VISION 360

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A TREASURY OF KEY TAX & REGULATORY DEVELOPMENTS!

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Vision 360: Shedding light on a brighter future…

The budget announcements have certainly grabbed eyeballs of every tax and finance professional. The budget which came at a time when expectations were high, have certainly earned accolades for being 'growth oriented' and 'reformative' with its thrust on capital investment and absence of any levy to recoup economic impact of COVID.

If one has to highlight the proposals, increased spending on key sectors, unchanged Income tax slabs, removal of GST audit, increased Customs duty to create conducive environment for domestic manufacturing, would certainly be seen as clear winners, although the proposal also contained some unexpected dampeners like excluding goodwill out of depreciation, restrictions on availment of Input Tax Credit, narrowing the scope of Zero-rated supply, etc. Yet, overall, the budget seems to be received positively by most, and country's top stock exchanges are of any reference, it only evidenced a positive sentiment with a surge of about 5% in its indices in a day.

BUDGET SEEMS TO BE RECEIVED POSITIVELY BY MOST, AND COUNTRY'S TOP STOCK EXCHANGES ARE OF ANY REFERENCE, IT ONLY EVIDENCED A POSITIVE SENTIMENT WITH A SURGE OF ABOUT 5% IN ITS INDICES IN A DAY.

Diving deeper into the direct tax changes, reduced time limit for reopening of past cases from six to three years and benefit of lower withholding rates under tax treaties for foreign shareholders in Indian companies comes across as a welcome change for sure. But, faceless assessments, although a move towards technological advancements in faster and seamless assessments, has its own side story where assessees would be left wondering if their issues have been understood and appreciated appropriately.

Further, with respect to indirect taxes, removal of mandatory requirement to getting annual accounts audited and reconciliation statement submitted by specified professional, is a significant change leading to industrywide positive impact on easing out the compliance requirements.

It is a mix of sentiments so far as GST related proposals are concerned. On one hand it is a bit too strict to allow ITC only if the supplier has furnished details of invoice or debit note in its return, on the other hand it is indeed a welcome step to see the budget finally effectuate GST Council's decision to retrospectively amend the law so as to charge interest only on net cash liability. Amongst all these changes, one couldn't fail to notice that while the Indian economy is very much on its way to emerge out of COVID -19 crisis, the display of commitment and sheer will of the Finance Minister will act as a catalyst in the next phase of the growth process, provided these proposals are addressed with 'focused implementation'.

Speaking of developments globally, the BEPS action plan was discussed by the European Union in its parliament where it faced some stark criticism for 'Minimum Standards of BEPS' and how these are in dire need of transparency and strengthening so as to implement BEPS in its true spirit. The discussions cited Bermuda, Cayman island as undue beneficiaries of this Minimum Standards and questioned its authenticity to exclude these countries from harmful region. The Parliament also advocated inclusion of all the territories that offer no-negligible corporate tax. It is worthwhile to see how other signatories to BEPS react to such criticism.

To sum up, the budget has now been announced which has put an end to many 'to be - not to be' situation and laid a clear path, while global tax horizon has mainly remained status quo. We the entire team of **TIOL**, in association with **Taxcraft Advisors LLP**, **GST Legal Services LLP** and **VMG & Associates**, have yet again sought to bring all the key development for your handy reference.

Happy Reading!

P.S.: This document is designed to begin with a comprehensive article peeking into recent tax issue 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 for some global trivia.

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GST refund: Yet another amendment; clarity or chaos?

The GST law can still be said to be in a nascent stage, given that it has hardly been four years since its implementation. However, it has already been amended more than a few dozen times until now. Amendments in law should generally be carried out only in cases to remove defects or to bring about necessary changes, otherwise it only creates confusion leading to uncertainty for the tax payers. However, frequent amendment of law is not a new phenomenon in India as the Supreme law of the Country i.e., the Constitution of India, itself has been more than a hundred times since 1950.

On the GST front, most notably, the refund provisions have been amended frequently by issuing multiple circulars which creates more confusion amongst the taxpayers. Further Rules are also amended time and time in line with the clarifications. And now, in order to align the amendments in the GST Rules, the Government has proposed necessary changes in the GST law itself.

The proposed amendment to Section 16 of the IGST Act, which deal with refund arising from zero-rated supply of goods and services, are summarized below:

Sr. No.	Provisions of law	Summary of amendments
1.	Supply to SEZ	The definition of the terms Zero rated supply has been proposed to be amended so that supply of goods and services to SEZ Unit / Developer 'for authorized operations' would only be qualified as Zero-rated supply.
2.	Subsection (3) has been proposed to be substituted with a new subsection (3).	Additional condition is proposed to be laid down for claiming refund of unutilized ITC on account of Zero-rated supply of goods. The Government has made it mandatory to realize export proceeds in convertible foreign exchange within the time limit prescribed under the FEMA provisions.
3.	Sub-Section 4 has been proposed to be inserted	Government on recommendation of council may notify the following class of person for claiming refund of integrated tax paid on export of goods: (i) a class of persons who may make zero rated supply on payment of integrated tax and claim refund of the tax so paid; and (ii) a class of goods or services which may be exported on payment of integrated tax and the supplier of such goods or services may claim the refund of tax so paid.

I. Supply to SEZ – Section 16(1)

In order to promote export of goods and services and remove burden of taxes on export supplies, the Government has exempted the supplies of goods and services to SEZ for authorized operations. The definition of the authorised operations and the relevant provisions of the IGST Act, clearly establish that the Units operating in the SEZ are required to undertake well defined activities. SEZ unit or developer can undertake 'Authorized operations' which are specified in the letter of approval issued by Development Commissioner of SEZ. It would pertinent to note that such type of exemption from payment of tax was also available under the pre-GST regime.

It would be pertinent to note that the Section 16(2)(b) of the IGST Act defines supply of goods and services to SEZ unit or developer as the Zero-rated supply. Further, Rule 89 of the CGST Rules provides that the application for refund shall only be filed by the supplier in respect of goods and services which have been used for authorised operation.

In this regard, it would be pertinent to refer to the Ruling of Karnataka AAR in the case of M/s. Coffee Day Global Limited **[2018-TIOL-114-AAR-GST]** had observed that the benefit flowing out from the SEZ Act, accrues only when the condition of authorized operations is fulfilled. Further, it was held that even in the event of the IGST Act, not explicitly using the term "authorised operations in Section 16(1)(b), it is implicit that the supply of goods or services or both described in Section 16(1)(b) have to be read as in relation to authorized operations.

In view of the above, the Government has explicitly included the word authorised operation under the provisions of Section 16(1)(b) so as to avoid any confusion among the suppliers of Goods and Services to the SEZ.

II. Amendment to Section 16(3) – Condition to realize consideration for claiming refund on account of exports of goods.

The Government has prescribed an important condition for realization of sale proceeds within the time limit prescribed under the provisions of FEMA for the purpose of claiming refund of unutilized ITC in case of export of goods. The proposed Section 16(3) provides that the registered person making zero-rated supply of goods shall, in case of non-realization of sale proceeds, be liable to deposit the refund so received along with the applicable interest within thirty days after the expiry of the time limit prescribed under the FEMA for receipt of foreign exchange remittances, in such manner as may be prescribed.

In this regard, it would be also pertinent to refer to the provisions of Rule 96B which provides for recovery of refund claimed for unutilized ITC or integrated tax paid on account of export of goods, in case the export proceeds in respect of such goods are not realized within the time limit prescribed. Provisions of Rule 96B are summarized as below:

- The provision is applicable when the sale proceeds in respect of such export goods have not been realized within the period allowed under the provisions of FEMA Act. However, in cases where the Reserve Bank of India writes off the requirement of realization of sale proceeds on merits, the refund paid to the applicant shall not be recovered; and
- The relevant amount of refund claimed has to be paid back along with interest u/s 50 of the CGST Act. Once the export proceeds are realized, the assessee may file application within a period of 3 months from the date of realization claiming the refund of amount of tax so paid.

It seems that such an amendment has been brought with an objective to provide enabling provisions under the IGST Act for the operation of recently introduced Rule 96B vide Notification No. 16/2020 – Central 23 March 2020. However, there exist certain anomalies which are addressed as below.

(i) Proposed Section 16(3) only applicable to refund of unutilized ITC on exports made without payment of tax

The proposed provisions of Section 16(3) of the IGST Act only provides for recovery of refund of unstilted ITC on account of Zero-rated supply in case the payment has not been realized within the prescribed time lines. Further, Section 16 is silent upon a situation when the consideration is not received for supplies of export made with payment of tax. So a view may be taken that such provisions is discriminatory between the exporters which are exporting goods and services with payment of tax and the exporters which are exporting the goods and services without payment of tax.

(ii) Applicability of Rule 96B is prospective or retrospective

On plain reading of newly introduced Rule 96B, it can be inferred that such a rule imposes an additional condition on the taxpayers restricting its right to claim refund and therefore in the absence of any specific provision, it should be applicable from the date of their publication in the official Gazette i.e. on 2nd March, 2020. However, it needs to be clarified whether such amendment is also applicable in respect of goods where refund of ITC has been claimed in respect of such goods, which were already exported prior to the date of applicability of such notification.

In the above case, arguments may be made that the provisions of Rule 96B should not apply to cases where refund has also been claimed prior to the date of notification on the following grounds:

- It is well settled principle of law that any amendment is prospective unless specifically provided to operate retrospectively;

- Further, it has also been held in various judicial precedents that amendments which are of clarificatory or explanatory in nature or which impose an additional condition or curtail any benefit on the taxpayer cannot be applied retrospectively;

- An argument can also be made that such an amendment to recover an amount of refund claimed earlier for which exports proceeds are not realized restrict the right of the assessee to claim the refund which was granted as per the scheme of the law as applicable at the time when such right aroused. in such cases, such an amendment may be considered as breach of principle of promissory estoppel; and

- An alternate argument can be made that such an amendment to recover the refund of tax is penal in nature. In this regards it would be important to refer to Article 20(1) of the Constitution of India that provides protection against "Ex post facto laws". An "Ex post facto law" is a law that retrospectively affects the legal consequences of an act done or a liability vested before enactment of such law. Any enactment is prospective in nature and has no effect on what is already done unless it is specifically provided in the law.

Date of Applicability of Rule 96B and proposed amendment to Section 16(3)

The proposed provisions of Rule 16(3) will be applicable when the Finance Act 2021 will receive the assent of the president. Therefore, a question arises whether the provisions of Rule 96B would hold good during the period between the date of applicability of the Notification 16/2021 and the date of proposed amendment in Section 16(3). It is well settled principal of law that the Rules are sub-ordinate legislation and the provisions of Rules cannot supersede the provisions of Act. It can therefore be concluded that there is a lot of ambiguity with respect to the operation of the said provisions.

III. Proposed amendment to Section 16(4)

In the recent past the government has identified many cases of fraudulent claims of ITC refund in case of exports with payment of taxes. Further, the government has also time to time issued advisory with respect to monitoring the refund of IGST on exports.

Therefore, in order to monitor and control the refund of integrated tax paid on making zero rated supplies, the Government has restricted the refund of integrated tax paid on zero-rated supplies only to a notified class of taxpayers or notified supplies of goods or services.

Authors' Note:

One expects that the Government legislates tax laws which create an environment of certainty for the taxpayer. It would therefore be expected that suitable clarification be issued by the CBIC to avoid confusions among the taxpayers and unnecessary litigations arising therefrom.

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Nipun Mohanka

In Country Tax and Treasury Lead,
Mars International India Private Limited

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

What is your reaction on Budget 2021?

The Hon'ble Finance Minister seems to have struck a balancing act amidst the incumbent fiscal deficit and other economic challenges posed by the pandemic. Sensex too has reacted positively. No change in corporate tax rates is an extremely positive move from Hon'ble Finance Minister.

Faceless litigation at ITAT level, introduction of dispute resolution scheme and reduction in time limit for reopening cases are some of the bold moves to settle disputes in a timely manner! However, M&A space may take a hit owing to: (a) prospective disallowance of depreciation on goodwill; and (b) augmenting the fold of capital gains on slump exchange. Possible overlapping of TDS and TCS on purchase/ sale of goods may prove to be draconian from compliance perspective.

In all, it is a bold and positive budget!

How do you perceive introduction of RoDTEP scheme?

Abrupt discontinuation of MEIS and all the restrictions imposed for its availability felt a bit too harsh on exporters. No wonder a Petition challenging such restrictions are already filed in Gujarat High Court. Migration from MEIS to RoDTEP certainly became unavoidable, however it could have been handled in a more considerate manner by the authorities.

By now it is most certain that exporters are at losing end given the deficit between MEIS benefit and expected benefit based on proposed RoDTEP framework. Exporters need to strike some serious government advocacy in time. Many exporters would see shrinking profits in post MEIS times which would inevitably lead to reduced EPS ('Earning per Share'), a key concern for listed companies. Only alternative seems to be increased production which calls for capital expenditure. In a way, shortfall in export incentive would directly impact either profits or capital expenditure or both.

If I have to sum it up, gone are the days when business could look up-to government incentivisation for its sustainability. Now, strong fundamentals are the only path ahead.

Now that E-invoicing has become mandatory, what is your overall feedback on the system?

I think, the Government agencies have certainly learned from its experiences while implementing GST and floating the GST portal. Comparatively, E-invoicing has been quite effortless to comply with. The simplicity of the system lies in the fact that it provides only for validation of the documents, whilst all the regulatory provisions are already taken care by the GST portal itself.

It's also worthy to take note here that unlike return filing, annual audit, etc. the E-invoicing did not see postponement in its implementation, barring one in 2020 which was mainly prompted by COVID situation. In all, the system seems to be successfully implemented.

Given global presence of multinational group companies, do you see any difficulty in maintaining uniform classification?

As a general practice seen in big multi-national groups, the global counterparts align their classification with each other based on World Customs Organisations Harmonised System of Nomenclature. Each of the global counterparts are generally responsible for appropriate classification in their respective jurisdictions. In India, given the variance of tax rates, classification does call for a keen eye.

Any apparent concern qua practical challenges in GST Laws?

The GST law seems to be restricting scope of Input Tax Credit day by day. First with the cap of 20% under Rule 36(4) on input supplies unsupported by invoice/debit note, which was further restricted to 10% and now 5%.

Besides, the budget now also proposes to amend Section 16(2) so as to enables a recipient to avail ITC only when the supplier has duly furnished the relevant details on portal, effectively imposing and absolute restriction on input supplies unsupported by invoice/debit note.

Such restrictions although meant to curb mal-practices severely hamper genuine taxpayer too and must be looked at with empathy.

Whether the industry feels despair for not getting any deduction/exemption as a recovery measure in post COVID scenario?

As the Government intended to phase out various deductions and exemptions by introducing new taxation regime under Chapter XII of the IT Act, it was unlikely that Budget 2021 would come-up with a new deduction/exemption on the direct tax side. So there's no reason for being despaired. In any case, recently announced PLI schemes itself is a boost to specified industries

How do you see the faceless move in the era of direct taxation?

I see it as a bold step with good intent. Though there would be some challenges in the initial phase of implementation, but in the longer, it may turn out to be fruitful for the taxpayers. The only challenge would be to represent complex matters before lower authorities. The taxpayers would require to prepare their submission in a lucid manner to avoid any ambiguity. Also, this may increase the number of appeals at Tribunal level.

Your views on the new provisions qua collection of tax at source u/s 206(1H).

These sorts of provisions, where a seller has to collect 0.1% towards tax at the time of recovering payment and to deposit it the government treasury, looks simple only on the paper. And with the introduction of TDS on sale of goods in current year's Budget, the situation would become even more complex. The challenges with on ground implementation like changes in overall ERP system, changing the ongoing purchase/sales order, etc. and complying with it is obviously not a simple task. The industry was seeking various clarifications from CBDT for a long time.

How do you see results of recent economic survey coupled with government measures in reducing direct taxation disputes?

Although comments on survey could be limitless, from taxation front, I personally concur its results which tags faceless assessment/appeals and Taxpayers' Charter as major structural reforms.

Further qua litigation, survey has expressed opinion of masses that the success rate of litigation started by the Government is low and it ends up being financial burden on taxpayers.

However, the Government has been successful in resolving disputes vide Vivad se Vishwas Scheme – which has been one of the successful schemes for resolving long pending direct tax disputes. As per the official data, disputes more than INR 1 lakh crore have been settled with collection in excess of INR 70,000 crores.

***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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ITAT holds that Section 50C amendment providing tolerance limit is retrospective in nature

Maria Fernandes Cheryl
2021-TIOL-275-ITAT-MUM

The Assessee, a non-resident individual, sold her house for a consideration of INR 75 lakhs. The stamp duty valuation of the property was INR 79.91 lakhs. Capital gains was however computed by taking into consideration the sale value. The AO held that capital gains ought to be computed by taking into consideration the stamp duty valuation as per provisions of Section 50C of the IT Act.

The Assessee preferred an appeal before the CIT(A) who upheld the action of AO/TPO - aggrieved the Assessee approached the Hon'ble ITAT. The ITAT held that third proviso to Section 50C which provides for a tolerance limit between stamp duty value and sales consideration is a remedy to the unintended consequences of this provision. An amendment was made to increase the tolerance limit from 5% to 10% to address the loopholes/lacuna of the law and so has to be treated as retrospective in nature even though not stated explicitly.

Thus, on the basis the above findings, ITAT allowed the appeal and held that the variation between stamp duty and actual consideration was a mere 6.55% - therefore, falling within a threshold of 10% as prescribed by the amended third proviso to Section 50C. Accordingly, ITAT deleted the said adjustment

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ITAT holds that addition under Section 68 could not be made where return was filed u/s 44AD

Dineshkumar Verma
2021-TIOL-239-ITAT-MUM

The Assessee was a contractor of wood, tiles and marble works, filed his return of income under Section 44AD and did not maintain any books of account for the FY under consideration. During the assessment proceedings, on the basis of annual information report, the AO observed that there were certain unexplained cash deposits in one of the accounts of the Assessee.

The AO issued a show cause notice seeking explanation of the deposits. The Assessee explained that the deposits were savings made from business over past three-four years and were deposited for purchase of certain land. The AO was not convinced with the explanation provided by the Assessee and therefore made an addition under Section 68 qua the deposits.

The Assessee preferred an appeal before the CIT(A) who upheld the action of AO/TPO – aggrieved the Assessee approached the Hon'ble ITAT. The ITAT held that maintenance of books of accounts was an essential prerequisite for making addition under Section 68 of the IT Act.

The Department contended that passbook of bank account ought to be considered as books of account. The ITAT rejected the Department's contention and held that Section 44AD did not impose any obligation on the Assessee to maintain books of accounts, therefore, an addition under Section 68 could not be made where the return of income was filed under Section 44AD.

Authors' Note:

The judgement is line with and based on ruling of Gauhati HC in case of Anand Ram Raitani (223 ITR 544) wherein the HC had held that existence of books of accounts was a condition precedent for invoking the provisions of Section 68 by the AO. Further, there are few judgements, wherein ITATs have upheld adjustment u/s 68 even when returns were filed u/s 44AD. Considering the divergent views, the issue is yet to attain finality.

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ITAT holds that Notification not a mandate for Implementation of MFN clause in DTAA

SCA Hygiene Products AB
2021-TII-09-ITAT-MUM-INTL

The Assessee, a Swedish company, rendered consultancy and IT support services to its Indian subsidiary. During the assessment proceedings, the AO was of the opinion that the amounts received by the Assessee from its Indian subsidiary for rendering consultancy and IT support services should be subjected to tax as FTS and required the Assessee to show cause as to why this income should not be taxed as FTS under the India-Sweden DTAA and also the IT Act.

The Assessee stated that as per the Indo-Sweden DTAA read with the MFN clause in the Protocol, a technical service can only be subject to tax as FTS if it 'makes available' of technical knowledge, experience, skill, knowhow or process. The AO however did not accept Assessee's contention and made adjustments accordingly.

The DRP supported the AO/TPO's view and stated that to invoke the MFN clause both the states (India and Sweden) are required to issue notifications, in absence of which benefit of other treaties could not be extended automatically to a third state.

Aggrieved, the Assessee approached the Hon'ble ITAT. The ITAT held that the MFN clause can be implemented in various ways and there is no 'one size fits all' approach to it. The purpose of the MFN clause is to ensure equal tax treatment in all jurisdictions thus limiting the source taxation to any other OECD jurisdiction would in itself trigger its application to the Indo-Sweden DTAA as well. The issuance of notifications merely takes place as a measure of caution and implementation of the MFN is in no way dependent on it.

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ITAT holds rendering of 'v' to employees of its Indian affiliate is neither a 'Managerial Services' nor 'Technical Services'

Sandvik AB
2021-TII-17-ITAT-PUNE-INTL

The Assessee, a Sweden based company, imparted 'Human Resources and Leadership Services' to three employees of its Indian affiliated. The Assessee company received a consideration of INR 22.44 lakhs for rendition of such services. The Revenue assailed the impugned order to tax such consideration in India, treating it as FTS within the purview of Article 12 of the India and Sweden DTAA read with Protocol thereto.

The Assessee contended that leadership training services were in the nature of 'managerial services' which were not subject to tax under the DTAA read with Protocol as extended to the DTAA between India and Portuguese. The AO rejected the contention by relying on the AAR in Perfetti Van Melle Holding B.V., in Re [2012] 342 ITR 200 (AAR).

Aggrieved Assessee preferred an appeal before the Hon'ble ITAT. The ITAT observed that AAR ruling in Perfetti (supra) and Steria (India) Ltd. vs. CIT was overruled by the Hon'ble Delhi High Court in Perfertti Van Melle Holding. B.V. vs. AAR [(2014) 52 Taxmann.com 161 (Delhi)] and it was held that Protocol is part of the DTAA and there is no need for separate notification incorporating the beneficial provisions of the other DTAA.

The ITAT dismissed contentions of the Assessee as devoid of any merit to treat the 'leadership training' as 'managerial services' and that of the AO to treat the same as 'Technical Services'. The ITAT further observed that training services were not covered under Article 12 of the DTAA. Further, Article 7 which covers 'Business Profit' of an enterprise if it carries on business in India through PE.

In view of the above facts, the ITAT ruled that the AO did not undertake an exercise of examining the case under Article 7. Hence, the matter was remitted to the AO for de novo adjudication.

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ITAT holds RBI approval relevant factor for determining ECB interest rate

GE India Technology Centre Pvt. Ltd.
2020-TII-50-HC-KAR-TP

The Assessee, GE India Technology Centre Pvt. Ltd., an Indian company was engaged in the business of R&D in the area of material sciences, process technology and providing related software development services. The Assessee obtained two ECBs from its AEs at interest rates of 7.5% and 8.49% pa. During the assessment proceedings, the TPO made additions to the income on account of payment of interest on ECBs by scaling down the interest rate at 5.67% pa.

The matter travelled to the ITAT. Before the ITAT, the Assessee argued that the interest rates of these borrowings were consistently accepted by the Revenue in earlier AYs. On the afore-said facts, the ITAT deleted the impugned addition. Further, the ITAT held that in view of rules of uniformity and consistency, the same approach was to be adopted for current AY as well.

Aggrieved by the order of ITAT, the Revenue filed an appeal before the Hon'ble Karnataka High Court. The revenue contended that each AY should be analysed separately and pointed out that rates specified by RBI could not be used for determination of ALP.

Based on the facts and submissions, the Hon'ble HC dismissed Revenue's appeal and held ITAT's deletion of TP adjustment on account of interest on ECBs paid to the AEs and observed that:

- **Approval given by the RBI qua rate of interest is a relevant factor while determination of rate of interest;**
- **Interest rates are to be determined considering the rate of interest prevailing at the time of availing the loan; and**
- **Affirms ITAT's observation that Revenue could not be allowed to make a departure when the rate of interest was accepted in previous AYs and followed Hon'ble Supreme Court ruling in case of Radhasoami Satsang [2002-TIOL-745-SC-IT].**

Authors' Note:

It is a well settled principle that rate of interest is to be determined considering the economic circumstances at the time of availing loans. However, this verdict of the Hon'ble Karnataka HC becomes important considering the fact that HC has held RBI approval as a relevant factor for determining rate of interest on ECB. It surely does not mean that once the RBI has approved rate of interest for ECBs, Income Tax authorities are bound to accept the same to be at Arm's Length. However, it would be interesting to see how much weightage will be given to the RBI approvals for determining ALP of interest payment for ECBs.

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ITAT rejects Nil ALP determination, holds technical assistance towards production as royalty

Dow Agrosciences India Pvt Ltd
2021-TII-35-ITAT-MUM-TP

The Assessee was a manufacturer and trader of pesticides, Agro chemicals & seeds. As the Assessee had entered into an international transaction, the AO made a reference to the TPO for determination of ALP. The TPO made an adjustment towards payment of royalty alleging the ALP to be 'Nil'. Basis the TP order, the AO passed a draft order. The Assessee preferred an objection u/s 144C before DRP. However, DRP upheld the action of AO/TPO.

Aggrieved, the Assessee approached the Hon'ble ITAT. The ITAT observed that the Assessee had entered into a process technology agreement by virtue of which it was required to pay royalty to its AE for specified period which had elapsed. However, as per the clauses in the agreement, in case the Assessee was required to obtain any additional technical information pertaining to the technology, it would have to renegotiate. The ITAT further observed that the AO/TPO misconstrued the said clause to be only applicable for acquisition of a new technology.

Based on the above discussion, the ITAT ruled that the TPO had acted beyond its jurisdiction which is restricted to determination of ALP by application of methods prescribed under Section 92C to consider it as 'Nil'. Accordingly, the ITAT upheld the payment of royalty and deleted the adjustments made by the AO/TPO.

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CBDT notifies Faceless Penalty Scheme, 2021

Notification No. 2/2021 & 3/2021
January 12, 2021

The CBDT has notified Faceless Penalty Scheme, 2021. The Scheme in line with Faceless Assessment Scheme 2020, does not provide for personal hearings except, where approved for Chief Commissioner or Director General of the Regional Faceless Penalty Centre. The Scheme also provides for composition of units, their functions and procedure for penalty proceedings. We have summarized below the procedure for penalty proceedings under the said scheme:

Procedure for penalty proceedings is set-out in brief here-in-below:

- The case would be referred to National Faceless Penalty Centre ('NFPC') which is central unit (single point of contact) once National Faceless Assessment Centre ('NFAC') initiates penalty;
- The NFPC shall assign cases to a specific penalty unit in any one of the Regional Faceless Penalty Centers ('RFPC') through an automated allocation system;
- Units of RFPC shall prepare a draft show cause notice and share with NFPC which shall serve the notice to the taxpayer;
- Response to the show-cause notice has to be filed with the NFPC within the period specified therein with the NFPC;
- The NFPC shall send such response to the penalty unit in RFPC, and where no such response is filed, inform the penalty unit. The penalty unit may make a request to the NFPC for obtaining further information, documents or evidence from any income-tax authority /NFPC/ taxpayer upon receipt of which the NFPC shall issue notice or requisition for the same to them;
- The penalty unit shall, after considering the material on record including any response furnished, propose for imposition of the penalty or non-imposition of the penalty and send the proposal to the NFPC.
- The NFPC shall examine the proposal and decide to pass the penalty or not or assign the case to a penalty review unit in any one of the RFPC through an automated allocation system, for conducting review of such proposal;
- The review unit shall either concur with or suggest modification to the proposal and intimate the NFPC based on which the NFPC shall take action or refer it to another penalty unit through the automated allocation system;
- Such other penalty unit shall after considering material on record including suggestions for modification and reasons recorded by the penalty review unit prepare a revised draft order for the imposition or non-imposition of penalty and share with NFPC which shall take the final decision on imposition of penalty.

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Karnataka HC directs Revenue to issue a reasoned order for bank attachment

Aryan Tradelink
WP No. 11581/2020(T/RES)

Pursuant to the enquiry initiated by the Revenue authorities, the electronic credit ledger of the Petitioner was blocked by the GST authorities by exercising powers under Rule 86A of the CGST Rules. Aggrieved, the Petitioner submitted that the credit ledger was blocked without issuing any notice or citing any reason for blocking of such credit. Further, it was submitted that in absence of any reason been recorded as required under Rule 86A, the order blocking credit ledger cannot be sustained.

Basis the above observations, the HC disposed off the Writ Petition and directed the Respondent to pass a detailed order under Rule 86A. It was further observed that for the purpose of Rule 86A(3), which stipulates that the blockage shall cease to effect after the expiry of one year from the date of blocking, the effective date shall remain the same.

Authors' Note

The provision of Rule 86A may be construed as a rather sensitive one. While such powers have been provided in the hands of the authorities for protecting the Revenue, it also creates a possibility of being misused and can be used as a tool to harass the genuine taxpayers, if remained unchecked.

In the recent, Gujarat HC in the case of S.S. Industries vs. Union of India [R/Special Civil Application No. 8841 of 2020], had directed the Government to issue appropriate guidelines for invocation of Rule 86A so that such provisions are not misused by the Authorities. Such guidelines are required to keep the concerned authorities in check and ensure these provisions are indeed invoked only in cases requiring such extreme action.

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Gujarat AAR holds that ITC shall be reversed where intermediate goods are destroyed by fire

Jay Chemical Industries Limited
2021-TIOL-07-AAR-GST

The Applicant had sought a ruling before the Gujarat AAR to ascertain whether ITC is required to be reversed on inputs consumed in intermediates, also a finished product, where such goods have been destroyed in fire.

The AAR observed that the inputs and capital goods used in manufacture of finished goods that have been destroyed, are not used in course or furtherance of business. Therefore, the AAR ruled that the ITC taken on inputs and input services used in the manufacture of intermediate goods shall also be reversed.

Authors' Note

While the law does not provide explicit provisions in respect of intermediary goods, the intention of Section 17(5) seems to be restricting credit where GST could not be paid on corresponding outward supplies. Going by the said analogy, it appears reasonable that credit pertaining to in inputs consumed in intermediary goods has been disallowed. However, this is likely to add additional cost to the business which may already be reeling under the adverse effects of the incidents such as fire, in the instant case.

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SC issues notice in Writ challenging the Gujarat HC judgement striking down IGST levy on ocean freight

Mohit Minerals Private Limited
2021-TIOL-21-SC-GST-LB

In a landmark judgement, the Gujarat HC in the case of Mohit Minerals Private Limited vs. Union of India and Ors. **[2020-TIOL-164-HC-AHM-GST]**, had struck down the levy of IGST on Ocean Freight on transportation of goods by vessel from a place outside India to a place in India. Aggrieved by the said judgement, the Revenue had preferred an SLP before the SC.

The SC has now issued returnable notices to the parties.

Authors' Note

The levy of tax on Ocean Freight has its roots under the Service Tax Law. The Government, then had also issued notifications levying Service Tax on ocean freight chargeable on import of goods. These notifications were challenged by a number of Petitioners inter alia on the ground that such notifications were ultra vires to various provisions of the Finance Act.

In the Service Tax regime also, the Gujarat HC in the case of Sal Steel Limited **[2020-TIOL-163-HC-AHM-ST]**, had held that the notifications levying Service Tax on ocean freight are ultra vires to various provisions of the Finance Act. The judgement in the case of Mohit Minerals Limited (supra) was also passed on similar lines. It would now be interesting to see whether the Apex Court upholds the judgement the Gujarat HC or not.

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Gujarat AAR holds that plastic goods not covered elsewhere, classifiable under Tariff 3926

Gujarat Raffia Industries Limited
2021-TIOL-55-AAR-GST

The Applicant had sought an advance ruling before the Gujarat AAR to ascertain the tariff classification and GST rate of various goods such as HDPE Tarpaulin, PE laminated fabrics, PP ropes, pondliner, vermibed, etc. The Applicant had submitted that their goods are classifiable under Chapters 54-59 which inter alia covers Textiles and Textile articles, chargeable to 5 and 12% GST as the case may be.

The AAR observed that in order to classify goods under the proposed chapters, they shall be textile material. In respect thereto, the AAR relied upon a judgement of the MP HC in the case of Raj Packwell Ltd. v. UOI [[1990 (50) E.L.T. 201 (M.P.)], wherein it had been held that so long as the finished articles of plastic is made out of plastic material, even if at the intermediate stage articles classifiable under different tariff item emerges, the said product would be considered to have been produced out of plastic material and, therefore, the HDPE woven sacks should be considered as articles of plastic.

Basis the above observations, the Gujarat AAR held that the goods manufactured by the Applicant were classifiable as articles of plastic under Chapter 39 of the Tariff Act, chargeable to 18% and 28% GST as the case may be.

Authors' Note

The Tariff Classification of plastic articles has always been majorly disputed even in the Customs Law. The dispute can majorly be attributed to the rate of articles classifiable under Chapter 39. In the instant case, the AAR ought to have referred to Note 1 to Chapter 39 which specifically provides that the expression 'plastics' do not apply to materials regarded as textile materials under Section XI of the Tariff Act.

Thus, the question that should have arose before the AAR would have been whether the articles manufactured by the Applicant can be called 'textile articles.' However, is seems that the Revenue, as usual, has determined the classification of goods under a heading which attracts a higher rate of tax.

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Gujarat HC issues notice in writ challenging 'credit restriction' provision

Surat Mercantile Association
2021-TIOL-248-HC-AHM-GST

The Petitioner challenged the vires of Rule 36(4) of the GST Rules, on the grounds that the same is violative of Article 14 of the Constitution. The Petitioner argued that the said Rule restricts ITC to a buyer of goods or services on the basis of the details of the outward supply furnished by the supplier of the services or goods or on the basis of the common portal. It was argued that the said provision is contrary to the scheme of the Act.

Taking cognizance of the submissions, the HC issued returnable notice to the Respondents.

Authors' Note

The legality of Rule 36(4) has always been questioning ever since the restriction came into existence. While the provisions of the GST law nowhere impose restriction of credit vis-à-vis that reported by the suppliers or vendors, amendment under Section 16 has now been proposed in the Union Budget 2021 that will legalise such restriction. In other words, such arbitrary restriction will now find legal backing and have the force of law. However, the question with respect to constitutionality of such provisions especially where the compliant taxpayer is put a different pedestal than the defaulting ones. It therefore needs to be determined by the Courts as to whether such provisions, even if now part of the Law itself vide the said amendment, can be treated as arbitrary and discriminatory against honest taxpayers.

Given the challenges posed in complying with such provisions, the validity of Rule 36(4) has been challenged by various petitions, before various HCs such as Delhi HC in the case of Bharti Airtel Limited vs. Union of India and Ors. Bharti Telemedia Limited [W.P.(C) 6895/2020], Sales Tax Bar Association [W.P.(C) 13097/2019] Himanshu Mohta and Associates [W.P.(C) 13154/2019]. The Punjab and Haryana HC is also addressing identical dispute in HSIL Limited [CWP-9861-2020], and the Gujarat HC in Society for Tax Analysis and Research [R/Special Civil Application No. 19529 Of 2019]. However, the matter is yet to attain finality.

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AAR: Canteen services to factory employees liable to GST regardless "profit-making" aspect

Amneal Pharmaceuticals Private Limited
2021-TIOL-28-AAR-GST

The Applicant, carrying out canteen facilities through third party canteen service at their factory, modelled the services in a way that the food was being offered to employees of the customer on subsidized rate whereby the employee's share of the cost is being deducted from their salary.

In view of the above facts, the Appellant had sought a ruling before the Gujarat AAR to ascertain whether any particular thing done by the applicant with respect to any goods and/or services or both amounts to or results in a supply of goods and/or services, within the meaning of that term.

Referring to the definition of 'business' the AAR observed that plain reading of the definition of 'business', it can be safely concluded that the supply of food by the applicant to its employees would definitely come u/s. 2(17) as a transaction incidental or ancillary to the main business. It was further observed Schedule II of the GST Act provides that supply, by way of or as part of any service or in any other manner whatsoever, of goods, being food or any other article for human consumption where such supply or service is-for cash, deferred payment or other valuable consideration, shall be considered as 'supply.'

Basis the above observations, the AAR ruled that recovery of amount from employee on account of third-party canteen services provided by the Company, which is obligatory under the Factories Act, would come under the definition of 'outward supply' of the CGST Act, 2017 and therefore, shall be taxable as a supply under GST.

Authors' Note

With the introduction of GST, applicability of GST on several transactions between employer and employees have come under scrutiny of law. While the consideration arising from employer-employee relationship is outside the purview of GST, the Advanced Rulings have consistently held any such recoveries made from employees whether for canteen or transport or notice pay would be treated as supply and taxable as GST. Even though provision of canteen facilities is mandatory under Factories Act, 1948, the Kerala AAAR in the case of Caltech Polymers Private Limited **[2018-TIOL-20-AAAR-GST]** had held that supply of canteen facility amounts to supply.

An alternate school of thought exists that argues that such services are provided to employees only because of the employer-employee relationship and therefore such transactions should be kept outside the purview of GST. However, given the experience with respect to taxability of Notice Pay under service tax regime, the issue is likely to be litigated heavily before it comes to a certain conclusion.

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AAR cannot be sought for 'hypothetical question' which has not yet materialised

Shree Arbuda Transport
2021-TIOL-45-AAR-GST

The Applicant, engaged in transportation business, proposed to enter into an agreement with a specific client engaged in the business of Export of Agricultural produce and proposes to offer bundled services like Clearing and Forwarding Agency charge, labour for loading of cargo, and other services in relation to export of services. The Applicant sought to quote a single consolidated rate towards such bundled services and therefore sought clarification of whether such bundled services would be treated as 'Mixed Supply' or 'Composite Supply'.

The Gujarat AAR ruled that no clarification can be sought for Advance Ruling on the basis of hypothetical questions on an issue which has not materialised.

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Petitioner challenges provision relating to time limit for issuance of Credit Notes and rectification of returns before P&H HC

DLF Limited
CWP-1049-2021

The Petitioner had preferred a Writ before the Punjab and Haryana HC challenging the provisions relating to time limit for issuance of credit notes and making rectifications in GSTR-1 and GSTR-3B returns as prescribed under the GST Act.

It was submitted by the Petitioner that such provisions impose an arbitrary and unreasonable time-limit on Petitioner to issue credit note and rectify its returns of outward supply. Further, the time restrictions imposed under the impugned provisions lead to a situation where an amount not chargeable to tax is retained as tax without the authority of law and thereby violative of Article 265 of Constitution.

The Petitioner further submits that the time limit prescribed for issuance of credit notes restricts the tax payer from adjusting the details pertaining to outward supplies recorded but not actually paid. Taking note of the Petitioner's submissions, the Hon'ble Bench issued notice to the Respondents.

Authors' Note

Even though the SC in case of Eicher Motors Limited vs. Union of India **[2002-TIOL-149-SC-CX-LB]** had held that ITC is a vested right, it has been held in several other cases, that ITC cannot be treated as an absolute right and the Government has a right to attach conditions to availment of credit. In fact, the validity of time-limit of 1 year 9 months (in the Excise regime) from the date of invoice for availing the credit has been upheld in the case of Osram Surya Private Limited vs. CCE **[2002-TIOL-64-SC-CX]** and Ashok Leyland Limited vs. Commissioner of Central Excise **[2014 TIOL 2102 CESTAT MUM]**. Accordingly, it can be argued that the Government is within its right to attach time limit for issuance of Credit Notes and rectification of returns under the GST Law as well.

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AAAR: Director's remuneration declared as fees for 'Professional or Technical services' taxable under 'reverse charge'

Clay Crafts (India) Private Limited
2021-TIOL-03-AAAR-GST

In a widely criticized ruling of the Rajasthan AAR [2020-TIOL-64-AAR-GST], it had been held that services rendered by the Director to the company for which consideration is paid to them under 'any head' is liable to GST under reverse charge mechanism. Aggrieved, the Applicant preferred a ruling before the Appellate AAR for reconsideration.

Referring to Circular No. 140/110/2020-GST dated 10.06.2020, wherein it had been clarified that remuneration paid to Directors, declared as 'salary' in books of company and subject to TDS u/s. 192 of the IT Act, is not exigible to GST being covered under Schedule III of the CGST Act. The AAAR further observed that in terms of the Circular, GST under RCM shall apply only where Directors are not employees of the Company and receiving consideration other than that taxable under Section 192 of the Income Tax Act. Accordingly, the AAAR modified decision of AAR to that extent.

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SC upholds levy of Sales Tax where BOE filed on High Seas transaction

Vellanki Frame Works Vs. The Commercial Tax Officer
2021-TIOL-12-SC-VAT

The Appellant had entered into an agreement for supply of goods from a foreign country to the first buyer and delivered them at the port of shipment. Thereafter, while the goods were in transit on high seas, the buyer transferred the goods to the Appellant by endorsing the bill of lading in his favour. Further, while the goods were on high seas, the Appellant allegedly transferred them to the end-buyer by endorsing the bill of lading in favour of the end-buyer.

When the goods reached the port, the Appellant had filed a BOE for warehousing and thereafter, filed another BOE for home consumption. On the basis of such bills of entry, assessment was done for customs duty. The Appellant argued that since it only acted as an agent of the end-buyers while filing the BOE and the sales of the goods in question to the end-buyers, being the sales taking place in the course of import of goods into the territory of India, it was eligible for exemption from payment of sales tax by virtue of Section 5(2) of the CST Act. However, the AO had rejected such claim of the Appellant by holding that the goods in question had crossed the customs frontiers of India when the BOE were filed.

Aggrieved, the Appellant had preferred a Writ before the HC, who had ruled in favour of the Revenue. Subsequently, the Appellant had preferred an Appeal before the Hon'ble SC. It was observed by the Hon'ble SC that sale or purchase of goods shall be deemed to take place in the course of inter-State trade or commerce if the sale or purchase:

(a) occasions the movement of goods from one State to another; or

(b) is affected by a transfer of documents of title to the goods during their movement from one State to another.
The Apex Court further observed that the inclusive definition of 'importer' in Section 2(26) of the Customs Act cannot be used to usurp the identity of an importer from the person who filed the BOE. Further, the person in whose name the BOE is filed, does not cease to be an importer. The SC further agreed with the HC in observing that there was no material on record to show that either the IGM contained the name of end-buyer as the importer/consignee or that the same was subsequently amended in terms of Section 30(3) of the Customs Act.

Basis the above observations, the SC observed that the HC had correctly denied the exemption claimed by the Appellant u/s. 5(2) of the CST Act and therefore, the HC has been justified in dismissing the writ petitions filed by the Appellant.

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Decision to retrospectively curtail subsidies promised under Industrial Policy illegal

Bajrang Power
Writ Petition (T) No. 3909 of 2011

The Appellant had set up a Company with its industrial unit including 'Captive Power Plant' in Chhattisgarh to avail the subsidy benefit proposed by the Industrial Policy whereby the Appellant became entitled for 25% of the total capital investment as subsidy by way of tax adjustment. However, despite the issue of eligibility certificate for grant of subsidy of Rs. 12.81 Cr., the Revenue did not adjust the amount against the payment of VAT/CST and instead VAT/CST demand was raised by issued of notices.

The Government in the meanwhile had introduced a cap of Rs. 3 Cr. on the subsidy under the policy. Subsequently, the granted subsidy was rolled back stating that the benefit shall be applicable to only those establishments where the 'captive power plant' is generating power for its own use and not under any other circumstance. Thus, the benefits provided under the policy was altered by the State after expiry of Policy period, by issuing Notification in 2011.

Aggrieved, the Appellant had filed a Writ Petitions against the decision of the State. The HC noted that the first question stood settled in view of a ruling of the Division Bench of the instant court and the issue stood answered in the Appellant's favour holding that Appellant is entitled for subsidy as was promised and offered in the industrial policy.

The HC further added that the intention of the policy makers was providing certain amounts of incentives to those persons who would be investing on captive power plants so as to ensure uninterrupted supply of power so that the investor does not suffer on the production front. Hence, it was held that the Appellant had a justified legitimate expectation for grant of subsidy for the reason that the investment put in was keeping in view the incentives provided by the State Government under the policy, and withdrawal of benefit granted by Committee through its decision was illegal and unjustified.

In view of the above observations, HC directed the State Government to adjust subsidy payable against the tax liability either which is due to receive from the Appellant or by adjusting the same from future taxes that the Appellant shall have to pay.

Authors' Note

As a settled principle of law, especially in commercial cases, a person cannot go back from a representation he has made to another person if the other person has acted and altered his position based on such representation. Such a principle of law is known as 'doctrine of promissory estoppel.' Until recently, it was known that this doctrine is restricted to commercial matters and do not extend to tax law.
However, off late, it has been seen that this doctrine is also applicable in taxation matters. Notably, in the case of Pournami Oil Mills Limited vs. State of Kerala and Anr. [2002-TIOL-1801-SC-MISC], the Apex Court had held that an exemption from sales tax granted to the new industries, by the State by issuing a notification, cannot be nullified by issuing a subsequent notification with retrospective effect, in case such new industries were set up on the basis of earlier notification.

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HC – Gujarat issues Notice to parties in a Writ challenging restrictions on availability of MEIS benefit between September to December 2020

Man Industries (India) Ltd
C/SCA//15716/2020

The Petitioner filed a Writ Petition before the Gujarat HC challenging the FTP provision capping MEIS benefit to INR 2 crores. The Government vide Notification No. 30/2015-20 dated 01 September 2020 had amended the Foreign Trade Policy 2015-20 and had capped the ceiling on total reward under MEIS to INR 2 crores for an IEC holder for the period ranging from 09 September 2020 to 12 December 2020.

Aggrieved by the said amendment, a Writ Petition has been filed before the Gujarat HC challenging the above amendment inter alia on two grounds:

- The Notification seeks to artificially classify similarly placed exporters into two separate class and therefore, is in violation of Article 14 of the Constitution;
- The amended provision does not provide for an exception in respect of contracts already executed factoring in the MEIS benefits and thus is in breach of the principle of promissory estoppel and legitimate expectation.

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	Key Updates
GSTN Update	**GSTN enables Invoice Furnishing Facility for taxpayers under QRMP Scheme** IFF facility has been provided to taxpayers under QRMP Scheme, Taxpayers who have opted for quarterly filing frequency under the scheme can file their details of outward supplies (B2B invoices only) for first two months of a quarter in IFF. Option to upload details in IFF can be availed till 13th of the subsequent month. Any invoices remaining to be furnished, can be filed using the IFF in the subsequent month IFF or in the quarterly Form GSTR-1. IFF is an optional facility provided to taxpayers under the QRMP scheme to pass ITC to their recipients for M1 and M2 months of a quarters. However, filing of Form GSTR-1 for the third month of a quarter is mandatory.
GSTN Update	**Aadhaar Authentication / e-KYC for Existing Taxpayers on GST Portal** Functionality for Aadhaar Authentication and e-KYC where Aadhaar is not available, has been deployed on GST portal w.e.f. 6 January 2021 for existing taxpayers. All taxpayers registered as Regular Taxpayers, ISD and Composition taxpayers can do their Aadhaar Authentication or e-KYC on GST Portal. This is not applicable for Govt. Departments, Public Sector Undertakings, Local Authorities and Statutory Bodies.
Trade Circular No. JC (HQ)-1/GST/2021/ADM-8 dated 12 January 2021	**Maharashtra Govt. to issue separate GST Circulars** The Commissioner of State Tax, Maharashtra vide Trade Circular No. JC (HQ)-1/GST/2021/ADM-8 dated 12 January 2021 has withdrew an earlier circular which provided for deemed adoption of GST Circulars issued by the CBIC. This departure from deemed adoption of CBIC circulars by the Maharashtra Government is made in order to maintain the integrity of communication and so also to avoid confusion caused as to which instructions are to be followed in case where there are circulars issued by the CBIC as well as the Maharashtra Government. Henceforth, whenever CBIC issues any circular, the Maharashtra Government on its examination would issue a separate circular regarding its applicability for the implementation of the MGST Act. It has been further clarified that circulars issued by CBIC till 12 January 2021 are deemed to have been adopted for the implementation of MGST Act, unless the Maharashtra Govt. has issued a separate circular on the same subject. It has been further provided that the actions taken on the basis of circulars adopted by the Maharashtra Government would remain valid.
GSTN Update	**GSTN issues advisory addressing issues faced in auto population of e-invoices in GSTR-1** GSTN introduced a new feature of issuing e-invoices, which would eventually be auto populated in GSTR-1. In pursuant to such feature taxpayers with aggregate turnover of above INR 100 Cr. started reporting invoice to Invoice Registration Portal ('IRP'). It was observed that while the pulling the data for December 2020 into GSTR-1, some of the details

	of the invoice was not populated into GSTR-1. This inadvertent gap is being rectified on priority and details of those invoices will be pushed to GSTR-1 shortly. However, the taxpayer is advised to proceed with the filling of GSTR-1 for the month of December 2020 (before the due date), based on actual data. Also, the taxpayer can modify/delete only those documents where there is a mismatch between auto-populated details from e-invoices and actual data. However, in such case, the 'Source', 'IRN' and 'IRN date' fields will be reset to blank in respective tables of GSTR-1 and accordingly won't get reflected in GSTR-2A/2B/4A/6A also. Such edited documents will be treated as if they were not auto-populated but uploaded separately by taxpayer. Additionally, the taxpayer can download the consolidated excel file of all the documents auto-populated from e-invoice from the GSTR-1 dashboard, which is inclusive of cancelled documents also. However, the modifications made to the auto-populated documents would not be reflected in the excel file.

CUSTOMS & TRADE LAWS

	Key Updates
Notification No. 01/2021-Customs dated January 04,2021 Read with Notification No. 02/2021-Customs dated January 04,2021	**CBIC notifies Custom Authority for Advance Ruling Regulations, 2021 and rescinds Customs (Advance Rulings) Rules 2002** CBIC vide Notification: No 01/2021 has notified Customs Authority for Advance Ruling Regulations, 2021 in supersession of Authority for Advance Rulings (Customs, Central Excise and Service Tax) Procedure Regulations,2005 in relation to matters pertaining to Customs Act, 1962 Following are few significant points: ‣ Customs Authority for Advance Ruling, Delhi and Mumbai will have all the power to hear and determine all applications and petitions. ‣ Form CAAR-1[earlier Form –AAR(CUS)] is a prescribed application for obtaining Advance Ruling. ‣ Form CAAR-2 is prescribed for applicants to file appeal against Advance Rulings and should be accompanied by Rs 15000 fees. ‣ Form CAAR-3 is prescribed for the Principal Commissioner or Commissioner to file an appeal against Advance Rulings. ‣ The applicant can withdraw his application within 2 weeks from date of application and thereafter only with leave of authority. The Customs (Advance Rulings) Rules 2002 has been rescinded.

CUSTOMS & TRADE LAWS

	Key Updates
Notification No. 1/2021-Customs (ADD) dated January 6,2021	**Levy of Anti-Dumping duty on Melamine originating in or exported from China PR extended** ▸ The levy of Anti-Dumping duty ('ADD') on Melamine originating in or exported from China PR which had been previously levied for 5 years from January 28, 2016 has been extended up to end of February.
Circular No. 01/2021-Customs dated January 14,2021	**Carriers of EXIM cargo through the foreign territories of Sri Lanka and Bangladesh exempt from furnishing of Bank Guarantee** ▸ Carriers of EXIM cargo through the foreign territories of Sri Lanka and Bangladesh are exempt from furnishing of Bank Guarantee provided they have an annual transhipment volume of more than 1000 TEUs. ▸ Those carriers having a transhipment volume below 1000 TEU's but having a good track record can apply for waiver of bank guarantee requirement to the jurisdictional Commissioners of Customs.
Instruction No. 1/2021-Customs dated January 14, 2021	**Instruction to waive the requirement for filing of the Bill of Coastal Goods for Coastal vessels carrying exclusively coastal goods** ▸ Coastal vessels carrying exclusively coastal goods whether berthing at coastal berth or EXIM berth exempt from the requirement of filing a Bill of Coastal Goods. ▸ Only a Manifest (arrival and departure) required to be submitted for coastal vessels operating from an Exim berth in the format already notified.

FOREIGN TRADE POLICY

	Key Updates
Notification No. 54/2015-2020 dated January 1, 2021	**Policy Condition for the import of odiferous preparations that do not operate by burning such as room freshners/car freshners under HS Code 33074900** Odoriferous preparations such as room fresheners/car fresheners which do not operate by burning can now be freely imported.
Trade Notice No. 36/2020-21 dated January 4, 2021	**DGFT issues trade advisory in relation to instances of cyber crimes** Trade Advisory has been issued by DGFT to resolve issues such as email spoofing/phishing cyber frauds targeted towards Indian Exporters for which implementation of security protocols such as Sender Policy Framework (SPF), Domain Keys Identified Mail (DKIM) and Domain based Message Authentication, Reporting & Conformance (DMARC), which are protocols for standard email signatures should be implemented.

	Key Updates
	According to DGFT, the implementation of the above protocols would ensure legitimacy of the sender and would protect their identity. Better password practices should also be followed and bank details should be confirmed by the exporters on another channel such as secure voice line. All precautionary measures should be taken by EPCs/Traders to protect their payments from cyber fraud.
Notification No. 55/2015-2020 dated January 7, 2021	**Import policy and condition of items classified under Chapter 41 & 43 of ITC (HS), 2017, Schedule – I (Import Policy)** The import policy condition of Leather further of Reptiles, Raw fur-skins of minks and fox including other fur-skins and tanned fur-skins of mink has been amended making it free for import.
Public No. 37/2015-2020 dated January 8, 2021	**Enlistment under Appendix 2E of M/s The All India Plastics Manufacturers' Association (North Zone), Gurugram, Haryana - Authorized to issue Certificate of Origin (Non-Preferential)** The All India Plastics Manufacturers Association (North Zone), Gurugram, Haryana is enlisted under Appendix 2E of the FTP 2015-2020 by virtue of which it has been authorized to issue Certificate of Origin (Non Preferential).
Trade Notice No. 37/2015-2020 dated January 11, 2021	**Electronic Issuance of Preferential Certificate of Origin (CoO) for India's Exports to UK under Generalised Scheme of Preferences (GSP)** UK is being added to the e-COO Platform under Generalised Scheme of Preferences (GSP) as a country of export. To avail GSP benefits exporters to UK are required to submit a valid proof of origin either in form of GSP Form A or a declaration of origin which assists in identification of an originating good. The GSP Form-A is available electronically on the e-CoO Platform and the GSP certificate when submitted electronically on the e-CoO platform will be made available through the existing online approval process with the image sign and signature.
Trade Notice No. 38/2015-2020 dated January 15, 2021	**Introduction of online e-PRC System for Application seeking Policy/Procedure relaxation in terms of Para 2.58 of FTP 2015-20** All exporters/importers seeking FTP/HBP relaxation are mandatorily required to submit their applications online through the exporter's dashboard on the DGFT Website from January 25,2021 following which manual submissions will not be entertained. This new module can be found under the Services tab of the DGFT Website.
Trade Notice No. 39/2015-2020 dated January 19, 2021	**Procedure and Criteria for submission and approval of applications for export of Diagnostic Kits and their components/laboratory reagents** The DGFT has provided the procedure and criteria for submission and approval of applications for export of Diagnostic Kits and their components/laboratory reagents.

	Key Updates
Notification No. 56/2015-2020 dated January 28, 2021	**Carriers of EXIM cargo through the foreign territories of Sri Lanka and Bangladesh exempt from furnishing of Bank Guarantee** • Previously it was notified that 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. • The dates for CIMS implementation have been extended, it will be effective from April, 01, 2021 and Registration can be done under the same from February 15, 2021.

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HC directs reactivation of DIN/DSC of directors of Company to enable them file requisite documents before RoC

Balwan Singh & Anr. Vs. MCA & Anr.
2021-TIOLCORP-09-HC-DEL-CA

The petitioners were directors of a company which was struck off from the Registrar of Companies, as a result of which they were disqualified and their DIN/DSC's, deactivated. Subsequently, the company was restored by an NCLT order dated December 21,2020, However, they were unable to avail the benefit of the Companies Fresh Start Scheme, 2020 to file the requisite documents in time as their DIN/DSC's were still deactivated. Aggrieved they filed a petition before the High Court.

Subsequently, The MCA had vide General Circular No. 03/2021 dated January 15,2021 introduced a scheme for condonation of delay for companies restored on the Register of Companies between December 1, 2020 and December 31, 2020 ('New Scheme') for the purpose of extending the time-limit for filing of any overdue forms to March 31, 2021 thereby waiving the requirement of payment of any additional fees.

The High Court thereby directed that the DINs and DSCs of the petitioners be reactivated within a period of one week in order to enable the Directors to file the relevant documents in relation to the restored company and also permitted the company to file the documents in terms of the new scheme before the concerned ROC.

Authors' Note:

This direction of the HC will act as a precedent ensuring that other companies that had been struck off but were restored in December would have the ability to get their DIN and DSC's activated ensuring timely filing of requisite documents by March 31, 2021.

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NCLAT rejects Corporate Debtor's insolvency application lacking bona-fide intention

Neesa Infrastructure Ltd. Vs. State Bank of India & Ors
Company Appeal (AT)(Insolvency) No. 946 of 2020

The Appellant is a registered Company under the Companies Act. One of the promoters of the company sought the initiation of CIRP for the inability of the company to meet its day to day financial requirements and pay its financial creditors.

The application though filed before the NCLT was rejected as there was no Special Resolution passed by the shareholders approving the filing of the application. The Promoter who had filed the said application had POA from only one other promoter.

Further, it was noted that various proceeding against the appellant had been initiated under the provisions of SARFAESI Act and RDDB Act, and the appellant failed and neglected to repay the loan as per the terms and conditions of the Bank.

Aggrieved the Appellant approached the NCLAT which dismissed the appeal believing that the application was filed by the Appellant with a mala-fide intention of stalling the proceedings against it and to wriggle out of the liability to pay, as determined, holding that IBC cannot be used as a tool to one's disadvantage and others advantage.

Authors' Note:

This judgment is a positive step towards ensuring that dues are met adequately and promptly. There are various instances where just to avoid payments, insolvency proceedings are initiated by the corporate debtors even if the ability to pay exists. This judgment ensures that insolvency proceedings are not used as a tool to escape payments.

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SC affirms HC's stance; States that in cases of recovery notice under SARFAESI, only recourse available with the petitioner is to challenge the notice and take appropriate remedy under Act.

Gyankund Trust to Educate and Serve Vs. RBI and Anr
Special Leave to Appeal (C) No(s). 13865/2020

Petitioner was served with the recovery notice under section 13 of SAFASI Act to recover the dues. Aggrieved petitioner has filed a petition challenging the notice before the high court. HC finds that petitioner has straightway approached the court instead of filing objections or making representation u/s 13(4) of SARFAESI Act. Hence, the HC dismissed a petition directing the petitioner to discharge its liability in full against notice served upon the petitioner by a bank under section 13 of SARFAESI Act.

Aggrieved, the petitioner submitted before the SC that the HC ought to have considered the writ petition by which the notice u/s 13(2) and 13(3) of the SARFAESI Act was challenged. Also submitted that, the Petitioner's account couldn't have been declared as NPA by the bank as the moratorium period was still continuing, which was from March 1, 2020, to August 31, 2020.

However, the SC affirmed the HC's stand that the petitioner's only remedy is to file objections to the notice under Section 13(2) of the SARFAESI Act and take appropriate remedy as available under the Act.

Authors' Note:

Apart from filing objections or making representation against notice, SARFAESI Act provides for the remedy to borrower to file application against actions taken by financial creditors on account of non-payment of dues shown in recovery notice by the borrower, to the Debts Recovery Tribunal (DRT). Aggrieved by the order of DRT, he can file application before NCLAT. Hence, following this route of appeal, he can approach the High Court or Supreme Court as the case may be. Through this judgment SC clarifies SARFAESI to be a wholesome piece of legislation which encompasses the remedies to issues arising from it within itself.

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Decision on whether charge-registration under Companies Act mandatory for creditor's IBC claim pending before SC

Volkswagen Finance Pvt. Ltd. Vs. Shree Balaji Printopack Pvt. Ltd. & Anr
2021-TIOLCORP-02-SC-IBC-LB

The Corporate Debtor had executed a Loan and Hypothecation Agreement. It was stated by the Appellant that they have security of the vehicle in terms of Sections 52 and 53 of the Insolvency and Bankruptcy Code, 2016.

The NCLAT had appointed a Liquidator and Claims were invited from the Creditors as per the provisions of the Code. The Appellant filed its claim with the copies of the Loan Agreement, the Hypothecation Deed, the Demand Letter and the Registration Certificate of the vehicle together with the invoices concerned for the consideration of the Liquidator. The Appellant had informed the Liquidator that the 'Charge' was duly registered by way of hypothecation registration with the Regional Transport Office (RTO) in terms of Section 51 of the Motor Vehicles Act, 1988 (M.V. Act) and believed that there was no requirement of registration of 'Charge' with the R.O.C.

The Liquidator, without examining the Certificate issued by the Registration Authority under the 'M.V. Act' dismissed the Claim made by the Appellant.

Being aggrieved with the decision of the Liquidator, the Applicant approached the NCLAT which inter held that registration of a hypothecation charge over a vehicle with the Authority under the Motor Vehicles Act would not suffice for making a valid claim as a secured creditor under the IBC.

Aggrieved the Appellant approached the SC which issued a notice returnable on February 8 and directed the parties to file brief written submissions at least 1 week before the next date of listing to facilitate the final disposal of the appeal.

Authors' Note:

It is up to the Hon'ble Apex Court to decide such a contentious issue pertaining to the superiority of the Companies Act or the MV Act when it came to concept of hypothecation as a charge in relation to the IBC claims. The decision of the Apex Court on whether registration of charge is required under Companies Act will highlight the order of prevalence of the law in terms of IBC claims.

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Constitutional validity of IBC amendments prescribing threshold for homebuyers for initiation of insolvency proceedings upheld by SC

Manish Kumar Vs. Union of India & Anr
2021-TIOLCORP-05-IBBI

The petitioners were allottees under real estate projects. and had approached the SC under Article 32 of the Constitution of India challenging section 3 of the Insolvency and Bankruptcy Code (Amendment) Act 2020. Section 3 of the impugned amendment, amends Section 7(1) of the Insolvency and Bankruptcy Code, 2016 to provide for a minimum threshold for home buyers to file CIRP application, of at least 100 allottees under a real estate project or not less than 10% of the total number of such allottees, whichever is less, for filing an application jointly to initiate CIRP against a real estate developer.

The Apex Court upholding the constitutional validity of Sec. 3 of the Insolvency and Bankruptcy Code (Amendment) Act, 2020 stated that a vast majority of allottees may see reason in either giving time and reposing faith in existing management of real estate project or successfully invoking the other remedies available to them, an individual allottee, left free to file an application under Section 7, would exhibit a high-level of subjectivity and may bring the entire real estate project itself to a possible doom thereby exhausting other remedies available for the rest of the allottees.

Authors' Note:

IBC is a productive piece of Legislation, division of Financial Creditor by introduction of minimum threshold for homebuyers would create a class within a class and would hinder them from reaping the benefits available to others. A homebuyer should not be required to garner support of other homebuyers to tackle errant developers. The argument that a single allotee can bring the whole project to its demise can also be applied to other Financial Creditors that does not cause a threshold to be applied there as well.

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Decision on whether unstamped commercial contract invalidates arbitration agreement pending before SC Constitutional Bench

N.N. Global Mercantile Pvt. Ltd. Vs. Indo Unique Flame Ltd. & Ors.
Civil Appeal Nos. 3802 - 3803 / 2020

The respondent entered into a work order with the appellant, following which appellant furnished a bank guarantee in favour of the respondent. The respondent invoked the said bank guarantee following certain disagreements with the appellant which caused the appellant to approach the Commercial Court, requesting a declaration disentitling the respondent from encashing the bank guarantee as a result of breach of the work order. The Commercial Court directed status-quo to be maintained as to the enforcement of the bank guarantee and rejecting respondent's application seeking reference of disputes to arbitration, held that the arbitration clause in the work order was not a general arbitration clause, which would cover the bank guarantee.

Aggrieved, the Respondent approached the Bombay High Court which setting aside the Commercial Court's order held the application for arbitration to be maintainable and that the Court was not justified in restraining the invocation of bank guarantee in the absence of any finding on fraud or special equities. Also held with regards to un-enforceability of the work order being unstamped that the Appellant could raise this issue either u/s 11 of the Act, or before the arbitral tribunal at the appropriate stage.

Aggrieved, the Appellant filed a SLP before SC which holding that non-payment or deficiency of stamp duty on the work order would not invalidate the main contract and that it would amount only to a deficiency curable on the payment of the requisite stamp duty, referred the matter to the Constitutional bench of 5 judges opining that "The arbitration agreement would not be rendered invalid, un-enforceable or non-existent, even if the substantive contract is not admissible in evidence, or cannot be acted upon on account of non-payment of Stamp Duty."

Further, SC took note of the submission of appellant that invocation of bank guarantee was fraudulent, since the agreement had never been acted upon, hence it is not arbitrable. With respect to this matter, SC found that involvement of voluminous and extensive evidence in fraud would be a wholly archaic view to decide whether the allegation of fraud is arbitrable or not.

Hence the SC ruled that "the allegations of fraud with respect to the invocation of the Bank Guarantee are arbitrable, since it arises out of disputes between parties inter se, and is not in the realm of public law."

Authors' Note:

The decision of the Constitutional bench would be a precedent clarifying whether stamping of substantive contract is a mandate to trigger arbitration as per the arbitration agreement. This decision has given new ground to decide the arbitrability of the fraud, and vitiated old practice in respect of deciding the arbitrability of fraud.

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Amendments in provisions relating to requirement of Minimum Promoter Contribution and lock-in period

SEBI has amended ICDR Regulation 2018 vide Notification No. SEBI/LAD-NRO/GN/2021/03 dated 08th January, 2021. Provisions of SEBI (ICDR) Regulations, 2018 provides for the guidelines for minimum promoter contribution and lock in period requirements. After receiving various representations from stakeholders and industry, SEBI has decided to relax these requirements keeping in view the liquidity and valuation requirements of companies especially in cases where companies are recovering from insolvency and bankruptcy etc. The salient provisions as introduced by aforesaid notification are as follows:

Non-applicability of Minimum Promoters Contribution (MPC)

The SEBI guidelines provides that requirement of minimum promoter contribution shall not apply upon satisfaction of specified conditions, with this notification, such conditions have been partially relaxed wherein the requirement of track record of dividend payout and continuing compliance with composition of Board of Directors have been dispensed with. The rationale for the proposed amendment is that an issuer raising funds through 'Follow On Public' offer, is already a listed company and has fulfilled the obligation of MPC at the IPO stage. Further, all the information/ disclosures about the issuer is available in the public domain and the investors willing to subscribe in the FPO have sufficient knowledge to take an informed decision.

Lock-in period

The lock in period requirements is primarily applicable to MPC and not to excess promoter contribution. With the change in MPC requirements for FPO, any contribution by promoters would be considered as excess contribution, thus the lock in period requirements shall not apply. However, SEBI has while amending the provisions under aforesaid notification has removed proviso to 115 which earlier provided the relaxation from lock in period for excess contribution. Therefore, while the intent of SEBI was to relax the MPC and lock in period requirements, the deletion of this proviso has created ambiguity as to whether any excess contribution would now attract lock in period or not.

Non-applicability of Lock-in period in case of share issue pursuant to resolution of stressed assets

Regulation 167(4) provides for lock-in period of one year in case of equity share issued pursuant to any resolution of stressed assets under a framework specified by the Reserve Bank of India or a resolution plan approved by the National Company Law Tribunal under the Insolvency and Bankruptcy Code 2016. However, this creates a practical problem for companies which are required to comply with provisions of SCRA ACT where in minimum public shareholding of at least 10% and 25% is required to be maintained with in specified time post resolution. Thus with these amendments, the lock in period in such cases has been done away with so that companies can comply with requirements with respect to minimum public shareholding.

Authors' Note:

In its board meeting held on December 16, 2020, SEBI deliberated on issues such as minimum promoter contribution, lock in period and minimum public shareholding and fair market pricing of shares post CIRP. It has brought in above important changes to take care of various practical issues which were being faced by companies. SEBI stated in its board meeting that to ensure the fair price of the scrip in case of post- CIRP (Corporate Insolvency Resolution Procedure) where public shareholding goes down due to CIRP and share price shows an abnormal increase as it was observed in many practical cases. So, to ease the dilution of promoters holding and to get the minimum public shareholding, provision of minimum lock-in period was removed to an extent.

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Extension of conducting AGM through video conferencing or other audio visual means

During the period of lockdown due to pandemic, MCA, vide circulars dated 08th April, 2020 and 13th April, 2020, has allowed to conduct the EGM through VC or OAVM which was further extended to conduct AGM also through circular dated 12th May, 2020. Through the same circular, MCA has dispensed with the requirement of printing and dispatch of annual reports to shareholders.

Pursuant to which, SEBI vide circular no. SEBI/HO/CFD/CMD1/CIR/P/2020/79 dated 12th May, 2020, has relaxed the requirement of sending physical copies of various documents related to general meeting including annual report to the shareholders who have not registered their email addresses, and requirement of proxy for general meetings such requirements have been dispensed with.

In continuation to above circulars, MCA vide circular no. 02/2021 dated 13th January, 2021 has extended the date of conducting AGM through VC or OAVM till 31st December, 2021.

To commensurate the provisions of SEBI (LODR) Regulation, 2015, SEBI vide circular no. SEBI/HO/CFD/CMD2/CIR/P/2021/11 dated 15th January, 2021, has extended the relaxations regarding sending the hard copies of annual report and requirement of proxy for general meetings till 31st December, 2021.

It is pertinent to note that MCA in its circular dated 31th January, 2021 specified that relaxation is not regarding the due dates of holding AGM specified under Companies Act, 2013. Accordingly, provisions of Companies Act, 2013 will be applicable on non-adherence of provisions related to conducting AGM on time prescribed.

Authors' Note:

In the wake of Covid-19 pandemic, various relaxations have been provided by the various regulators during the lockdown period. Such relaxations are being extended seeing the practical conditions and to ensure the ease of business. This will even reduce the fixed cost burden on the companies at the times when companies are grappling to reduce fixed cost.

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Extension of relaxations on Right Issue up to 31st March, 2021

In view of the impact of COVID-19 pandemic and lockdown measures undertaken by Central Government and State Governments, SEBI, through circular no. SEBI/HO/CFD/DIL2/CIR/P/2020/78 dated 06th May, 2020 had provided one time relaxation from the strict enforcement of certain regulations of SEBI (Issue of Capital and Disclosures Requirements) Regulations, 2018, pertaining to Right Issue opening up to 31st July, 2020 which was later on extended for right issues opening up to 31st December, 2020.

Now, through the circular no. SEBI/HO/CFD/DIL1/CIR/P/2021/13 dated 19th January, 2021, SEBI has extended these relaxations for the shared issued under right issue up to 31st March, 2021.

The relaxations provided under this circular on the right issue are summarized as below:

- Failure to dispatch the abridged letter of offer and application form through registered post or speed post or courier will not constitute non-compliance;
- In case of Dematerialized right entitlements (REs), shareholders are allowed to submit application for right issue even if those shareholders had not been able to open DEMAT account or communicate the DEMAT account details to Issuer; and
- Instead of applying for right issue through ASBA facility, Issuer along with lead manager shall institute an optional mechanism (non-cash mode only) to accept the applications of shareholders.

Authors' Note:

This extension notification has eased the compliances looking at the practical issues faced by the businessmen. Other notifications were also introduced during the pandemic related to right issue. These relaxations include sending abridged letter of offer through registered post or speed post, renouncing their right entitlements (RE) application in case of Dematerialized RE shareholders etc. These relaxations are the procedural relaxation although there are various other relaxation provided in respect of right issue through the issue of other notifications.

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New Companies (Corporate Social Responsibility) Rules, 2021

Through the notification no G.S.R. 40(E) dated 22nd January, 2021, MCA has notified the amendments into the Companies (CSR Policy) Rules, 2014. Draft CSR rules were released by MCA in March last year for public comments, after receiving comments from industry and various other stakeholders, this notification has been issued. This notification primarily focuses on institutionalizing CSR activities through more specific guidelines for registration of trust, monitoring and reporting of expenses.

Salient features of notification are as follows:

A. Revised scope of CSR Activities

New scope of CSR activities has provided the exclusive list of activities not considered as CSR activity. Following are the exclusive list of activities which shall not be considered as CSR activity:

(i) Activities undertaken in pursuance of normal course of business of the company;

Exception- Company engaged in R&D of new vaccine, drugs and medical devices may undertake R&D activity of new vaccine, drug and medical devices related to COVID-19 for FY2020-21, 2021-22 & 2022-23.

(ii) Activities undertaken outside India, but activities undertaken for training of India sports personnel will be considered as CSR activities;

(iii) Contribution to the political parties

(iv) Activities benefitting employees of the company;

(v) Activities supported by the companies on sponsorship basis for deriving marketing benefits for its products or services;

(vi) Activities carried out for fulfillment of any other statutory obligations under any law in force in India;

B. Unique CSR Registration No

Revised CSR rules have made it mandatory to implementing agency to register itself and have a unique CSR registration number to play the role of implementing agencies. It has to file prescribed form i.e. CSR-1 electronically with MCA to register itself.

C. Annual Action plan and increased responsibilities of CSR Committee

New norms of CSR policy have increased responsibilities of CSR Committee in terms of formulating and recommending an action plan to BOD. Board has been authorized to alter such plan with recommendation of CSR committee. This new norm is aiming at better planning of CSR activities and minimization of ad-hoc allocation of funds near the end of the FY.

D. CSR Expenditure

An entity which is covered under Sec 135, has to spend at least 2% of the average net profits of last three years. Followings are the key amendments made to spending on CSR:

- **Administration Overhead:** Administration overheads shall not exceed 5% of CSR expenditure. Administration expenses have been defined by new rules as 'General Management' and 'administration charges' of CSR functions in company

- **Capacity building of CSR Capacity:** Earlier, expenses on CSR capacity building of personnel of the company was also covered under the limit of 5% which is now not covered. Hence, now such expenses will be part of CSR expenses. Also, new amendment rules allow the companies to engage international organizations for such purpose.

- **Surplus and Unspent CSR Account:** If any surplus arises out of CSR activities, then it shall not be part of business profit and it shall be either ploughed back into the same project or transferred to unspent CSR Account. Further, it is to be noted that there is no specified unspent CSR account, therefore until such account is prescribed, any unspent CSR amount shall be transferred to any account specified in schedule VII (PM national relief fund, PM Cares or other specified funds).

- **Set off of excess amount:** Set off for amount incurred in excess of CSR expenses required to be incurred, for specified no. of years was made available by companies amendment act, 2020. Now by amending such provision further, set off is available for immediate 3 Financial years which will be subject to following conditions.

- Excess amount shall not include surplus arising out of CSR activities;
- Board shall pass a resolution to this effect.

- **Capital Expenditure:** Expenditure on creation or acquisition of capital assets is now permitted which will be subject to the condition that such asset shall be held by either a Section 8 Company having CSR number or beneficiaries of such CSR activity or any Public authority.

  Transition period to comply with above requirement in respect of assets created prior to these new rules is 180 days which can be extended by 90 days by BOD.

E. International Organization

Companies those are covered under the purview of CSR, have been allowed to engage international organization for designing, monitoring and evaluation of the CSR projects or programs as per its CSR policy.

F. Introduction of Impact assessment requirement

Every company having CSR outlay of 5 crore or more in last 3 FY has to conduct impact assessment through independent agency in respect of those projects which are completed within a period of more than 1 year and having outlays of more than INR 1 crore. Report on such assessment shall be annexed to annual report on CSR.

However, expenses on Impact assessment requirement will be considered as CSR expenses but it shall be restricted to the lower of 5% of CSR expenses for respective financial year or INR 50 lacs.

G. Implementing Agency should be registered trust

Company can incur expenditure on CSR by itself or through specified implementing agencies. Earlier, these implementing agencies were supposed to be either a Section 8 Company or registered public trust. However, it is now prescribed that any such public trust shall be registered u/s 80G or 12A of IT Act.

H. Reporting on CSR policy

Adequate reporting has been ensured by the amendment rules to make the CSR policy more transparent which are as follows:

- Annual report on CSR shall be annexed to Board Report.
- In case of foreign company, annual report on CSR shall be annexed to balance sheet.
- Additionally, BOD of the company shall disclose composition of CSR committee, CSR Policy and project approved by the BOD on the website.

Authors' Note:

These amendments will be allowing corporates to undertake multi-year projects. These amendments are aimed at further improving the ease of doing business as well as making the CSR framework more transparent. Introduction of impact assessment will cause the companies to focus on impact of CSR projects.

Amendment for implementing agencies to be registered u/s 80G are very impactful changes as lot of private trust conduct CSR expenditure on behalf of the companies. These private trusts now have to be registered on or before April 2021. To bring transparency in implementation of CSR projects, Implementation agencies have been required to register itself with MCA and get a unique registration number. Conclusively, it can be said that these new CSR rules have addressed many practical issues and aspects and would lead to more focused and result oriented CSR activities.

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Introduction of Condonation of delay Scheme

In March 2020, MCA has introduced Companies Fresh Start Scheme, 2020 (CFSS-2020) which was later extended till 31st December, 2020. The said period of scheme has expired, however to give relief to companies for whom Registrar of Companies has passed a name restoration order during December 2020, a new scheme has been introduced to further condone the delay.

Hence, vide General Circular 03/2021 dated 15th January, 2021, the MCA has introduced another scheme for various filing compliances. Such Condonation scheme is described as below:

Duration of the scheme	01st February, 2021 - 31st March, 2021
Eligible Companies	Against whom, appeal has been filed for restoration of name before NCLT and restoration of name made between 01.12.2020 – 31.12.2020
Forms covered under the scheme	(i) All e-forms except e-form SH-7 (ii) Charge related forms (CHG-1, CHG-4, CHG-8 and CHG-9)
Applicable Fees	Fees prescribed for such respective form. No delay charges will be applicable

Authors' Note:

This amendment has given relief to those who were left to take the benefits of CFSS-2020 because of passing order for restoration of name by December, 2020 end. This will reduce the financial burden of additional charges on the companies. Due to COVID disruptions, most of the businesses were on halt and this Scheme was a much-needed breather in the form of relaxations and concessions during this dark hour.

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European Parliament resolution of 21 January 2021 on reforming the EU list of tax havens

European Parliament, on January 21, 2021, adopted a resolution to change system of listing or delisting from the EU-Tax Haven blacklist. Resolution moves towards transparency and consistency and stronger defensive measures against tax avoidance.

The resolution calls on the Commission and the Code of Conduct Group to include in the assessment tax measures leading to low levels of taxation in line with the ongoing negotiations on Pillar II of the OECD/G20 Inclusive Framework. It recalls that current process does not include a standalone criterion on 0 % or very low tax rates, calls on the Council to include the automatic listing of jurisdictions with a 0% corporate tax rate or with no taxes on companies.

The Resolution highlights removal of Cayman Islands and Bermuda from the list on introduction of very minimal substance criteria and weak enforcement measures.

Reference:
https://www.europarl.europa.eu/news/en/press-room/20201208IPR93318/eu-tax-haven-blacklist-not-catching-worst-offenders

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ATO issues schedule 3 of the practical compliance guidelines on Interest-free loans between related parties

The ATO has released Schedule 3 of Practical Compliance Guideline (PCG 2017/4) which shall apply retrospectively from January 1, 2021 in relation to interest-free loan arrangements between related parties. The guidance provides a mechanism for the review of outbound interest-free loans between cross border related parties.

The updated schedule of guidance provides the conditions for the modification of the risk score assigned to related party outbound interest-free loans in terms of Schedule 1 of the Practical Compliance Guideline and also highlights the foundation on which the related party financing risk indicators are based and its application to outbound interest free loans.

A high-risk indication would require arm's length compensation to bring it to low-risk.

Reference:
https://www.ato.gov.au/Business/Business-bulletins-newsroom/Public-advice-and-guidance/PCG-2017/4---Schedule-3-released/

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GLOSSARY

Abbreviation	Meaning	Abbreviation	Meaning
AAAR	Appellate Authority of Advanced Ruling	ITA	Interactive Tax Assistant
AAR	Authority of Advance Ruling	ITAT	Hon'ble Income Tax Appellate Tribunal
ACIT	Assistant Commissioner of Income Tax	ITC	Input Tax Credit
AE	Associated Enterprise	ITES	Information Technology Enabled Services
ALP	Arm's Length Price	MAT	Minimum Alternate Tax
AMP	Advertisement Marketing and Promotion	MPS	Minimum Public Shareholding
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	NeAC	National e-Assessment Centre
CASS	Computer aided selection of cases for Scrutiny	OECD	Organization for Economic Co-operation and Development
CBDT	Central Board of Direct Taxes		
CBEC	Central Board of Excise and Customs	OAVM	Other Audio Visual Means
CBIC	Central Board of Indirect Taxes and Customs	PCIT	Principal Commissioner of Income Tax
CENVAT	Central Value Added Tax	PLI	Profit Level Indicator
CESTAT	Custom Excise and Service Tax Appellate Tribunal	R&D	Research and Development
CGST Act	Central Goods and Services Tax Act, 2017	RoDTEP	Remission of Duties and Taxes on Export of Products
CIRP	Corporate Insolvency Resolution Process	SC	Hon'ble Supreme Court
CIT(A)	Commissioner of Income Tax (Appeal)	SCM	Subsidies and Countervailing Measures
CLU	Changing Land Use	SCRR	Securities Contracts (Regulation) Rules, 1957
CSD	Canteen Stores Department	SLP	Special Leave Petition
CWF	Consumer Welfare Fund	TCS	Tax Collected at Source
DCIT	Deputy Commissioner of Income Tax	TDS	Tax Deducted at Source
DGAP	Directorate General of Anti-Profiting	The CP Act	The Consumer Protection Act, 2019
DGFT	Directorate General of Foreign Trade	The IT Act	The Income-tax Act, 1961
DRP	Dispute Resolution Panel	The IT Rules	The Income-tax Rules, 1962
Finance Act	The Finance Act, 1994	The LT Act	The Limitation Act, 1963
GST	Goods and Services Tax	TPO	Transfer Pricing Officer
HC	Hon'ble High Court	UN TP Manual	United Nations Practice Manual on Transfer Pricing
IBC	International Business Corporation	VAT	Value Added Tax
IGST	Integrated Goods and Services Tax	VSV	Vivad se Vishwas
IGST Act	Integrated Goods and Services Tax Act, 2017	VC	Video Conferencing
IRP	Invoice Registration Portal		

PUBLISHER & AUTHORS

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TAXCRAFT ADVISORS

RAJAT CHHABRA
(Partner)

KETAN TADSARE
(Associate Partner)

VAKIL ASWANI
(Manager)

RAGHAV PRASAD
(Associate)

ASHWIN CHOUDHARI
(Associate)

GST LEGAL SERVICES

GANESH KUMAR
(Partner)

BHAVIK THANAWALA
(Associate Partner)

ANKIT KARANPURIA
(Senior Manager)

UNEET NAIK
(Manager)

RUSHABH LUHAR
(Associate)

VMG & ASSOCIATES

VISHAL GUPTA
(Partner)

GAURAV AGARWAL
(Manager)

MOHIT SHARMA
(Associate)

PRASHANT SHARMA
(Associate)

FIRM INTRODUCTION

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RAJAT CHHABRA
Taxcraft Advisors LLP
Founding Partner
rajatchhabra@taxcraftadvisors.com
+91 90119 03015

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GST LEGAL SERVICES

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GANESH KUMAR
GST Legal Services LLP
Founding Partner
ganesh.kumar@gstlegal.co.in
+91 90042 52404

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VISHAL GUPTA
VMG & Associates
Founding Partner
vishal.gupta@vmgassociates.in
+91 98185 06469

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TAXINDIAONLINE.COM
RICHA NIGAM, Marketing Head, TIOL Pvt. Ltd.
richa@tiol.in | +91 98739 83092