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Vision 360: Hopeful and Grateful !

Although, the second wave of the COVID-19 pandemic had forced the nation to come at a stand-still, it is commendable as to how the country as a whole, has managed to boost the vaccination drive, all the while running the economy rather smoothly. The boost in vaccination drive is largely thanks to customs duty exemptions provided by the authorities upon import of raw material.

We hope that this vaccination drive would be further boosted if the International Governments collectively manage to get the vaccine patents waived by the USA. In such times of crisis, it is only just to prioritize humanity over economy. On this front, the Indian Government has exempted the import of Remdesivir and medical grade oxygen, oxygen related equipment and COVID-19 vaccines. Similarly, the Government has also reduced the IGST on import of Oxygen Concentrators for personal use.

Even in respect of GST compliance, a slew of reliefs have been provided by relaxation of procedural requirements and time extensions to help the people cope with difficulties faced. Similar to the Customs and GST counterparts, the Direct tax authorities have also made a note of the difficulties faced by the people and provided COVID-19 reliefs, such as extension in time-limits for making payments under VsV and extension of other compliance deadlines.

Apart from the COVID-19 reliefs and measures, the tax authorities and the judiciaries have been quite active in their regular courses, as well. Notably, the SC, while setting aside an order of the Himachal Pradesh HC, held the power of provisional attachment under GST to be draconian. In the said case, the SC beautifully analysed the scope of the attachment provisions, which might help the Revenue authorities in execution of the same.

In an equal important judgement in the direct tax filed, the Madras HC allowed depreciation on non-compete fee, while deleting the addition of reserve arising from amalgamation. In another case, the Delhi HC has allowed the deduction of business expenditure, while holding that setting up of business different from commencement. In view of this judgement, henceforth, the Revenue shall bear in mind that the extent of expenditure on advertising does not decide as to whether the expenditure incurred is of a revenue nature or capital.

In addition to the judicial and regulatory updates, we have also covered the controversial ruling of Gujarat AAR in the case of Enpay Transformer Components India Private Limited, wherein, the authority has inter alia raised the question as to whether interest paid in connection with import of goods can be assessed independent of the goods so imported? The authors have penned down their thoughts on this ruling, giving their valuable insights.

Further, in light of the second wave of the COVID-19 pandemic, it has been observed that many organisations have been over and beyond their CSR obligations to provide for the society. However, the interplay between the Companies Act provisions and the GST provisions are not all that simple for availing the credit thereof. In this regard, the authors have taken a deep dive in the pool of CSR activities to analyze and interpret as to where the GST credit upon CSR activities is available vis-à-vis litigative.

While we are incredibly grateful to be privileged enough to be able to able to publish this Newsletter in such times, we are also hopeful that the current vaccination drive will be a total success and bring back this country and the economy back on its feet and shoulder-to-shoulder, with the rest of the world. As a great American Football coach, Vince Lombardi, once remarked "It's not whether you get knocked down, it's whether you get up."

We, the entire team of **TIOL**, in association with **Taxcraft Advisors LLP**, **GST Legal Services LLP** and **VMG & Associates**, are glad to present to you this comprehensive coverage on all the key tax and regulatory updates!

Happy Reading!

P.S.: This document is designed to begin with an 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 and sparkle zone for some global and local trivia.

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GST Credit on CSR activities – A deep dive!

Background

The noble concept of Corporate Social Responsibility ('CSR') might seem to be relatively new in India, however the same has existed in India right from the early days of trade in the Mauryan history. The philosophers even then emphasized on ethical practices and principles while conducting business although it was practiced informally. However, after the regulation of trade by incorporating laws and procedures, this concept has been given a proper structure in the name of CSR. CSR is nothing but a way of giving something back to society. It represents considering environment and society concerns while planning one's business operations.

In recent times, the Companies Act, has formulated certain provisions which prescribe mandatory provisions with respect to the CSR. In terms of such provisions, every Company inter alia having net worth of Rs. 500 crores or more, or turnover of Rs. 1,000 crores or more, or net profit of Rs. 5 crores or more during the immediately preceding financial year is required to perform CSR activities. However, inpsite of still 4 years post the introduction of GST, the interplay of GST with CSR provisions of the Companies Act, despite being clear in letter, remains mudded in ambiguity.

The Issue

In this article, the authors aim to interpret and analyze the implications of GST on CSR expenditure. In this regard, it would be pertinent to refer to ITC provisions under the GST law. Section 16(1) of CGST provides that every registered person will be allowed to avail ITC in respect of the inward supplies that are being used or intended to be used in the course or furtherance of business. However, Section 17(5), provides that ITC will not be allowed on goods or services used for personal consumption or goods disposed of by way of gift or free samples. In view of the above, since CSR may include giving goods or services without consideration, the moot question which arises is whether CSR expenditure can be considered to be in the course or furtherance of business.

Interpretation

The term 'business' has been defined u/s. 2(17) of the CGST Act to include trade, commerce, vocation etc. whether or not for pecuniary benefit. Accordingly, it can be inferred that all activities which are ancillary or incidental to such activities would also be included in business. As the CSR is a mandatory expenditure for certain class of organisations, failure to incur such expenditure could result in non-compliance, attracting penal provisions under the Companies Act. Therefore, a school of thought exists that in the absence of specific provisions restricting the credit on such expenses, ITC in respect of CSR expenditure should be allowed.

The said view gains strength from the proviso to Section 17(5) of the CGST Act, wherein ITC has been allowed in case where it is obligatory for an employer to provide goods and / or services to its employees under any law for the time being in force. Drawing an analogy, where CSR expenditure is obligatory expense under the Companies Act, ITC for such expenses should be available.

However, However, there is another school of thought which believes that ITC on such expenses may not be allowed due to lack of consideration involved in CSR activities. Further, the question would be compounded in such cases where CSR expenditure are incurred but which would not be obligatory under the Companies Act. For example, where an organization, going beyond its obligation and incurring such expenses beyond the limit prescribed under the Companies Act. In such cases, the Revenue may challenge the ITC on the ground Section 17(5) does not allow ITC on gifts. Further, the proviso does cover cases of voluntary CSR expenditure.

In recent times, a new type of CSR expenditure has also been witnessed, wherein the organizations undertake to construct buildings for noble causes, such as schools for educational purposes or hospital for health care purposes. In such cases, there exists a two-edged sword i.e., the organization would be required to prove that such expenses are not in the nature of gifts and are not capitalized in the books of account. However, the expenses on construction activities would definitely not be capitalized in CSR activities, therefore the ITC would be eligible.

A SCHOOL OF THOUGHT EXISTS THAT IN THE ABSENCE OF SPECIFIC PROVISIONS RESTRICTING THE CREDIT ON SUCH EXPENSES, ITC IN RESPECT OF CSR EXPENDITURE SHOULD BE ALLOWED.

HOWEVER, THERE IS ANOTHER SCHOOL OF THOUGHT WHICH BELIEVES THAT ITC ON SUCH EXPENSES MAY NOT BE ALLOWED DUE TO LACK OF CONSIDERATION INVOLVED IN CSR ACTIVITIES

In this regard, it would be pertinent to note that in the case of Rambagh Palace Hotels Private Limited **[2019-TIOL-155-AAR-GST]**, it was observed by the Rajasthan AAR that ITC in general is not available for construction, reconstruction, renovation, addition, etc. of an immovable property even when such goods or services or both are used in course or furtherance of business. However, the limitation in such a scenario is only to the extent of capitalization in the books of accounts of the taxpayer. Accordingly, it was ruled by the AAR that the ITC of goods and services used for construction of school building will not be available to the Applicant to the extent of capitalization.

Further, in recent developments, the UP AAR in the case of Dwarikesh Sugar Industries Limited **[2020-TIOL-305-AAR-GST]**, the Applicant, engaged in the business of business of manufacture and sale of sugar and allied products, had been obligated under the Companies Act to comply with CSR. Accordingly, the Applicant had undertaken to construct the school building, additional rooms, laboratories, etc. In view of the above, the Applicant had filed an Application before the UP AAR to ascertain whether expenses incurred in order to comply with CSR qualified as being in the course of business and eligible for ITC under the CGST Act.

Referring to the judgement of Mumbai Tribunal in the case of Essel Propack Limited **[2018-TIOL- 3257-CESTAT-MUM]**, it was observed by the AAR that since CSR has been made obligatory also for the private sector, unless the same is to be treated as input service in respect of activities relating to business, production and sustainability of the company itself would be at stake.

The AAR further observed that as per Section 17(5)(h) of the CGST Act, ITC shall not be available inter alia in respect of goods disposed of by way of gift or free samples. It was observed that in common parlance gift is provided to someone occasionally, without consideration and which is voluntary in nature.

Accordingly, the AAR rightly noted that a clear distinction was required to be drawn between goods given as 'gift' and those provided /supplied as a part of CSR activities. While the former is voluntary and occasional, the latter is obligatory and regular in nature. As it is the Applicant's obligation to incur such expenses, they do not qualify as 'gifts' and therefore, ITC is not restricted under Section 17(5) of the CGST Act.

However, in the case of Polycab Wires Private Limited **[2019-TIOL-107-AAR-GST]** where the question was whether ITC would be available on free distribution of electric items like switches, fans, cables etc. to flood affected areas, the Kerala HC had held that no ITC would be available in terms of Section 17(5) of CGST Act. Accordingly, it can be seen that even now, contradictory views persist in the instant matter.

CSR for COVID-19 Reliefs

While the organizations meeting the thresholds, have been mandatorily fulfilling the CSR expenditures, many other organizations have suo moto come forward to help the disadvantaged section of the society in current time of crisis. Accordingly, various questions were raised as to whether such expenses for COVID-19 reliefs would qualify as CSR expenditure. In this regard, the MCA vide General Circular No. 10/2020 dated 23 March 2020 and 15/2020 dated 10 April 2020 had prescribed certain activities, which would qualify as CSR expenditure.

However, the said circulars were issued in the perspective of Companies Act and not the GST law. Therefore, in order to avail the ITC for CSR expenses during COVID-19 relief, would still largely be based on the interpretation of Section 17(5) of the CGST Act.

Conclusion

In view of the above, it can be observed that while certain judicial and quasi-judicial authorities have been taking liberal approach in allowing the ITC for noble matters such as CSR activities, there still persists contradictory rulings and judgements, wherein the authorities resort to narrow interpretation of the law. In this regard, the CBIC should come up with a clear and unequivocal clarification regarding the ITC availability on CSR expenditure, keeping in mind the reliefs extended during the COVID-19 pandemic.

Jitendra Mohananey

Group Financial Controller
Gujarat Fluorochemicals Limited / Inox Wind Limited

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

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

The Renewable energy sector has witnessed a paradigm shift over the past few years in terms of its overall contribution to power generation pie, average cost of power and competitive tariffs offerings when compared to conventional sources of energy. Currently, renewable is the cheapest source of power in India. The sector has seen substantial installations over last ten years and now stands close to a quarter of India's overall power installations. Although the cases of infections are rapidly increasing forcing authorities to take lockdown measures, the economic impact might not be as severe as last year. Yet, there is no denying that like other sectors, renewable energy sector is still grappling to re-bounce from COVID impact last year and this second wave might just make things more difficult. However, the experience and learnings from first wave might come handy in handling the challenges coming with the second wave. As power is an essential commodity, producing power plants across industries was never stopped. In my view, the sector would see a robust growth in near future riding on the back of stable Government policies, advanced technological developments and cohesive investment environment in India.

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

In my opinion, the target of 175 GW of renewable energy by 2022 set by the Government is very aggressive. The power evacuation infrastructure has been a challenge for the entire sector. There have been multiple instances of power generation loss and delay in commissioning of projects due to grid curtailment. Though PGCIL has put in tremendous e¬fforts in developing evacuation capacities across states, we need to go a long way to match evacuation capacities commensurate with the pace of development of power generation installations. Over the last 5 years, the transmission sector has seen average annual capex of more than 50,000 crores and many newer private sector players are in pursuit of investing into power infrastructure projects. Therefore, during next few years we should witness a coordinated sector growth (other things being equal), wherein power generation installations and development of power evacuation infrastructure would go hand in hand.

Tax incentives extended to renewable energy sector such as Accelerated Depreciation, Generation Based Incentives and Section 80IA benefits etc. which were provided in past have been removed. However, the benefits of lower corporate tax regime u/s 115BAB have been extended to power generation companies. What is your view on this benefit given the fact that it is available in contrast with Section 80IA benefit and has a sunset clause in near future?

During the initial growth of the sector,

the Government provided various tax incentives to support renewable sector. However, backed on technological innovations, cost reduction through value re-engineering and availability of capital at competitive prices, the sector has seen significant developments in last few years. In my view the sector is at a cusp of self-sustainability and therefore, needs a stable policy environment and Government's thrust to increase its green energy footprints than any financial assistance or special tax incentives to survive. Moreover, it was a great step by the Government to categorize power sector as manufacturing sector for the purposes of said income tax benefit. The lower corporate tax rate has always been an ask by foreign institutional investors looking for investments into India's power sector.

However, one of the key aspects to note here is that this benefit is available as substitution for other tax benefits such as Section 80IA and additional depreciation benefits, therefore one has to do a thorough analysis of costs and benefits of the said provision before taking a decision. Besides, this has a sunset clause wherein the projects commissioned post March, 2023 would not be eligible for lower tax rate benefit. The Government should consider an extension of this sunset clause especially when the projects are somewhat delayed by COVID-19 disruptions as well as delays on account of non-readiness of power evacuation infrastructure.

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

While ADD offsets the dumping practices, it is not something a manufacturer can bank on for its survivability. The survival must depend on business fundamentals itself. However, restrictions on imports always create an opportunity for domestic manufacturers, especially the new ones. It is also important to analyze the supply chain positioning, if domestic industry does not have enough supply chain integration domestically, its viability is dependent on imports. The wind operated renewable energy sector which relies on imports from Korea, Europe and China for cost efficiency. Levy of ADD is more of a cost benefit analysis and ought to be dynamic enough to address the changing paradigms in domestic industry as well as be cognizant of dumping practices of exporting countries.

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

Government has undertaken major changes in the Tax System by introducing E-waybill, E-invoicing, faceless assessment, etc. How do you see these changes in bringing transparency and efficiency in the tax system?

Undoubtedly, the Government has indeed taken some bold steps in re-vamping the age-old tax system in India. Starting from the introduction of GST and gradually moving towards the e-waybill and e-invoicing has indeed brought the transparency in recording and reporting of the transaction from taxation perspective. Though, all the said systems have been introduced with series of initial hiccups and multiple amendments in the beginning, still one would say that the same has been introduced successfully given the massive scale of user base and implementation in India. Instead, with the e-invoicing and simplification of return structure, tax compliance has seen dramatic increase in ease of doing business in India.

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.

ITAT holds services provided to subsidiary in India through servers in Singapore, not taxable as Royalty/FTS

Atos Information Technology Singapore Pte Ltd
2021-TII-55-ITAT-MUM-INTL

The assessee was a tax resident of Singapore and had provided certain services in the nature of data centre/managed services to its subsidiary in India and received payment. In the return of income filed by the assessee, it did not offer the payment as income claiming benefit under India-Singapore DTAA.

The AO rejected the assessee's claim terming the payment received by the assessee as royalty under the India-Singapore DTAA as the payment was allegedly for the use of or right to use of information concerning industrial, commercial, scientific experience and copyright. The AO further stated that the payment could also be classified as FTS under India-Singapore DTAA as the assessee had rendered managerial and technical services to its subsidiary in India.

Aggrieved, the assessee approached the DRP which observed that the assessee had not made any effort to substantiate how various services rendered would not fall within the category of royalty/FTS with reference to the provisions of India-Singapore DTAA. Thereby, it was concluded that the assessee had provided equipment and associated software and services to manage the equipment, hence, payment received for such services could be termed royalty as per the India-Singapore DTAA.

Aggrieved, the assessee filed an appeal before ITAT which observed that for a payment to be classified as Royalty under the DTAA it should fall in one of the following 3 instances: (i) that the payment was for the use or right to use industrial, commercial or scientific experience, (ii) the payment was for the use or right to use any copyright of a literary, artistic work etc., and (iii) the payment was for the use or right to use industrial, commercial or scientific equipment. However, the payment made to the assessee did not fall in any of the abovementioned category. The services rendered by the assessee to its subsidiary were purely IT infrastructure management and mailbox hosting services through servers maintained by it outside India. Further, none of the assessee's employees visited India while services were being rendered. Therefore, the payment made to the assessee could not qualify as royalty.

ITAT also held that the payment could not be classified as FTS as the recipient of the services could not use any technical knowledge, experience, skill independently on its own without requiring the involvement of the assessee as no technical knowledge was made available to the Indian subsidiary. Thus, as the payment received by the assessee could not be classified as royalty/FTS under the DTAA, the question of taxability of royalty/FTS did not arise.

HC deletes addition of reserve arising from amalgamation u/s 28; Allows depreciation on non-compete fee

Areva T & D India Ltd
2021-TIOL-829-HC-MAD-IT

The assessee was a manufacturer of heavy electrical equipment that had filed their return of income which was subsequently selected for scrutiny. During the discussions held with the assessee, the AO noted that the assessee claimed depreciation in respect of 'non-compete fee' in relation to assessee's sister concern (taken over by the Assessee) that had paid INR 16 Cr. as non-compete fee at the time of acquiring running businesses of two companies and claimed depreciation on non-compete which was allowed by the Revenue in the preceding years.

The AO rejected the claim on the ground that 'non-compete fee' could not be classified as any of the businesses or commercial right as spelt out in Appendix I of the Income Tax Rules, 1962 and therefore, not allowable.
The other issue was with regard to amalgamation of three companies with the assessee company and on amalgamation, the assets stood transferred to the assessee company.

The net excess value of the assets over the liability of the amalgamating company had been adjusted against the general reserve of the assessee company. The assessee was called upon to explain as to why the said excess asset, which was taken over as liability during the current year, should not be taxed under Section 28(iv) of the Act.

The explanation offered by the assessee was not accepted by the AO who held that the said amount had to be charged to income tax under the head 'profit and gain of business' under Section 28(iv) of the Act.

Aggrieved by all of the above findings, the assessee filed an appeal before the CIT(A) who reversed the order of the AO. Aggrieved by such reversal, the revenue filed an appeal before the Tribunal which was also dismissed causing the revenue to approach the High Court which allowing depreciation on non-compete fee held that the AO and CIT(A) had been allowing such depreciation in the previous years and they therefore have to allow such depreciation for the current year as well as it is a settled law that the AO was bound to be consistent with the earlier decisions.

HC placing reliance on various judgments also deleted the addition of reserve u/s 28(iv) of the Act holding that the amalgamation of the three companies with the assessee company was not the business of the assessee and consequently, it could not be stated that the provisions of Section 28(iv) of the Act would apply to the excess of the net book value of the entities over the consideration paid in any way nor was it income liable to tax under the head 'profit and gains of business in the hands of the assessee. The provisions of Section 28(iv) make it clear that the amount reflected in the balance sheet of the assessee under the head 'reserves and surplus' could not be treated as a benefit or perquisite arising from business or exercise of profession. For applicability of Section 28(iv) of the Act, the income must arise from the business or profession.

HC holds setting up of business different from commencement; Allows deduction of business expenditure

Miele India Pvt. Ltd
2021-TIOL-932-HC-DEL-IT

The assessee was a trading company that had filed its return of income which was picked up for scrutiny. Post the assessment proceedings, the AO passed an assessment order making additions of pre-operative expenses contending that assessee commenced its business on October 29, 2009 on the date of launching its physical outlet and advertising expenses on the grounds that such expenses had been incurred to build goodwill and were capital in nature.

Aggrieved by the order of the AO, the assessee approached the CIT(A) which deleted the additions made by the AO.
Aggrieved, the revenue approached the Tribunal which upheld the order of the CIT(A) causing the revenue to approach the HC.

Before the HC, revenue contented that since assessee commenced its business on October 29, 2009 by launching its 'experience centre', that had to be taken as the actual date when the assessee had set-up its business. Further contended that since assessee is a trading entity, it needed an outlet which, as indicated above, was set-up only on October 29, 2009, without which, assessee could not have sold the goods as it had no online presence.

On other hand, the assessee submitted that there is a difference between the setting-up of business and commencement of business.

HC noting that prior to October 29, 2009, assessee had executed lease deeds for its premises, obtained Importer Exporter code, engaged senior employees, carried out local purchase and sales which would not have been possible if the business had not been set up held that the fact that the assessee had set-up an experience centre in the FY 2009-2010 is not sufficient to hold that the assessee had not set-up its business in the previous AY.

With respect to the addition made on account of advertising expenses, HC not finding anything on record to show that the advertising expenses were not incurred wholly and exclusively for the business of the assessee held that Goodwill, which is built, based on the reputation acquired by the business over the years, is an intangible asset, which is monetized, ordinarily, when the business is sold. The extent of expenditure on advertising does not decide as to whether the expenditure incurred is of a revenue nature or of a capital nature as there was nothing on record to show that a capital asset had been created and therefore, the rationale adopted by Revenue for disallowing the expense was flawed.

Thus, deleting both the additions made by the AO, the HC disposed of the appeal filed by the revenue.

ITAT holds fees paid to SUPIMA for use of logo, royalty; Liable to TDS u/s 195

Ambika Cotton Mills Ltd
ITA Nos.2851, 2852 & 2853/Chny/2019

The assessee was a manufacturer of cotton yarn that had imported long staple cotton from America known as "PIMA" cotton. The assessee had entered into a license agreement with SUPIMA, USA whereby license was granted to the assessee for use of their logo. The assessee paid license fee for such use of trademark without deducting TDS to SUPIMA, USA.

The AO passed an order holding that the payment made by the assessee to SUPIMA, USA was in the nature of royalty as per the Explanation-2(1) to Section 9(1)(vi) and hence, liable for deduction of TDS u/s 195.

Aggrieved, the assessee approached the CIT(A) which confirmed the findings of the AO.

Aggrieved, the assessee approached the ITAT which upholding the order of the CIT(A) held that the payment was in the nature of royalty, liable for deduction of tax u/s 195.

HC holds Provision created to meet liability towards Vendors not liable to TDS

Toyota Kirloskar Motor (P) Ltd
2021-TIOL-863-HC-KAR-IT

The assessee was a Japanese manufacturer and seller of automobiles that had made provision towards marketing, overseas and general expenses. However, at the time of filing of return, a substantial portion of the provision remained un-untilized as per books of accounts which was not claimed as deduction u/s 40a(i) and (ia) and offered to tax. Subsequent to filing of the return, the assessee received invoices from the vendors and the amount mentioned in the invoices was debited to the provision with a corresponding credit to the respective vendor's account. The amount indicated in the invoices was utilized against the provision and the TDS along with interest was also discharged at the time of credit of the invoice amount to the account of the vendor. Subsequently, the amount which remained un-utilized in the provision after completion of negotiation / finalization of services was reversed in the books of accounts of assessee.

The AO initiated proceeding for non-deduction of TDS in respect of the amount which was reversed/unutilized to the provision, and the amount of TDS and interest on the amount was computed along with a fee levied for late remittance of TDS.

Aggrieved, the assessee approached the CIT(A) as well as ITAT both of which had affirmed the order of AO causing the assessee to approach the HC which referring to various judgments set aside the proceedings against the assessee for non-deduction of TDS and held that tax liability cannot be fastened merely on account of book entry in the absence of income. The IT Act mandates deduction of tax at source by a person who makes the payment. There can be no levy of tax in the absence of income and accordingly proceedings for non-deduction of TDS could not have been initiated.

HC remits issue of depreciation on franchise fee, payable annually, for IPL Delhi team

GMR Sports Pvt. Ltd
2021-TIOL-951-HC-KAR-IT

The assessee was a special purpose vehicle of a holding company that had submitted a tender to BCCI and won the franchise to form cricket team for IPL resulting in a franchise agreement with BCCI for a franchise fee payable annually in 10 instalments for 10 years. The assessee filed its return of income and claimed a deduction on the franchise fee paid during the year. However, this was disallowed by the AO who stated that franchise fee was for acquisition of business right which was an intangible asset and therefore not available for deduction but 25% of the amount paid during the year as franchise fee was eligible for depreciation.

Aggrieved, the assessee approached the CIT(A) which held that the assessee was eligible to claim depreciation on the entire franchise fee paid during the year.

Aggrieved, the revenue approached the ITAT which held that the depreciation was allowed on the entire cost of franchise rights as against franchise fee instalment paid during the year.

When the matter arrived before HC, it noted that the Tribunal had not assigned any reasons in support of its decision and the order passed was bereft of any reasoning, suffering from the vice of non-application of mind causing the HC to therefore remit the issue back to the ITAT for fresh consideration.

ITAT holds TP adjustments can only be made to transactions with AE; remits working capital adjustment to TPO for re-computation

Doosan Power Systems India Pvt Ltd
2021-TII-159-ITAT-MAD-TP

The assessee was an engineering, procurement and construction services provider to thermal power generating companies in India and also rendered engineering services to its associated enterprises who had entered into international transactions with its associated enterprises. The case was taken up for scrutiny and during the course of assessment proceedings a reference was made to TPO to determine the Arm's Length Price of international transactions with its associated enterprises.

The TPO suggested upward adjustment towards engineering services segment, and downward adjustment towards project segment and royalty payment. Consequent to TP adjustment as suggested by the TPO, the AO passed draft assessment order.

The assessee filed its objection before the DRP against the draft assessment order passed by the AO challenging comparable selected by the TPO and also opposing the entity level adjustment proposed in respect of project segment and engineering segment on the ground that it is well settled principle of law that TP adjustment can be made only in relation to transactions with its associated enterprises and not to third-party transactions.

DRP rejected objections filed by the assessee and confirmed TP adjustment proposed by the TPO in respect of project segment and engineering segment and also upheld the proposed adjustment towards royalty payment. Pursuant to directions of DRP, the AO passed the final assessment order making additions towards TP adjustment in respect of project segment, engineering segment and royalty payment.

Aggrieved, the assessee approached the Tribunal which placing reliance on various judicial precedents held that both TPO as well as the DRP had erred in making TP adjustment at entity level as transfer pricing adjustment has to be made only in respect of transactions of the assessee with associated enterprises after comparing the transactions made by similarly placed company in uncontrolled transactions with non-associated enterprises. TP adjustments cannot be made beyond the transactions of the assessee with its associated enterprises.

The Tribunal also observed that the TPO and DRP had not provided working capital adjustments which were necessary while computing profit level indicator after analysing the margins of comparables and therefore, remitted the adjustment back to the TPO for re-computation.

ITAT Upholds voluntary TP adjustment made by assessee and dismisses negative WC adjustment made by TPO

Harman Connected Services Corporation Pvt. Ltd.
2021-TII-144-ITAT-BANG-TP

The assessee was a subsidiary of an American subsidiary engaged in provision of software development and related services who had filed its return of income and offered a sum as voluntary adjustment.

The AO found that the assessee had entered into international transaction upward of INR 15 Crores and therefore, referred the case to the TPO for the determination of ALP of the transaction.

The TPO noted that the assessee had adopted TNMM as MAM and OP/TC as PLI and considered the transaction to be at ALP. However, TPO was dissatisfied with the assessee's computation of ALP applied certain filters and found the transaction to not be at ALP and also computed negative working capital adjustment without considering the voluntary adjustment offered by the assessee. The AO taking into consideration the findings of the TPO passed the draft assessment order.

Aggrieved by the draft assessment order, the assessee approached the DRP which dismissed the order of the TPO. The AO, however, passed an assessment order which was not in accordance with the directions of the DRP.

Aggrieved by the AO's order, both the assessee and the DRP approached the Tribunal which held that the voluntary adjustment income offered by the assessee has wrongly been ignored by the TPO for the computation of ALP. The Tribunal also directed the TPO to make positive working capital adjustment as the assessee did not bear any working capital risk.

ITAT holds corporate-guarantee as international transaction; Fixes arm's length guarantee-fee at 0.50%

Aban Offshore Ltd
2021-TII-155-ITAT-MAD-TP

The assessee was an offshore drilling and production services provider to companies engaged in exploration, development and production of oil and gas both in domestic and international markets who had filed its return of income which was selected for scrutiny under Company Aided Scrutiny Selection.

The Assessee had entered into an international transaction with its AE and had granted corporate guarantee to its AE. Therefore, the AO made reference to the TPO.

Before the TPO, the assessee contended that the corporate guarantee was merely a commitment and as such did not have any bearing on the profits, income, losses or assets. Thus, corporate guarantee could not be considered as an international transaction within the scope and spectrum of

'International Transaction' u/s.92B of the IT Act.

Not satisfied with this contention of the assesssee, the TPO held Corporate Guarantee given to AE to be an international transaction and fixed arm length guarantee fee at 1% and accordingly made an upward adjustment which was confirmed by the DRP.

Aggrieved, the assessee approached the Tribunal which noting that the Finance Act, 2012 inserted an explanation to Section 92B with retrospective effect to include corporate guarantee within the definition of international transaction from April 1, 2002, held the Corporate Guarantee as international transaction, however fixed arm length guarantee fee at 0.5% as opposed to 1% fixed by the AO directing the AO to adopt 0.5% as arm length guarantee fee.

ITAT deletes AO's disallowance of professional fees which was held at ALP by TPO

Lifestyle International (P) Limited
2021-TII-71-ITAT-BANG-INTL

The assessee made payment to its AE as professional fees and considered the same as international transaction. During the assessment proceedings the AO referred the said international transaction to the TPO who determined the transaction to be at ALP, despite which the AO passed an assessment order making a disallowance to the professional fees u/s 40A(2) of the IT Act.

Aggrieved, by the said order of the AO, the assessee approached the CIT(A) which directing the AO to delete the disallowance held that the AO had erred in disallowing the aforesaid expenses u/s 40A(2) without specifying what is excess or unreasonable in the payments made and also by failing to bring on record a fair market value analysis for making such disallowance.

Aggrieved by the order of the CIT(A), the Revenue approached the Tribunal which relying on various judicial pronouncements deleted the disallowance on professional fees observing that the AO is required to compute the total income of the assessee in regard to the ALP determined by the TPO. When payments are already been accepted at arm's length by the TPO, then there was no justification on the part of the A.O. to hold that the expenditure as unreasonable and invoke the provisions of section 40A(2) of the IT Act.

The Tribunal also observed that once the assessee has discharged initial onus, the burden would be shifted to the Revenue to show that the expense was unreasonable and excessive having regard to the legitimate needs of business based on material or evidence on record and that the assessee had made less than ordinary profits. The onus is on the AO to bring on record comparable cases to prove that payment made by the assessee is in excess of fair market value and the provisions of section 40A(2) of the Income Tax Act are not automatic. Thus, AO has erred in invoking the provisions of section 40A(2) of the Income Tax Act to disallow the claim of expense as excessive and not legitimate to the business needs, especially in view of the fact that the TPO, in its transfer pricing orders has held the transaction to be at arm's length.

ITAT holds inter-unit transfer to be at ALP for Sec-80IC deduction; dismisses TPO's order alleging profit-shift by assessee to claim higher deduction

Hero MotoCorp Ltd.
2021-TII-157-ITAT-DEL-TP

The assessee was a manufacturer of two-wheelers and had four manufacturing units (at Gurgaon, Dharuhera, Haridwar and Neemrana). The profits derived by the assessee from the unit located at Haridwar were eligible for-profit deduction u/s 80IC.

The other units purchased various components required in the assembly of two wheelers from third party vendors (due to proximity of location of such units with third parties and business relationship, etc) and transferred it to the unit at Haridwar at market value along with the freight charges incurred for the transaction which was booked at the Haridwar unit. No value addition was made by the other units to the various components transferred.

The aggregate purchases of Rs. 25.04 crores (as shown in the books of accounts of Haridwar unit), comprised of: (i) semi-finished goods for which nominal processing was carried out before transfer to Haridwar unit, and (ii) balance components.

The assessee had benchmarked the afore-mentioned inter-unit transactions between the Haridwar unit and other units by applying CUP as the MAM. The assessee also applied TNMM considering itself to be the tested party and accordingly the transaction of inter-unit transfer was considered to be at ALP.

The TPO ignored the CUP method on the ground that profit margin of non-eligible units ought to have been charged on transfer of such components/semi-finished goods and accordingly, held that assessee shifted profits to eligible unit in order to claim higher deduction u/s 80IC without benchmarking the inter-unit transfer price with any contemporaneous evidence or acceptable ALP method which was upheld by the CIT(A).

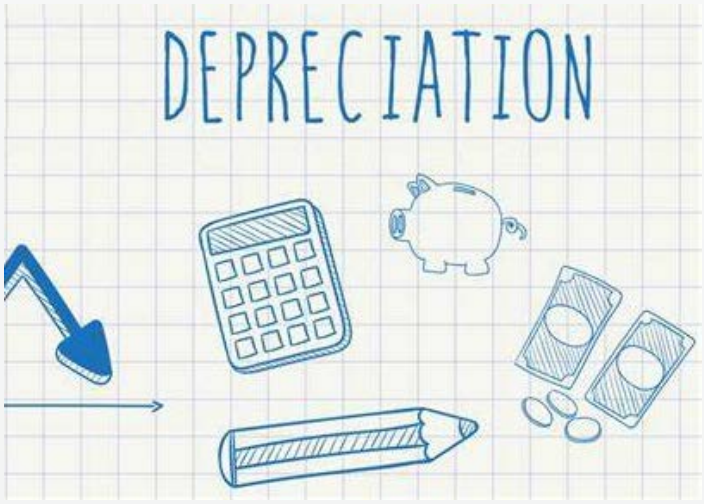
Aggrieved, the assessee approached the ITAT and contended that in the previous orders of the Hon'ble Tribunal regarding identical disallowance by the TPO in previous years, The ITAT had deleted such disallowance and therefore this issue stands squarely covered in their favour.

The ITAT placing extensive reliance on its previous rulings with regards to such disallowances made by the TPO in assessee's case allowed the assesse's appeal holding that when non-eligible units procured goods at market price from third party vendors and supplied the same to the eligible unit at the same purchase price as increased by applicable freight cost, no further substitution of such price is warranted in terms of section 80IA(8) as the transaction was a genuine business transaction borne out of commercial expediency.

ITAT affirms PBDIT as appropriate PLI; dismisses CIT(A) contention equating higher depreciation to lower repair and maintenance expenses

Aerzen Machines (India) Pvt. Ltd.
2021-TII-130-ITAT-AHM-TP

The assessee was a manufacturer of positive displacement blowers and had carried out certain international transactions with its AE based in Germany for which it had determined the ALP using CPM method for purchases and design and development charges received and CUP method with respect to interest expenses and warranty receivable claiming them to be MAM. The assessee had also adopted PBDIT as PLI for working out the ALP.



The AO being dissatisfied with the working of the assessee regarding the determination of ALP, rejected the same and adopted TNMM method as MAM taking three comparables and PBIT as PLI (after excluding the rental income for computing operating profit in working out the PLI) for working out the ALP and thereby made an upward adjustment with respect to the aforementioned international transactions.

Aggrieved, the assessee approached the CIT(A) which upheld the order of the AO, however directed the AO to include the rental income for computing operating profit in working out the PLI.

Aggrieved, the assessee approached the ITAT and contended that PBDIT should have been taken as PLI as there is huge difference in the amount of depreciation claimed vis-a-vis comparables and that out of the three comparables selected by the AO, two of them ought to be rejected basis the turnover filter.

The CIT(A) contended before the ITAT that if the assessee was claiming higher depreciation than comparable it implies that assessee must be claiming less repair and maintenance expenses than comparables.

Observing that the ratio of turnover to depreciation of assessee is higher than that of the comparables, ITAT inferred the need for adjustments in the depreciation, However noticed the absence of guidelines or provision of law for making such adjustments and accordingly placing reliance on the decision of the coordinate bench in Erhardt & Leimer (India) **[2017- TII – 09 – ITAT – AHM – TP]** held that AO should have taken PBDIT as PLI while working out the ALP and not finding merit in the contention of the CIT(A) dismissed it stating depreciation to be independent from repair and maintenance expenses.

CBDT extends time-limits for making payments under VsV

Notification No. 39/2021
April 27, 2021

CBDT has extended the due dates as per fourth column of table u/s 3 of VsV Act, for payment of tax without additional amount to June 30, 2021 from April 30, 2021 and payment of amount with additional tax to July 1,2021 from May 1, 2021.

CBDT notifies format, procedure and guidelines for SFT submission for Depositories, Mutual Funds

Notification No. 3 of 2021
Notification No. 4 of 2021
April 30, 2021

CBDT vide Notification No. 3 of 2021 and Notification No. 4 of 2021 dated April 30, 2021, has prescribed the format, procedure and guidelines for submission of Statement of Financial Transactions (SFT) for Depository Transactions and Mutual Fund Transactions by Registrar and Share Transfer Agent.

Accordingly, all reporting entities (Depositories u/s 2(1)(e) of Depositories Act 1996 and Registrar and Share Transfer Agent) are required to prepare the data file in prescribed format from their internal system and the reporting entities are required to submit the data files using SFTP Server using the login credentials, communicated separately.

Further, a separate control statement is required to be signed, verified and furnished by the Designated Director and the reporting entities are required to provide to the account holder, the information reported to Income Tax Department so as to enable taxpayers to reconcile the information displayed in the Annual Information Statement in Form 26AS and in case of any inaccuracy/defects, remove the defects by submitting a correction/deletion statement.

Furthermore, the reporting entity to document and implement appropriate information security and archival and retrieval policies and procedures with clearly defined roles and responsibilities to ensure security of submitted information and related information/documents and to ensure prompt submission and availability of information and related information/documents to the competent authority.

CBDT extends compliance deadlines to May 31, 2021

Circular No. 8/2021
May 1, 2021

In view of the grievous pandemic, CBDT has extended the deadlines pertaining to (i) filing of appeal before CIT(A), (ii) objections before DRP, (iii) ITR in response to notice u/s 148, (iv) belated/ revised filing of ITR, (v) TDS compliance u/s 194-IA, 194-IB and 194M, and (vi) filing of statement in Form No. 61 to May 31, 2021.

HC quashes interest recovery in form DRC-01 instead of DRC-07

Rajkamal Builder Infrastructure Private Limited
2019-TIOL-2774-HC-AHM-GST

The Petitioner had preferred a Writ before the Ahmedabad HC challenging the validity of SCN issued vide Form DRC-01 u/r. 142(1) of the CGST Rules for recovery of interest on gross liability under Section 50 of the CGST Act.

Firstly, it was observed by the HC that in terms of the proposed amendment to Section 50 of the CGST Act vide Finance Bill 202bis1, the interest can only be levied on the net tax liability and not on the gross tax liability. Secondly, in respect of the validity of the SCN in Form DRC-01, it was observed by the HC that such form can be served by the proper officer along with the notice issued under the prescribed provisions of the CGST Act.

It was observed that Section 50 has not been prescribed u/r. 142 of the CGST Rules, therefore, it was held that DRC-01 could not have been issued for the purpose of recovery of the amount towards interest on delayed payment of tax.

Upon further perusal of Rule 142, the HC held that the notice should have been issued in Form DRC-07 u/s. 79 of the CGST Act.

Authors' Note:

While it is now a settled principle that interest has to be charged only on net liability paid in case while filing From GSTR-3B, the moot issue here seems to the procedure to be followed for adjudication in such cases. It would be pertinent to note that while Rule 142(5) does not refer to Section 50 of the CGST Act for issuance of notice, it does not even refer to Section 79. On the other hand, Section 73 and 74 of the CGST Act provide for issuance of SCN for recovery of tax or interest and they find reference u/r. 142(5) of the CGST Rules. Therefore, it can be said that SCN for interest can be issued u/s. 73 / 74 of the CGST Act.

SC quashes trade receivables attachment order, holding power of provisional attachment 'draconian'

Radha Krishan Industries
2021-TIOL-179-SC-GST

The Himachal Pradesh HC had dismissed a Writ filed by the Petitioner challenging the vires of attachment order passed by the Revenue u/s. 83 of the CGST Act on the ground that an alternate remedy is available. Aggrieved, the Appellant approached the SC on questions, whether the orders of provisional attachment are in consonance with the conditions stipulated in Section 83 and whether the HC was right in concluding that the provisional attachment cannot not be challenged in a writ petition. Upon referring to Section 83 of the CGST Act, it was observed by the Apex Court that:

- The power to order a provisional attachment is entrusted during the pendency of proceedings under any one of six specified provisions: Sections 62, 63, 64, 67, 73 or 74;

- The power to order a provisional attachment has been

vested by the legislature in the Commissioner;

- Before exercising the power, the Commissioner must be 'of the opinion that for the purpose of protecting the interest of the government revenue, it is necessary so to do';
- The order for attachment must be in writing; and
- Provisional attachment is of any property including a bank account belonging to the taxable person.

In view of the above, it was further observed that before the Commissioner can levy a provisional attachment, there must be a formation of 'the opinion' and that it is necessary 'so to do' for the purpose of protecting the interest of the Government Revenue. The power to levy a provisional attachment was observed to be draconian in nature.

In respect to the Rules for provisional attachment, the SC observed that in terms of Rule 159(5) of the CGST Rules, the person whose property is attached is entitled to dual procedural safeguards: (i) An entitlement to submit objections on the ground that the property was or is not liable to attachment; and (ii) An opportunity of being heard. The second significant aspect of sub-Rule (5) is the mandatory requirement of furnishing an opportunity of being heard to the person whose property is attached. In the instant case, there has been a breach of the mandatory requirement of Rule 159(5) and the Commissioner was clearly misconceived in law in coming into conclusion that he had a discretion on whether or not to grant an opportunity of being heard.

The SC further observed that Revenue while ordering a provisional attachment u/s. 83 was acting as a delegate of the Commissioner in pursuance of the delegation effected u/s 5(3) and an appeal against the order of provisional attachment was not available u/s 107 (1). As the Appeal was not maintainable under the CGST Act, it was observed that the Writ Petition before the HC was sustainable. In view of the above observations, the SC set aside the judgement of the Himachal Pradesh HC and allowed the Appeal.

Authors' Note:

The law very clearly states that the formation of the opinion must bear a proximate connection to the purpose of protecting the interest of the Revenue. However, this principle is seldom followed and often ignored. Recently, the Bombay HC in the case of Praful Nanji Satra [2021-TIOL-782-HC-MUM-GST] had held that attachment of property, including bank account is a serious intrusion into the private space of a person. Even with ample judgements emphasising of the impact of such powers, the Revenue authorities have been observed to arbitrarily attach the properties of the taxpayers.

Accordingly, it may be said that the Revenue authorities need to exercise more option while exercising such powers to avoid undue harassment to the taxpayers.

Gujarat AAR disallows ITC utilisation absent nexus of input qua output

Aristo Bullion Private Limited
2021-TIOL-118-AAR-GST

The Applicant had proposed to engage in the business of supply of Gold unwrought or in semi-manufactured forms or in powder form. The Applicant further proposed to engage in the business of procuring Castor oil seeds directly from the Agriculturists and supply in the Domestic market as well as export the same. It was submitted by the Applicant that agriculturists are not required to obtain registration under GST. It was submitted that the

provisions of Section 9(4) of the CGST Act, 2017 and Section 5(4) of the IGST Act, 2017 are not operative attracting GST on the supply of goods received by the Registered person from the unregistered person, hence the Castor oil seeds procured from unregistered person will not attract GST in the hands of the recipient of supply at the receipt stage;.

In view of the above, the Applicant filed an application before the Gujarat AAR to ascertain whether GST liability on supply of Castor oil seed can be discharged through the ITC balance available in the Electronic Credit Ledger of the Applicant, majorly attributable to the inward supply of gold.

Upon perusal of Section 16 and 17(5) of the CGST Act, the AAR observed that for the Applicant, to be eligible to avail ITC on any supply of goods or services, the same has to be used or should be intended to be used in the course or furtherance of his business i.e., the nexus/connection between the inputs and the final products manufactured from these inputs is required to be proved. Accordingly, as the inputs are used in the course or furtherance of their business of Gold, etc., they cannot be considered to have nexus with supply of castor oil, etc.

In view of the above, it was observed that there is no nexus/connection whatsoever, of the inputs i.e., gold dores or silver dores with the business of supply of Castor oil seeds by the Applicant. Accordingly, it was held that even the basic conditions envisaged in the provisions of Section 16(1) had not been fulfilled and therefore, the inputs are not used or intended to be used in the course or furtherance of the business of supply of Castor oil seeds. Therefore, the AAR concluded that the Applicant is not eligible to utilise the ITC available in their ECrL, earned on the inputs/raw-materials/inward supplies meant for outward supply of Bullions, for payment of GST liability on supply of Castor oil seeds.

Authors' Note:

Even under the erstwhile regime, the Judiciaries and Revenue authorities had maintained that in order to utilise CENVAT Credit or to claim refund, the assessee shall be able to prove the nexus between input / input services and the final product / output. In the case of Coca Cola India Private Limited [2009-TIOL-449-HC-MUM-ST], it was held by Bombay HC that in the absence of any qualifying words before the term 'activities in relation to business', it had to be construed widely and would cover all activities which were related to the functioning of the business. However, there is no requirement under the law to maintain separate Electronic Credit ledgers for different products or service lines. Once the credit is available under the Electronic Credit Ledger, it should be allowed to be utilised for payment of any GST Liability.

Further, it has been a settled principle even under the Erstwhile Excise law that no one to one nexus needs to be maintained between the inputs and the output and we do not find any such restriction in the GST Act as well. Therefore, to conclude that the basic condition of Section 16(1) i.e. to use in the course of business is not fulfilled simply because there are different product lines and ITC belongs to a separate product line seems to be far stretched and may be challenged further before the Higher Courts.

Gujarat AAR denies ITC on debit notes issued for invoices in respect of 2018-19 transactions

I-tech Plast India Private Limited
2021-TIOL-127-AAR-GST

The Applicant, a manufacturer and supplier of plastic and rubber toys had sought an Advance Ruling before the Gujarat AAR to ascertain the appropriate classification and the applicable GST Rate of the toys supplied and whether ITC can be claimed in relation to CGST and SGST separately in debit notes issued in current F.Y. towards the transactions for the period 2018-19.

The AAR observed that as the toys manufactured by the Applicant were not electronic, they were appropriately classifiable under CTH 95030030, chargeable to 12% GST. As for the question relating to claiming of ITC in respect of debit notes for transactions of F.Y. 2018-19, it was observed that the amendment to sec 16(4) of the CGST Act does not have far reaching effect in the said matter and the debit note is always connected to the invoice even if it is issued in relation to change in value of an invoice.

The AAR further observed that the debit note does not gain independent existence on omission of the words 'invoice relating to such' from the words 'invoice relating to such debit note pertains'. Further, referring to an e-flyer issued by the CBIC, it was observed that the serial no. and date of corresponding tax invoice is required to be mentioned in the debit note. This indirectly co-relates the actual invoice with the debit note issued. Basis the above observations, the AAR held that Applicant cannot claim ITC in relation to CGST and SGST separately in debit notes issued in current F.Y., towards the transactions for the period 2018-19.

Authors' Note:

As expected, the AAR has ruled in the favour of the taxpayer without fully appreciating the facts. It is to be noted that reporting of original invoice details have been made optional in case of Debit Notes. Further, if we go by the ruling of the AAR, it renders the whole amendment meaningless. Practically there are several business scenarios wherein the debit notes would be issued post the timeline specified under Section 16(4) and therefore, it can be argued that the amendment has been made to allow credit irrespective of the year of the supply and is in line with the intention of the GST Act i.e. to allow seamless flow of credit. It would be appreciable if the CBEC can issue clarifications to avoid further litigation in this matter.

SC to decide validity of Rule 89(5) denying input-service refund under Inverted Duty Structure

The Quarry Owners Association and Ors.
2021-TIOL-1049-HC-MAD-GST

The Revenue has filed an SLP before the SC to ascertain the validity of Rule 89(5) of the CGST Rules which inter alia denies refund of Input Services under the Inverted Duty Structure. As there are contradictory judgements on the subject matter by HCs and various Petitions being pending before various HCs, the SC found it appropriate to decide the matter themselves. Accordingly, the SC has listed the matter for hearing on 28 April 2021.

Authors' Note:

As a huge breakthrough for many in the trade and industry, the Gujarat HC in the case of VKC Footsteps **[2020-TIOL-1273-HC-AHM-GST]** had read down explanation (a) to the Rule 89(5) to the extent it denies refund of ITC relatable to input services in case of Inverted Duty Structure. The Gujarat HC had found the said explanation to be contrary to Section 54(3) of the CGST Act. However, the relief of the trade was short-lived as the Madras HC in the case of Tvl. Transtonnelstroy AFCONS Joint Venture [W.P No.8596 of 2019] had declared Rule 89 (5) to be intra vires to Section 54 in case of inverted-duty structure.

In this regard, it would be pertinent to note that the proviso to Section 54(3) does not provide any restriction as to whether refund can be allowed only on inputs and not input services. Accordingly, only a final decision by the hon'ble SC can bring this matter to finality.

CBIC to take action against transport service providers defaulting GST payment

Uber India Systems Private Limited
2021-TIOL-1049-HC-MAD-GST

Uber India had filed a representation before the CBIC seeking clarity on taxability of service of facilitation of passenger transportation by way of white plate motor-cycles. Uber India had duly discharged its GST liability on the said services, however, certain market players were not discharging GST on this service, by taking benefit of Entry No. 15 of Notification No. 12/2017 – C.T. (Rate), which inter alia exempts certain prescribed transportation services. As the CBIC had not responded to Uber India's representation, they approached Madras HC seeking appropriate directions to the CBIC for clarity on the above matter.

Accordingly, the CBIC clarified that services of passenger transportation through motor-cycles not having contract carriage permit is liable to GST at the applicable rate of 5% and appropriate action would be taken against companies which have not deposited the GST.

AAAR denies exemption of supply of services outsourced by Concessionaire relating to waste management

Sumeet Facilities Limited
2021-TIOL-15-AAAR-GST

The Appellant is inter alia engaged in supply of services related to waste management. The Apellant had sought an Advance Ruling before the Tamil Nadu AAR to ascertain whether the activities in respect to the waste management provided by their concessionaries to the Greater Chennai Corporation is exempted from GST in terms of Notification No. 12/2017- Central Tax (Rate) dated 28 June 2017. Initially, the AAR had denied the exemption in terms of the said notification.

Aggrieved, the Appellant preferred an Appeal before the AAAR and submitted that separate service agreements were entered with the concessionaries for the supply of service to the Municipal authorities and same was even accepted by Municipal authorities. It was submitted that the services provided fall under SAC Head of 9994: Waste Collection, treatment and disposable services of the Annexure to NN. 11/2017 Central Tax (Rate) dated 28 June 2017 and are exempt from GST since the services are pure services provided to the local authority basis the exemption at S No. 3 to NN 12/2017.

Referring to the NN 12/2017, the AAAR observed that the exemption benefit is available only to the service provider and does not extend to the subcontractors. It was further observed that the Appellant had provided its services to its Joint Venture only and the Appellant and their concessionaries are separate entities and thus cannot be considered at par in order to claim the benefit. Further, it also held that the concessionaries also cannot claim the benefit since they have provided composite supply of goods and services.

AAAR holds GST to be leviable on reimbursement being advance payment

ICU Medical India LLP
2021-TIOL-15-AAAR-GST

The employees of the Appellant-Company had entered into a cardholder user agreement with their holding Company in the USA for issuance of credit cards. The said credit cards were meant to be used for travel related expenses on behalf of the Appellant-Company within India and outside. The vendors issued invoices on the Appellant and the Appellant claimed eligible credit on such invoices.

The Appellant booked such the expenses in its books and the eligible ITC would be debited by crediting the expense account. Thereafter, the Holding Company would raise invoices on the Appellant for reimbursement of payments and bank charges towards credit card expenses. In view of the above, the Appellant had filed an application before the Tamil Nadu AAR to ascertain whether GST would be leviable on the reimbursement and the applicable rate thereof.

The AAR had ruled that such reimbursement would be exigible to GST as RCM chargeable at 18%. Aggrieved, the

Appellant preferred an Appeal before the AAAR. It was observed by the Appellate authority that the expenses were borne by the Recipient overseas Holding Company and later reimbursed, but again included in the taxable invoices were in the nature of advance consideration paid by the recipient to the supplier Appellant and the time of supply provisions relating to advances received by a supplier of services as per Section 13 of the CGST Act would be applicable.

It was further observed that reimbursement does not result in any transaction on its own. However such expenses of employees of the Appellant through the credit card of the overseas Holding Company, borne at the first instance by the recipient of supply is nothing but which the supplier was liable to incur and reimbursed for the only purpose of restoring the Appellant's company's accounts to previous position for operational convenience so that the same could be later included in software development charges invoiced by Appellant to the recipient.

The Appellate authority observed that such reimbursements as per Section 15 of the CGST Act read with sequential application of Rules 28-31 of the CGST Rules, are to be included in the value of supply and tax is to be paid as per the time of supply provisions applicable to such provisions. In view of the above, it was held by the AAAR that GST is leviable on the reimbursement amount, being advance payment by the Holding Company towards the cost incurred for the software services supplied, as per the Time of supply provision under Section 13 of the CGST Act.

Gujarat AAR holds gamut of services by hospital for in-patient care, to be composite Supply

Shalby Limited
2021-TIOL-124-AAR-GST

The Applicant, a multi-specialty hospital, had been providing health care services to both out-patients and in-patients. The in-patients were provided with stay facilities, medicines, consumables, surgical implants, dietary food and other surgery items required for treatment. During the course of such treatment after admission into the hospital, the in-patients were also provided rooms on rent.

The Applicant submitted that the Hospital does not enter into contracts with patient for supply of medicines / implants / consumables etc. The agreement was as such for treatment of disease or illness and not for supply of goods i.e., Implant, medicines, surgical and medical consumable etc. In view of the above, the Applicant filed an AAR before the Gujarat AAR to ascertain whether the medicines, consumables and implants used in the course of providing health care services would be considered as Composite Supply and accordingly eligible for exemption under the category Health Care Services.

Referring to the definition of 'composite supply' the AAR observed that supply of medicines, implants and consumables are natural bundled with the supply of health services. In this case, supply of health services is the principal supply as that is the reason the in-patients get admitted to hospital instead of buying the medicines or consumables and using on themselves. Therefore, supply of medicines, consumables and implants to the In-patients in the course of their treatment is a composite supply of health services.

The AAR further observed that the room rent for patients in hospital was exempted in terms of Circular No.27/01/2018-GST dated 04 January 2018 and the food supplied to the in-patients, as advised by the

doctor/nutritionist, was a part of composite supply of health care and not separately taxable.

Basis the above observations, the AAR ruled that the medicines, consumables and implants used in the course of providing health care services to in-patients for diagnosis or treatment for patient is a 'Composite Supply'. It was further ruled that the supply of inpatient health care services by the Applicant hospital as defined in the Notification No. 12/2017- Central Tax (Rate) dated 28 June 2017, as amended from time to time, was exempted from CGST.

AAR holds Interest liable on GST under reverse-charge for delayed payment on imported goods

Enpay Transformer Components India Private Limited 2021-TIOL-125-AAR-GST

The Applicant had been importing goods from its Holding Company located at Turkey, for which the payment terms was 120 days from the date of invoice for import of goods. If the Applicant, located at India fails to make payment to the Holding company on due date, the holding company charges interest on late payment. Further, the Applicant had obtained bank credit facility on the Corporate Guarantee and paid Stamp tax in Turkey as per their land rules. Further, the Holding Company had raised reimbursement invoice of said payment to ENPAY India.

In view of the above, the Applicant had filed an Application before the Gujarat AAR to ascertain whether liability to pay GST on reverse charge arises if amount is paid as interest on late payment of invoices of imported goods and the applicable rate thereof.

The AAR observed that the foreign buyer has tolerated the act of receiving payment after a lapse of a period of 120 days from the date of the invoice in respect of the goods supplied by them to the applicant for which interest is to be paid by the applicant.

Accordingly, such act is likely to be covered under the Supply of Services under Entry No.5(e) of the aforementioned Schedule-II. Further, referring to Section 15(2)(d) of the CGST Act, it was observed that the value of supply also includes interest or late fee or penalty for delayed payment of any consideration for any supply. Basis the above, it was held that the payment of interest by the Applicant will be covered under the supply of services under Entry No.5(2)(e) of Schedule-II of the CGST Act and shall be liable to GST.

As for the rate, it was observed by the AAR that the rate shall be the same as that of the IGST applicable on the goods. In respect of reimbursement invoice for stamp duty, it was observed that the Supplier of Applicant does not fulfil the conditions required for being a 'Pure agent' in terms of provisions of Rule 33 of the CGST Rules. It was further observed that a mere letter issued by the supplier stating that no mark-up was charged for the stamp tax paid by them or a receipt from the Stamp Tax Office, Turkey regarding Stamp Tax paid does not suffice to prove that no mark-up was charged for the said reimbursement amount, however, the has to be backed up by proper documentary evidence such as financial records etc. of the supplier.

In view of the above, the AAR held that the Applicant shall be liable to pay GST under reverse charge for amount paid as interest on late payment of invoices of imported goods and rate of GST payable to be same as that of IGST applicable on goods.

Madras HC allows refund of unutilized CENVAT Credit in absence of merits in the rejection order

BNP Paribas Global Securities Operations Private Limited
2021-TIOL-908-HC-MAD-ST

The Petitioner had filed refund application for CENVAT Credit of the previous regime after the introduction of GST, which had been rejected by the Revenue. It had been reasoned by the Revenue that the Petitioner had not debited the amount that was claimed as refund before or at the time of making the claim. Aggrieved, the Petitioner preferred a Writ before the Madras HC.

The HC observed that the Petitioner had not been able to utilize the credit of duty under the provisions of GST which came to be effect from 01 July 2017, accordingly, legitimate export incentives cannot be denied. The HC further observed that denial of the benefit of refund claim filed by the petitioner under Rule 5 of CCR was devoid of merit. In view of the above, the HC directed the Revenue to refund the amount claimed by the Petitioner u/r. 5 of CCR.

Gujarat HC restores proceeding under SVLDRS absent adequate opportunity of being heard

Chinar Shipping & Infrastructure
2021-TIOL-846-HC-MUM-ST

The Petitioner had filed an application under the SVLDRS scheme to dispose of a pending service tax matter. The Revenue, in Form SVLDRS-2 had determined the amount payable by the Petitioner, which was higher than the one declared. Aggrieved, the Petitioner filed Form SVLDRS-2A disagreeing with the demand. Disregarding Form SVLDRS-2A, the Revenue issued form SVLDRS-3 declaring the amount payable by the Petitioner, the same as disagreed amount.

The Petitioner contended that though a request for hearing was made, no communication had been received from the Revenue and during search on the official website, it was known that a hearing was scheduled for 06 February 2020. However, the Petitioner realised this after the scheduled date. Thereafter, the Petitioner had made a personal representation before the Revenue explaining its position and requesting to adjust amounts of deposits, however, the same was not to any avail.

Aggrieved, the Petitioner filed a Writ challenging propriety and validity of the statement in Form SVLDRS-3. Referring to its previous decision, it was observed by the Gujarat HC that the objective of computerization programme is to improve efficiency and effectiveness of tax administration, to provide management with reliable and accurate information with certainty in its accuracy.

It was further observed that the thrust of the Scheme was to reduce the baggage of the litigation work of the pre-GST regime. The HC further held that before insisting on payment of excess amount or higher amount, the designated committee is required to give an opportunity of hearing to the declarants. The HC stated that

non-compliance of principles of natural justice would impeach the decision-making process rendering the decision invalid in law. In view of the above, the HC set aside Form SVLDRS-3 and directed the Revenue to give an opportunity of hearing and then decide the matter.

Authors' Note:

It is a settled principle of law that before issuing any order, an adequate opportunity of hearing is to be granted. The SC, has more than a dozen times emphasized the importance of natural justice and the opportunity of being heard. Notably, In the case of CCE v. ITC Ltd. [1995] 2 SCC 38], the SC had held that an assessee should be asked to show cause as to why he should not be visited with higher tax before such levy. He must be given an opportunity of meeting those grounds. This is a requirement of the principles of natural justice.

Despite the law being settled, it has been seen that the Revenue seldom gives two thoughts before passing a non-speaking / non-cryptic without giving an opportunity of being heard. This unnecessarily adds more weight to the already overburdened shoulders of the Judiciary.

Tribunal allows employer to claim CENVAT on Workmen Compensation Policy

Dharti Dredging and Infrastructure Ltd
2021-TIOL-223-CESTAT-HYD-LB

The Appellant had availed CENVAT Credit as per the provisions of Rue 2(l) of the CCR on Service Tax paid on insurance premium paid in respect of 'workmen compensation insurance policy'. However, the same was denied by the Revenue on the ground that credit on insurance amount had been excluded under clause (c) of the said Rule. Aggrieved, the Appellant preferred an Appeal before the Chennai Tribunal. It was submitted by the Appellant that what was sought to be excluded was what is primarily meant for personal use or consumption of employees. In the instant case, the benefit of insurance is not going to the employees at all. As per the Workmen Compensation Act, 1923, the employees are entitled to compensation, whether or not the appellant takes the insurance policy. The amount of compensation is also fixed as per law. This potential liability of the company was sought to be covered by the insurance policy which they have taken. This is one of the insurance policies where the potential liability of the insured is indemnified by the insurance company.

As far as the the judicial precedents relied upon by the Respondent are concerned, the benefit CENVAT credit was denied on the input service in dispute which was for personal consumption of the employees and not to cover the potential liability of the assessee.

It was further observed by the Tribunal that the benefit of the policy, if any, goes to the assessee and not to the individual employees. It is not like health insurance taken for the benefit of employees.

In view of the above the Tribunal held that the benefit of the insurance flows directly to the Appellant themselves and not to individual employees. Therefore, the present policy is not excluded by clause (c) of Rule 2(l).

Authors' Note:

The Workmen Compensation Act, 1923 is a beneficial

legislation and the policy taken by the assessee in that case does not name the employees but categorised the employees based on their vocation/skill. The insured in such cases is the Company and the intention of the policy is to protect the employees who work at the site and not to drive them to various forums for availing compensation in the event of an injury or death. The service in such cases is not primarily for personal use or consumption of employee and the insured is the assessee and not the employees.

In the case of Hydus Technologies India Pvt Ltd vs. C.C.E., CUS. & S.T., Hyderabad-II [2017 (52) STR 186 (Tri-Hyd)], it was observed that "the benefit bestowed by one legislation cannot be taken away or made highly difficult and impractical to be adhered to by another field of law" and accordingly, the benefit was allowed despite specific exclusion by Rule 2(l). However, in the case of Ganesan Builders Ltd vs CST, Chennai-II **[2017-TIOL-3152-CESTAT-Madras]**, CESTAT-Chennai has denied the benefit of Cenvat credit on input services following the definition of input service but was subsequently reversed by the HC. Accordingly in such cases, the ITC should be allowed to the assessees.

J&K HC allows deduction of 1% turnover discount from the sales value for determining the taxable turnover

MRF Limited
2021-TIOL-927-HC-J&K-CT

The Petitioner is engaged in the manufacturing and sale of tyres, tubes, etc. across the county through various sale depots including one at Jammu. The Petitioner allowed 1% discount to its dealers as per pre-determined agreement and the entitlement of such discount to the dealer was duly indicated on each invoice. The Appellate Tribunal had disallowed exclusion of discount from turnover of sales on the ground that discount was not deducted from the invoice amount and since it is being adjusted later on, it was in the nature of bonus or incentive to the dealers.

Aggrieved, the Petitioner approached the J&K HC seeking reference to sec 12-D of the J&K General Sales Tax Act, and Sec 2(n) of the Act r/w Rule 19 of the J&K General Sales Tax Rules, contending that the taxable turnover shall be determined after allowing certain deductions which include discount on the sales/purchases.

The J&K HC agreed with the contention of the Petitioner and allowed the taxable turnover to be determined after excluding the turnover discount.

Authors' Note:

The decision by J&K HC is in line with the judgement of the Delhi HC in the case of MRF Limited **[2015-TIOL-1311-HC-DEL-VAT]**. Accordingly, it has been correctly observed that the turnover for the assessment years was to be computed after deducting the turnover discount granted to the dealers as claimed in the returns by the assessee.

Tribunal holds CENVAT Credit to be ineligible for erection of towers, however allows Appeal on limitation

Bharti Airtel Limited
Final Order No. 20098/2021

The Appellant, a service provider of telephone/ telecommunications services, had been denied CENVAT Credit on angles, channels, beams, etc. used for erection and installation of towers and panels used for housing/ storage of generating sets and other components/ equipment /spares etc. The Revenue relied upon Circular No. 137/315/2007 – CX4 dated 07.12.2007, which inter alia clarified that that the activity of erection of towers does amount to manufacture and hence credit is not available.

The Tribunal observed that the Bombay HC in the Appellant's case itself, has disallowed credit on the above-mentioned goods. However, it was further observed that the said matter is pending before the SC. The Tribunal further observed that the Delhi HC in the case of Vodafone Mobile Services Limited **[2019-TIOL-309-SC-ST]** had allowed credit on capital goods and inputs on towers, pre-fabricated shelters and accessories. However, the said case is also pending before the SC.

Accordingly, as the HCs had taken contrary views and both the matters being pending before the SC, the Bangalore CESTAT, being bound by the judgement of the larger bench of Delhi Tribunal in the case of Tower Vision Private Limited [2016-TIOL-539-CESTAT-DEL-LB], it was pleaded that the matter be decided in the favour of the Revenue.

Although deciding the matter in favour of the Revenue on merits, the Tribunal allowed the Appeal of the Appellant on the ground of limitation. It was held that as the disputed period in the instant matter pertained to 2004-2006 and the SCN was issued in 2009, the demand was barred by limitation. It was observed that the fact that different HCs have given different views, stand testament to interpretation nature of the entire matter. In view of the above observations, the Tribunal allowed the Appeal.

CESTAT allows refund for export of sales & marketing service rendered to group company

CSG Systems International (India) Pvt. Ltd. Final Order No. 20092/2021

The Appellant, a service provider of commercial training and coaching, manpower recruitment agency service and information technology software service and business auxiliary service had filed a refund application u/r. Rule 5 of CCR for unutilized CENVAT credit of service tax availed in respect to the exports. However, the refund claim was rejected by the Revenue on the ground that the business auxiliary service provided to group companies outside India shall be considered as Intermediary services and not export of services. Aggrieved, the Appellant preferred an Appeal before the CESTAT.

The CESTAT observed that during the issuance of SCN, the authorities had alleged lack of nexus, claim being time barred and lack of documentation or discrepancies in documents for rejection of the refund claim. However, at a later stage, while passing the Order, the Revenue had travelled beyond the SCN by holding that the sales, marketing and administrative services are classified as Business Auxiliary Services provided in India and hence the services are intermediary. Accordingly, the Tribunal had remanded the matter back to the original authority to reconsider the facts of the case. However, the authorities, without following the directions, contended that the service provided were intermediary services and therefore cannot be treated as export of services. Aggrieved, the Appellant once again preferred an Appeal before the CESTAT.

Referring to the judgement of SC in Brindavan Beverages Private Limited **[2007-TIOL-118-SC-CX]**, the Tribunal observed that the foundation of any demand and any order passed beyond the SCN is not legally permissible and only on this ground, the order passed by the Revenue was held to be bad in law.

As far as the merits of the case were concerned, the Tribunal observed that in terms of the Master Service Agreement, the sales marketing and support services provided to Appellant's group companies are export of services because the said services have been provided on principal-to-principal basis and there is no element of principal-agent relationship. It was further observed that all the six conditions of Rule 6A had been satisfied, which proves that the services are export of services. Accordingly, the Tribunal allowed the Appeal.

Authors' Note:

It would be pertinent to note that in order qualify as an intermediary service provider, a taxpayer is required to satisfy certain conditions viz. principal-agent relationship, facilitation of supply of goods between two or more persons, service of intermediary to be ancillary to main service, etc. In the case of Verizon India Private Limited [2019-TIOL-2268-CESTAT-DEL], the Delhi Tribunal had held that for a service to be considered as intermediary, three parties need to be involved while there were only two parties in this case. It was further held that the Appellant did not act as an intermediary between two persons and was supplying services on a principal-to-principal basis.

Following is the summary of the key circulars and notifications issued in the field of indirect taxes in the month of April 2021;

Notification / Circular	Key Updates
Notification No. 08/2021 – Central Tax dated 01 May 2021	**COVID-19 Relief – Interest Waiver** • Prescribes interest rate of 9% for the first 15 days from the due date and 18% thereafter on late filing of GSTR-3B for the months of March and April 2021 for taxpayers having an aggregate turnover of more than Rs. 5 crores in the preceding F.Y.; • Prescribes NIL interest for the first 15 days from the due date and 9% for the next 15 days and 18% thereafter on late filing of GSTR-3B for the months of March and April 2021 for taxpayers having an aggregate turnover up to Rs. 5 crores in the preceding F.Y.; • Prescribes NIL interest for the first 15 days from the due date and 9% for the next 15 days and 18% thereafter on late filing return under proviso Section 39(1) of the CGST Act for the months of March and April 2021 for taxpayers having an aggregate turnover up to Rs. 5 crores in the preceding F.Y.; • Prescribes NIL interest for the first 15 days from the due date and 9% for the next 15 days and 18% thereafter on late filing return under proviso Section 39(1) of the CGST Act for the quarter ending March 2021 for taxpayers having an aggregate turnover up to Rs. 5 crores in the preceding F.Y.
Notification No. 09/2021 – Central Tax dated 01 May 2021	**COVID-19 Relief – Late Fees Waiver** • Waives off late fee payable for the period of 15 days from the furnishing of GSTR-3B for the months of March and April 2021 for taxpayers having an aggregate turnover of more than Rs. 5 crores in the preceding F.Y.; • Waives off late fee payable for the period of 30 days from the furnishing of GSTR-3B for the months of March and April 2021 for taxpayers having an aggregate turnover up to Rs. 5 crores in the preceding F.Y.; • Waives off late fee payable for the period of 30 days from the furnishing quarterly return for the quarter ending March 2021 for taxpayers having an aggregate turnover up to Rs. 5 crores in the preceding F.Y.
Notification No. 10/2021 – Central Tax dated 01 May 2021	**GSTR-4 Due Date Extension for F.Y. 2020-21** Extends the due date for filing of Form GSTR-4 i.e., Annual Return for the FY 2020-21 for taxpayers who have opted for the composition scheme from 30 April 2021 to 31 May 2021. The notification shall be deemed to have come into force with effect from 30 April 2021.

Notification / Circular	Key Updates
Notification No. 11/2021 – Central Tax dated 01 May 2021	**ITC-04 Due Date Extension for March 2021** Extends the time period for furnishing declaration in Form ITC-04 i.e., details of goods / capital goods sent to job worker and received back to 31 May 2021 for quarter January to March 2021.
Notification No. 12/2021 – Central Tax dated 01 May 2021	**GSTR-1 Due Date Extension for April 2021** Extends the time limit for furnishing the details of outward supplies in Form GSTR-1 for the month of April 2021 to 26 May 2021
Notification No. 13/2021 – Central Tax dated 01 May 2021	**Notifies Amendment Rules** Notifies Central Goods and Services Tax (Third Amendment) Rules, 2021 to amend the CGST Act in the following manner: • Inserts second proviso in Rule 36(4) of the CGST Rules to provide that the condition in Rule 36(4) ibid i.e., 105% of eligible visible ITC from Form GSTR-2B, is to be seen cumulatively for the period April and May 2021; • Inserts proviso in Rule 59(2) of the CGST Rules to provide that for dealers who have opted for quarterly filing of Form GSTR-1 and were eligible to file monthly B2B sales till 13th of succeeding month to pass on the ITC to the recipient using Invoice Furnishing Facility ('IFF') can now furnish details using IFF for the month of April 2021 till 28 May 2021;

Notification No. 14/2021 – Central Tax dated 01 May 2021	**COVID-19 Compliance Reliefs**
	
	In view of the second wave of COVID 19 pandemic, it has been notified as under:
	
	• Where any time limit for completion or compliance of any action, by any authority or by any person, falls during the period from the 15 April 2021 to 30 May 2021, the time limit for completion or compliance of such action, shall be extended up to the 31 May 2021, including for the purposes of:
	• Completion of any proceeding or passing of any order or issuance of any notice, intimation, notification, sanction or approval;
	• Filing of any appeal, reply or application or furnishing of any report, document, return, statement or such other record;
	• However, such extension of time shall not be applicable for the compliances of the provisions of the CGST Act, as mentioned below
	  • Chapter IV– Time and Value of supply
	  • Procedure for Registration, Special provisions relating to casual taxable person and non-resident taxable person, Tax Invoice, furnishing of details of Outward Supplies, Levy of Late Fees, Interest on delayed payment of Tax, Power to Arrest, Liability of partner of firm to pay tax, Penalty of certain offences, Detention, seizure and release of goods and conveyances in transit

Notification / Circular	Key Updates
	• Furnishing of Returns, except those prescribed • Inspection of goods in movement, in so far as e-way bill is concerned; and • Rules made under the provisions specified at clause (a) to (d) above • However, for the purpose of verification of the registration application and where the approval falls during the period of from 01 May 2021 to 31 May 2021, then, the time limit for the same has been extended up to 15 June 2021 Where the notice has been issued for rejection of refund claim and the time limit for issuance of order falls during the period of from 15 April 2021 to 30 May 2021 then the time limit for issuance of order shall be extended to the later of: • 15 days after the receipt of reply to the notice from the registered person or • 31 May 2021 The Notification shall come into force with effect from 15 April 2021
CBEC-20/16/05/2021-GST	**CBIC releases guidelines for provisional property-attachment u/s 83 of the CGST Act** For the purpose of protecting interest of the Government revenue, the CBIC has directed provisional attachment during pendency of any proceeding's u/s of 62,63, 67,73,74 of CGST Act. **Procedure for Provisional attachment:** • The Commissioner shall file and form an opinion basis which property needs to be attached. An order shall be passed in Form GST DRC-22 with Document Identification Number and other details of the property; • The copy shall be shared with the other Authorities who needs to have knowledge of the provisional attachment of property • The copy of attachment shall be shared with the taxable person and the taxable person can submit an objection, if any within the prescribed time limit and basis the submission can either retain the attachment or release the property by issuing an order in FORM GST DRC-23. If the goods are perishable, then the property shall be released and adjacent amount shall be paid to the authorities. **Cases where property can be attached:** • Where any taxable person has supplied any goods or services without issuance of invoice with an intention to evade tax; • Where invoice has been issued without supply of goods or services and ITC has been availed fraudulently without invoice or bill; • Fraudulently obtained Refund; etc **Cases where property can be attached:** • The value of the property which needs to be provisionally attached shall be equal to the amount that is required to protect the interest of the revenue;

Notification / Circular	Key Updates
	• More than 1 property can be attached if 1 property is not sufficient to cover the estimated amount. The same can be done at different point of time as may be required; • Provisional attachment shall only be done of the property which belongs to the taxable person; • Immovable property shall be given first preference and then movable property shall be attached; • Provisional attachment shall cease after expiry of 1 year from the date of the provisional attachment order
GSTN Update	**GSTN rolls-out new features of Form GSTR-2B & GSTR-3B under QRMP scheme** With effect from 01 January 2021 the taxpayers whose Annual t/o is upto 5crore, can optionally file GSTR1 and GSTR3B on quarterly basis. The B2B invoices details can be filled up in Invoice Furnishing Facility (IFF) for month 1 and 2 (i.e., Jan and Feb) and for month 3 (i.e., Mar) details can be filed in the quarterly Form of GSTR1. Further, under QRMP Scheme liability in Form GSTR3B will be auto populated basis the IFF filed and GSTr1 filed and the liability under reverse charge shall be auto populated from GSTR2B. Further, the new features for QRMP Scheme have been incorporated at the GSTN portal. The updates can be summarized as below: **Auto generation of GSTR2B** • GSTR2B contains details filed in IFFs and Form GSTR1 wherein details get reflected in 2 Section i.e., ITC available and ITC not available; • The authorities have given an option to download GSTR2B on quarterly basis (default). However, an option to view it on monthly basis is also provided • On clicking at the hyperlink of 'view advisory' details of the Suppliers from/type can be viewed. **Auto population in GSTR3B** • Figures if ITC available and ITC reversed will be now be auto populated in Table 4 of Form GSTR-3B basis the details in Form GSTR2B; • An option to edit the auto populated details in the GSTR3B has also been provided; • A warning message will be popped up to tax payer when ITC available is increased by more than 5% or ITC to be reversed is reduced, however system doesn't block the tax payer from filing the return.

Notification / Circular	Key Updates
Maharashtra VAT Notification dated 01 April 2021	**Scheme for withdrawal of pending assessment proceedings basis probable revenue criterion** The Maharashtra Government has announced the Maharashtra Criteria for Selection (on the basis of probable revenue earnings) of the cases for Assessment (Amendment) Scheme, 2021. The said scheme aims at formulating the criteria for withdrawal of the assessment proceedings based on threshold revenue earnings, below which assessment proceedings may be withdrawn. It has been further provided that the likely Revenue earnings in each such case will be determined with the use of the Business Intelligence Data Warehouse tools or such other electronic data mining tools. This Scheme shall be applicable to all pending assessment proceedings
GSTN Update dated 13 April 2021	**New features of Form GSTR-2B & GSTR-3B under QRMP scheme** GSTN has introduced updates in Forms GSTR-1, GSTR-3B and Matching Offline Tool for taxpayers in QRMP Scheme while listing out salient points related to filing of Form GSTR-1 statement and auto-population of liability in Form GSTR-3B for taxpayers under QRMP Scheme for the quarter Jan-March 2021. Such new features are: • Provision of Auto Generation of Form GSTR-2B for the QRMP taxpayers, and • Provision of Auto-population of ITC in Form GSTR-3B for the QRMP taxpayers

Notifications	Key Updates
Notification No. 41/2021-Customs (N.T.) dated April 05, 2021	**CBIC introduces Customs (Verification of Identity and Compliance) Regulations, 2021** CBIC has introduced Customs (Verification of Identity and Compliance) Regulations, 2021 which shall come into effect from April 5, 2021. • These regulations will apply to the importers, exporters and customs brokers engaging in import or export activity after commencement of these regulations and to any persons selected by Commissioner of Customs, who were engaged in import or export activity or claimed certain benefits u/s 99B of the Customs Act, 1962 or engaged as a Customs Broker prior to commencement of these regulations. However, they would not apply to Central

Notifications	Key Updates
	Government, State Governments and Public Sector Undertakings. • Accordingly, the above-mentioned persons are required to furnish documents or information on a common portal for verification of their identity. A physical verification shall take place where the verification of identity is completed by means other than authentication of Aadhar. • Failure of verification of identity on account of non-compliance or incorrect submission of documents shall lead to suspension of benefits provided u/s 99B of Customs Act, 1962 till the submission of correct documents enabling verification of identity are provided.
Notification No. 26/2021- Customs dated April 08,2021	**CBIC marks the enactment of Finance Act, 2021; makes necessary amendments to Notifications** As the Finance Act, 2021 has now been enacted, CBIC has also amended various notifications which had earlier been issued/modified in accordance with provisions of the Finance Bill, 2021 with the relevant provisions of such amendment in the Finance Act, 2021.
Notification No. 44/2021-Customs (N.T.) dated April 15,2021	**Sea Carriers to continue delivering Cargo declaration as per old regulations till May 31, 2021** CBIC has amended Regulation 15 of the Sea Cargo Manifest and Transhipment Regulations, 2018 thereby extending the time period for authorised sea carrier to continue delivering the cargo declaration as per the Import Manifest (Vessels) Regulations, 1971 and Export Manifest (Vessels) Regulation, 1976 from April 15, 2021 to May 31, 2021.
Notification No. 22/2021- Customs (ADD) dated April 15,2021	**Anti-Dumping Duty on Barium Carbonate extended till October 20, 2021** The levy of ADD on Barium Carbonate imported or originating from China PR has been extended up to October 20, 2021.
Notification No. 27/2021- Customs dated April 20,2021	**CBIC exempts custom duty on import of Remdesivir till October 31,2021** CBIC has exempted the customs duty on import of Remdesivir Injection and active pharmaceutical ingredients as well as other materials used in manufacture of Remdesivir till October 31, 2021, subject to the compliance of the procedure set out in the Customs (Import of Goods at Concessional Rate of Duty) Rules, 2017 by the importer.
Notification No. 28/2021- Customs dated April 24,2021	**CBIC exempts Customs Duty and Health Cess on import of medical grade oxygen, oxygen related equipment and Covid -19 vaccines among others till July 31, 2021** Pursuant to the decisions taken in the high-level meeting led by the Hon'ble Prime Minister, CBIC has exempted Custom Duty and Health Cess on the import of medical grade oxygen, oxygen related equipments and Covid -19 vaccines among others till July 31, 2021.

Notifications	Key Updates
Notification No. 24/2021- Customs (ADD) dated April 26,2021	**Anti-Dumping Duty levied on the import of PTFE from Russia extended to import of PTFE from Korea** ADD levied on PTFE originating or exported from Russia has been extended to PTFE originating or exported from Korea.
Notification No. 25/2021- Customs (ADD) dated April 26,2021	**Anti-Dumping Duty levied on the import of PTFE from China extended to import of PTFE products** ADD levied on PTFE originating or exported from China has now also been extended to PTFE products originating or exported from China.
Notification No. 26/2021- Customs (ADD) dated April 27,2021	**Anti-dumping duty levied on import of '1-phenyl-3-methyl-5-Pyrazolone' from China** ADD has been levied on the import of '1-phenyl-3-methyl-5-Pyrazolone' originating in or exported from China for a period of 5 years from the date of imposition of provisional ADD, i.e., June 9, 2020.
Notification No. 28/2021- Customs (ADD) dated April 27,2021	**Anti-dumping duty levied on import of 'Toluene Di-isocyanate' from EU, UAE, Saudi Arabia and Taiwan for a period of 5 years** ADD has been levied on the import of 'Toluene Di-isocyanate' having isomer content in the ratio of 80:20, originating in or exported from EU, UAE, Saudi Arabia and Taiwan for a period of 5 years from the date of imposition of provisional ADD, i.e., December 2, 2020.
Notification No. 29/2021- Customs dated April 30,2021	**Customs duty exempted on the import of 'specified inflammatory diagnostic (markers) kits' till October 31, 2021** Inflammatory Diagnostic (marker) kits, namely- IL6, D-Dimer, CRP(C-Reactive Protein), LDH (Lactate De-Hydrogenase), Ferritin, Pro Calcitonin (PCT) and blood gas reagents have been exempted from the levy of customs duty till October 31, 2021.
Notification No. 30/2021- Customs dated May 01,2021	**CBIC reduces IGST on import of Oxygen Concentrators for personal use to 12% till June 30, 2021** CBIC has reduced IGST on import of oxygen concentrators for personal use from 28% to 12% to bring IGST rate on such personal imports at par with commercial imports of the same till June 30, 2021.

Notifications/Trade Notices/Public Notices	Key Updates
Notification No. 41/2021-Customs (N.T.) dated April 05, 2021	**Electronic filing and Issuance of Preferential Certificate of Origin (CoO) for India's Exports under India-Mauritius Comprehensive Economic Cooperation and Partnership Agreement (IMCECPA) w.e.f. 01st April 2021** The electronic platform for Preferential Certificate of Origin (CoO) has been expanded further from April 1, 2021 to facilitate electronic application of Preferential Certificates of Origin under the India Mauritius Comprehensive Economic Cooperation and Partnership Agreement (IMCECPA) The concerned Indian Exporters are required to take note of the following points with regard to the process being notified herewith: • Digital Signature Certificate (DSC) would be required for the purpose of electronic submission. The digital signature would be the same as used in other DGFT applications; • The digital signature may be Class III and should have the Importer Exporter Code (IEC) of the firm embedded in the DSC; • Any new applicant exporter would be required to initially register at the portal. The password would be sent on the email and mobile number of the IEC holder. In case the IEC holder desires to update their email on which communication is to be sent, the same may be done by using the 'IEC Profile Management' service on the DGFT website https://dgft.gov.in. • Once registration is completed, the IEC details would be auto-populated as per the DGFT-IEC database. Applicant is required to ensure that updated IEC details are available in the DGFT system. Necessary steps may be taken to modify the IEC details online, whenever required.
Public Notice No. 53/2015-2020 dated April 09, 2021 Notification No. 01/2015-2020 dated April 11, 2021	**DGFT relaxes late cut provisions for shipping bills of FY 2019-20 for allowing MEIS applications till September 30, 2021** DGFT has allowed submission for MEIS claim for shipping bills of FY 2019-20 till September 30, 2021 without any late cut. However, late cut shall apply where the MEIS claim is filed after September 30, 2021. **DGFT prohibits export of Injection Remdesivir and Remdesivir API** The export of Injection Remdesivir and Remdesivir Active Pharmaceutical Ingredients (API) falling under the ITCHS Codes Ex 293499 and Ex 300490 or falling under any other HS Code has been prohibited, with immediate effect.

Notifications/Trade Notices/Public Notices	Key Updates
Public Notice No. 01/2015-2020 dated April 13, 2021	**Allocation of additional quantity of 3675.13 MT (raw/refined) sugar to UK under TRQ scheme for the year 2020-21** Under the TRQ scheme for the year 2020-21 an additional quantity of 3675.13 MT (raw/refined) sugar is to be exported to the UK till September 30, 2021.
Trade Notice No. 02/2021-22 dated April 26, 2021	**DGFT operationalizes 'COVID-19 Helpdesk' to resolve International Trade related issues** In light of difficulties being faced by trade stakeholders due to surge in COVID-19 cases, DGFT has operationalized 'COVID-19 Helpdesk' to support and provide suitable resolutions to issues arising in respect of International Trade. The Helpdesk shall inter alia look into issues relating to import/export documentation, banking matters, customs clearance delays and shall also collect and collate trade related issues concerning other Ministries/Departments/Agencies of Central Government and State Governments and seek their support in providing possible resolutions. The Status tracker under DGFT Helpdesk Services can be used to track the status of resolutions and feedback, if any.
Notification No. 02/2015-2020 dated April 26, 2021	**Amendment in the import policy of 'mosquito killer racket' under HS Codes 85167920 and 85167990** The import of 'mosquito killer racket' has been prohibited if C.I.F value is below INR 121/per racket.
Notification No. 03/2015-2020 dated April 26, 2021	**Amendment in the import policy of Melon Seeds falling under HS Code 12077090** The import of Melon Seed falling under HS Code 12077090 has been restricted
Notification No. 04/2015-2020 dated April 30, 2021	**DGFT exempts import of oxygen concentrators as 'gifts' for personal use till July 31, 2021** DGFT has allowed the duty-free import of oxygen concentrators as "gifts" for personal use through post, courier or e-commerce portals till July 31, 2021.
Public Notice No. 03/2015-2020 dated April 30, 2021	**Application fee per certificate for submission of Certificate of Origin enhanced** The fee for submission of Certificate of Origin has been enhanced to INR 200 from INR 100 per certificate.

Supreme Court issues directions to deal with pendency of cheque bounce cases; Lists matter after 8 weeks before 3 Judge-Bench

Expeditious trial of cases under Sec. 138 of Negotiable Instruments Act, 1881
2021-TIOLCORP-19-SC-MISC-CB

A Suo Moto Writ Petition was initiated by the Supreme Court in pertinence to the pendency of complaints filed under Section 138 of the Negotiable Instruments Act, 1881 which deals with the dishonor of cheques for insufficiency of funds. One of the reasons attributed by the Supreme Court for the backlog of cases was the mechanical conversion of the complaints under Section 138 to summons trial from summary trial without recording of reasons for such conversion leading to delay in disposal of such cases.

To deal with the massive pendency of complaints under Section 138. The Supreme Court took the help of an Amicus Curiae who in its report highlighted several reasons for the growing pendency of cases and suggested certain remedial measures.

Taking into consideration the remedial measures suggested by the Amicus Curiae, the Supreme Court inter alia directed the High Courts to issue practice directions to the Magistrates to record reasons before converting trial of complaints under Section 138 of the Act from summary trial to summons trial and recommended the amendment of the Negotiable Instruments Act, 1881 to allow a single trial against a person for multiple offences under Section 138 of the Act committed within a period of 12 months.

The Supreme Court also directed the High Courts to issue practice directions to the Trial Courts to treat service of summons in one complaint under Section 138 forming part of a transaction, as deemed service in respect of all the complaints filed before the same court in relation to the said transaction and observed that Sec. 258 of CrPC which empowers a Magistrate to stop the proceedings at any stage in certain cases shall not apply to proceedings for cheque dishonour cases.

Further, As suggested by the Amicus Curiae, the Supreme Court directed the High Courts to identify the pending revisions arising out of complaints filed u/s 138 and refer them to mediation at the earliest.

The matter has been listed after eight weeks for further hearing before a three-judge bench.

Authors' Note:

It is said that Justice delayed is Justice denied. The Courts and Tribunals of our country are overburdened with a multitude of cases pertaining to a variety of issues which leads to huge delays in the delivery of justice. Adherence to the decelerating infirmed procedures of the law is the bane of the legal system behind the ever-growing pendency of cases. Cases are often put on the back burner by our courts due to the paucity of time. The Supreme Court by its Suo Moto Petition has tried to lower the burden of the Judiciary in relation to the overflowing cheque bounce cases that are riddled with procedural infirmities to promote their speedy disposal.

Supreme Court re-affirms that acknowledgement of debt in balance sheet can be used to ascertain limitation period

Asset Reconstruction Company (India) Limited vs Bishal Jaiswal & Anr 2021-TIOLCORP-24-SC-IBC-LB

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

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

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

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

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

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

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

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

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

Stating itself to not be a Constitutional court, NCLAT asserted that the referral bench ought to have followed the judgment of the five-member bench in 'V. Padmakumar's Case' as a binding precedent and not question the correctness of the judgment as matter of judicial discipline. The Supreme Court however, placing reliance on a catena of precedents, held that an entry made in the books of accounts, including the balance sheet, can amount to an acknowledgement of liability within the meaning of Section 18 of the Limitation Act and remanded the matter back to NCLAT for reconsideration.

Authors' Note:

The Supreme Court has put to rest the debate on the validity of the V Padmakumar judgment and the issue of authority of the referral bench over the five-member bench. It is very necessary to mention that the Supreme Court had earlier expunged the observation of the five-member bench in the V Padmakumar judgment highlighting the equality in stature of both the benches belonging to the same forum. However, by virtue of this judgment, the Supreme Court has again opened a can of worms which was temporarily resealed by the NCLAT. People would now rake up old issues which they willfully decided not to contest during limitation period.

NCLAT rejects revenue's belated claims towards CIRP stating it to be time bound

Office of the Asst. State Tax Commissioner vs. Parthiv Parikh, RP, Jaihind Projects Ltd. & Ors. Company Appeal (AT) (Ins) No.583 of 2020

The Corporate Debtor (Respondent) is a company registered with the Maharashtra Sales Tax Department that had defaulted in payment of State Tax to the Appellant.

On an application filed by an Operational Creditor which was allowed by the NCLT, the Corporate Insolvency Resolution Process (CIRP) was initiated against the Corporate Debtor and Interim Resolution Professional was appointed. In pursuant to the CIRP, the Interim Resolution Professional issued a public notice.

Subsequently, a Resolution Professional was appointed replacing the earlier Interim Resolution Professional.

The Appellant contending that he was made aware of the insolvency proceedings against the Respondent only through a communication of his superior officer, filed a claim in Form B for the default in payment in order to secure the interest of the State Tax Department. This claim however, was rejected by the Resolution Professional on the ground of delay in filing the claim as the Resolution Plan had already been submitted for approval to the NCLT after approval by the Committee of Creditors.

The Appellant not satisfied with the rejection of his claim sent an email to the erstwhile IRP for condoning delay in filing claim and accepting his claim as Operational Creditor. The erstwhile IRP forwarded this request to the Resolution Professional for necessary action. The Resolution Professional through an email rejected the claim.

Thereafter, the Appellant filed an appeal before the NCLT which dismissed the appeal as it was already considering the Resolution Plan submitted by the RP which it subsequently approved.

Aggrieved, the Appellant approached the NCLAT which dismissing the appeal held that the purpose of issuing public notice was to make all the interested parties/stakeholders aware of the initiation of Corporate Debtor's CIRP, the Appellant submitted its claim more than 1 year and 1 month after the invitation of claims through public notice, any interruption in the CIRP at this stage by including a delayed claim/s would defeat Resolution as this would have resulted in the CIRP and approval of successful Resolution Plan to continue for an indefinite period of time, which is certainly not the intention of IBC.

Authors' Note:

Time is of the essence in IBC proceedings. Approval of the Resolution Plan cannot go on indefinitely. Acceptance of the claim of the Appellant by the NCLT would have caused other such applicants to demand accommodation on the same ground allowing late submission of their claims once this window would have opened. This in turn would force the Tribunal to deliberate over issues that were once settled and therefore cause a rapid increase in their workload.

SC appoints arbitrator; holds party to arbitration-agreement claiming existence of dispute, cannot be rendered without forum

V. Sreenivasa Reddy vs. B.L. Rathnamma Arising out of SLP (Civil) No.11036 of 2019

The Appellant had entered into an Agreement of Sale with the Respondent in respect of a property for which the appellant had paid a certain some as earnest money deposit. The Respondent issued a letter to the Appellant requesting him to make the balance payment and secure registration of the sale deed.

The Appellant replied to the letter stating certain issues in relation to the transaction. Subsequently, The Respondent issued a legal notice cancelling the agreement of sale and forfeiting the advance payment made by the Appellant.
The Appellant placing reliance on the arbitration clause of the agreement filed a petition before the Karnataka HC for the appointment of arbitrator, which was disposed of on the submission by the respondent that the matter has been settled out of Court.

An application was filed by the Appellant seeking recall of the order and to restore the petition, however, the same was rejected due to noncompliance of office objections.

Another petition was also filed by the Appellant which was withdrawn as the petition seeking appointment of the arbitrator was to be filed before the Hyderabad HC however, it was held by the Hyderabad HC that the matter having already been settled out of the court which was noted in the judicial order was sufficient to decline the request for appointment of arbitrator, and accordingly the application was dismissed.

Aggrieved, the Appellant approached the Supreme Court which stating that there is no definite material on record to indicate that there was a concluded settlement between the parties based on which the petition was disposed off held that a party to an arbitration agreement contending that there was a dispute amongst the parties cannot be left without a forum for resolution of the dispute by taking a 'hyper technical view' of the matter.

As the so-called settlement had neither been recorded in the earlier proceedings, nor any document brought on record to indicate that factually the settlement had taken

place so as to wipe out the original dispute, the Supreme Court allowing the appeal appointed an arbitrator for the resolution of the dispute.

Authors' Note:

The existence of an arbitral dispute is essential to invoke arbitration. However, it has been rightly held by the Supreme Court that if a party to an arbitration agreement contends that there was a dispute amongst the parties, such a party cannot be left without a forum for resolution of the dispute. In the impugned judgment, where the Agreement for Sale explicitly mentioned all disputes arising out of the agreement to be referred to arbitration, the Hyderabad HC was not justified in rejecting the Application for arbitrator's appointment merely based on Respondents' contention that the dispute between the parties had been settled out of court in the absence of any definitive material or documents on record evidencing the same.

HC holds LLP can be a partner of a partnership firm; Inconsistencies in the provisions of the LLP Act and the Partnership Act irrelevant for registration of partnership deed

Jatamma Xavier vs. Registrar of Firms
WP(C). No.25741 OF 2020(P)

The Petitioner claims to be the designated partner of an LLP that had entered into a partnership with an individual and accordingly a partnership deed was executed. When the Petitioner approached the Respondent (Registrar of Firms) for the registration of the partnership deed, The Respondent stating that some of the provisions pertaining to the liability of the Limited Liability Partnership Act 2008 are inconsistent with that of the Indian Partnership Act, 1932, rejected the said partnership deed on the ground that an LLP cannot be a partner of a firm.

According to the Respondent, the Indian Partnership Act, 1932 makes the partners to be jointly and severally liable with all the other partners and also severally liable for the acts of the firm, of which such person is a partner. At the same time under the LLP Act, the liability of the partner is restricted only to the extent provided in the agreement. This according to the Respondent is the inconsistency that exists between the two acts.

Aggrieved, the Petitioner approached the High Court, the question before which was whether LLP can be treated as a person which can be permitted to form a partnership with an individual.

The High Court held in this case that the difference in the provisions under the Partnership Act relating to liability of the firm or the individual partners would not stand in the way of constitution of a partnership with an LLP.

When the LLP itself becomes a partner, the liability of partners in an LLP cannot have any relevance as it would be bound by the provisions in the Partnership Act. The liability of the LLP would be as in the case a company which joins a firm after entering into a partnership.

As a partnership can be entered into between two persons, such persons can be an incorporated body of individuals, and given that LLP is a body corporate, it can be said to be a person.

The High Court highlighting that the partnership deed was executed between an individual and an LLP which is a body corporate having a legal entity and coming within the definition of "person", discarded the Respondent's objection to registration of the partnership deed based on liability clause provisions under the LLP Act, and held that the individual liability of the partners of LLP would be irrelevant when the LLP itself would have liability as a partner in a partnership firm.

Therefore, allowing the petition, the High Court directed the Respondent to reconsider the Petitioner's request for registration of the Partnership Deed and take appropriate action on the same within 1 month.

Authors' Note:

An LLP is a separate legal entity that fulfills the definition of a juridical person. The High Court is right in holding it to be qualified to enter into partnership with individuals or other juridical persons. The impediments caused by the provisions on liability of the Partnership Act towards this union can be dealt with by making the LLP itself unlimitedly liable towards the partnership whereas restricting the liability of the partners of the LLP to what was agreed upon in the LLP agreement.

HC imposes cost on minority shareholder of Devas Multimedia; rejects its plea seeking quashing of winding up order against Company

Devas Employees Mauritius Pvt. Ltd. vs. Union of India & Ors
Writ Petition No.6191 Of 2021 (GM-RES)

The Petitioner was a minority shareholder of Devas Multimedia. Devas Multimedia had entered into a lease agreement with Antrix Corporation for space segment capacity on ISRO/Antrix S-Band Spacecraft. However, this agreement was terminated by Antrix Corporation on the ground that Devas Multimedia had committed fraud in collusion with the officials of Antrix Corporation, Department of Space and ISRO which resulted in huge financial loss to the Central Government.

Accordingly, the Central Government passed a sanction order authorizing the Chairman and MD of Antrix Corporation to appear before the NCLT and petition for the winding up of Devas Multimedia. This petition was accepted by the NCLT.

Aggrieved by the order of NCLT directing winding up of Devas Multimedia, the Petitioner approached the NCLAT which directed the Petitioner to file necessary interlocutory application before NCLT seeking permission to implead itself and granted the Petitioner liberty to raise all factual and legal pleas.

Accordingly, the Petitioner preferred a writ before the HC contending that a winding up petition can be filed by persons specified in Sec. 272(1) of the Companies Act, which includes both Registrar and 'any person authorized by the Central Government' and that in the case of Registrar, before according sanction, Government is required to give an opportunity to the company and the same is missing in the instant case of a 'person authorized by Central Government' since both stand on the same footing therefore the sanction order of the Government is a 'malafide exercise of power', an administrative order which involves civil consequences must be made consistently with the principles of natural justice. The Petitioner also contended that the winding up petition had been filed on the same day the sanction order had been gazetted and

thus the sanction had been accorded in a hurried manner.

The HC observed that there is a classic distinction between the Registrar and a person authorized by the Central Government because Registrar is a regulator and stands on a different footing. The Registrar is privy to all information of a Company and when he proposes to move a petition for its winding up u/s 271(c) of the Companies Act, it shall be based on his opinion and satisfaction that the affairs of that Company were conducted in a fraudulent manner which is not the case of a person authorized by the Central Government. Sanction is an administrative act and therefore affording any opportunity of hearing is not contemplated at that stage.

HC further observed that one of the most profound tenets of Constitutionalism is presumption of Constitutionality assigned to each legislation enacted. Indubitably, Parliament has competence. The sanction accorded by the Central Government does not meet petitioner with any civil consequence as Devas Multimedia itself is not aggrieved by the sanction order therefore there is no order, which has any civil consequences.

With regards to the Petitioner's contention that the sanction order was hurried, the HC remarked that being in the electronic era of instant communication, no exception can be taken if a department functions with speed/efficiency.

Thereby dismissing the writ petition, the HC imposed cost of INR 5 lac on the Petitioner.

Authors' Note:

It is interesting to note that Devas Multimedia had also initiated arbitration proceedings against Antrix Corporation in the ICC against the termination of the agreement wherein the ICC passed an award of USD 1.2 Billion. Antrix kept arguing that the ICC lacked jurisdiction to arbitrate the dispute and refused to appoint arbitrator as directed by the ICC. It is the nonchalance of Antrix that has caused it to end up in a situation where it is required to pay through the nose for no fault of theirs.

HC following SC's decision in Ghanshyam Mishra held customs duty to be within the purview of "operational debt"

Ruchi Soya Industries Ltd vs. UOI & Anr 2021-TIOL-1010-HC-MAD-CUS

The Petitioner had filed a Bill of Entry in advance to clear the consignment of crude palm oil of edible grade in bulk. In the Bill of Entry, the petitioner had proposed to pay Basic Customs Duty (BCD) at 7.5% as per Serial No.55 to Notification No. 12/2012-Customs dated March 16, 2012 as it stood on September 15, 2015.

However, by the time the Bill of Entry was taken up for assessment, Serial No. 55 had been amended by a Notification dated September 17, 2015 and the rate of BCD had been increased to 12.5% from the earlier 7.5% and therefore the Bill of Entry was assessed on the increased rate of BCD.

Aggrieved, the Petitioner preferred a writ before the HC contending that it was unaware of the change in the rate of duty because the sale of official Gazette was purportedly made only on September 21, 2015.

Alternatively, the Petitioner also contended that it was undergoing CIRP and therefore as the Customs Department did not submit its claim to the Resolution

Professional it had lost its right to claim its dues.

The HC noting that not only was the notification posted on the website of the Central Board of Excise and Customs on September 17, 2015 but was also published in the official Gazette of Government of India on September 17,2015, held that the petitioner cannot complain that it was unaware of the change in the rate of duty merely because the sale of official Gazette was purportedly made only on September 19,2015 as the practice of requiring publication and offer for sale on the date of receipt u/s 25(4) of the Customs Act, was rendered vestigial by the Parliament over a period of time having no useful purpose in the light of publication of the same on the website and thus, was amended.

The HC also made reference to the Information & Technology Act, 2000 according to which the requirement of any law to provide information in writing is fulfilled if the same is rendered available in electronic form.

With regards to the alternative contention of the Petitioner, HC observed tax being a compulsory exaction by the Government and a sovereign debt cannot be altered by any authority, whether by the Court or under a private arrangement or under the Companies Act, 2013 or IBC. In other words, corporate restructuring of financial debt under IBC, 2016 does not mean waiver of extinguishing of sovereign debts. Thus, tax and duties levied and collected under law can never be treated as 'Operational Debt'.

However, in the light of the decision of the SC in Ghanshyam Mishra and Sons vs. Edelweiss Asset Construction wherein the SC held that the dues owed to the State Government and Central Government would come within the definition of 'operational debt, The HC remarked that though the definition of 'operational debt' u/s 5(21) of IBC is not intended to include "crown debt" such as taxes and duties payable to the Government and is distinct from the "claim" and "debt" as defined in Sec. 3 of the IBC, this Court is bound by the interpretation placed by the SC in Ghanshyam Mishra.

Accordingly, partly accepting the claim of the Petitioner that the rights of Customs Department to claim customs duty stood extinguished on invocation of CIRP. The HC held that if the Petitioner failed to get any clarification from the NCLT as to whether the Resolution Plan filed with NCLT included "customs duty" to be paid by the Petitioner on the import under the subject Bill of Entry, within the stipulated time, the Customs Department shall proceed to recover the amount of duty short paid under the subject Bill of Entry together with interest from the Petitioner in accordance with law.

Authors' Note:

In Ghanshyam Mishra and Sons vs. Edelweiss Asset Construction, SC referred to the amendment in clause (f) of para 3 of SOR of the IBC and observed that the legislative intent behind amending subsection (1) of Section 31 of I&B Code was to clarify, that the resolution plan approved by the Adjudicating Authority shall also be binding on the Central Government, any State Government or any local authority to whom a debt is owed in respect of payment of dues arising under any law for the time being in force, such as authorities to whom statutory dues are owed, including tax authorities. These amendments, according to the SC were in view of the various difficulties faced and in order to fill the critical gaps in the corporate insolvency framework where extensive litigation in some cases caused undue delays resultantly hampering the value maximization. It was also found necessary to ensure, that all creditors were treated fairly.

Relaxation in the period of parking of unutilized ECB proceeds in term deposits

A.P. (DIR Series) Circular No. 01
April 07, 2021

External Commercial Borrowing ("ECB") are commercial loans raised by the eligible resident entities from recognized non-resident entities, conformed to specified parameters, for foreign or domestic expenditures.

As per the Master Direction of RBI, unutilized ECB proceeds meant for rupee expenditure can be parked in term deposits with AD Category I banks in India for a maximum period of 12 months cumulatively.

Considering the challenges posed by COVID-19 pandemic, vide notification no. RBI/2021-22/16 dated April 07, 2021, RBI has extended the period for parking unutilized ECB proceed drawn on or before April 7, 2021 till March 31, 2022.

Authors' Note:

ECBs are widely used in India to facilitate access to foreign money by Indian corporations and PSUs. During the year 2012, contribution of ECBs was between 20% and 35% of total capital flows into India. Large number of Indian corporates and PSUs have used the ECBs as a source of debt. The money raised through ECB is cheaper given near zero interest rates in the US and Europe, Indian companies can repay part of their existing expensive loans.

Promoting ECBs is a development tactics of Indian government to encourage the capital inflows in India in such pandemic hit situation. Looking at the significance of ECBs in Indian economy, this move is a welcome move to provide relief to ECB borrowers.

Introduction of Pre-Packaged Insolvency Process for MSME's

THE INSOLVENCY AND BANKRUPTCY CODE (AMENDMENT) ORDINANCE, 2021
April 4, 2021
No. IBBI/2021-22/GN/REG071.
April 9, 2021

The Central Government has introduced a Pre-Packaged Insolvency framework for MSME vide the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2021. The subject pre-packaged framework is a hybrid arrangement of formal and informal proceedings. Objective of such ordinance is to ensure quicker, cost-effective and value maximizing outcomes for all stakeholders, in a manner which is least disruptive to the continuity of their businesses and which preserves jobs.

Through this ordinance, Chapter-IIIA has been added to IBC, 2016 after Chapter III which has been named as "PRE-PACKAGED INSOLVENCY RESOLUTION PROCESS". Corresponding amendments have also been made in other chapters of the Code.

Further, vide Notification dated April 9, 2021 Insolvency and Bankruptcy (Pre-packaged Insolvency Resolution Process) Regulations, 2021 shall regulate the pre-package insolvency process provided in IBC, 2016.

Pre-Package Insolvency resolution process can be described into three stages:

Admission of resolution plan by AA

1. **Pre-requisites for application:** Application for initiating pre-packaged insolvency process has following pre-requisites:
   - Minimum default of INR 10 Lac has been prescribed to initiate the pre-package insolvency process;
   - Corporate debtor should be MSME;
   - This process has been initially started for financial creditors only;
   - Application should be accompanied with approvals from members and financial creditors as well as declaration of corporate debtors; and
   - Application shall be filed within 90 days.

2. **Admission by the AA:** AA shall within 14 days, admit or reject the application. Date of admission of application shall be the date of commencement of insolvency process.

3. **Priority of PIRP over CIRP:** If CIRP is pending and PIRP application is filed within 14 days of CIRP application, then PIRP application shall first be disposed of.

Approval by Committee of Creditors and submission to AA

After the appointment of Resolution Professional by AA, followings steps shall be taken:

1. **Submission of Resolution Plan:** Corporate debtor shall submit claims of creditors, preliminary information and base resolution plan with Resolution Professional within 2 days.

2. **Approval of plan by Committee of Creditors:** Resolution Professional shall present the base resolution plan with Committee of Creditors for approval. Committee of Creditors may approve the plan if the plan does not impair the claims of Operational Creditors. This leaves the scope of restructuring of Financial Creditors only.

Drawback: CDR system for MSME/One time settlement would be preferable over the PIRP as PIRP is associated the risk of liquidation as well.

3. **Debtors in Possession Approach:** During the pre-packaged insolvency process period, management of the affairs of the corporate debtors shall continue to vest in BOD or partners of the corporate debtor only. This approach has been called "DIP Approach". However, regulation 50 imposes restriction on DIP approach by requiring prior approval of Committee of Creditors for transaction beyond a threshold.

Drawback: DIP approach was the primary motivator of opting for PIRP. This restriction makes the DIP concept infructuous.

4. **Avoidance of Specified transaction or fraudulent or wrongful trading:** Resolution Professional shall form an opinion on existence of any avoidance of specified transactions or wrongful or fraudulent transaction within 30 days of commencement of process.

Drawback: This time line is too short to identify and form an opinion on such transactions.

5. **Submission of plan:** IBC provides that resolution plan shall be submitted by the resolution professional within 90 days.

6. **Change of Management Control:** Where the Committee of Creditors is of the opinion that affairs are being grossly mismanaged or are being regulated in fraudulent manner, it can resolve to shift the power of management from the board or partners to the Resolution Professional by a vote of not less than 66% of the voting shares.

   Resolution Professional shall file an application to AA in this regard and AA shall pass such order to vest the

management of Corporate Debtors Affairs with Resolution Professional.

Post submission of Plan to the AA

1. **Approval of plan by the AA:** AA shall approve or reject the resolution plan within 30 days of receipt of such plan. Upon approval of the resolution plan by AA, Resolution Professional shall intimate each claimant the principle or formula for payment of debts due to them.

2. **Termination of PIRP:** Where the Committee of Creditors doesn't approve the plan or approve the termination of the plan, Resolution Professional shall file an application with AA to terminate the process and AA shall accordingly pass the order of termination.

Drawback: As per PIRP provisions, no CIRP or PIRP had not been gone through for 3 years prior to the application for PIRP. Hence, Once the PIRP is terminated subsequent PIRP cannot be initiated for next 3 years.

3. **Liquidation of the Corporate Debtor:**

AA shall pass an order for liquidation in following cases:

Case No. 1: where AA passes an order of vesting the management with RP and plan is approved by the Committee of Creditors but no change in management takes place from the board or partner to other person.

Case No.2: where AA passes an order of vesting the management with Resolution Professional and plan is not approved by the Committee of Creditors or termination of the plan is approved by the Committee of Creditors.

Drawback:

- The impeding risk of liquidation acts as a demotivator for resorting to PIRP.

Authors' Note:

The subject concept is quite common in the United Kingdom and the United States of America. Pre-package insolvency scheme are largely aimed at providing MSMEs with an opportunity to restructure their liabilities and start with a clean slate while still providing adequate protections so that the system is not misused by firms to avoid making payments to creditors.

However, alteration of concept of pre-package insolvency scheme has made inspiration behind opting out for pre-package insolvency as drawn from the United Kingdom and the United States of America, infructuous. With all drawback as explained above, this pre-package insolvency process seems lighter than other informal processes.

Relaxation from Compliance with various filing due date

SEBI/HO/DDHS/DDHS_Div1/P/CIR/2021/557
SEBI/HO/CFD/CMD1/P/CIR/2021/556
April 29, 2021

Considering the representations received from listed entities, professional bodies, industry associations, market participant etc. requesting extension of timelines for various filings and relaxation from certain compliance obligations under the LODR Regulations inter-alia due to ongoing second wave of the CoVID-19 pandemic and restrictions imposed by various state governments, SEBI vide notifications dated April 29, 2021, SEBI has provided relaxations in respect to due dates for various filings. The same have been captured in the table below

Description	Requirement	Due Date	Extended deadline for the quarter/half year/ year ending March 31, 2021
Entities having their debt securities listed			
Half-Yearly Financial Results	45 days from the end of the quarter	May 15, 2021	June 30, 2021
Annual Audited Financial Results	60 days from the end of the FY	May 30, 2021	June 30, 2021
Statement of deviation or variation in use of funds	Along with the financial results (within 45 days of end of each quarter / 60 days from end of the financial year)	May 15, 2021/ May 30, 2021	June 30, 2021
Entities having their bonds listed			
Annual audited financial results	60 days from the end of the FY	May 30, 2021	June 30, 2021
Entities having their commercial papers listed			
Half-Yearly Financial Results	45 days from the end of the quarter	May 15, 2021	June 30, 2021
Annual Audited Financial Results	60 days from the end of the FY	May 30, 2021	June 30, 2021
All listed entities			
Annual Secretarial Compliance Report	60 days from the end of the FY	May 30, 2021	June 30, 2021
Quarterly financial results	45 days from the end of the quarter	May 15, 2021	June 30, 2021
Annual audited financial results	60 days from the end of the FY	May 30, 2021	June 30, 2021
Statement of deviation or variation in use of funds	Along with the financial results (within 45 days of end of each quarter / 60 days from end of the financial year)	May 15, 2021/ May 30, 2021	June 30, 2021

Authors' Note:

This is a welcome move to provide a relief to listed companies in the wake of surging covid-19 cases in the so called second wave. So far, 170-odd listed companies in India have announced their financial results for the March quarter and fiscal year 2021. These relaxations were needed to make the procedural compliance less strict as the business are already suffering with loss of business volume due to different restrictions imposed by different states.

Alignment of Interest of key Employees of AMCs with interest of Unit holder

SEBI/HO/IMD/IMD-I/DOF5/P/CIR/2021/553
April 28, 2021
SEBI/HO/IMD/IMD-II DOF3/P/CIR/2021/555
April 29, 2021

With the intention to align the interest of key employees of the AMCs with the interest of unitholders of the mutual fund schemes, SEBI has taken steps to standardized the schemes categories and characteristics of each category and assign the risk of the return of the scheme with the AMCs and the key employees thereof.

Salient features of these amendments are as follows:

Applicability: The provision of this amendment circular shall be applicable with effect from July 01, 2021.

Key Employees: Following employees would cover under the definition of "Key Employees" of the AMC:

(i) Chief Executive Officer (CEO), Chief Investment Officer (CIO), Chief Risk Officer (CRO), Chief Information Security Officer (CISO), Chief Operation Officer (COO), Fund Manager(s), Compliance Officer, Sales Head, Investor Relation Officer(s) (IRO), heads of other departments, Dealer(s) of the AMC;
(ii) Direct reportees to the CEO (excluding Personal Assistant/Secretary);
(iii) Fund Management Team and Research team;
(iv) Other employees as identified & included by AMCs and Trustees.

Payment of Compensation in form of Units: A minimum 20% of gross annual CTC net of income tax and statutory contributions of the key employees shall be paid in form of units of the mutual fund scheme in which they are working.

Conditions for such payment:

Such payment in units shall be subject to the following conditions:

A. It shall be in proportion to the AUM of the respective scheme. For this purpose, Exchange Traded Funds (ETFs), Index Funds, Overnight Funds and existing close ended schemes shall be excluded.

B. It shall be paid over 12 months in proportion to the salary/perks paid in each month.

C. It shall have a lock in period of 3 years or tenure of the scheme, whichever is less.

Allowed to diversify its funds:

If any key employee is willing to diversify such compensation paid in form of units and he is managing only a single fund scheme, so it is allowed to him to invest maximum 50% of such compensation into other fund scheme whose risk-o-meter is equivalent or higher than its own fund scheme.

Redemption of Units during the lock-in-period:

- Redemption of such units shall not be allowed during the lock-in-period. However, AMC may allow him to borrow the money from the AMC against such units in exigencies such medical emergencies or humanitarian grounds.

- Redemption of such units shall not be allowed within the lock-in-period in case or resignation or retirement before attaining the age of superannuation. However, such units shall be released from the lock-in-period on attaining the superannuation age in case of retirement

and key employees shall be free to redeem the units.

Claw-back and Oversight:

- If key employee violates the Code of Conduct or involved in fraud or gross negligence, so units allotted to them shall be subject to the claw-back and those units shall be redeemed and redemption amount shall be credited to the scheme.
- AMC shall ensure the compliance of this circular and trustees shall monitor the same. In case of non-compliance, it shall be reported in the quarterly CTR and half yearly trustee report.
- On the website of the AMC, every scheme shall report the 'compensation' in aggregate paid in form of the form of units to the key employees.

Disclosure Requirement:

To enhance the quality of disclosures with respect to risk and performance of the scheme, following disclosure requirement have been mandated by the Mutual Fund/AMCs vide notification dated April 29, 2021:

A) Risk-O-Meter of the scheme

B) Full details of the scheme portfolio in the fortnightly, monthly and half-yearly statement of the scheme

Authors' Note:

Market players said the move would ensure that fund managers and the top management have "skin in the game" and this would lead to a better selection of securities and performance. In the recent past, the performance of several schemes, both on the debt as well as the equity side, was hit due to exposure to poor-quality assets. The move will give SEBI and asset management companies (AMCs) a better grip on their employees as the regulator has also introduced a "claw-back" clause.

Relaxation in procedural matters relating to Right Issue

SEBI/HO/CFD/DIL2/CIR/P/2021/552
April 22, 2021

Owing to nationwide lockdown due to pandemic, initial relaxation from compliance with the procedural requirements with respect the right issue opening up to July 31, 2020 was provided vide circular no. SEBI/HO/CFD/DIL2/CIR/P/2020/78 dated May 6, 2020. This time period has been extended numerous times due to Covid pandemic situation.

Later, this time limit was extended till March 31, 2021 vide a circular dated January 19, 2021. Recently, due to the second wave of this CoVID-19 pandemic, SEBI has issued Circular no. SEBI/HO/CFD/DIL2/CIR/P/2021/552 dated April 22, 2021 to further extend this timeline to September 30, 2021.

Authors' Note:

In the series of the compliance relaxation provided by the SEBI to the listed companies due to the second wave of CoVID-19 pandemic situation, this step is another much awaited relief for the listed companies. These relaxations are related to service of abridged letter of offer, issues related to service of notice thru the advertisement, opening of demat account, application for right issue etc.

Asset Classification and refund of Interest on interest during the moratorium period

DOR.STR.REC.4/21.04.048/2021-22
April 7, 2021

RBI has issued a circular in complying with the judgement pronounced by the SC in the matter of Small Scale Industrial Manufacturers Association vs UOI & Ors. on March 23, 2021 vide circular dated April 7, 2021, RBI has issued following guidelines:

A. Refund/adjustment of 'Interest on Interest'

Eligible Borrowers: This relief would be available for the all borrowers including those availed of the working capital facility during the moratorium period.

Relief Amount and its calculation methodology:

1. All the lending institutions have been instructed to have a Board-approved policy to refund/adjustment the 'Interest on Interest' charged to the borrowers during the moratorium period as declared by the RBI from March 1, 2020 to August 31, 2020.

2. Methodology for the calculation of amount to be refunded by the lending institution shall be finalized by the Indian Banks Association (IBA) in consultation with other industry participants.

Disclosure Requirement: Lending institutions shall disclose the aggregate amount to be refunded/adjusted as specified above in its financial statement for the financial year 2020-21.

B. Asset Classification and Income Recognition

Lending institution shall continue to follow the asset classification and income recognition norms as below:

If moratorium granted in terms of CoVID-19 Regulatory Package: Lending institution shall follow circular dated May 23, 2020 for asset classification in respect of accounts where moratorium period was granted. As per circular dated May 23, 2020, moratorium period shall be excluded while reckoning the period of default for the purpose of the asset classification.

If moratorium not granted in terms of CoVID-19 Regulatory Package: Lending institution shall follow the master direction for asset classification and income recognition in respect of the accounts where moratorium period was not granted.

Authors' Note:

The subject matter was disputed right after end of the regulatory package of CoVID-19 last year. Accordingly, the SC verdict shall put all the confusion revolving around it to rest. Last month, the Supreme Court had said that all borrowers, irrespective of how much they owed, are eligible for a waiver of the compound interest or interest on interest. During the petition the government had agreed to foot the bill for a compound interest waiver for loans upto INR 2 crore. Rating agency ICRA estimates that the additional burden on the government will be to the tune of INR 7,000 to 7,500 crores, if it reimburses the lenders for the compound interest waiver. This is over and above the INR 6,500 crore it shelled out in the first round for smaller loans.

Updated guidelines on Income Tax treatment of Forex gains and losses released by Singapore IRAS

Singapore IRAS has released the fourth edition of e-Tax guide on Income Tax treatment of Foreign Exchange (FOREX) Gains or losses for businesses (banks and businesses other than banks).

The e- Tax guide throws light on the tax treatment of forex differences arising on capital and revenue transactions, realised versus unrealised gains or losses, translation foreign exchange differences and also discusses the accounting treatment in contrast with the tax treatment. The e-Tax guide further highlights the difference in tax treatment of forex arising from the revaluation of foreign currency bank account depending on different type of account such as revenue designated a/c and mixed usage and provides an updated FAQs on the designated bank account treatment and the application of the de-minimis limit (to allow businesses to treat foreign exchange differences on foreign currency bank accounts as revenue in nature when capital transactions are within the limit)

Reference:
https://www.iras.gov.sg/irashome/uploadedFiles/IRASHome/eTax_Guides/Income%20Tax%20Treatment%20of%20Foreign%20Exchange%20Gains%20or%20Losses%20for%20Businesses%20(Forth%20edition).pdf

China enhances R&D super-deduction for manufacturing entities and extends Preferential Tax policies

China's Ministry of Finance and its State Administration of Taxation has jointly issued Announcement No. 6 of 2021 in relation to the Extension of Several Preferential Tax Policies supporting technological innovation, the development of micro and small enterprises, and related undertakings.

This announcement covers many preferential tax policies mainly applying to income tax, value-added tax, resource tax, and stamp duty. Tax benefits have been extended to enterprises purchasing fixed assets, 'super deduction' has been allowed for research and development expenses for three years and an extra 75% deduction for R&D expenses incurred has been provided for when calculating the Chinese enterprise income tax in addition to deduction for the actual expenses incurred. The super deduction provided applies only to the expenses that have not been converted into intangible assets and included in current profits and losses.

Furthermore, this announcement extends relevant preferential tax policies to December 31, 2025 for the relocation of poverty-stricken populations and Taiwan residents working in the Pingtan comprehensive experimental area. Taxes paid prior to the date of promulgation of Announcement No. 6, can be deducted from the future tax payable or be refunded accordingly.

Reference:
http://www.chinatax.gov.cn/chinatax/n810341/n810825/c101434/c5162506/content.html

Singapore IRAS issues Transfer Pricing Guidance on centralized intra-group activities undertaken by MNE groups

The Singapore IRAS has released transfer pricing guidance for multinational enterprise (MNE) groups with centralized activities. The e-tax guide highlights Singapore's well-established role as home to a large number of MNE HQs who may be looking to centralize key decision-making, management and coordination, build customer insights and develop product and services strategies for regional markets. The guide presses on the many possible different transactions in the context of MNE groups and proposes a thorough examination of the actual functions performed, assets used, and risks assumed in each specific related party transaction and highlights its importance in determining the arm's length transfer price.

The Guidelines place importance on accurately demarcating the actual related party transaction and note that MNE groups generate value in different ways from provision of intra-group services. Due consideration must therefore be given to the contribution that HQs make to the value creation when determining ALP. Such contribution to value creation should be based on the economic significance of those functions in terms of their frequency, nature and value to the respective parties to the transaction and not on number of functions performed.

The Guidelines also note the general approach to analyze intragroup HQ activities should be no different from analyzing other intra- group transactions and if the activities are benefitting the Group entities, HQ should be compensated on arm's length basis, in the absence of which, a compensation which should have been determined based on appropriate analysis, should be deemed to have been received by the HQ and be subject to tax in Singapore as part of the HQ's income.

On the whole, the Guidelines acknowledge that every HQ is different and each HQ has to be considered on its own facts and circumstances. It lays emphasis on the point that the total remuneration for the HQ should always be commensurate with its functions, assets and risks profile.

Reference:

https://www.iras.gov.sg/irashome/uploadedFiles/IRASHome/eTax_Guides/eTaxGuide%20-%20TP%20for%20Headquarters%20(19%20Mar%202021).docx.pdf

AAR: Two-Edged Sword?

The Authority of Advance Ruling under the Goods and Service Tax Law was set up with an intent to mitigate tax uncertainties and foster clarity of applicable statutory framework. The overall system was expected to aid businesses to become tax compliant. Yet more often than not, we see the forum falling miserably short of these expectations.

Recently, in the matter of Enpay Transformer Components India Private Limited **[2021-TIOL-125-AAR-GST]**, the Applicant (Enpay India) imported goods for its business purpose and discharged the liability of Customs duties, including IGST, based on assessable value as determined under Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 (Valuation Rules) at the time of import.

These valuation Rules required Enpay India to pay determine the assessable value inclusive of transaction value and ocean freight. Such assessment was also accepted by the Customs Authorities. However, Enpay India sought clarity from Advance Ruling Authorities when it had to pay interest to its overseas vendor for delay in making payment within stipulated time frame of 120 days.

Payment of such interest is not a new phenomenon and is a prevalent practice under the Contract laws, however it seldom impacts determination of assessable value for the purpose of Customs law. As a matter of fact, Valuation Rules per se do not provide for inclusion of such interest in the assessable value.

However, the Authorities referred the provisions of Central Goods and Services Tax Act, 2017 and held that such interest is paid towards tolerance by the overseas vendor and the entire transaction tantamount to import of service. It thereafter ruled that IGST is payable on such interest under reverse charge.

The Sparkle:

The IGST Act provides that the integrated tax on goods imported into India shall be levied and collected in accordance with the provisions of the Customs Tariff Act, 1975 on the value as determined under the said Act at the point when duties of customs are levied on the said goods under the Customs Act, 1962. Such a statutory framework had so far prevented inclusion of interest in the assessable value of imported goods.

However, the interpretation adopted by the Authorities essentially treats payment of interest as an independent transaction of 'import of service' differentiating from 'import of goods'. The ruling has thus raised the questions as to whether interest paid in connection with import of goods can be assessed independent of the goods so imported? This artificial dissection of transaction would result in dual incidence of tax i.e. IGST paid on import of goods and IGST payable on interest paid to supplier of such imported goods.

This apart, the Ruling also circumvents the longstanding position under the Customs laws that imported goods must be assessed in the condition in which these are imported, and any subsequent event post importation, such as payment of interest caused by delay in payment towards imports of goods, is irrelevant to determine the assessable value of imported goods. This Position of law is well settled by the decision of Hon'ble Supreme Court in the case of Dunlop India Vs. UOI **[2002-TIOL-647-SC-CUS-LB]**; CC Vs. Sony India Ltd. **[2008-TIOL-183-SC-CUS]**; Vareli Weaves Pvt. Ltd. v. Union of India **[2002-TIOL-645-SC-CUS]**.

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	MRP	Maximum Retail Price
AO	Assessing Officer	NAA	National Anti-Profiteering Authority
APA	Advance Pricing Agreement	NCLAT	National Company Law Appallete Tribunal
APU	Authorized Public Undertaking	NCLT	National Company Law Tribunal
AY	Assessment Year	OECD	Organization for Economic Co-operation and Development
BEPS	Base Erosion and Profit Shifting		
CASS	Computer aided selection of cases for Scrutiny	PCIT	Principal Commissioner of Income Tax
CBDT	Central Board of Direct Taxes	PLI	Profit Level Indicator
CBEC	Central Board of Excise and Customs	R&D	Research and Development
CBIC	Central Board of Indirect Taxes and Customs	RFCTLARR Act	Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act
CENVAT	Central Value Added Tax		
CESTAT	Custom Excise and Service Tax Appellate Tribunal	RoDTEP	Remission of Duties and Taxes on Export of Products
CGST Act	Central Goods and Services Tax Act, 2017	SC	Hon'ble Supreme Court
CIRP	Corporate Insolvency Resolution Process	SCM	Subsidies and Countervailing Measures
CIT(A)	Commissioner of Income Tax (Appeal)	SCRR	Securities Contracts (Regulation) Rules, 1957
CLU	Changing Land Use	SLP	Special Leave Petition
CSD	Canteen Stores Department	TCS	Tax Collected at Source
CWF	Consumer Welfare Fund	TDS	Tax Deducted at Source
DCIT	Deputy Commissioner of Income Tax	The CP Act	The Consumer Protection Act, 2019
DGAP	Directorate General of Anti-Profiting	The IT Act/The Act	The Income-tax Act, 1961
DGFT	Directorate General of Foreign Trade	The IT Rules	The Income-tax Rules, 1962
DRP	Dispute Resolution Panel	TPO	Transfer Pricing Officer
Finance Act	The Finance Act, 1994	UN TP Manual	United Nations Practice Manual on Transfer Pricing
GST	Goods and Services Tax	VAT	Value Added Tax
HC	Hon'ble High Court	VSV	Vivad se Vishwas
IBC	International Business Corporation	NeAC	National e-Assessment Centre
IGST	Integrated Goods and Services Tax	The LT Act	The Limitation Act, 1963
IGST Act	Integrated Goods and Services Tax Act, 2017	CIRP	Corporate Insolvency Resolution Process
IRP	Invoice Registration Portal	MPS	Minimum Public Shareholding

ONE-STOP DESTINATION FOR TAXMAN AND TAXPAYER

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

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