations Practice Manual on Transfer Pricing
Finance Act	The Finance Act, 1994	VAT	Value Added Tax
GST	Goods and Services Tax	VSV	Vivad se Vishwas
HC	Hon'ble High Court	NeAC	National e-Assessment Centre
IBC	International Business Corporation	The LT Act	The Limitation Act, 1963
IGST	Integrated Goods and Services Tax	CIRP	Corporate Insolvency Resolution Process
IGST Act	Integrated Goods and Services Tax Act, 2017	MPS	Minimum Public Shareholding

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FIRM INTRODUCTION

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

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

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.

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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