VISION 360

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ONE-STOP DESTINATION FOR
TAXMAN AND TAXPAYER

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A TREASURY OF KEY TAX & REGULATORY DEVELOPMENTS!

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Vision 360: Positive changes in GST...

The fundamentals of the Indian economy are sound as the real GDP in Q3 and Q4 of FY 21 already crossed the pre-pandemic level. The Indian economy grew by a record of 20.1 percent in the April – June quarter. Economic data, from electricity consumption to tax collections have been showing encouraging signs of revival. Private investments have also picked up.

Even the tax collections have increased. GST collection, which stood at INR 1.17 lakh crores, is at a five month high and is 23% higher than the collections in the same period last year. Even the direct tax collection in India for fiscal 2021-22 till September 22 has increased by 74.4 percent compared to the corresponding period of last fiscal year.

In the month of September 2021, there have been a number of significant changes in GST law, especially those recommended by the GST Council in the 45th GST Council meeting dated 17.09.2021 held in Lucknow. As a COVID relief measure, multiple rate concessions on COVID-19 drugs were offered and extended. Similarly, GST rate changes were also recommended on various items such as retro fitment kits for vehicles, railway parts and locomotives, etc.; and various services such as licensing services / right to broadcast and show original films, sound recordings, radio and television programme.

The GST Council also recommended increase in the GST rate on specified renewable energy devices and parts from 5% to 12% with effect from October 01, 2021. This is likely to result in a hike in solar tariffs which is expected to go up by around 10 paise per unit. The increase in GST is also expected to hike the capital cost by 4.5%. The timing for increase in tax rate is not ideal for solar power developers who had planned to take advantage of the tax break before imposition of 25% basic customs duty on solar cells and 40% basic customs duty on solar modules, which will become effective from April 1, 2022.

Generally, a concessional rate of duty is provided for procurement of specified petroleum products required for petroleum operations. While procuring such products an essentiality certificate is issued by the Directorate General of Hydrocarbons. In this regard, it is clarified that there is no requirement for taking a certificate on every transaction of inter-state stock transfer.

Furthermore, in line with the previous amendments of Section 50(1) of the CGST Act which was amended to impose interest on the net tax liability as opposed to the gross tax liability, Section 50(3) of the CGST Act was proposed to be amended so that interest on wrongful/ineligible ITC be charged only when the same is utilized and not merely availed. Significantly, such changes are recommended to be applicable from retrospective effect w.e.f July 01, 2017.

Likewise, there have been significant developments in direct tax, customs and regulatory space during the month of September 2021 including issuance of Notification for production linked incentive in relation to auto and auto components sector by the Government of India.

With yet another issue of VISION 360 that captures key developments in tax and regulatory space during the month of September 2021, we, the entire team of **TIOL**, in association with **Taxcraft Advisors LLP, GST Legal Services LLP and VMG & Associates**, are elated to bring the same to you at one place.

Happy Reading!

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

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SPARKLE ZONE

GST: RECENT EVOLUTION! — 47

This special piece pertains to recent developments in GST laws through recommendations from the GST Council and CBIC's clarifications…

Export of goods, technology and/or software: An evaluation from the stand point of export control regulations!

The Export control regulations have been in the news recently as authorities have ramped up investigations against exporters and have taken legal action against a few of them for non-compliance. More often than not, exporters, especially those pertaining to the small and medium scale industries have been found to be unaware of the said regulations. In this backdrop, it would be relevant to present a bird's eye view of the regulations.

What are Export Control Regulations?

In India, the law relating to export controls is found in Appendix 3 to Schedule 2 of the ITC (HS) Classification of Export and Import Items which contains a list of goods (including technologies and software) which have potential dual-use. Dual-use refers to the (potential) usage of the item in military applications or in weapons of mass destruction, along with its civilian/industrial applications. The list of these items is called the Special Chemicals, Organisms, Materials, Equipment and Technologies (SCOMET) List.

Export of such items is either prohibited or permitted against an authorisation which is provided by the Directorate General of Foreign Trade (DGFT) or the Department of Defence Production or the Department of Atomic Energy, as the case may be. Imposition of prohibition or grant of authorisation is irrespective of whether the item covered in the SCOMET List is new or used.

SCOMET authorisation holders are required to maintain records in manual or electronic form for a period of 5 years from the date of export.

Coverage of technology and software

In addition to categorising of goods or items, the SCOMET List also comprises of technology and software. 'Technology' as defined in SCOMET inter-alia is said to include any information that is capable of being used in the development, production, use in any good, software or provision of a service. The definition of 'Technology' also includes 'Technical data' (such as blueprints, plans, diagrams) or 'Technical assistance' (such as instructions, skills, training, working knowledge) within its ambit. In other words, any specialized information may be controlled as 'Technology'.

Controlled technology can be potentially transferred through various means. Ordinarily it may be transferred through email, server access, conference calls/video calls, acquisition of an entity by a foreign corporation, training manuals, workshops, academic journals and university courses. The sheer diversity of modes through which technology can be transferred adds to the compliance risks and enforcement difficulties. This is more so now as technological innovation has further eased the ability to transfer technology, say through newly developed file sharing applications, video chatting services, cloud services, file sharing features on messaging / video chatting application such as WhatsApp – and, at the same time made it easy to completely erase any transfer footprint.

Category 8 of SCOMET List – particularly relevant for IT/ ITeS industry

Category 8 of the SCOMET List has been borrowed from the control list of Wassenaar Arrangement. To reiterate, it comprises of various items, technology and software particularly related to electronics, computers, telecommunications, information security, sensors, lasers, navigation, avionics, aerospace, propulsion and certain special materials and related equipment. Such items which comprise of electronic devices and circuits, semiconductor software and technology, encryption software and technology are significant to IT/ITeS industries. For instance: (a) semiconductor which are widely used in the electronics industry such as in analogue-digital-converters, optical integrated circuits, signal processing devices etc are controlled vide Category 8A301/8D301/8E301; and (b) Encryption software and technology comprising of hard drive software, communications software, intranet used within organisation, avionics software etc. are controlled vide Category 8D501.

Consequence of violating Export Control Regulations

In India, stringent measures are adopted for violation of export control regulations. Any exporter violating export control regulations can attract civil and/or criminal penalties which may include penalty, fine and imprisonment in terms of numerous legislations.

IT IS HIGH TIME THAT THE INDUSTRY TAKES APPROPRIATE MEASURES, SUCH AS SETTING-UP AN INTERNAL COMPLIANCE MECHANISM, TO ENSURE COMPLIANCE WITH EXPORT CONTROL REGULATIONS!

In terms of the Foreign Trade (Development and Regulation) Act, 1992 (FTDR Act) violation of export control regulations can lead to suspension of importer exporter code number [Section 8] and/or imposition of penalty equivalent to five times the value of the goods along with goods being subjected to confiscation [Section 11].

Under the Weapons of Mass Destruction and their Delivery Systems (Prohibition of Unlawful Activities) Act, 2005, violations as regards any of the prohibitions relating to weapons of mass destruction or fissile/radioactive materials can attract punishment with life imprisonment [Section 14, 15]. Punishment for unauthorised export may attract fine which may extend to INR 20 Lakhs. Other violations also attract payment of penalty/fine along with imprisonment

In terms of the Customs Act 1962, improper exportation of goods attracts penalty upto three times the value of the goods (Section 114). Provision of false declarations or incorrect particulars attracts penalty upto five times the value of the goods. Such violations may also attract imprisonment

Before parting…

It is high time that the industry takes appropriate measures, such as setting-up an internal compliance mechanism, to ensure compliance with export control regulations. This would broadly entail classifying an item under an appropriate SCOMET category, verification of end use or end-user, risk assessment, export licensing, post shipment tracking, internal audits and training and educating staff.

Given that most of the entries in the SCOMET List are highly technical in nature, whenever in doubt, it would bid well for the exporters to take appropriate guidance/clarification from subject matter experts and/or the DGFT as regards the coverage of their goods or technology or software within the ambit of SCOMET List. Taking such steps would ensure that exporters don't bear the brunt of excessive penalties and sanctions which can at times also lead to the closure of their business.

For the Government's part, need of the hour is to also have a mechanism for voluntary disclosure of export control violation – which enables an exporter to seek a post export authorization/license with no or mitigated penalty, especially if the violation is inadvertent. This would be a breather for the exporters and allow them to be legally compliant. The disclosure of the inadvertent transfers made would enable the Government to keep a better track of the intangible technology transfers, which otherwise may not have been detected.

A twist in saga of 'Re-assessment'!

Just a week after the M.S. Dhoni hit a six securing India's second World Cup in 2011, the CBEC too hit a sixer in its own right by bringing in a revolutionary change in the Customs Law and introduced the mechanism of self-assessment. Much like the Indian Cricket team bringing cheers to the nation, the CBEC simplified the process of clearance by bestowing responsibilities the importers and exporters for due assessment and certification of the particulars at the time of clearance.

Under the self-assessment Scheme, there was an explicit provision imbedded that the Custom Officer would have the power to verify such assessments and make reassessments where warranted. By way of this enactment the BOE or the SBs could be self-assessed with proper classification and valuation of goods.

However, issues in this regard arose when importers filed refund applications for excess paid duties without submissions of re-assessed BOE. Majorly, the claimants opined that the filing of the refund application ipso facto means and implies that the claimants are seeking re-assessment of all the BOE. This contention however, was neither entertained by the Revenue authorities nor the judicial authorities.

Given the differences between the Revenue and the taxpayers, the matter reached to the doors of the SC in the case of ITC Limited **[2019-TIOL-418-SC-CUS-LB]**. In this case, the SC had inter alia held that the claim for refund cannot be entertained unless the order of assessment or self-assessment is modified in accordance with law by taking recourse to appropriate proceedings and it would not be within the ken of Section 27 to set aside the order of self-assessment and reassess the duty for processing the refund applications.

The SC had reasoned that in case any person is aggrieved by any order which would include self-assessment, **he must get the order modified under Section 128 or under other relevant provisions of the Act.** As the judgment pronounced by the SC is the law of land under Art. 141 of the Constitution of India, the Revenue authorities refused the refund applications on account for re-assessment in the absence of an Appealable order. Thus, the situation was such that where any person had paid excess duty, he could not claim refund, unless there was a speaking order passed by the Appellate authority.

Vivo Mobile Case

In one particular case, Vivo Mobiles had been paying CVD @ 6%/12.5% for import of mobile phones. However, post the SC decision in the case of SRF Limited [2015-TIOL-74-SC-CUS], it was realized that they were eligible to claim the benefit of a notification requiring CVD to be paid @ 1%. Accordingly, Vivo filed various refund applications u/s. 27 of the Customs Act for the excess paid CVD. While the original authority had sanctioned the refund to be deposited into the CWF, the Commissioner (A) had allowed the refund to be granted to Vivo. Aggrieved, the Revenue preferred an Appeal before the Delhi Tribunal.

Delhi Tribunal's Observations

Dissecting the judgement of the SC in the case of ITC Limited (supra), the Tribunal observed that in the said case, amendments or corrections can be carried out in the BOEs in terms of Sections 149 and 154 of the Customs Act at the stage of refund also. Even in ITC Limited (supra), the SC had both prior to the amendment and post amendment of assessment provision, is that the claim for refund cannot be entertained unless the order of assessment or self-assessment is modified **'in accordance with law by taking recourse to appropriate proceedings.'**

For this reason, it was put forth by the Respondent that even if, the refund applications cannot be entertained, then too it is open to invoke the provisions of Sections 149 or 154 of the Customs Act for either seeking amendment in the Bill of Entries or seeking correction in the Bills of Entry and then refund applications can be filed.

It was further observed that in the case of Dimension Data India Private Limited **[2021-TIOL-224-HC-MUM-CUS]**, the Bombay HC had held that in the case of ITC Limited (supra), the SC had itself clarified that in case if any person is aggrieved by an order which would include an order of self-assessment, he has to get the order modified under Section 128 **or under other relevant provisions of the Customs Act** before he files a claim for refund. This was based on the premise that as long as the order is not modified, the order remains on record holding the field and on that basis no refund can be claimed. But the moot issue remains is that the Supreme Court has not confined modification of the order only through the mechanism of Section 128.

THE DELHI TRIBUNAL HELD THAT VIVO MOBILES CAN TAKE RECOURSE TO APPROPRIATE PROCEEDINGS, INCLUDING THE PROVISIONS OF SECTIONS 149 AND 154 OF THE CUSTOMS ACT FOR EITHER AMENDMENT OF THE BILLS OF ENTRY OR FOR CORRECTION OF THE BILLS OF ENTRY!

The Tribunal also took note of the judgement by the Telangana HC in the case of Sony India Private Limited **[2021TIOL-1707-HC- Telangana-CUS]**. In this case, it had been held that an order of assessment can be modified either under Section 128 or under other relevant provisions of the Act. Accordingly, it was clarified that the modification of an order of assessment can also be sought under Section 149 of the Act.

In view of the above observations, the Delhi Tribunal held that Vivo Mobiles can take recourse to appropriate proceedings, including the provisions of Sections 149 and 154 of the Customs Act for either amendment of the Bills of Entry or for correction of the Bills of Entry.

Authors' Note

While the SC had never expressly prohibited the taxpayers to pursue alternative modes for getting BOE re-assessed for claim of refund, it was widely understood that the sole way for claiming refund of excess paid duty was to file an Appeal before the Appellate authority and obtain a speaking order. The fact that the SC had expressly provided for modification of BOE u/s. 128 or any other provision, seemed to have been overseen by many.

The instant judgement will undoubtedly have a far-reaching impact on the trade and Industry, especially in cases where refund applications are pending or has been rejected for want of re-assessment. In view of the instant decision, the taxpayers who have paid excess duty upon import, may exercise the window of filing the applications either u/s. 149 or 154 of the Customs Act for amendment or correction. Accordingly, a refund application u/s. 27 of the Customs Act may be filed, even after the substantial lapse of time as the modification/ amendment u/s 149 does not provide any restrictions on time limit as such. However, given the far-reaching impact of instant case to several refund applications filed/rejected on this ground alone, the Government / legislature may take a contrary view and may resort to suitably amend the law with retrospective effect of appeal the instant decision before the High Court.

INDUSTRY PERSPECTIVE

Rahul Varma
Senior Director - Taxation,
Cipla Limited

Mr. Varma shares his thoughts and perspective on Production Linked Incentive Scheme for Pharma Industry, exclusion of Pharma Industry from RoDTEP, digitalization of Indian Tax system and much more…

The Government has recently announced a Production Linked Incentive ('PLI') Scheme for Pharma Industry in order to boost the domestic production. How do you intent to take advantage of the PLI Scheme?

With massive production capacities, India is the world's largest manufacturer of generic drugs. The PLI scheme has offered eligible manufacturing companies and sectors a 4-10% incentive on incremental sales over the base year of 2019-20 for a five-year period. This will certainly benefit the Indian manufacturers' given that the sales targets are achieved.

However, some issues could have been addressed better to support make in India in the notifications / press releases issued by the Government. For instance, setting up a Greenfield project takes too long due to delays in approvals, permissions from the regulatory bodies, etc. Any new project requires a minimum of two years from commencement to start production in a best-case scenario, which means incentives are paid over a period from two to three years of the starting date.

Though, the scheme does provides a great thrust on innovation as well as the development of complex and high-tech products including emerging technologies. Initiatives like these will help India create a truly global industry in terms of stature and size.

Being a regular importer and exporter of healthcare products, what are the major challenges faced by the Company, especially in light of the recent changes in faceless assessment ?

The newly introduced Faceless Customs procedure has indeed met its stated objectives barring initial procedural hiccups. However, in certain cases, instead of reducing the time for clearances of goods, the authorities are taking longer time to clear the regular consignment. The same is mostly on account of assessments being referred to officers in remote areas/states wherein the authorities are often unaware about the technicalities of the chemical and medicinal goods / equipment and tend to issues queries, which are mostly not relevant. This is even more critical in the cases of perishable and temperature controlled goods/ medicines, where delay has a direct bearing on the life of the product itself. At the same time, credit must be given to the faceless system for bringing much required transparency in the clearance process and allowing 24*7 clearances during the pandemic, which has indeed helped the entire industry to some-what overcome the challenges of pandemic.

Further, classification of the goods has been another uphill task, especially in the pharma industry wherein the raw materials consist of wide range of chemicals and like products, with minor differences. The molecular difference in chemicals is something that is not completely envisaged in the tariff and understandably so, the difference in opinion about classification occurs between the department and the importers.

The Government has excluded Pharma Industry from RoDTEP radius. How has the industry as a whole reacted on it?

The Pharma industry were one of the major beneficiaries of the MEIS Scheme and therefore being left out from the RoDTEP Scheme was indeed a major setback for the entire industry. It is understood that this decision comes from the Government upon considering the sector has done rather well even without incentives. However, such a consideration is beyond our understanding as why such an important and thriving industry has been left out of the ambit of RoDTEP and making it non-competitive compared to other industry The pharma industry can't be made to suffer taxes and expected to export these taxes as part of their cost structure.

Accordingly, the industry has collectively submitted its representation before the authorities and we are expecting a favourably consideration by the ministry on the same. However, it would also be worthwhile to note that the quantum of the benefit has been drastically reduced compared to what was available under the MEIS Scheme. Accordingly, even if the benefit is extended to the Pharma industry under the RoDTEP, we cannot really be dependent on the same.

One of the major targets of the current Central Government was to digitalise the Indian tax system. How do you think the Government has fared so far on this front?

It is no secret that the underlying objective of the Government in digitalization was to curb the tax evasion phenomenon, which is one of the biggest issues faced by the Indian economy. However, in order to put a complete check on the tax evasion, it is imperative for the digital system to work hassle free.

With the current faceless customs clearance systems, as discussed above, or the faceless assessment scheme in the Direct tax sector, it is seen in many cases that instead of streamlining the processes, there have been numerous technical glitches in the system. However, digitisation is undoubtedly key in the compliance matters, especially in taxation, which has been seen in many developed countries such as the U.S.A. and Australia. One of the notable achievements in the digital India movement has been GST. Right from electronic filing of returns, to the introduction of E-Way Bill, E-Invoicing have been major success.

Similarly, the Faceless assessment system in direct tax has also maturing post its implementation by govt few years back. It has saved lot of time both for government and taxpayers. It has worked in reducing any personal bias against the assesses and dispel any apprehension of wrong practices. It has helped in creating a positive environment and improve ease of doing business.

What innovative steps has the Company taken in its business structure in order to boost the overall business activities in the current situation?

The pharma industry is witnessing a massive revamp. The pandemic has made it imperative for organisations to become more agile and responsive to the new normal in the short and long term. To face this dynamic situation, the Company is embarking on a strategic re-imagination journey, led by the investment in Innovation and digital transformation. It was a weak spot for the Pharma industry initially but now digitalisation and its presence in such crucial times has impact the overall business structure in a positive manner. This is resulting in increase in value chain across various functions undertaken by the Company as a whole which inter alia includes financial activities, Research and Development, Manufacturing, Supply Chain, Customer Outreach, etc.

Tax has always been a subject matter of litigation. Sometimes, the litigation burden is so heavy that the Government is required to dispose off the same by way of legacy dispute resolution schemes. What are your views on such schemes?

Back in 2019, the Government had come up with the Sabka Vishwas Legacy Dispute Resolution Scheme for indirect tax matters, which had been very successful. Following suit, the Government had introduced the Vivad Se Vishwas Scheme in 2020. However, the said scheme seems to have fallen short of matching its IDT counterpart in as much as the benefit under this scheme is comparatively lower. Further, I understand that the many applications under the VSV are pending for finalization, which has only added to the current burden of litigation instead of lowering the same. The reason that the IDT scheme was successful while the VSV was not it was largely because of key difference in the way the cases are framed by the revenue for the two. While in the IDT issues are dealt with item by item as a separate case while the VSV was dealing with issues by a direct tax case at various levels which may contain many items. While most of the items shall be in the favour of the industry why should industry could compromise on large covered matter while they may want to settle some isolated issue at risk for the industry.

If the system under the Direct Tax Resolution scheme is modified according to the requirements of the assessees and if the benefits are enhanced, the same would also work as wonders!

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

ITAT holds Explanation 2 to Section 37(1) prospective, allows CSR expenditure incurred in line with Govt. directives

National Building Construction Corporation Ltd
ITA No.3819/Del/2018

The Assessee was a Public Sector Undertaking engaged in execution of civil and electrical projects that had filed its return of income for AY 2014-15. The return of income of the Assessee was selected for scrutiny assessment and certain disallowances were made by the AO.

Aggrieved, the Assessee approached the CIT(A) who sustained the disallowance made in respect of CSR in light of Explanation 2 to Section 37(1) of the IT Act which prohibits CSR expenditure to be clarificatory in nature, and thus makes it applicable retrospectively.

Aggrieved, the Assessee approached the ITAT which placing reliance on its co-ordinate bench ruling in Rites Limited [ITA No.6447 & 6448/Del/2017], held that Explanation 2 to Section 37(1) of the IT Act was prospective in nature and applicable with effect from AY 2015-16 and further expenditure incurred on specific directions of Government was allowable. Thus, allowing the Assessee's claim for CSR expenditure, the ITAT disposed of the appeal.

ITAT allows expenditure from undisclosed income declared during survey

Anjani Infra
ITA No. 478/SRT/2018

The Assessee was a real estate developer. It had filed its return of income for AY 2013-14 which was selected for scrutiny assessment.

During the assessment the AO noted that a survey was carried out and the Assessee had debited expenditure of INR 8.00 Lakhs from the income disclosed in survey.

The AO asked the Assessee to show cause as to why the expenditure of INR 8.00 Lakhs out of income disclosed in survey not be rejected since no expenditure was allowed from the income disclosed during the survey.

The Assessee stated that disclosure of income was made together with other business entities covered in the group known as Laljibhi Daliya and Jyantibhai Babaria cases. The Assessee was engaged only in business of building and developing of residential and other housing projects. No other activities or investment were carried out or undertaken by the Assessee. The disclosure of unaccounted income of INR 8 Lakhs was made by the Assessee to ask receipt of on-money in the business of real estate. Further, the Assessee had also paid professional fees of INR 8.00 Lakhs to its legal consultant.

The reply of the Assessee was not accepted by the AO and he treated the payment of professional fees as cash credits. Treating the additional income declared in survey as deemed income of the Assessee under Section 68 of the IT Act, the AO disallowed the professional fees.

Aggrieved, the Assessee approached the CIT(A) who upheld the disallowance made by the AO.

Aggrieved, the Assessee approached the ITAT which noted that the Assessee had not undertaken any activities other than real estate development. Therefore, placing reliance on the co-ordinate bench rulings in Suyog Corporation

[ITA No.568/Ahd/2012] and Jamnadas Muljibhai [[2006] 99 TTJ 197 (Rajkot)], wherein claim for expenditure was allowed from the on-money treated as business receipts and also observing that the professional fees paid by the Assessee had been subjected to TDS, ITAT found no justification in disallowing the expenditure.

ITAT holds Interglobe not liable for interest on short-deduction of tax at source for acting under bona fide belief of not being informed about the cancellation of lower TDS certificate

Interglobe Aviation Ltd.
2021-TIOL-1607-ITAT-DEL-SB

The Assessee received intimation under Section 200A of the IT Act raising a total demand of INR 73.32 Lakhs including interest of INR 9.23 Lakhs payable thereon under Section 201(1A) of the IT Act for short deduction of tax.

The Assessee submitted that it was not informed about the cancellation of lower TDS certificates, either by the deductee or by the Revenue which resulted in short-deduction.

The AO, not convinced with the submission, demanded the amount in the intimation for short deduction of tax.

Aggrieved, the Assessee approached the CIT(A) which partially confirmed the order of the AO holding the Assessee not to be Assessee-in-default but directing the Assessee to pay interest from the date the tax was deductible till the date of filing of tax returns.

Aggrieved, the Assessee approached the ITAT which observed that short-deduction by the Assessee was under a bona fide belief as substantiated by Form 26A. The ITAT held the interest liability to be unsustainable in law as the valid certificates issued to the Assessee were cancelled without any intimation to the Assessee.

SC holds no legal obligation of banks to maintain separate investment funds for earning different kinds of investment incomes, rejects disallowance of interest under Section 14A

South Indian Bank Ltd.
2021-TIOL-236-SC-IT

The Assessees were scheduled banks that were also engaged in the business of investments in bonds, securities and shares which resulted in tax-free income.

The Assessees did not maintain separate accounts for the investments made in bonds, securities and shares wherefrom the tax-free income was earned nor did they maintain separate accounts for the overheads and administrative expenditure, thus, the income could not be related to any separate account.

Accordingly, the AO in its order made proportionate disallowance of interest attributable to the funds invested to earn tax free income by referring to the average cost of deposit.

Aggrieved, the Assessees approached the CIT(A) who confirmed the order of the AO.

Further aggrieved, the Assessees approached the ITAT which noticed that the Assessees had surplus funds and reserves from which investments could be incurred. In absence of clear identity of funds, the ITAT accepted the argument of the Assessees that investments were not made out of interest or cost bearing funds alone and deleted the disallowance of interest.

Aggrieved, the Revenue approached the HC which reversed the decision of the ITAT primarily on the basis that the Assessees did not maintain separate accounts as such and had purchased the bonds/shares from mixed account. The HC was of the view that a proportionate amount of the interest paid on the borrowings/deposits, was considered to have been incurred to earn the tax-free income on bonds/shares. Therefore, the HC saw it fit to disallow such proportionate amount.

Aggrieved, the Assessees approached the SC. The SC allowed the appeals of the Assessees and held that the Assessees were not legally obligated to maintain separate investment funds for earning different kinds of investment incomes and where non-interest-bearing funds available were larger than the funds deployed in tax-free investments, disallowance of interest could not be made.

ITAT deletes penalty on delayed furnishing of quarterly TDS statements, holds it not prejudicial to Revenue

Telangana State Medical Services Infrastructure Development Corporation
ITA Nos. 1528, 1529 & 1530/H/2016

The Assessee was a State Government Undertaking that was subjected to a survey operation wherein it was found that the Assessee had failed to file TDS quarterly statements/returns in Form 24Q and 26Q for all the four quarters of FY 2008-09 relevant to AY 2009-10.

In view of Assessee's failure to file subject statements/returns, the AO initiated penalty proceedings and the Assessee was required to show cause as to why an order imposing penalty should not be passed.

Neither did the Assessee appear for the hearing, nor did it submit any written explanation as to why the penalty should not be levied.

Since the Assessee did not respond, the AO verified details of TDS statements from the Assessment Statement System and observed that the Assessee had not filed quarterly returns within the specified dates. Accordingly, AO imposed a penalty on the Assessee.

Aggrieved, the Assessee approached the CIT(A) who confirmed the penalty order.

Aggrieved, the Assessee preferred an appeal before ITAT which decided the matter ex parte basis on the facts available on record and the Revenue's submissions, given that nobody appeared on behalf of the Assessee.

The ITAT observed that though Assessee defaulted in furnishing TDS returns in the prescribed Forms 24Q and 26Q for all the quarters within the stipulated period, the entire tax along with interest was deposited and subsequently the TDS returns for all the quarters were filed after about 2 years from the due date.

Thereby placing reliance on Pune ITAT ruling in Maharashtra Jeevan Pradhikaran **[2021-TIOL-881-**

ITAT-PUNE], the ITAT observed that although penalty had been levied on the Assessee due to late filing of TDS statements/returns, no loss had been caused to the Revenue by the action of the Assessee. Thus, setting aside the order of the CIT(A), the ITAT directed the Revenue to delete the penalty so levied.

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ITAT follows SC ruling in Maruti Suzuki, holds assessment order on dissolved Infosys Group Company void ab initio

Infosys BPM Limited
ITA No.2372/Bang/2019

The Assessee was an Indian Company engaged in business process outsourcing and a wholly owned Dutch subsidiary company which held 100% shares in three companies a) Infosys BPO (Poland) Sp.Z.o.o (b) Infosys BPO (Thailand) Ltd. and (c) PAN Financial Shared Services India Pvt. Ltd. ('PFSS').

On July 25, 2007, Koninklijke Philips Electronics N.V. ('KPENV') entered into a sale and purchase agreement with the Assessee under which KPENV agreed through the Dutch subsidiary company to outsource and dispose of its shared service centres for finance, accounting and procurement business.

Under the framework of the above agreement, it was decided to transfer the shared service centre for finance, accounting, and procurement business in India ('Undertaking') owned by Philips Electronics India Ltd to PFSS. Accordingly, a business transfer agreement was entered and PFSS became the owner of the Undertaking, with effect from September 30, 2007.

The return of income for AY 2008-09 was filed by PFSS on September 24, 2008 declaring a loss of INR 5.16 Crores.

The Assessee entered into a Share Purchase Agreement with its Dutch subsidiary company by which the entire shares held by the Dutch subsidiary company in the three companies were transferred to the Assessee on December 31, 2008.

Pursuant to the transfer, the three subsidiaries became the direct subsidiaries of the Assessee.

Subsequently, a scheme of amalgamation was filed in the Madras HC and the Karnataka HC under Sections 391 and 394 of the Companies Act for merger of PFSS with the Assessee, which was approved by both the courts, with effect from April 01, 2008. PFSS was accordingly dissolved without being wound up and the Assessee was a successor of PFSS.

The AO passed the assessment order for AY 2008-09 in the name of PFSS on September 27, 2010, with certain additions.

The Assessee preferred an appeal against the additions and in the proceedings before the CIT(A), a letter was filed by the Assessee before the CIT(A) informing of the merger of PFSS with the Assessee.

The CIT(A) was also informed that all communications and correspondence in future be issued and served on the Assessee at its registered office at Bangalore. The hearing was attended by employees of the Assessee and thus, the AO was aware of the fact that PFSS was merged with the Assessee.

The AO proceeded with the assessment and passed the assessment order on PFSS. The Assessee challenged the assessment order passed on the dissolved company and contended that since PFSS was dissolved without being wound up, the concerned CIT(A) should have transferred the jurisdiction and the pending proceedings to the AO of the Assessee in Bangalore. Thereby, the assessment order passed by the AO was without jurisdiction and bad in law.

Aggrieved by the assessment order of the AO against PFSS, the Assessee approached the CIT(A) which refused to accept the Assessee's contention on the ground that the merged entity did not inform the AO about the fact that it ceased to exist and was merged with the Assessee.

Aggrieved, the Assessee preferred an appeal before the ITAT which placing reliance on the SC ruling in Maruti Suzuki [2019-TIOL-56-SC-IT], held that the assessment order passed on PFSS after dissolution to be non est and void ab initio.

ITAT grants working-capital adjustment on actual basis, rules on SWD comparables

EF Information Systems Private Limited
2021-TII-322-ITAT-BANG-TP

The Assessee was a subsidiary of a Luxemburg based company and was engaged in the provision of software development services ('SWD') and IT services to its AEs. The Assessee had entered into an international transaction with its parent company.

To determine ALP, the Assessee in its TP study had taken 21 companies as comparables.

The TPO rejected the TP study and undertook fresh selection of comparables, disallowed working capital adjustment on actual basis placing an upper limit on the said adjustment, and made a TP adjustment against the SWD services rendered by the Assessee to its AEs.

Aggrieved by the TP adjustment, the Assessee approached the CIT(A) which upheld the TP adjustment made by the TPO.

Aggrieved, the Assessee approached the ITAT seeking the exclusion of the comparables selected by the TPO.

Accepting Assessee's plea, the ITAT excluded 5 comparables selected by the TPO placing reliance on the Coordinate bench ruling in Cisco Systems (India) (P) Ltd. [IT(TP)A Nos.505 and 508/Bang/2015] wherein these companies were excluded on grounds of functional dissimilarity, earning income from sale of products etc.

The ITAT observed that the TPO should have allowed working capital adjustment on actual basis without placing an upper limit on the said adjustment, as there was no dispute with regard to the fact that the difference in working capital would materially affect the price charged for the services rendered.

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Accordingly, the AO/TPO was directed to grant working capital adjustment on actual basis while making reference to Rule 10B of the IT Rules which do not restrict the subject adjustment.

HC rejects Assessee's attempt to challenge a part of Settlement Commission's order, dismisses writ petition

Orchid Pharma Limited
2021-TII-57-HC-MAD-TP

The Assessee was a Public Limited Company listed in National Stock Exchange and Bombay Stock Exchange, engaged in the business of manufacture and trading of pharmaceutical bulk drugs and formulations. Upto AY 2003-2004, all the units of the company enjoyed 100% EOU status and its income was exempted from tax.

Further, the IT Department had conducted a survey on the Assessee March 17, 2010. Consequently, the Assessee on March 31, 2010, filed its revised return of income for AY 2004-05 to 2009-10. Thereafter, the Assessee moved to the Income Tax Settlement Commission, to settle the disputes. Accordingly, an application was filed by the Assessee before the Income Tax Settlement Commission and the Assessee offered income as detailed in the application. The Income Tax Settlement Commission by an order allowed the Settlement application to proceed with.

Reports were called from the TPO. Assessee stated that in respect of the TP issues, Assessee made substantial exports to various countries across the globe. The global market for pharmaceuticals could broadly be classified as regulated and less regulated markets. The regulated markets comprised USA, UK, Europe, Japan, while all other countries could be clubbed together as the less regulated markets.

In order to verify the ALP of these transactions with the Distribution Partners, the Income Tax Settlement Commission made reference to the TPO.

The Assessee stated that it had furnished all the details fully and truly in the application submitted before the Income Tax Settlement Commission. Only in relation of the TP issues, the Assessee stated that the subject transactions were dealt improperly as it did not treat the Assessee as an AE of the Distribution Partners under Section 92(A) of the IT Act.

Subsequently, the CIT was directed to make further enquiry in respect of various issues including the TP issues. Pursuant to such directions, TPO was directed to submit its report with regard to international transactions. However, TPO with regards to the TP issues held the following:

(i) The Assessee and three of its Distribution Partners were to be treated as Deemed AEs;

(ii) PSM was the MAM over Assessee's CUP method; and

(iii) The activities of the Assessee could be divided into 3 categories (namely Development, Manufacture and Marketing) and since the Assessee undertook both development and manufacture of the products and also shared some of the marketing responsibilities the profit-sharing ratio was fixed at 70:30 (70 to the Assessee and 30 to the Distribution Partners) following the PSM as against 50:50 agreed between the Assessee and the Distribution Partners.

Aggrieved, the Assessee preferred a writ petition before the HC. The HC dismissed the Assessee's petition and observed that the Assessee could not selectively accept the majority portion of the order passed by the Income Tax Settlement Commission and dissect the TP issues, which were not considered to its expectation.

Thus, remarking that it could not modify the Income Tax Settlement Commission's order or quash the said TP issues alone, the HC stated it was to be construed for all purposes that the said TP issues had not been settled by the Income Tax Settlement Commission and the competent authority of the IT Department was bound to proceed further in respect of the TP issues, which were not settled before the Income Tax Settlement Commission.

ITAT disallows recharacterization of debentures/CCD as shares, remits ALP determination of payment of interest to AEs

City Corporation Limited
2021-TII-323-ITAT-PUNE

The Assessee was a private limited company in the field of real estate development. The return of income filed by the Assessee was selected for scrutiny.

While going through the Assessee's Form 3CEB and transfer pricing report, the TPO observed that it had not done the benchmarking for the payment of interest on debentures/compulsory convertible debentures ('CCDs') properly. The TPO observed that the assessee had issued CCDs to its AEs in India and abroad against which it had claimed an interest payment. In respect of the same, the TPO held that the said transaction was a shareholder activity and thus, the payment of interest was nothing but a self-inflicting loss.

Accordingly, the TPO took the ALP of the payment of interest to AEs at Nil and thus, made a TP adjustment which was confirmed by the AO in his order.

Aggrieved, the Assessee approached the CIT(A). Relying on the decision of the Pune Bench of the ITAT in Assessee's own case for AY 2013-14, the CIT(A) provided partial relief to the Assessee by reducing the TP adjustment. It was held that the AO was not justified in re-characterising the transaction of issue of debentures/CCDs as that of equity shares.

Aggrieved, the Assessee approached ITAT contending that no TP adjustment was required in respect of interest payments to its AEs. ITAT noted that the amount of excess interest on debentures/CCDs over and above its ALP ought to be reversed and added back to the income of that year. The ITAT, finding no reason to interfere with the CIT(A) order which relied on the ITAT ruling in Assessee's own case, upheld the same and remitted the determination of ALP for the payment of interest made by the Assessee to its AEs back to the file of the AO/TPO.

ITAT excludes 6 comparables for ITeS-provider, treats forex gain as operating in nature

Tech Mahindra Business Services Limited
2021-TII-293-ITAT-MUM-TP

The Assessee was engaged in providing IT enabled services to its AEs and had benchmarked its international transactions by adopting Transactional Net Margin Method and taking PLI as OP/TC having 8 comparables.

The TPO applying various filters and taking fresh comparables made a TP adjustment on the provision of IT enabled services to its AEs which was upheld by the DRP and the final assessment order was passed by the AO.

Aggrieved, the Assessee approached the ITAT with a plea for exclusion of 6 comparables selected by the TPO and treating Forex gain as operative in nature.

While placing reliance on coordinate bench ruling in Assessee's own case in previous years, the ITAT accepted Assessee's plea of exclusion of the 6 comparables selected by the TPO. In the instant case, the subject functionally dissimilar comparables were excluded on grounds of being KPO service provider, specialised geospatial service provider, engineering design services provider, etc.

Further, the ITAT noted that Assessee had derived foreign exchange fluctuation gains on re-statement of outstanding debtors as on the balance sheet date. Accordingly, placing reliance on coordinate bench ruling in Medtronics Pvt Ltd [ITA No.7263/Mum/2018, ITAT directed the TPO to include forex gain as part of operating revenue stating that the forex gain would certainly form part of only operating revenue of the company.

In addition to the above, observing that with the exclusion of the 6 comparables and treatment of forex gain as operating, the Assessee would be well within +/- 5% tolerance range as per proviso 2 to Section 92C (2) of the IT Act. ITAT held that there was no need to make any TP adjustment in respect of provision of IT enabled services by the Assessee to its AEs.

ITAT holds revisionary powers cannot be exercised against void final assessment order passed without draft order

Mohan Jute Bags Mfg. Co
2021-TII-317-ITAT-KOL-TP

The Asseessee had filed its return of income which was selected for scrutiny under CASS.

The AO noted that the total transaction of the Assessee with its AE exceeded INR 5 Crores and attracted the provisions of TP; therefore, the AO referred the Assessee's case to the TPO. The TPO determined ALP of the Assessee's transactions with its AE and made a TP adjustment.

Aggrieved, the Assessee approached the CIT(A) which dismissed the Assessee's appeal ex parte.

Further aggrieved, the Assessee approached the ITAT which restored the appeal back to the CIT(A) for fresh adjudication.

Much before the ITAT ordered the restoration of the appeal back to CIT(A), the CIT(A) had issued SCN to the Assessee conveying his desire to exercise his power under Section 263 of the IT Act to intervene in the order passed by the AO contending that it had the right to do so since the Assessee had not raised before the CIT(A) the legal issue of failure on the part of AO to frame draft assessment order.

The CIT(A) thereby set asides the order of the AO and directed the AO to make fresh assessment after properly complying with the provisions of Section 144C of the IT Act.

Aggrieved, the Assessee approached the ITAT against the exercise of revisional jurisdiction by CIT(A), pointing out that the subject matter of the issue regarding the TP had already been agitated by the Assessee before the appellate forum.

As per law, the AO was bound to issue draft assessment order and thereby, inter alia give an opportunity to Assessee to avail to go before the Dispute Resolution Panel. Thereby, the ITAT noted that the order of the AO was null in law as the AO had acted arbitrarily without taking into consideration the mandatory procedure to be followed as per Section 144C of the IT Act.

Accordingly, the ITAT observed the AO's action to be arbitrary & whimsical exercise of power which violated Article 14 & 21 of the Constitution of India. Therefore, the CIT(A) could not exercise his jurisdiction to interfere with a null and void order.

Thus, holding the order of the CIT(A) to also be a nullity, ITAT allowed Assessee's appeal.

CBDT notifies "specified bank" u/s 194P for TDS on "specified senior citizen"

Notification No. 98/2021
September 2, 2021

In exercise of powers in Explanation (a) to Section 194P, CBDT notifies "specified bank" to mean a banking company which is a scheduled bank and has been appointed as agents of RBI under Section 45 of the RBI Act'.

Further, CBDT states that "banking company" shall have the meaning assigned to it in Section 45A(a) of the RBI Act and the "scheduled bank" shall have the meaning assigned to it in Section 2(e) of the RBI Act.

CBDT notifies Rule for authentication of electronic record u/s 144B

Notification No. 101/2021
September 6, 2021

CBDT introduces Rule 14C to prescribe the manner of authentication of an electronic record through electronic verification code. Accordingly, it provides that for the purpose of Section 144B(7)(i)(b) where an assessee or any other person submits an electronic record by logging into his registered account in the designated portal, such electronic record shall be deemed to have been authenticated under electronic verification code.

CBDT further clarifies that 'designated portal' shall have the same meaning assigned to in clause (i) of Explanation to Section 144B to mean the web portal designated as such by the Principal Chief Commissioner or Principal Director General, in charge of the National Faceless Assessment Centre.

CBDT excludes person receiving equity shares of PSUs under strategic disinvestment from ambit of Sec. 56(2)(x)

Notification No. 105/2021
September 10, 2021

CBDT notifies the Income-tax (28th Amendment) Rules, 2021 through which it inserts clause (4) to Rule 11UAC. Through this insertion, CBDT excludes person receiving equity shares of PSUs under strategic disinvestment from the ambit of Section 56(2)(x) of the IT Act.

Section 56(2)(x) provides that following receipts shall be taxed in hands of any person:

(a) Any sum of money exceeding INR 50,000/- in aggregate without consideration;
(b) Any immovable property received without consideration, if the stamp duty value of such property exceeds INR 50,000/-; and

(c) Any immovable property received for a consideration which is less than the stamp duty value of the property by an amount exceeding INR 50,000/-.

Prior to the subject amendment, Section 56(2)(x) also applied to equity shares of PSUs under strategic disinvestment. However, CBDT has exempted persons receiving equity shares of PSUs from the levy of tax under 56(2)(x) of the IT Act.

Further, CBDT clarifies that "strategic disinvestment" shall have the same meaning as assigned to it in clause (iii) of Explanation to Section 72A(1)(d) to mean sale of shareholding by the Central Government or any State Government in a public sector company which results in reduction of its shareholding to below 51%, along with transfer of control to the buyer.

CBDT extends due-dates for filing of various Income-tax returns and audit reports for AY 2021-22

Circular No. 17/2021
September 9, 2021

In view of the difficulties reported by the taxpayers and other stakeholders in filing of Income-tax returns and various reports of audit for the AY 2021-22 under the IT Act, CBDT further extends the due dates for filing of Income-tax returns and various reports of audit as herein below:

Compliance	Period	Earlier Due-Date	Revised Due-Date
Return of Income under Section 139(1) of the IT Act – where Tax Audit is not applicable*	AY 2021-22	September 30, 2021	December 31, 2021
Report of Audit	PY 2020-21	October 31, 2021	January 15, 2022
Report from Accountant by persons entering international transactions or specified domestic transactions under Section 92E of the IT Act	PY 2020-21	November 30, 2021	January 31, 2022
Return of Income under Section 139(1) of the IT Act – where Tax Audit is applicable*	AY 2021-22	November 30, 2021	February 15, 2022
Return of Income under Section 139(1) of the IT Act – where Transfer Pricing provisions are applicable*	AY 2021-22	December 31, 2021	February 28, 2022
Belated/ Revised Return of Income under Section 139(4) / 139(5) of the IT Act	AY 2021-22	January 31, 2022	March 31, 2022

Clarification (*) - Where the amount of net tax payable exceeds 1 Lakh, the extension shall not apply to Explanation 1 to Section 234A of the IT Act thereby the interest of 1% per month or part thereof under Section 234A shall apply considering the original due date. Further, in case of an individual resident in India referred to in sub-section (2) of Section 207 of the IT Act, the tax paid by him under Section 140A of the IT Act within the due date provided in that Act, shall be deemed to be the advance tax.

SC denied refund of ITC on Input Services in case of Inverted Duty Structure

VKC Footsteps India Private Limited
2021-TIOL-237-SC-GST

The Gujarat HC in the case of VKC Footsteps India Private Limited [2020-TIOL-1273-HC-AHM-GST], had held that Rule 89(5) of the CGST Rules which allows refund of unutilized ITC in case of inverted duty structure only on 'inputs' and not 'input services' was ultra vires to the parent provision of Section 54(3) of the CGST Act.

Contrary to the Gujarat HC decision (supra), the Madras HC in TVL Transtonnelstroy Afcons Joint Venture **[2020-TIOL-1599-HC-MAD-GST]**, held that Section 54(3)(ii) does not infringe with Article 14 of the Constitution of India and therefore refund of only inputs would be available under Inverted Duty Structure. Given the contradictory judgements, the matter was taken up by the SC. The SC has inter alia upheld the validity of Rule 89(5) on following premises:

- The Parliament had appropriately employed the expression of 'unutilized ITC' in the principal clause of Section 54(3) and the first proviso and used the limited expression 'inputs' in sub-clause (ii) to the first proviso in the IDS. Therefore, the position laid down by the Parliament stipulating refund admissibility only where the unutilized ITC has accumulated on account of rate of tax on inputs being higher than the rate of tax on output supplies is valid and cannot be interpreted otherwise.

- The Petitioners had challenged the validity of Rule 89(5) as a piece of delegated legislation on the ground that it ultra vires the Section 54(3) and therefore, lacking in substance. In this regard, it was further observed that clause (ii) of the first proviso is not merely a condition of eligibility for availing of a refund but a substantive restriction under which a refund of unutilized ITC can be claimed, only when the accumulation is relatable to an inverted duty structure. Accordingly, Rule 89(5) was held to coexist harmoniously with Section 54(3).

- Although there exists anomaly in Rule 89(5), it per se cannot result in the invalidation of a fiscal rule which has been framed in exercise of the power of delegated legislation.

Basis the above observations, the SC upheld the validity of Rule 89(5) of the CGST Rules, while also urging the GST Council to reconsider the said provision and make a policy decision.

Authors' Note

Immediately after the instant decision of Apex Court, the GST Council took cognizance of the issue in its recently held 45th GST Council Meeting and recommended to set-up a Group of Ministries ('GoM') to examine the issue of correction of IDS for major sectors, rationalize the rates and review the exemptions from the perspective of revenue augmentation under the GST. Particularly for the Footwear and Textile sector, the GST Council has recommended to change the rate of GST itself from January 2022 in order to avoid or reduce the impact of IDS. With the slew of recommendations and changes suggested by the GST Council pursuant to the instant decision of SC, the industry is indeed optimistic and watchful of the outcomes of the GoM, hoping for a suitable amendment in the Rule 89(5) of the CGST Rules.

With power conferred under the constitution, the legislature indeed has the authority to frame the rules in order to provide the mechanism for appropriate implementation of the Act. However, the formulation of rules needs to be in harmony with the governing statute. If a rule restricts the very purpose and intent of the legislation and imposes / exceeds the jurisdiction of the principal statute, then the said rule needs to be struck down. As a settled matter of principle, the Rules are required to provide only the form and manner in which the provisions of the Act need to be carried out and the substantive provisions of the Act cannot be curtailed by making a contrary rule.

SC withdraws Suo Motu directions for extension of limitation period

In Re: Cognizance for Extension of Limitation
2021-TIOL-246-SC-MISC-LB

The Hon'ble Supreme Court In Re: Cognizance for Extension of Limitation, withdrew its earlier suo motu directions which provided extension from limitation period for court proceedings. Such extension was provided to recoup with COVID situation.

Now that situation has returned to normalcy, the Court has withdrawn the extension. The Order also issued directions as follows:

- Period of March 15, 2020, to October 02, 2021 shall stand excluded from limitation period of any suit, appeal, application, etc.
- In cases where the limitation period has expired between March 15, 2020, till October 02, 2021, the persons will have a limitation period of 90 days from October 03, 2021. In the event where the actual balance period of limitation as on October 03, 2021 is greater than 90 days, the longer period shall apply.
- The Government of India shall amend the guidelines for containment zones.

Authors' Note

The withdrawal of extension comes amidst a battery of advocates pleading for its continuation anticipating third wave of COVID. The Supreme Court in this regard noted its remarks that if such third wave indeed hits, the court will take cognizance thereof. However, for now it is only appropriate that the limitation period prescribed by legislators is brought in place.

This decision is relevant for all the court proceedings relevant across the statutes in operation in India.

WB AAR disallows ITC on invoices furnished belatedly

Eastern Coalfields Limited
2021-TIOL-221-AAR-GST

The Applicant had sought an advance ruling before the WB AAR to ascertain entitlement to claim ITC on the invoices raised by the supplier pertaining to past period for which the supplier has actually paid the tax charged in respect of such supply in the subsequent months.

The AAR observed that GSTR-2B had come into effect from January 2021, and accordingly, the same did not have statutory force on entitlement of ITC for the prior periods. It was further observed that, as the Applicant availed ITC in January to March 2020, whereas invoices for such supplies were not uploaded by supplier during relevant months, there was a violation of Rule 36(4) of the CGST Rules. Accordingly, the Applicant would not be entitled to avail or claim ITC owing to delayed compliances by the supplier.

Authors' Note

Ever since the inception of Rule 36(4) of the CGST Rules, it had been rigorously challenged before various judicial authorities, especially on the premise that it does not flow from the parent provision of Section 16 of the CGST Act. It would be pertinent to note that even the Finance Bill, 2021 had proposed to suitably amend Section 16(2) of the CGST Act by inserting a clause allowing ITC only for invoices uploaded by the supplier. However, such proposed amendment is yet to be notified. Accordingly, it can be argued that as the law stands on date, there is no backing to Rule 36(4) of the CGST Rules, and in-turn no enabling provision for restriction of ITC on the basis of GSTR-2A/2B.

Karnataka HC quashes attachment order against e-commerce operator for alleged fraud by its suppliers

Sterne India Private Limited
2021-TIOL-1853-HC-KAR-GST

The Revenue had initiated investigation against one of suppliers of the Petitioner for alleged issuance of bogus invoices without supply of goods. In relation to the investigations, searches had been conducted at the Petitioner's premises and statements had been recorded. Thereafter, the Revenue had provisionally attached the bank account of the Petitioner. The Petitioner had been notified about the bank account attachment only by the bank and not by the Revenue authorities. Aggrieved, the Petitioner preferred a Writ before the Karnataka HC.

The HC observed that the Revenue could not produce evidence that order for bank attachment was communicated to the Petitioner. The HC further observed that as no proceedings had been initiated against the Petitioner u/s. 74 of the CGST Act, the action of bank account attachment was arbitrary and without the authority of law. In view of the above observations, the HC set aside the bank account attachment order and ordered for its release.

Denial of refund on export of marketing/promotion service, challenged

Uber India Systems Private
Writ Petition No. 17856 OF 2021/17874-2021

The Petitioner had entered into an inter-company Service Agreement with its overseas group companies for rendering various support services in the nature of marketing and promotion of Uber app, research on new territories, etc. Considering such services as export u/s 2(6) of IGST Act, the Petitioner had filed various refund applications, which were subsequently rejected. The Revenue observed that such services qualified as 'intermediary' under the CGST Act and consequently, the place of supply shall be deemed to be in India.

The Petitioner preferred a Writ before the Punjab and Haryana HC. The Petitioner inter alia argued that it does not satisfy the ingredients of Section 2(13) and therefore, does not qualify as an intermediary. It had been further argued that the Revenue had accepted the services rendered as export under the pre-GST regime, accordingly, they ought not take a contrary view in the GST regime, as the definition of 'intermediary' under ST and GST is identical.

Taking cognizance of the submissions put forth by the Petitioner, the HC has listed the matter for hearing on 27 October 2021.

Authors' Note

It is pertinent to note that intermediary service provision has always been a bone of contention for the Revenue vis-à-vis the taxpayers and understandably so, given the subject provision has huge tax implications for the exporters. Under the erstwhile ST regime, the New Delhi AAR in the case of GoDaddy India Web Services Private Limited **[2016-TIOL-08-ARA-ST]** had ruled that Place of Provision of Services Rules, does not include a person who provides main service on his own account. In the instant case, as the applicant itself provides the principal service, i.e., business support services to a receiver abroad on his own account, the services provided by it would not be regarded as an 'intermediary services'.

Even in light of a catena of precedents categorically differentiating export vis-à-vis intermediary, the Revenue authorities often pass judgements upholding the tax liabilities without giving much heed to the settled principles. It would further be pertinent to note that recently, the very provision of 'intermediary' had been challenged before the Bombay HC in Dharmendra M Jani **[2021-TIOL-1326-HC-MUM-GST].** However, as the said matter has arrived at a dead-lock, it would be interesting to see the view of the P&H HC. Though, taking cognisance of the dispute surrounding the issues, the Department has issued Circular No. 159/15/2021-GST dated 20.09.2021, clarifying majority of the concerns on the subject.

Order for blocking of ITC in absence of 'reasons to believe', sustained.

North End Food Marketing Private Limited
2021-TIOL-1769-HC-ALL-GST

Pursuant to investigation proceedings, the ITC in the Electronic Credit Ledger of the Petitioner had been blocked u/r. 86A of the CGST Rules. Aggrieved, the Petitioner had preferred an Appeal before the Appellate authority which set-aside the order holding that the 'reason to believe' that the ITC was fraudulently availed needs to mandatorily exist for invoking Rule 86A.

Thereafter, the Addl. Commissioner communicated to the Revisionary Authority that the Appellate Authority's is required to be revised as the same is erroneous. Accordingly, the Revisionary Authority stayed operation of the Appellate Authority's order without calling for and examining records or providing any hearing opportunity. Aggrieved, the Petitioner preferred a Writ before the Allahabad HC challenging blocking of ITC and the correctness of exercise of Revisionary Power by the Commissioner.

The HC observed that the power under Rule 86A of the CGST Rules is draconian in nature and must be invoked only based on tangible and credible material instead of any and every material. Accordingly, it was held that such power should not be exercised merely on the ground that an inquiry has been initiated or basis any unfound suspicion.

The HC further held that power of Revisionary Authority being supervisory power, should be exercised with independent application of mind. Such power should not be exercised based on assumptions or mere noting of other officers. It was also observed that it is mandatory to follow procedure as laid down under the CGST Rules which prescribes for issuance of a Notice in GST RVN-01 before passing of an order under Section 108 of the CGST Act. In view of the above observations, the Allahabad HC set aside the order of Revisional Authority.

Authors' Note

The CGST Rules draws powers conferred by virtue of CGST Act. Conditions under Section 16 of the CGST Act restrict the availment of credit and warrant reversal in cases where credit has been wrongly availed. The right to avail and utilize ITC for discharging tax liability is a legal right arising from the statute, and it is trite in law that this right can be curtailed only with the specific power of the law and not otherwise. None of the provisions contained in Section 16 or any of the other sections under the Act empowers the government to block ITC under any circumstances. The Act provides for the provisional taking of credit on a self-assessment basis. Accordingly, it appears that the blocking of credit goes against the very intent and objective of the Act.

ITC on CSR expenses denied

Adama India Private Limited
2021-TIOL-228-AAR-GST

The Applicant had incurred various expenses on CSR activities such as donations to Government organizations, civil works, distribution of stationary, medicine etc. Such expenses are mandatory under the Companies Act. In view of the above facts, the Applicant had sought an advance ruling before the Gujarat AAR to ascertain whether the ITC would be eligible on the said CSR activities.

Referring to Rule 2(d) of the Companies (CSR Policy) Rules, the AAR observed that it excludes activities undertaken in pursuance of normal course of business from the purview of CSR. The AAR further observed that Section 16 of the CGST Act allows ITC only on goods or services which are received in course or furtherance of business. In view of the above observations, the AAR held that expenses incurred on CSR activities cannot be said to be received in normal course of business and accordingly, ITC on such CSR expenses shall not be available.

Authors' Note

There are various contradictory rulings in respect of ITC eligibility on CSR expenses. Notably, the UP AAR in the case of Dwarikesh Sugar Industries Limited **[2020-TIOL-305-AAR-GST]** had held that ITC shall be available on expenses incurred to comply with the requirements of CSR under Companies Act. In the instant Ruling, the Gujarat AAR has narrowly interpreted the provisions of CSR Rules. Accordingly, it is likely that the Applicant would prefer an Appeal before the AAAR.

Bangalore Tribunal allows CENVAT Credit on tower and tower materials

Bharti Airtel Limited
2021-TIOL-70-CESTAT-BANG

The Appellant had procured various telecommunication equipment's for setting up of telecom network. The Appellant availed the entire credit on input service and only 50% of the credit on capital goods. The Revenue denied the CENVAT Credit so availed inter alia on the premise that the activity of erection of towers does not amount to manufacture as the tower is in the nature of immovable fixture and hence, angles, channels and beams, cannot be treated as inputs. Aggrieved, the Appellant challenged the CENVAT credit denial before the Bangalore Tribunal.

The Tribunal noted that while the Bombay HC in the case of Bharti Airtel Limited [2014-TIOL-1452-HC-MUM-ST] had disallowed the CENVAT Credit on angles, channels, beams, etc., the Delhi HC in the case of Vodafone Mobile Services Limited **[2019-TIOL-3728-CESTAT-CHD]** had taken a contradictory view and allowed the CENVAT Credit. The Tribunal further observed that the Bombay HC judgement was duly referred in the subsequent Delhi HC judgement. Distinguishing the views of the Bombay HC, the Delhi HC had observed that a machine or apparatus annexed to the earth without its assimilation by fixing with nuts and bolts on a foundation to provide for stability and wobble free operation cannot be said to be one permanently attached to the earth and therefore, would not constitute an immovable property.

The Tribunal further took note of the Delhi HC's observation that the definition of all goods mentioned in Rule 2(k) of the CCR is wide enough to bring all goods which are used for providing any output service. Accordingly, the court held that the towers and pre-fabricated shelters form an essential element in the provision of telecommunication service. Accordingly, the Bangalore Tribunal allowed the CENVAT Credit on tower materials, antennae, prefabricated shelters as 'capital goods', used for providing output service.

Authors' Note

It goes without saying that structural steel is the essential input which is quintessential for certain industries, such as steel manufacturing, telecom, etc. and without it such industries cannot be established. Accordingly, disallowing CENVAT Credit on such inputs / capital goods is fatal for such industries. It would be pertinent that the erstwhile CBEC vide Circular No. 964/07/2012-CX dated 02.04.2012 had categorically clarified that structural components used essentially as a part of Boiler System shall not be hit by the exclusion clause to the said definition of inputs, as these are not used for laying of foundation or making of structures for support of capital goods, but are essentially the part of said Boilers. This position was once again reiterated by the CBEC vide Circular No. 966/09/ 2012-CX dated 18.05.2012. It appears that even in light of categorical clarifications, the Revenue authorities seldom take cognizance of such clarifications and arbitrarily issue notices and disallow credit, adding unnecessary litigation to the already overburdened Judicial system.

Mumbai Tribunal's deadlock on refund of unutilized CENVAT credit continues

ATV Projects India Limited
Excise Appeal No. 87084 of 2019

The Appellant, engaged in manufacturing of heavy engineering equipment, had closed down its factory in the year 1998 due to various business exigencies. However, they continued filing the period Excise returns until 2017.

The Appellant had accumulated CENVAT Credit, which had been claimed as refund in the year 2017 u/s. 11B of the Excise Act. The said refund application came to be rejected on the ground that the larger bench of the Bombay HC in the case of Gauri Plasticulture Private Limited [2019-TIOL-1806-HC-MUM-CX] had inter alia held that refund of unutilized CENVAT credit was not available on factory closure. Aggrieved, the Appellant had preferred an appeal before the Mumbai Tribunal.'

The Judicial Member of the Tribunal observed that the Karnataka HC in the case of Slovak India Trading Company Private Limited **[2006-TIOL-469-HC-KAR-CX]** had held that there may not be a specific provision in the Rule 5 of the CCR to grant refund when the manufacturing is stopped as a result of the closure of the factory, however, there is also no prohibition in terms of Rule 5. Consequently, refund of CENVAT Credit on account of factory closure had been allowed. Thereafter, the Revenue had preferred an SLP against the said judgement of Karnataka HC. The SLP had been dismissed by the SC on the ground that Additional Solicitor General had conceded the correctness of the High Court judgment and admitted that various judgements relied upon by the court were not appealed against.

The Judicial Member further observed that in the case of Jain Vanguard Polybutlene Limited [2015 (326) E.L.T. A86 (S.C.)] the SLP was dismissed keeping the question of law open. However, it was observed such dismissal would not necessarily mean that the question of law concerning admissibility of such cash refund was kept open as it was settled by the Tribunal in the appeal by Slovak India Trading (supra) and concurred by the judgement of the Karnataka HC that attained finality in rejection of the SLP by SC with admission of learned ASG that the Union of India had not appealed against any of those judgments of the Tribunal basing on which Karnataka HC had confirmed the Tribunal's order.

It was further observed that the SC in the case of Gangadhar Palo [2012 (25) STR 273 (SC)], it had been observed distinctly that SLP if dismissed with reasons, however meagre (even one sentence) there is merger or orders. Accordingly, it had been observed that judgement of Karnataka HC in the case of Slovak India (supra) would be merged with the SC judgement. In view of the above, the Judicial Member allowed the Appeal and directed the Respondent to process the refund within 3 months.

On the other hand, the Technical Member of the Tribunal observed that the judgement of the Karnataka HC in the case of Slovak India (supra) is distinguishable from the instant case in as much as refund arising on account of the disputed credit in that case could not have been utilized at the time when the unit was in operation.

It was further observed that the Delhi Tribunal in the case of Steel Strips Limited **[2011-TIOL-656-CESTAT-DEL-LB]** had held that the earlier view of the tribunal does not merge with dismissal of the SLP in the case of Slovak India (supra). It had been also observed that as a settled principle in law, the court cannot read anything into a statutory provision or a stipulated condition which is plain and unambiguous. A statute is an edict of the legislature. The language employed in a statute is the determinative factor of legislative intent. Accordingly, the Technical Member dismissed the Appeal. To settle the issues and give finality to the divergent opinion emerged, the Registry has now been directed to place the matter before the Hon'ble President of the Tribunal.

Authors' Note

The instant case has once again opened the pandora's box for the matter relating to refund of unutilized CENVAT Credit. It shall be noted that until now, various taxpayers have lost out on their eligible CENVAT Credit under the erstwhile CENVAT/MODVAT Scheme, on the ground of absence of express provision allowing refund in case of factory closure. Such a reasoning does not seem to be justifiable. Lord J. Denning had once remarked that 'a Judge must not alter the material of which the Act is woven but he can and should iron out the creases. When a defect appears, a Judge cannot simply fold his hands and blame the draftsman.'

Accordingly, it is expected that the instant matter would reach the doors of the HC or the SC to attain finality where the judge might iron out the creases under the Excise Law, allowing refund of unutilized CENVAT Credit on factory closure.

Notification / Circular	Summary
Press Release dated 18 September 2021	**Recommendations of the 45th GST Council Meeting** In a rather eventful week for GST, beginning with the Supreme Court's verdict on Inverted Duty Structure, ended with one of the most significant GST Council Meetings. The Meeting was held yesterday in Lucknow under the chairmanship of the Union Finance and Corporate Affairs Minister Smt. Nirmala Sitharaman. The Council made the following the following key recommendations: **GST rates on goods and services:** • Extending the existing concessional GST rates on certain COVID-19 treatment drugs, up to 31 December 2021 such as Remdesivir chargeable to 5% GST, Tocilizumab chargeable to Nil rate, etc. The Council further recommended reduction of GST rate to 5% on more COVID-19 treatment drugs, up to 31 December 2021; and • GST rate changes in order to correct inverted duty structure, in footwear and textiles sector, to be implemented with effect from 01 January 2022. **Correction in Inverted Duty structure in Footwear and Textiles sector** • External batteries sold along with UPS Systems/ Inverter attract GST rate applicable to batteries [28% for batteries other than lithium-ion battery] while UPS/inverter would attract 18%; • All pharmaceutical goods falling under heading 3006 attract GST at the rate of 12% and not 18%; and • Carbonated Fruit Beverages of Fruit Drink and Carbonated Beverages with Fruit Juice attract GST rate of 28% and Cess of 12%. This is being prescribed specifically in the GST rate schedule. **Clarifications on GST rate on certain services** • Coaching services to students provided by coaching institutions and NGOs under the central sector scheme of Scholarships for students with Disabilities is exempt from GST; • Overloading charges at toll plaza are exempt from GST being akin to toll; and • Alcoholic liquor for human consumption is not food and food products for the purpose of the entry prescribing 5% GST rate on job work services in relation to food and food products. **Other recommendations** • The Council decided to set up a GoM to examine the issue of correction of inverted duty structure for major sectors, rationalize the rates and review exemptions from the point of view of revenue augmentation, from GST. It was also decided to set up a GoM to discuss ways and means of using technology to further improve compliance including monitoring through improved e-way bill systems, e-invoices, FASTag data and

Notification / Circular	Summary
	strengthening the institutional mechanism for sharing of intelligence and coordinated enforcement actions by the Centre and the States. **Measures for streamlining compliances in GST** - Aadhaar authentication of registration to be made mandatory for being eligible for filing refund claim and application for revocation of cancellation of registration; - Late fee for delayed filing of Form GSTR-1 to be auto-populated and collected in next open return in Form GSTR-3B; - Refund to be disbursed in the bank account, which is linked with same PAN on which registration has been obtained under GST; and - Rule 36(4) of CGST Rules, to be amended, once the proposed clause (aa) of section 16(2) of CGST Act, is notified, to restrict availment of ITC in respect of invoices/ debit notes, to the extent the details of such invoices/ debit notes are furnished by the supplier in Form GSTR-1/ IFF and are communicated to the registered person in FORM GSTR-2B.
Circular No. 160/16/2021-GST dated 20 September 2021	**Addressed difficulties relating to amended Section 16(4) of the CGST Act** - It has been clarified that w.e.f. 01 January 2021, the issuance date of debit notes shall determine the relevant financial year; and - Further, ITC on the debit notes issued after the 01 January 2021 will be eligible as per the amended provision of Section 16(4) and for the debit notes raised before 01 January 2021. ITC applicability will be determined based on the provision of Section 16(4) as it existed before the amendment. **Physical copy of invoices not required if invoice generated as per Rule 48(4)** - No physical copy of invoices is required in cases where invoice has been generated by the supplier in the manner prescribed u/r 48(4) of the CGST Rules and production of the QR code having an embedded IRN electronically, for verification by the proper officer, would suffice; **Scope of 'subjected to export duty' explained qua Section 54(3)** - In cases where there is no export duty and supplies are at NIL rate such transactions shall not be covered by the restriction imposed under the first proviso to sec 54(3) of the CGST Act.
Circular No. 162/18/2021-GST dated 25 September 2021	**Refund of taxes erroneously paid under wrong head** - It has been clarified that the taxpayer can claim refund in both situations provided the taxpayer pays the required amount of tax in the correct head; - Rule 89(1A) of CGST Rules, provides that any person claiming refund, in respect of a transaction considered by him to be an intra-State supply, which is subsequently held to

Notification / Circular	Summary
	be an inter-State supply, may file an application in Form RFD-01, within 2 years from the date of payment of the tax; ▸ In this regard, it has been clarified that in respect to aforementioned section along with new inserted Rule 89(1A) of CGST Rules, the refund can be claimed before the expiry of 2 years from the date of payment of tax under the correct head as the case may be; ▸ Further, for the exports made before the insertion of Rule 89(1A) vide Notification No. 355/2021- Central Tax dated 24 September 2021, refund can be filed before the expiry of 2 years from the date of issuance of the said notification; ▸ For the exports made before the insertion of Rule 89(1A) vide Notification No. 355/2021- Central Tax dated 24 September 2021, refund can be filed before the expiry of 2 years from the date of issuance of the said notification; and ▸ Refund will not be allowed under aforementioned sections where tax adjustment has been made through issuance of credit note u/s 34 of the CGST Act.
Circular No. 159/15/2021-GST dated 23 September 2021	**Clarification on the scope of Intermediary Services** ▸ The arrangement of intermediary requires a minimum of three parties, two of them transacting in the supply of goods or services or securities (the main supply) and one arranging or facilitating (the ancillary supply) the said main supply. An activity between only two parties can, therefore, NOT be considered as an intermediary service; ▸ A person involved in supply of main supply on principal-to-principal basis to another person cannot be considered as supplier of intermediary service; ▸ The Intermediary must arrange or facilitate some other supply, which is the main supply, and does not himself provides the main supply. Thus, the role of intermediary is only supportive; ▸ In cases wherein the person supplies the main supply, either fully or partly, on principal-to-principal basis, the said supply cannot be covered under the scope of 'intermediary'; and ▸ The specific provision of place of supply of 'intermediary services' under section 13 of the IGST Act shall be invoked only when either the location of supplier of intermediary services or location of the recipient of intermediary services is outside India.
GSTN advisory dated 16 September 2021	**EWB generation where principal supply is 'supply of service'** ▸ The EWB is not required to be generated in cases where the principal supply is purely a supply of service not involving movement of goods, since in terms of Rule 138 of CGST Rules, EWB is required to be generated for movement of goods. However, clarifies that in cases where along with the principal supply of service, movement of some goods is also involved, EWB may be generated by entering the details of HSN code of the goods, along with SAC of services involved like printing,

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	works-contract, catering, pandal or shamiana services, etc.
Circular No. 161/17/2021-GST dated 20 September 2021	**Clarification on supply of services by a subsidiary/sister concern** - A Company incorporated in India and a body corporate incorporated by or under the laws of a country outside India, which is also referred to as foreign company under Companies Act, are separate persons under CGST Act, and thus are separate legal entities. Accordingly, these two separate persons would not be considered as 'merely establishments of a distinct person'; - Supply of services by a subsidiary/ sister concern/ group concern, etc. of a foreign company, which is incorporated in India under the Companies Act, to the establishments of the said foreign company located outside India, would not be barred by the condition (v) of Section 2(6) of the IGST Act for being considered as export of services, as it would not be treated as supply between merely establishments of distinct persons; and - Supply from a company incorporated in India to its related establishments outside India, which are incorporated under the laws outside India, would not be treated as supply to merely establishments of distinct person.
Instruction No. 02/2021-22 IGST dated 22 September 2021	**Instruction on SCN issuance for GST evasion cases in time-bound matter** - The time limit of 3/5 years for issuance of orders u/s 73 and 74 of the CGST Act has already kicked in and further deferral in issuing SCN may leave little time with Adjudicating Authority to pass orders within stipulated time mentioned under said Sections. Accordingly, present situation warrants for extra efforts on the part of field formations and strict monitoring at supervisory level.

Bombay HC allows GSTIN ID amendment under EDI System

Sinochem India Private Limited
2021-TIOL-1859-HC-MUM-CUS

The Petitioner had sought to amend BOE u/s. 149 of the Customs Act for change in the GSTN ID. The Revenue had denied such request on the ground that no such GSTIN ID amendments can be made under the EDI System. Aggrieved, the Petitioner had preferred a Writ before the Bombay HC.

The HC observed that although the opening words of Section 149 provides that, "save as otherwise provided in sections 30 and 41", it has not been demonstrated that such other provisions in the Act do stand in the way of the Petitioners' prayers for amendment. The HC further observed that the amendments sought for by them cannot be allowed because such amendment is requested on the basis of documentary evidence which were not in existence at the time of clearance of the goods.

The HC noted that the Petitioner had prayed for amendment of documents only. Any deficiency in the system cannot be used by the Respondents as a shield so as to deny relief to a party. It was further noted that if indeed the system does not permit, the deficiency has to be covered up manually until improvements are affected in the system for such amendment. Accordingly, the HC allowed the Writ Petition and directed the Respondent to reconsider the amendment application.

Authors' Note

Section 149 of the Customs Act has been drafted to provide for amendment of any document and not merely Bill of Entry and Shipping Bill. Accordingly, the Bombay HC has correctly held in the instant case that exercise of the said right cannot be denied on account of procedural lapse at the Revenue's end. In case of such deficiencies in the portal, it is imperative on the Government to correct the same.

SC dismisses Revenue's SLP as the proceedings has been initiated by DRI under Customs Act

Agarwal Metals and Alloys
2021-TIOL-233-SC-CUS-LB

Investigations had been initiated by the DRI against various firms on information that they are indulging in 'Aluminium scrap' undervaluation. The Tribunal in such cases had accepted the Appellants' submission that import prices declared by it are indeed comparable and further held adoption of insurance value for alleging under-valuation as improper. Accordingly, the Tribunal had held that the Revenue had proceeded to redetermine the value of imported aluminium scrap on the basis of the DGOV circular without considering and overlooking the contemporaneous data available before it on record.

Aggrieved, the Revenue had pursued the matter right upto the SC. The SC observed that it its own judgement earlier this year in the case of Canon India Private Limited [2021-TIOL-123-SC-CUS-LB], had interpreted Section 28(4) of the Customs Act to hold that only 'the proper officer' could issue notices, and DRI do not classify as 'proper officer' under the said provision. Basis the above observation, the SC had dismissed the Revenue's SLP as the notices in the instant case had also been issued by the DRI.

Authors' Note

In March of this year, the SC had pronounced its judgement in Canon India (supra). The said judgement had been widely appreciated and welcomed by the Trade and Industry as it nullifies even the recovery proceedings initiated by the Revenue authorities u/s. 28AAA of the Customs Act. Also, it should be noted that even in the GST Law, the recovery provisions u/s. 73/74 of the CGST Act uses the term 'proper officer'. Accordingly, it is contemplated that the GST Council might suitably amend the said provision to widen its scope to include the GST Intelligence Departments as 'proper officers.'

Delhi Tribunal allows refund of CVD post GST introduction

Flexi Caps and Polymers Private Limited 2021-TIOL-611-CESTAT-DEL

The Appellant had obtained advance licenses under the Customs Act. However, failing to meet the EO, the Appellant had applied for redemption of the license and paid the applicable CVD/SAD along with applicable penalty on the imported items. Accordingly, the Appellant had become eligible to take the credit of CVD and Additional CVD paid on the said imports under the erstwhile CCE. However, by the time the Appellant could utilize the said credit, new CGST Law had come into effect. Therefore, the appellant filed an application u/s. 11B of the Excise Act, seeking refund of the said credit.

The said refund application had been sanctioned, however, it was subsequently overturned by the Commissioner (A) of GST. Aggrieved, the Appellant preferred an Appeal before the Delhi Tribunal. The Tribunal observed that Appeal filed before Commissioner (A) was not maintainable under the CGST Act for a refund application which was filed under the erstwhile law. Accordingly, it was held that the refund rejection was not maintainable on this ground alone.

In view of the above observation, coupled with the fact that the entire duty had already been paid, the Tribunal held that the Revenue had wrongly rejected the refund despite an unambiguous provision, not only giving entitlement of refund to the appellant but also recognizing the refund eligibility under the erstwhile law to have been given in cash under the GST law.

Benefit cannot be denied for inadvertent error in reward column while filing SB, MEIS

Indian Metals and Ferro Alloys Limited 2021-TIOL-1871-HC-ORISSA-CUS

During the course of filing details on the EDI system, the Petitioner had inadvertently ticked 'N' in the reward column of the shipping bill, instead of 'Y', even though, the SB had mentioned the intent to claim the MEIS benefit. As a result, the Appellant was unable to file its claim under the MEIS.

Accordingly, the Petitioner approached the HC after his request for amendment was denied by the Policy Relaxation Committee. The HC observed that the judicial forums on various occasions had extended the benefit of the reward scheme if it ticked inadvertently 'N' instead of 'Y' in the shipping bill in the reward column. The HC further observed that in the instant case too, as the Petitioner had declared its intent to claim the reward in as many words in the shipping bill in question itself, and inadvertently ticked 'N' in the reward column in the shipping bill in question, there is no reason to deny the relief claimed for by the Petitioner. Accordingly, the HC directed the Revenue to allow the benefit of MEIS to the Petitioner.

Authors' Note

It is pertinent to note that recently the Bombay HC in the case of Portescap India Private Limited **[2021-TOL-522-HC-MUM-CUS]** had allowed the MEIS benefit even though they had inadvertently selected the intent as 'N' instead of 'Y'. The HC had reasoned that the inherent objective of MEIS is to promote manufacture and export of notified goods / products to notified markets and once this is done, such exporter is required to be rewarded by duty credit scrips which can be utilized by the exporter. Accordingly, such benefit shall not be disallowed on account of inadvertent errors.

Notification/Circular	Key Updates
Notification No. 33/2015-2020 dated 28 September 2021	**Extension of FTP** Validity of Foreign Trade Policy 2015-20 is extended. This will now remain in effect till March 31, 2022.
Public Notice No. 25/2015-2020 dated 28 September 2021	**Extension of HBP** Validity of Handbook of Procedures 2015-20 is extended. This will now remain in effect till March 31, 2022.
Trade Notice 18/2021-2022 dated 20 September 2021	**De-Activation of IECs not updated on the DGFT** It has been notified that all IECs which are not yet updated shall be de-activated. However, the concerned IEC holders are provided one final opportunity to update their IEC in this interim period till 05 October 2021. The de-activation activity is being initiated in a phased manner and is in continuation with the mandate of DGFT to all IEC holders to ensure that details in their IEC is updated electronically every year during April-June period (for which no user charges will be borne by the IEC holder). IEC so de-activated, would have the opportunity for automatic re-activation without any manual intervention or a physical visit to the DGFT RA.
Notification No. 29/2015-2020 dated 23 September 2021	**Amendment in SEIS rates** • SEIS claim rates for various services exported have been revised for services rendered in the F.Y. 19-20; • Benefits to claim SEIS on payments received in Indian Rupees shall not be available on exports made in F.Y. 19-20; • The benefit of SEIS claim to service providers has been limited with total entitlement capped at INR 5 crore per IEC for F.Y. 2019-20; and • The deadline for filing of online application for SEIS claim for F.Y. 2019-20 shall be 31 December 2021. Further, the provisions of late cut shall not be applicable for applications pertaining to F.Y. 2019-20 and such applications shall get time-barred thereafter.
Notification No. 29/2015-2020 dated 23 September 2021	**Extension of Export Obligation Period** • The period of Export Obligation has been extended till 31 December 2021 for Advance Authorisations and Export Promotion Capital Goods Schemes which expired on 01 August 2020 to 31 July 2021 without payment of composition fee. However, this extension is subject to 5% additional Export Obligation on the balance of original or extended Export Obligation; • Further, the option to avail Export Obligation extension with payment of composition fees would remain available; and • As for the holders of the Scheme who have already obtained extension upon payment of composition fees, shall not be permitted to avail refund of such fees.

Notification/Circular	Key Updates
Notification No. 45/2021-Customs dated 29 September 2021	**Extension of exemption of import duty on import of COVID-19 vaccine** The CBIC has further extended exemption from the whole of the duty of customs leviable on COVID-19 vaccine till 31 December 2021.
Notification No. 76/2021-Customs (N.T.) dated 23 September 2021	**Procedure for duty-credit issuance under RoDTEP** The CBIC has notified that issuance of duty credit scrips for RoDTEP shall be subject to the following conditions: • It is issued in lieu of remission of any duty or tax, chargeable on any material used in the manufacture or processing of goods or for carrying out any operation on such goods in India that are exported, where such duty or tax or levy is not exempted, remitted or credited under any other Scheme; • It is issued against export of goods notified in the prescribed Appendix of the FTP, at the respective rate and cap notified under the said Appendix; • It is issued against the shipping bill or bill of export, presented u/s. 50 of the said Customs Act on or after 01 January 2021, and where the order permitting clearance and loading of goods for exportation u/s. 51 of the Customs Act has been made; • It is issued after the claim is allowed by Customs upon necessary checks, including on the basis of risk evaluation through appropriate selection criteria, and after filing of export manifest or export report; and • It is issued in accordance with any rules or regulations issued in relation to duty credit, e-scrip or electronic duty credit ledger. It has further been notified that in case of contravention of the duty credit scrips, the Jurisdictional Officer may cancel the credit scrips.

HC follows Meethelaveetil ruling, quashes ROC order disqualifying Director under Section 164

Synthalapadi Narayanarupa Swarupa vs. Union of India & Ors.
W.P.No. 11595 of 2021 and W.M.P.Nos. 12344 & 12346 of 2021

The Petitioner was disqualified as a Director by the ROC under Section 164(2)(a) of the Companies Act, for non-filing of financial statements or annual returns for continuous period of three financial years by the defaulting companies on whose board the Petitioner was also a Director, due to which, he was prohibited from being appointed or reappointed as Director in any other company for 5 years.

Aggrieved, the Petitioner preferred a writ petition before the HC contending that that the action taken by ROC was arbitrary and unreasonable.

Placing reliance on its ruling in Meethelaveetil Kaitheri Muralidharan ***[2020 SCC OnLine Mad 2958]*** wherein the issue as to whether the ROC was entitled to deactivate the DIN was elaborately dealt with, the HC allowing the writ petition of the Petitioner directed the ROC to permit Petitioner to continue as Director in the existing Companies, and to get reappointed as Director in any Company or be appointed as a Director in any other Company without any hindrance.

Authors' Note

As per Company law, if a person is a Director of five companies, which may be referred to as companies A to E, if the default is committed by company A by not filing financial statements or annual returns, the said Director of company A would incur disqualification and would vacate office as Director of companies B to E. However, the said person would not vacate office as Director of company A. If such person does not vacate office and continues to be a Director of company A, it is necessary that such person continues to retain the DIN. In this connection, it is also pertinent to point out that it is not possible to file either the financial statements or the annual returns without a DIN. Consequently, the Director of Defaulting Company A, in the above example, would be required to retain the DIN so as to make good the deficiency by filing the respective documents. Thus, apart from the fact that the Appointment and Qualification of Director Rules, do not empower the ROC to deactivate the DIN, such deactivation would also be contrary to Section 164(2) read with Section 167(1) of Companies Act, inasmuch as the person concerned would continue to be a Director of the Defaulting Company.

HC transfers proceedings to NCLT after passing winding-up order, pursuant to creditors' application

Raviraj Takawane vs. SKK Steel Enterprises Pvt. Ltd.
Interim Application No.31 of 2021 in Appeal (L) No.440 of 2018

An application was filed by four financial creditors in the HC seeking transfer of a company petition to the NCLT.

Before the HC the question for consideration was whether, after a winding up order has been passed by the HC, an application can be made for transfer of a company petition to the NCLT for disposal.

Referring to Section 434 of the Companies Act and relying on Apex Court's precedents in this regard, the HC observed that the Court may by order transfer such proceedings to the NCLT and the proceedings so transferred shall be dealt with by the NCLT as an application for initiation of CIRP.

Further, adhering to the principles laid down by SC, the HC observed that the applicants, being financial creditors of the said Company were entitled to bring an application under the proviso to Section 434(1)(c) of the Companies Act, and the application would be maintainable despite the fact that a winding up order had already been passed.

SC rejects plea challenging CIRP withdrawal basis resolution of CoC

K.N. Rajakumar vs. V. Nagarajan & Ors.
2021-TIOLCORP-34-SC-IBC-LB

The appellant had joined the Corporate Debtor as a junior assistant and since he was not receiving his salary regularly sought to get relieved from the services and settlement of his salary dues, However, as the Corporate Debtor requested him to continue in the service, he continued to do so on a salary which was much less than the one he was entitled to for 49 years.

Post retirement, the Appellant issued a Demand Notice to the Corporate Debtor calling upon the Corporate Debtor to pay dues of outstanding salary amounting along with interest.

On failure of the Corporate Debtor to comply with the notice, The Appellant filed an application under Section 9 of the IBC, before the NCLT and CIRP was initiated against the Corporate Debtor and RP was also appointed.

Aggrieved, the Corporate Debtor approached the NCLAT which allowed the appeal of the Corporate Debtor and set aside the order of the NCLT.

Aggrieved, the Appellant filed an application before the SC seeking permission to file appeal which was rejected by the SC. In the meantime, an application was filed by the Corporate Debtor which was allowed by the SC granting the liberty to approach CoC for settlement under Section 12A of the IBC.

The CoC in its meeting decided to withdraw CIRP initiated in respect of the Corporate Debtor and the NCLT accepted the application of withdrawal of CIRP and directed the RP to hand over the management of the Corporate Debtor to the Board of Directors.

Aggrieved, the Appellant filed an application in the NCLT seeking to set aside the withdrawal of CIRP initiated against the Corporate Debtor as decided in the CoC meeting which was dismissed by the NCLT.

Aggrieved, by the resolution of the CoC meeting and the order passed by the NCLT, the Appellant approached the SC which observed that the Adjudicating Authority was entitled to withdraw the application admitted under Section 7 or Section 9 or Section 10, on an application made by the applicant with the approval of 90% voting share of the CoC.

Further, noting that Appellant's earlier petition under Section 9 of IBC to initiate CIRP against the Corporate Debtor basis pending salary dues which was admitted by NCLT, was set aside by NCLAT, and the said NCLAT order was never challenged by the Appellant, the issue had attained finality when the appeal filed by the Corporate Debtor came to be allowed by NCLAT.

Authors' Note

In the instant case, SC rightly remarked that one of the principal objects of the IBC was providing for revival of the Corporate Debtor and to make it a going concern. Every attempt had to be first made to revive the concern and make it a going concern, liquidation being the last resort.

SC holds IBC moratorium applicable only to Corporate Debtor, allows homebuyers to initiate proceedings against Promoters

Anjali Rathi & Ors. vs. Today Homes & Infrastructure Pvt. Ltd. & Ors.
SLP (C) No. 12150 of 2019

The Petitioners were a group of homebuyers in a group housing project being developed by the Respondent. The home buyer agreement envisaged that possession of the apartments would be delivered within a period of thirty-six months, which in almost all cases was to be in 2014.

The grievance of the Petitioners was that the project was abandoned by the developer. As a result, they instituted proceedings before the National Consumer Dispute Redressal Commission ('NCDRC') seeking refund of their money with interest.

The NCDRC allowed their claim by directing the Respondent to refund the principal amount paid by the petitioners together with 12 per cent interest from the date of deposit along with costs within four weeks. There was a provision in the order for interest being enhanced to 14 per cent if the amount was not paid within the stipulated period. This order of the NCDRC had attained finality.

Execution proceedings under Sections 25 and 27 of the Consumer Protection Act were also instituted by the Petitioners. However, these execution proceedings were repeatedly adjourned and the Petitioners were not satisfied with the settlement terms offered by the Judgment Debtor.

Since no settlement was arrived at, the Managing Director of the first respondent was directed to appear personally. The Respondent filed a petition before the HC to challenge the order of the NCDRC requiring the personal presence of the Managing Director. However, the HC issued notice to the Petitioners and also issued a direction that no coercive steps shall be taken against the Managing Director of the Respondent.

In the meantime, an operational creditor approached the NCLT initiating proceedings under Section 9 of the IBC. The NCLT admitted the petition, following which the CIRP was initiated and a moratorium was declared under Section 14 of the IBC.

The order of the NCLT resulted in the filing of an SLP before the SC by the Petitioners. The grievance raised was that the application filed for the initiation of corporate insolvency against the Respondent was merely to stall the refund of the amount due to the homebuyers, in terms of the order of the NCDRC.

Thereafter, the Petitioners lodged their claims before the RP, though without prejudice to their contentions in the proceedings pending before the SC.

The SC thereby directed that a meeting of the CoC be convened within a period of two weeks so that a final decision could be taken on whether any of the Resolution Plans were acceptable to it.

By a vote of 96.93 per cent, the CoC approved the Resolution Plan which was submitted by the consortium of home buyers. However, the Resolution Plan was awaiting approval before the NCLT.

Aggrieved, the Petitioners approached the SC before which the Corporate Debtor contended that proceedings could not continue due to the moratorium.

The SC observed that moratorium which restrains initiation/continuation of proceedings was only in relation to the Corporate Debtor and not in respect of its Directors/Management, against whom proceedings could continue.

Therefore, directing the NCLT to dispose of the approval application within 6 weeks, SC held that Petitioners could not be prevented by moratorium from initiating proceedings against the Promoters of the Corporate Debtor in relation to honoring the settlements reached before the SC.

Authors' Note:

It is interesting to note that in the instant case the SC placed reliance on its ruling in P. Mohanraj & Ors. vs. Shah

Brothers Ispat Pvt. Ltd. **[2021-TIOLCORP-11-SC-IBC-LB]**, wherein it held that the proceedings under Section 138 and 141 of the Negotiable Instruments Act 1881 against the Corporate Debtor would be covered by the moratorium provision under Section 14 of the IBC. However, it also clarified that the moratorium was only in relation to the Corporate Debtor (as highlighted above) and not in respect of the Directors/Management of the Corporate Debtor, against whom proceedings could continue.

SC holds NCLAT has no jurisdiction to condone delay in filing appeal beyond 15 days

National Spot Exchange Ltd. vs. Anil Kohli, RP for Dunar Foods Ltd.
2021-TIOLCORP-33-SC-IBC

The State Bank of India had initiated the insolvency proceedings before the NCLT under Section 7 of the IBC against the Corporate Debtor on the ground that Corporate Debtor had taken credit limits by hypothecating the commodities kept in the warehouses of the appellant. The NCLT admitted the petition and commenced the CIRP against the Corporate Debtor. The IRP was also appointed by the NCLT who invited the claims from the creditors of the Corporate Debtor.

The Appellant submitted its claim and also forwarded its claim through courier to IRP. In response to the public announcement by the IRP inviting the claims from the creditors of the Corporate Debtor, The Appellant submitted the claim of INR 673.85 Crores.

IRP rejected the claim of the appellant on the ground that there was no privity of contract between the Appellant and the Corporate Debtor and that there was no letter or guarantee issued by the Corporate Debtor in favour of the Appellant.

Aggrieved by the rejection of the claim by IRP, the Appellant approached the NCLT which rejected the Appellant's application and upheld the decision of the IRP not to include the claim of the Appellant as a creditor.

Aggrieved by the decision of the NCLT, the Appellant preferred an appeal before the NCLAT. There was a delay of 44 days in preferring the said appeal.

The appeal before the NCLAT was required to be filed within a maximum period of 45 days (30 days + 15 days). However, there was a further delay of 44 days beyond a total period of 45 days.

Therefore, considering sub-section (2) of Section 61 of the IBC, the NCLAT dismissed the appeal on the ground that it had no jurisdiction to condone the delay beyond 15 days and thereby the appeal was barred by limitation.

Aggrieved, the Appellant approached the SC which dismissing the appeal, upheld the order of the NCLAT holding that the NCLAT had no jurisdiction to condone delay in filing appeal beyond 15 days.

Authors' Note:

As per the proviso to Section 61(2) of the IBC, the Appellate Tribunal may allow an appeal to be filed after the expiry of the said period of 30 days if it is satisfied that there was sufficient cause for not filing the appeal, but such period shall not exceed 15 days.

SC holds Excise Department's subsequent demands no ground to prevent Bank from exercising secured creditor rights

Superintendent Central Excise & Customs vs. Kotak Mahindra Bank & Ors.
2021-TIOL-217-SC-CX

The State Bank of India was a secured creditor and the debts were transferred to the Respondent. The debt was created on June 24, 1985. Amod Petrochem Pvt. Ltd., which gave the security of both movable and immovable property was in a difficult position financially. The Excise Department had also raised subsequent demands for the period 1985-1986 and 1986- 1987 on grounds of evasion of duty and penalty was also imposed along with the option of fine in lieu of confiscation.

The Respondent initiated proceedings before the Debt Recovery Tribunal under the SARFAESI Act. The debt was crystallized, and thereafter steps were taken in terms of Section 14 of the SARFAESI Act before the DM for attachment of properties, the movable properties stood sold.

As regards immovable property, SC noted that a direction was sought by the Bank before the HC with regards to non-implementation by the DM.

Aggrieved by the same, Bank filed a Letters Patent Appeal and by an elaborate judgment, the Letters Patent Appeal and the writ petition were allowed.

The SC had earlier directed status quo with regard to the nature, title and possession in respect of the immovable property by an order dated January 02, 2011, leave was granted thereafter and that is how the matter came up before the Court after a decade.

The SC observed that undoubtedly, there was a creation of a secured debt in favour of the State Bank of India and thereafter the transfer of the debt to the Respondent.

The SC also opined that it was not possible for Revenue to plead that it had a crown debt which would take precedence over a secured liability.

Further, the SC observed that on realization of the dues of the Bank, if amounts were still left, those amounts could be utilized to satisfy the dues of the Excise Department and if there were still amounts left, the debtor would be the beneficiary of the same.

The SC further remarked that the great irony of the situation was that the Bank was required to protect an immovable property for more than a decade on account of this issue pending and consequently, incurred further amounts for the said purpose.

Thus, stating that it was unnecessary to go into other issues sought to be raised by the parties, the SC dismissing Revenue's SLP, held that the Respondent could not be prevented from exercising its rights as a secured creditor on the pretext that there was a debt to the Excise Department arising from the confiscation order.

Extension of last date of filing of Cost Audit Report to Board of Directors

Pursuant to representations received from various stakeholders, MCA has extended the last date of filing of Cost Audit Report under rule 6(5) of the Companies (Cost Records and Audit), Rules 2014.

In view of the extraordinary disruption caused due to the pandemic, it has been decided that if cost audit report for the financial year 2020-21 by the cost auditor to the Board of Directors of the companies is submitted by 31st October, 2021 then the same would not be viewed as violation of rule 6(5) of Companies (cost records and audit) Rules, 2014.

Consequently, the cost audit report for the financial year ended on 31st March, 2021 shall be filed in e-form CRA-4 within 30 days from the date of receipt of the copy of the cost audit report by the company. However, in case a company has got extension of time for holding Annual General Meeting under section 96(1) of the Act then e-form CRA-4 may be filed within the timeline provided under the proviso to rule 6(6) of the companies (Cost Records and Audit) Rules, 2014.

Authors' Note:

This extension was expected as similar relaxations were given in previous year as well i.e. to align the cost audit report filing with extended AGM timelines. Though the corporate world is resuming its normal operations including work from office, however such extensions are needed to support them to ensure the compliances with applicable laws.

Change in Foreign Exchange Management (Export of Goods and Services) rules to prescribe the interest rates on advances received against export of goods

Reserve Bank of India vide Notification No. FEMA 23(R)/5/2021-RB dated Setpember 8, 2021 has notified Foreign Exchange Management (Export of Goods and Services) (Amendment) Regulations 2021 thru gazette notification. The regulation 15 has been amended to include the optional interest rate on advance received against export of goods. As per erstwhile provisions, an exporter of goods was allowed to pay interest on advances received subject to a maximum limit of LIBOR + 100 basis points. However same has been changed to prescribe that interest may be paid as per above rate or other applicable benchmark as may be directed by the Reserve Bank of India.

Authors' Note:

For more than 40 years, the London Interbank Offered Rate—commonly known as Libor—has been a key benchmark for setting the interest rates on international transactions. However over a period of time there has been various issues with LIBOR rates and banks aren't transacting the way they used to transact earlier and hence LIBOR has become less relevant in international market. Keeping this is view, RBI has kept an option to prescribe rates to be used in case of export import of goods.

Insolvency and Bankruptcy Board of India launches Electronic Platform for Auctions under liquidation process

Vide notification no. IBBI/LIQ/44/2021 dated September 30, 2021, IBBI has launched electronic platform for hosting public notices of auctions of assets liquidation under the IBBI (Liquidation Process) Regulations 2016.

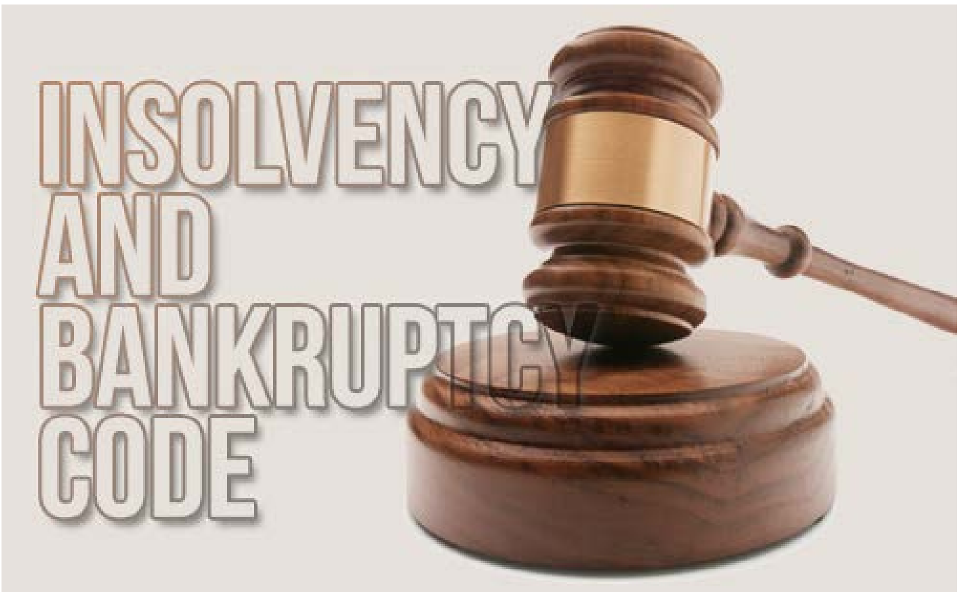
Liquidators are presently auctioning liquidation assets on various auction platforms. The information regarding such auctions is not available at a centralized place. A centralized platform hosting all public notices of auctions of liquidation assets of ongoing liquidation processes would improve visibility for the liquidation assets being sold, and may expedite the process and lead to better realization.

Considering the above, the Board has provided an electronic platform on its website for hosting public notices of auctions of liquidation assets. The Board hereby designates this platform for the purposes of clause (5) of paragraph 1 of Schedule I of the Liquidation Process Regulations.

Liquidators are, therefore, directed to upload the public notice of every auction of any liquidation asset, with effect from 1st October, 2021, at IBBI webpage on the day of its publication in newspapers, through their designated login page.

Authors' Note:

This move would bring in more transparency in the liquidation process as now Resolution Professional will be required to upload all notices on a centralized place therefore enabling potential investors to access and evaluate proposals more independently and then make bids for revival and acquisition of business. This is in addition to amendments brought in during July 2021 where it was mandated to file form CIRP 8 containing important details of the plan on an electronic platform. With such changes, it is evident that Government wants to make the resolution process as transparent as possible to achieve the intended goal.



G-24 submits its observations before the OECD Inclusive Framework Secretariat to address the tax challenges arising from digitalisation of the economy

To address tax challenges arising from digitalisation of the economy, the Working Group on Tax Policy and International Tax Cooperation of G-24 ('Working Group') has submitted its observations before the OECD Inclusive Framework Secretariat comprising of member countries such as Argentina, Brazil, Egypt, India, Kenya, Mexico, Morocco, Nigeria, South Africa, and Sri Lanka who are also the members of OECD/G20 BEPS Inclusive Framework.

The Working Group has demanded for an inclusive process for concerns of developing economies and for reallocation of 30% or more of MNE's non-routine profits under Amount A of Pillar One along with recommended gradual exclusion of digital service tax and progressive implementation of Amount A and also Subject to Tax Rule ('STTR') broad enough to address the base erosion of developing countries.

Further, favouring a high minimum effective tax rate under the Global Anti-Base Erosion Rules, Working Group laid emphasis on dispute prevention over dispute resolution, forewarning that in the medium run without a meaningful share in Amount A and a broader STTR, any solution would be sub-optimal and unsustainable.

Reference:

https://www.g24.org/wp-content/uploads/2021/09/Comments-of-the-G24-on-the-IF-July-Statement.pdf

Model Manual on Exchange of Information prepared by Global Forum, World Bank Group & African Development Bank released by OECD

A new version of Manual on Exchange of Information ('EOI') jointly prepared by Global Forum on Transparency and Exchange of Information for Tax Purposes along with World Bank Group and African Development Bank was released by OECD.

The new edition covers broader range of exchange of information tools tailored to address specific needs of various jurisdictions and also contains checklists and various templates to fortify the communication amongst jurisdictions.

The Manual also provides a detailed guide to assist jurisdictions, irrespective of their stage of implementation of EOI, to put in place the necessary processes and procedures which aim at improving the existing ones to ensure effective EOI.

Comprising of three chapters viz.,: (i) Introduction (ii) Competent Authority and EOI Units and (iii) Tax Auditors, the Manual aims at assisting various jurisdictions in developing their own approach towards EOI.

Reference:

https://www.oecd.org/tax/exchange-of-tax-information/global-forum-secretariat-african-development-bank-and-world-bank-group-deliver-new-model-manual-on-exchange-of-information-for-tax-purposes.htm

Comments on Draft Agenda invited by UN Tax Committeet

The UN Tax Committee had sought inputs into their work plan for the next four years. The Committee had invited stakeholders to share their thoughts on what its work plan could be before its next virtual session on October 19, 2021. This was to ensure that the Committee's agenda was practical and relevant to developing countries and included the most pressing challenges faced by them in tax policy and administration.

The draft agenda as it currently stands was drawn up during the 22nd session by the previous Committee membership, with inputs from the member states and other observers participating.

The UN Tax Committee primarily sought written comments in relation to the Draft Agenda on:

- Areas that should be given priority from the issues identified in the agenda, including the reason for prioritizing the identified issue(s) and the expected outcome from the proposed Committee work;
- Any other issue(s) that should be included in the Committee's work plan, considering its mandate, composition and expected outcome from the proposed Committee work; and
- Any additional value that the Committee can bring to developing countries in their tax policy and administration in the context of the COVID-19 pandemic response, recovery and resilience building and efforts to achieve the Sustainable Development Goals.

Comments on the above issues were to be submitted till September 21, 2021; but are yet to be posted on the Committee website.

Reference:

https://www.un.org/development/desa/financing/post-news/comments-draft-agenda-un-tax-committee

Bahrain to increase VAT rate to 10% effective Jan 1, 2022

The Council of Ministers in Bahrain has approved an increase in the standard rate of VAT from 5% to 10% with effect from January 1, 2022. This is to re-stabilise the Fiscal Balance Programme which was adversely impacted by COVID- 19.

It is expected that the zero-rate applicable on supplies including basic food, healthcare, education, oil and gas sector, construction of new buildings, local and international transport, and investment metals may not be affected. It is also expected that the VAT exemption for certain financial services and real estate may continue.

Details of transitional rules, if any, have not yet been published and are awaited.

GST: Recent Evolution!

Past few days have seen multiple changes to the GST law through GST Council's recommendations as well as CBIC's clarifications. These range from changes in tax rates, clarifying scope of export of service, intermediary service, reducing the scope of charging interest on ITC, refund of unutilized ITC on export of goods and others. We have put together our thoughts on such changes and their impact on business.

No interest on ineligible ITC 'availed'

The GST Council in its 45th meeting held on September 17, 2021 recommended that interest on wrongful/ineligible ITC be charged only when the same is utilized. Presently, the provisions of Section 50(3) of the Central Goods and Services Tax Act, 2017 ('CGST Act') triggers charge of interest on mere availment of wrongful/ineligible ITC, even when the same is yet to be utilized. Such charge of interest on availment was seen inappropriate inter alia as it is only when such ITC is utilized that the revenue suffers loss. Notably the recommendations are made for retrospective effect from July 01, 2017 and thus will provide respite to many.

Present recommendation of the GST Council is also in line with some of its previous recommendations with regard to Section 50(1) of the CGST Act which provides that such interest be charged only on that part of GST liability which a taxpayer pays after utilizing ITC (i.e., net cash liability). The actual amendment however lacked the retrospective effect as recommended by GST Council, owing to 'technical issues', and although CBIC clarified that it would not press for recovery of interest for prior period, it did not stop the authorities from initiating disputes. The issue was settled only when Madras High Court in Maansarovar Motors Private Limited vs. Assist. Commissioner identified the intent of GST Council and discarded all the revenue claims for interest that pertained to ITC. Given this background, it is also important to see if the recommendations of GST Council with regard to Section 50(3) are indeed given retrospective effect as recommended or another legal battle needs to be fought in regard thereto.

Scope of 'Intermediary', 'Export of Service' and its impact on cross border transactions between Group companies, sister concerns, subsidiaries, etc.

Sectors such as Business Process Outsourcing, Knowledge Process Outsourcing and Legal Process outsourcing are treated as 'intermediary' and specific provisions for place of supply of intermediary services [Section 13(8)(b)] are invoked by revenue, which provide that a place of supply for such services would be the location of supplier of services – which inevitably is in India. Consequently, these services despite having been provided to an overseas recipient are excluded from the scope of 'export of service'.

Needless to say, it has also spiked multiple catenae of legal disputes, mostly resulting in favor of revenue and depriving due export benefits. Some of such recent incidences are rulings of AAR in Vserv Global P Ltd. **[2018-TIOl-263-AAR-GST]** affirmed in **[2019-TIOL-37-AAAR-GST]** and Mayank Vinodkumar Jain (Order No. GST-ARA-57/2019-20/B-11 dated 22.01.2020).

Now, in order to remove ambiguity caused in the interpretation of the scope 'intermediary services', the nature and scope of such services was examined by the CBIC in Circular No. 159/15/2021-GST. The clarification lays down certain primary requirements for a service to qualify as an intermediary service. These requirements firstly envisage an intermediary service to be a transaction where minimum three parties are involved viz. facilitator, supplier, recipient. It thus eliminates a bipartite transaction from scope of intermediary service. Secondly, an intermediary service envisages mutual existence of two distinct supplies – a 'main supply' between supplier and recipient on a principal to principal basis and supply of 'facilitating' service by a facilitator a.k.a. 'intermediary'.

It is interesting to note here that the present clarification is accompanied by another CBIC Circular No. 161/17/2021-GST dated September 20, 2021 which distinguishes a 'branch' / 'agency' / 'representational office' from 'subsidiary/group company/ sister concern' for the purpose of definition of 'export of service' and clarifies that a transaction between subsidiary/sister concern/group concern etc. of a foreign company, which is incorporated in India under the Companies Act, 2013 and establishments of the said foreign company located outside India, which are incorporated in the respective jurisdiction would not be excluded from the scope of export of service. The anomaly in the interpretation was yet another obstacle for sectors such as BPO/KPO/LPO, IT etc.

ITC on Debit Note

The CBIC has issued its Circular No. 160/16/2021-GST dated September 20th, 2021 which interprets the amended Section 16(4) of the CGST Act, 2017 which delinks the date of issuance of debit note from the date of issuance of the underlying invoice for the purposes of availing credit.

The Circular clarifies that date of issuance of debit note would determine the relevant financial year for the purposes of Section 16(4) and that such amendment would also be applicable in respect of a situation where Debit note was issued prior to January 01, 2021 and ITC could be availed in view of the stated amendment vide filing GSTR 3B for the month of September 2021.

The clarification was much needed, especially in light of rulings, such as I-tech Plast India Pvt. Ltd., the Advance Ruling authority in its order dated 30.11.2020, that didn't interpret the amendment to Section 16(4) in its correct spirit. With such a clarification, it is hoped that confusion in relation to time period within which ITC can be taken in respect of debit note will go away.

THERE IS NO NEED TO CARRY THE PHYSICAL COPY OF TAX INVOICE WHERE INVOICE HAS BEEN GENERATED BY THE SUPPLIER AS PER RULE 48(4)!

Other Miscellaneous clarifications

As regards the issue of whether carrying physical tax invoice is mandatory during transportation of goods when e-invoice is generated, it has been clarified that there is no need to carry the physical copy of tax invoice where invoice has been generated by the supplier as per Rule 48(4) of Central Goods and Services Tax Rules, 2017 and production of QR code having an embedded Invoice Reference Number ('IRN') electronically for verification purpose before the proper officer would suffice. A similar clarification was issued by GSTN last year.

Further, the scope of the proviso to Section 54(3) of the CGST Act has also been clarified which restricted refund of unutilized ITC when exported goods are subjected to export duty. It is clarified that the term 'subjected to export duty' used in proviso to Section 54(3) of the CGST Act means where the goods are actually leviable to export duty and suffering export duty at the time of export.

Therefore, goods in respect of which either NIL rate is specified in Second Schedule to the Customs Tariff Act, 1975 or which are fully exempted from payment of export duty by virtue of any customs notification or which are not covered under Second Schedule to the Customs Tariff Act, 1975, would continue to be eligible for refund of unutilized ITC.

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	Production Linked Incentive
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
CSR	Corporate Social Responsibility	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

PUBLISHER & AUTHORS

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FIRM INTRODUCTION

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GLS
GST LEGAL SERVICES

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

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

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

VMG
& ASSOCIATES

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

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

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

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