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EDITION 15

A TREASURY OF  
KEY TAX &  
REGULATORY  
DEVELOPMENTS!

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## Vision 360: A glimpse of good times to come...

**W**ith the onset of festivities, November seems to leverage the excitement and hubbub in post lockdown times. With the largest vaccination drive the world has ever witnessed, India seems to be putting the COVID situation behind.

The GST collection figures have also surged since July, August and September. In fact, October witnessed GST collections of nearly INR 1.30 lakh crore which is about 20% YOY growth and also the second highest tax collection in post lockdown situation.

In all, the economy appears to be well on its way to recovery, albeit it's no time to be complacent about it as some of the sectors in India continue to struggle, some for profitability, some for sheer survival!

The government has also taken cognizance of rise in import of about 102 products and now plans to curb the same by enhancing domestic manufacturing capacity. The commerce and industry ministry has identified these 'priority products' and asked at least 15 other ministries to engage in the drive to develop domestic manufacturing.

The government has constituted a committee for the determination of RoDTEP rates for exports against Advance Authorisation (AA) and exports from Special Economic Zones (SEZs) and Export Oriented Units (EOU's), as these sectors were left out in the earlier exercise, according to the DGFT. These was a wide uproar from industry to include these two sectors among others in the fold of RoDTEP.

Speaking of holistic growth, the Governor of RBI Mr. Shaktikanta Das hinted that growth impulses are strong and displayed confidence that economy may reach GDP of 9.5% this fiscal year. He was quoted saying "Though soaring global crude prices and many geopolitical issues along with other global headwinds are challenges to growth, the overall growth outlook is very positive for



us. I am very confident that our GDP will comfortably grow by 9.5 per cent this fiscal because all growth impulses are very strong, and the fast-moving indicators are stronger." He credited the recovery of economy to the slew of measures taken by the Central Government.

Speaking of which, the Central Government has finally taken a popular stance on fuel prices by reducing the Excise duty. After months of calls for this price cut, Excise duty on Diesel and Petrol was reduced by Rs. 10/- and Rs. 5/- respectively. This was seen being followed by reduction in VAT by many states. As a result, the country has seen a major relief in fuel prices in a long-long time and will also aid overall inflammation management.

The sovereign recently has also reaffirmed its commitment to trade multilateralism by renewing Preferential Trade Agreement negotiations with many countries. There are indications that India will recalibrate the approach towards these agreements given improved preference to India over China after COVID situation. These treaties would further catalyse India's standing in Global Supply Chain and International Trade. These developments are in addition to some other Judicial and Regulatory developments significant for us.

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

**360**'.

We hope you will find it an informative and interesting read. As always, we look forward to receiving your inputs, thoughts and feedback, in order to help us improve and serve you in the best way possible!

**Happy Reading!**

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

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## INTERNATIONAL DESK

With numerous modifications and amendments happening in the field of taxation across the globe, the authors shed light on few of the relevant and interesting recent global tax updates relating to G20 Finance Ministers & Central Bank Governor endorsing two-pillar solution, call for swift development on rules, model manual on exchange of information released by OECD, etc. ..... 45



## Refund of Credit on Factory Closure – Reopening the closed doors!

**A** business is always incorporated with a simple objective of earning a profit. However, businesses are always uncertain! A study shows that 50% of all businesses fail in the first 5 years of their inception. Such uncertain event of closure of business indeed has financial repercussions. However, in disguise and in addition, it also has tax repercussions having monumental impact. When a Company is going concern, it can very well utilize its accumulated credit to set-off the output liability. However, post the closure of the business, the entire credit, accumulated over a period of time becomes redundant. Ideally, in such a scenario, where a Company is unable to utilize its credit, cash refund of the same shall be granted. This was the case for quite some time, until the Bombay HC decided otherwise.

### Historical Background

Under the erstwhile Central Excise regime, Section 11B of the Excise Act inter alia allowed the refund of duty paid on excisable goods used as inputs in accordance with the provisions of CENVAT Credit Rules. The said provision spells out specified situations, where cash refund is allowed. Admittedly, a situation of closure of factory/business is not covered u/s. 11B of the Excise Act. It is for this reason i.e., absence of specific situation covering factory or business unit closure, that the Revenue often denies the claim of unutilized CENVAT credit.

However, taking a broader approach, various judicial forums have consistently allowed refund of unutilized CENVAT credit on factory closure u/s. 11B of the Excise Act. Certain judicial forums have been of the view that CENVAT Credit is a vested and indefeasible right, which cannot be denied for want of specific provision under the law. The SC in the case of Eicher Motors Limited **[2002-TIOL-149-SC-CX-LB]**, had considered MODVAT Credit as one such 'indefeasible right' of the taxpayer. However, it must be understood that this indefeasible right as stated by the SC is created only once the same gets vested and not before that.



A major breakthrough, however, came with the judgement of the Karnataka Tribunal in the case of Slovak India Trading Co. Private Limited **[2005-TIOL-1698-CESTAT-BANG]**, wherein cash refund of unutilized CENVAT Credit had been allowed on account of factory closure. Aggrieved, the Revenue had challenged the said judgement before the Karnataka HC. The HC upheld the Tribunal's order, against which the Revenue preferred an SLP before the SC.

The Apex Court in its decision in **[2008 (223) E.L.T. A170 (S.C.)]** maintained the HC judgement by observing that the ASG appearing for the Union of India had fairly conceded that the decisions of the Tribunal, which were relied upon by the Tribunal, for allowing the cash refund of CENVAT credit, had not been appealed against. Basis this judgement of the SC, the law had been more or less settled in favour of the assessee and the Courts had been regularly allowing cash refund on account of factory closure.

However, with the advent of the larger bench of the Bombay HC judgement in the case of Gauri Plasticulture **[2019-TIOL-1248-HC-MUM-CX-LB]**, the judicial discipline flowing from the SC judgement in Slovak India (supra) had been disturbed. Evaluating the correctness of the SC judgement, it was inter alia held that the dismissal of SLP by the SC, on the concession of ASG, is not a confirmation or approval of view and cannot be read as a declaration of law under Article 141 of the Constitution of India. In simple words, it can be said that the Larger Bench of the Bombay HC is of the view that dismissal of SLP filed by the Revenue does not merge the decision of the Karnataka HC, with that of the SC. Accordingly, the larger bench had held that refund of unutilized CENVAT Credit cannot be claimed u/s. 11B of the Excise Act.

It is this judgement of the Bombay HC, basis which the Revenue authorities continue to reject the refund claims for unutilized CENVAT Credit, on account of factory closure. Subsequent to the decisions of the Revenue authorities,

the appellate authorities too, upheld the refund rejection orders basis the HC judgement, holding that Karnataka HC judgement in Slovak is not merged SC judgement.

### Recent Developments

In the midst of all the chaos between the judgements of two HCs and the SC, one M/s. ATV Projects India Limited had challenged the refund rejection on account of factory closure before the Mumbai Tribunal in [Excise Appeal No. 87084 of 2019]. It would be pertinent to note that Revenue in this case had rejected the refund claim, precisely by citing the Bombay HC judgement in Gauri Plasticulture.

The Appellant in the said case argued that the larger bench of the Bombay HC in Gauri Plasticulture had not applied the doctrine of merger correctly. It was argued that the by virtue of the doctrine of merger, the SC judgement in Slovak India had merged with the HC judgement. The Appellant appreciated the judgement of the SC in the case of Kunhayammed and Others [2002-TIOL-50-SC-LMT-LB], wherein it had had been held inter alia, that for the doctrine of merger to be applicable, there must be a decision of a subordinate court/forum, in respect of which there exists a right of appeal/revision which is duly exercised, and the superior forum before whom such appeal/revision is preferred must modify, reverse, and/or affirm the decision of the subordinate court. The consequence of such modification, reversal, and/or affirmation is that the decision of the subordinate forum would merge with the decision of the superior forum, which in turn would be operative and capable of being enforced.

It was this judgement of the SC, on which the larger bench of the Bombay HC had relied for holding that the decision of the Karnataka HC does not merge with that of the SC in Slovak India. In the ATV case, challenging the Kunhayammed case, the Appellant argued that the SC in a subsequent judgement in Gangadhara Palo [2011-TIOL-131-SC-MISC] had held that SLP even if dismissed with reasons, however meagre (even one sentence), there is merger of orders. It had been further held that once an SLP is dismissed, giving reasons by the SC, however meagre, it



becomes a declaration of law. Thereafter, the decision, which is merged with the SC decision, cannot be reviewed.

### Judicial Member's Decision

Taking cognizance of this argument put forth by the Appellant, the Judicial member of the Tribunal observed that the SC judgement in Gangadhar Palo would have binding effect on all Courts, Tribunal etc. in view of the mandate in Article 141 of the Constitution of India. Accordingly, the Judicial member allowed the Appeal of ATV, directing the Revenue to grant the refund with consequential reliefs.

### Technical Member's Decision

Dissenting the view of the Judicial Member, the Technical Member observed that the Karnataka Tribunal in Slovak India had not stated the facts of the case that was before it in this case but relied upon certain decisions referred to by the Counsel for appellant for granting the relief. Accordingly, it was held that the decision of the Single Member, even without referring to the facts of the case in hand and by just granting relief on the basis of certain decisions is sub silento and could not have been binding precedent.

The technical member further observed that in another case, the Mumbai Tribunal had not decided the issue but expressed opinion to the effect that grounds raised in the appeal are forceful, and remanded the matter back to original authority. It was held that such opinion cannot be said to be binding.

It was further observed by the technical member that in various cases relied upon by the Appellant, the facts of the matter were distinguishable in as much as the said cases related to matters where the MODAVAT Credit could not be utilized as the assessee had moved out of such scheme. Lastly, the technical member, relying upon the judgement of the larger bench of the Bombay HC in the case of Gauri Plasticulture (supra), held that judgement of the Karnataka HC in Slovak India would not merge with the SC decision. Accordingly, the technical

member dismissed the Appeal filed by the Appellant.

### The Deadlock

Given the contradictory view of the members of the Division bench, the matter has now been directed to be placed before the President of CESTAT for finally settling the issue at rest. The major point of consideration is whether the SC decision is to be accepted as binding precedent in view of Kunhayammed r/w. Gangadhar Palo in view of operation of Article 141 of the Constitution of India irrespective of the merger or no merger of the judgment of HC with the judgment of the Apex Court.

### Our Take on the ATV Case

The window which allowed the assessee to claim refund of unutilized CENVAT on account of factory closure, seemed to have been closed once and for all by the larger bench of the Bombay HC judgement in Gauri Plasticulture, as the said matter had not been appealed against before the SC. However, as things stand, it seems that the closed doors are now being re-opened. If the Appellant in this case succeeds in their quest, it would be a big win for the



entire trade and industry, as unimaginable amounts of monies have been lying with the Revenue authorities for this very reason of factory closure!

While deciding the finality of the matter, the President of the CESTAT, or the Bombay HC or the Apex Court, whatever the forum may be, the following considerations shall be kept in mind in the larger scheme of things:

Whether the Apex Court's judgement in Slovak or Bombay HC's judgement in Gauri Plasticulture is binding on the Appellant;

Whether there is merger of orders of the Karnataka HC and SC in Slovak; and

Whether Art. 141 of the Constitution applies to the Slovak judgement.

Once the above questions are ascertained, the long-standing issue may attain finality. While the Mumbai Tribunal has not resolved the issue completely, it has certainly reopened the doors of the entire matter. This is a pivotal juncture where the matter can move forward either on the assessee's direction or the Revenue's.



## Social Welfare Surcharge – *Chhota Packet Bada Dhamaka!*

“**I**n this world, nothing is certain but death and taxes!” – Benjamin Franklin. The Bostonian couldn't be any truer, especially when DRI initiates a slurry of investigation into SWS exemptions.

### Background

For the purpose of meeting specified social obligations, the Government had been levying various cesses and surcharges. For example, the Education Cess ('EC') and Secondary and Higher Education Cess ('SHEC') had been introduced for generating Revenue to be spent on education of the masses. These surcharges had been collected along with regular taxes such as Customs duty, Excise duty, Service tax, etc.

For one such surcharge, the Government, back in 2018, had introduced the Social Welfare Surcharge ('SWS') to be chargeable on import of goods at the rate of 10% of Basic Customs Duty ('BCD'). As the said duty was chargeable on the BCD amount, the importers had not been paying the SWS wherever the BCD had been exempted by virtue of any notification. This practice was under the understanding that where the principal duty is exempted, the surcharge thereof would also be exempted.

The above principle also had the backing of various CBIC circulars, wherein it had been categorically clarified that Education Cess ('EC') and Secondary and Higher Education Cess ('SHEC'), being surcharges, are not payable by importers when the BCD or tax itself is NIL or wholly exempt. Moreover, the Apex Court in

the case of SRD Nutrients [2017-TIOL-416-SC-CX] wherein it had been held that EC and SHEC would not be payable when the basic excise duty itself is NIL.

### The Issue

The above practice had been well accepted and largely followed, until the advent of the SC judgement in the case of Unicorn Industries vs. UOI [2019-TIOL-528-SC-CX-LB]. In this case, the Apex Court had held that where a notification exempts a 'duty of excise', the exemption cannot be extended to 'other duties of excise' such as EC, SHEC, etc. In this case, the SC followed the ratio laid down in Modi Rubber Limited and Ors. [2002-TIOL-393-SC-CX-LB], wherein it had been held that that the exemption granted to duty of excise would not extend to special duty of excise levied under the Finance Act. In Unicorn Industries, the SC had further held the judgement in the case of SRD Nutrients to be per incuriam as the Modi Rubber case was not placed before the SC in that case.



Subsequent to this narrow interpretation and judgement of the SC in Unicorn Industries, the CBIC vide Circular No. 2/2020 – Customs dated 10 January 2020 had clarified that SWS would not be specifically exempted in situations where BCD has been paid through debit in duty credit scrips (namely, MEIS and SEIS). Moreover, the

clarification was silent on payment of SWS in case of imports where the BCD is fully exempt or is NIL rated.

Given the SC judgement coupled with the CBIC Circular, the Directorate of Revenue Intelligence ('DRI') has begun proceedings for recovery of SWS from importers. As per the Revenue authorities, there exists no specific notification which categorically



exempts the levy of SWS. Hence, in cases where imports have been made under EPCG or Advance Authorization etc. or even where BCD is NIL / exempted, there is no consequential exemption from SWS.

### Analysis of the Scenario

While delivering the judgement in Unicorn Industries, the Apex Court reasoned that exemption granted to certain duties, would not automatically be extended to cesses. It had been further reasoned that the quantum of cesses can be determined by ascertaining the value of principal duty even if the same is exempt. While it is true that Revenue as well as the Courts shall adopt a strict interpretation in dealing with exemption notifications [Meridian Industries **[2015-TIOL-262-SC-CX]**], such reasoning cannot be used as a weapon to levy cesses where the principal duty is itself exempt or NIL rated. It would be pertinent to note that in cases of cesses / duties such as National Calamity Contingent Duty, which is computed on the value of goods, the SC judgement in Unicorn Industries would hold good, as such levy is independent of principal duties such as BCD or excise duty.

However, the second leg of the SC reasoning that quantum of cesses can be determined by ascertaining the value of principal duty even if the same is exempt, is incorrect. Where the principal duty itself is exempted, cess cannot be levied on the value of the tax, what would have been collected otherwise. The erstwhile CBEC vide Circular No. 345/2/2004 – TRU dated 10 August 2004 had clarified that cesses cannot be leviable where goods are fully exempted from excise duty or customs duty, are chargeable to NIL duty or are cleared without payment of duty under specified procedure, as there is no collection of duty. The interpretation of the SC virtually contradicts the levy provision by ignoring the fact that levy of Cess is linked to levy and collection of principal duty such as BDC / excise duty, etc. Accordingly, it can be argued

that where the 'levy' of surcharge is dependent on 'levy' of principal duty, the Revenue cannot rely on the levy of principal duty to assess and collect Cess / surcharge.

It shall also be noted that in the case of Modi Rubber, the Court had to decide the chargeability of 'special excise duty', where the principal duty was always chargeable. Therefore, the ratio of that case cannot mutatis mutandis be applied in the instant case. Moreover, the question raised in the instant case of Unicorn Industries was surrounding with refund of duties / levies / cesses which had been initially discharged by the Petitioners on its final products and then claimed as refund. This decision can thus be said to stand on a different footing vis-à-vis cases where there is an upfront exemption of BCD (under a notification) or, in cases of Advance Authorization, EPCG etc.

### Parting thoughts

The Apex Court through its said verdict has undoubtedly created a panic situation among the exporters who had been importing goods without payment of SWS under in case of EPCG / AA, etc. Moreover, as such demands for SWS are for the past periods, they will be demanded along with interest u/s. 28AA of the Customs Act. Thus, it can be seen that while SWS is merely a small levy on principal duties, the instant judgement of the SC has turned it into a volatile land mine which may go off at any moment as desired by the DRI.

However, as a shield to the SWS demand explosion, the importers may defend their position by arguing that SWS being a piggy-back cess, cannot be demanded independently where the principal duty itself is NIL or exempted. It may also be argued that the Customs EDI portal itself computes the SWS as NIL wherever the BCD is NIL or fully exempt. The importers may also knock the doors of CBIC for a positive clarification as a Government advocacy initiative.





## Giriraj Agiwal

Head - Taxation

Aarti Industries Limited

*Mr. Agiwal 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...*

### What are your views on exclusion of Chemical sectors from RoDTEP scheme?

The Government decision on excluding Chemical industry from getting benefits of RoDTEP was quite surprising as it will impact the competitiveness in the market in respect to exports. The exclusion deprives pharmaceutical exporters of the level playing field vis-a-vis global manufacturers.

Besides, many big global chemical users in Western world are now de-risking China procurement strategy and broad basing suppliers in India or even with the US / EU for shorter and stable supply chain even at marginally higher prices. Chemical sector must also be strategically looked at given the role it plays in global supply chain. Chemicals are majorly used as intermediary products for manufacture of other finished goods such as paints, PVC resins, etc. No doubt strengthening Indian chemical sector's position globally will give an edge to Indian trade on global canvass.

Presently, multiple representations have been filed highlighting this situation before the authorities and we await a positive response on it.

### Any comments on the recent DRI investigations of SWS exemption ?

The levy of SWS was introduced vide the Finance Act, 2018 which prescribed its calculation, at 10 per cent of BCD as "levied and collected". So, trade and industry claimed and enjoyed exemption from SWS wherever BCD was effectively not paid, through Advance Authorisation (AA), EPCG, EOU, etc. Such exemption was based ipso facto absence of payment of BCD and no specific exemption notification was issued. Some of the Judicial Precedents too supported this position of law.

However, recent decision of Hon'ble Supreme Court in the

case of Unicorn Industries seem to deviate from this position. The court held that additional duties / cesses cannot automatically be exempted in absence of a specific exemption notification. With this decision DRI has initiated streak of investigation with an aim to recover SWS where benefit of AA, EPCG, EOU, EHTP, etc. was availed.

In this turmoil, certain questions remain unanswered. It is a cardinal principal of taxation law that in absence of prescribed procedure for collection of tax, no liability can be enshrined. In case of SWS, the only mechanism for collection thereof is a prescribed percentage of BCD. In absence of BCD liability itself, there is no alternate mechanism for collection of SWS. The levy becomes unwarranted.

The magnitude of investigation by DRI clearly indicates that the issue will be led by Petitions before Higher Courts and a bitter battle is ahead of everyone to be fought.

### The indirect tax space is fast evolving over the last few years. Do you believe that such changes are aligned with overall long-term growth objectives?

The GST law had been introduced in July 2017 with the primary objectives of removing the cascading effects of tax and implement a mechanism of seamless flow of credit. While one of the objectives seem to have been fairly fulfilled, the other not so much. The GST law has certainly done away with the cascading effect to a considerable extent; however, the seamless flow of credit largely remains a myth.

The recently introduced E-Invoicing provisions under GST are such that its non-compliance by the suppliers can have severe impacts on the ITC eligibility of the recipient. If a supplier issues E-invoice without IRN, the bona fide recipient would not be able to avail the ITC thereof, as such invoice would not be considered as valid. Similarly, Rule

36(4) of the CGST Rules inter alia restricts the availment of unmatched credit to 5%. Once again, the recipient has to bear the consequences for non-compliance by suppliers. Therefore, it can be said that while the GST law has come quite far, it still has a long way to go!

### **Do companies face any compliance issues, and are any changes expected to be taken up by Government?**

Well, the matching requirement of invoices to avoid restriction u/r. 36(4) of the CGST Rules, is the one which pains the most on monthly basis. The burden to ensure that the supplier files his returns on time and reports the invoices correctly, are a bit too much to take. Although the GST Council had recommended reducing the compliance burden, it still remains an unachieved target!

However, while critiquing the Government on the compliance front, it would be relevant to mention that the Government had considerably relaxed the compliance burden during the COVID-19 pandemic. All in all, it can be said that the Government is cognizant of the implications of their tax administrative policies on taxpayer compliance and is taking steps to improve overall compliance as well as to reduce the administrative and procedural difficulties faced by taxpayers. I believe they have been able to deliver quiet well on this front, though there are certain areas still to be addressed.

### **Have you been facing any issues in Direct Tax assessments? Do you expect any changes that may help industry to ensure a better governance and compliance?**

The Government has recently introduced Faceless Assessment Scheme (FAS) for direct taxes with an intention to boost and quicken the process of completing the assessment proceedings. However, that aims appears to be going off track and it is creating more problems than giving desired resolutions. In order to streamline the process, a way out should be introduced by the Government wherein such schemes become a booster for the taxpayers as well as the tax authorities. Further, in general scenario, the communication gaps should be resolved and a certain threshold should be introduced for personal hearings on case-to-case basis.

### **What is your outlook on digitization and what role would it play in better corporate governance and compliance?**

India, like most of the progressive economies have shifted to digitalization when it comes to tax compliances. The proliferation of digital technologies over the past two decades has been substantial, wherein there have been rapid rates of adoption of new technologies. Digitalization in tax has been changing the aspects of tax from tax collections and compliance down to the tax base itself.

The drastic changes in digital tax compliance and digital governance have led to an evolving role for the stakeholders involved, such as businesses, the Government and tax consultants. It shall be noted that when GST was implemented, there was initial resistance of acceptance and havoc since the system was new and there was change in law. However, with time, people have accepted the changes and have been attempting to understand the changes in law. However, given the regular technical glitches in the GSTN portal, the complete digitalization of the tax compliances would not be possible.

### **Recently, few High Court judgements have allowed taxpayers to rectify TRAN-1 which were to be filed and amended prior to December 27, 2017. What is your take on this?**

The Taxpayers have welcomed these judgements since it will benefit them in utilising their unutilised credit. It was the only means for taxpayers to carry forward the transitional ITC into GST regime. Initially, since the GST law was new there were calculation errors from taxpayers, which resulted in making bona fide mistakes and short availment of credit. Further, there were technical glitches in GST portal initially and the GSTN portal was not functioning as desired. This had resulted in delay and difficulties to the tax payers in filing the TRANS-1 form. However, with the help of the recent judgements wherein HCs have allowed the taxpayers to revise their TRAN-1 returns, the taxpayers shall be benefitted qua availing and utilising their unutilised credit.

*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 allows ESOP expenditure under Section 37(1) to Network 18, follows Biocon ruling

#### Network 18 Media & Investment Ltd 2021-TII-363-ITAT-MUM-TP

The Assessee had claimed deduction of ESOPs expenditure of INR 75.53 Lakhs for AY 2012-14 which was disallowed by the Revenue based on the grounds that the liability did not crystallize and the expenditure was notional.

Further, the Assessee had also made a suo moto disallowance of INR 11.68 Crores under Section 14A having received exempt income in the nature of dividend and long-term capital gain.

The Revenue held that the disallowance made by the Assessee was not in accordance with Rule 8D and computed net disallowance of INR 43.08 Crores.

Aggrieved, the Assessee approached the CIT(A) who allowed the expenditure relying on the ITAT special bench

ruling in M/s Biocon Ltd vs DCIT 90 [2013-TIOL-625-ITAT-BANG-SB] and also deleted the disallowance.

Aggrieved, the Revenue approached the ITAT which upheld the CIT(A)'s order. It observed that the ESOP expenditure was not in the nature of a contingent liability and thus, deductible under section 37(1) of the Act. Further, the ITAT special bench ruling on which the CIT(A) had placed reliance to reach its conclusion had also been affirmed by the High Court.

Qua the disallowance made by the Assessee under Section 14A of the IT Act, the ITAT observed that the Assessee had sufficient interest free funds at its disposal, and thus, disallowance under Rule 8D(2)(iii) could be made on the average value of assets yielding exempt income during the year.



### HC holds no distinction between listed, unlisted shares with reference to holding period for classification as long-term capital asset

#### Exim Rajathi India Pvt. Ltd 2021-TIOL-1890-HC-MAD-IT

The Assessee was exporter of agricultural commodities and was also dealing in iron ore. The Assessee filed their return of income for the assessment year 2007-08. The return was duly processed under Section 143(1) of the IT Act. Subsequently, the case was selected for scrutiny and the Assessee was called upon to furnish details and the case was discussed with the Authorized Representative of the Assessee and Assessment order passed by the AO.

The CIT exercised their power under Section 263 of the Act on the ground that the order of assessment was erroneous and prejudicial to the interest of Revenue and accordingly, proceeded with the matter. After hearing the Assessee, the

CIT directed the AO to work out with the short-term capital gains keeping in mind the rate of interest. The said order was given effect by the AO.

Aggrieved, the Assessee approached the CIT(A) contending that the Revenue has made a mistake by treating the shares held for more than twelve months as short-term capital assets whereas, the proviso to Section 2(42A) clearly defined such an asset as a long-term capital asset and therefore, the gain should have been taxed at the special rate of 20%.

The CIT(A) partly allowing the Assessee's appeal observed



that the shares need not be one of a company, which was listed on the stock exchange. Further, the shares of private limited companies were eligible to be treated as long term asset, if they were held for more than twelve months.

Aggrieved, the Revenue approached the ITAT which

dismissing the Revenue's appeal and observed that the first proviso to Section 2(42A) did not distinguish between unlisted and listed shares for extending the benefit of lower holding period for classification as long-term capital asset.



## ITAT holds CBDT Circular No. 5/2012 to be prospective in nature, finds Cipla's gifts, freebies to medical professionals, allowable expenditure

### Cipla Ltd 2021-TIOL-1829-ITAT-MUM

The Assessee was engaged in manufacturing and sale of drugs and pharmaceutical products and was assessed under Section 143(3) of the IT Act for AY 2009-10 at an income of INR 1027.15 crores.

Pursuant to survey conducted on the Assessee, the AO observed that the Assessee had claimed expenditure incurred by way of gifts, freebies, travel allowance, monetary grants or advantage in kind from pharmaceutical companies in contravention of MCI guidelines in 2009 of INR 8.68 Crores and accordingly reassessment proceedings were initiated for AY 2009-10 by the AO.

The AO placing reliance on CBDT Circular No. 5/2012 dated August 1, 2012 ('CBDT Circular') which denied deduction under Section 37(1) of the IT Act for expenses incurred in violation of MCI Regulations observed the same to be clarificatory in nature and disallowed Assessee's claim of INR 8.68 Crores.

Aggrieved, the Assessee approached the CIT(A) which confirmed the decision of the AO which caused the Assessee to approach the ITAT.

The ITAT placing reliance on its co-ordinate bench ruling in *Aristo Pharmaceuticals vs. ACIT* [2019-TIOL-2682-ITAT-MUM] observed the CBDT Circular to be prospective in its application holding that the said CBDT Circular had enlarged the scope of Indian Medical Council Regulation, 2002, and had made the same applicable to the pharmaceutical companies, thus the same could not be reckoned to have a retrospective effect.

Thus, allowing Assessee's appeal, the ITAT observed the expenditure incurred on gifts, freebies etc. given to medical professionals to be deductible and accordingly directed the Revenue to delete the addition.



## ITAT holds foreign taxes not allowable deduction under Section 37(1) of the IT Act

### Infor (India) Private Limited 2021-TII-350-ITAT-HYD-TP

The Assessee had claimed deduction for the foreign taxes paid which was disallowed by the AO.

Aggrieved, the Assessee approached the CIT(A) which affirmed the decision of the AO to not allow the deduction. Aggrieved, the Assessee approached the ITAT contending that the subject issue of allowability of foreign taxes paid as a deduction in the nature of an expenditure incurred wholly and exclusively for business purpose was no more res integra in view of Bombay HC ruling in Reliance Infrastructure Ltd. Vs. CIT [2016-TIOL-3078-HC-MUM -IT], wherein it was held that it was not covered under Section 40(a)(ii) of the IT Act.

The ITAT observed that the aforesaid ruling of the Bombay HC was distinguished by Ahmedabad bench ruling in DCIT Vs. Elitecore Technologies Private Ltd. [2017-TII-65-ITAT-AHM-INTL] and was held not to be a binding

precedent since it came from a non-jurisdictional HC.

The ITAT placing reliance on Andhra Pradesh HC Full Bench's ruling in CIT Vs B R Constructions [2003-TIOL-213-HC-AP-IT ] further observed that Section 91 of the IT Act was a specific provision dealing with foreign tax credit to be granted in case of taxes paid in the specified countries and stated that allowing the deduction would mean that the specific provision of Section 91 of the IT Act would be rendered ineffectual over the general provision of Section 37(1) of the IT Act.

Thus, observing that special provision prevailed over the general provision, ITAT dismissed the Assessee's appeal and held that the foreign taxes against which credit was not allowable under Section 91(1) ought not to be deductible as business expenditure under Section 37(1) of the IT Act.



## ITAT allows invocation of Rule 27 to raise jurisdictional grounds on validity of assessment under Section 153C of the IT Act

### HTL Ltd 2021-TIOL-1830-ITAT-DEL

The Assessee was a company engaged in the business of manufacturing of large switching exchange data modem and other equipments used for communication sector that had been subjected to an assessment under Section 153C of the IT Act and an addition of INR 26.39 crores was made.

Aggrieved, the Assessee approached the CIT(A) contending that the addition was made on the same material available at the time of original assessment and that no incriminating documents were found in the search and survey carried out prior to the issuance of the notice

under Section 153C of the IT Act as claimed by the AO.

The CIT(A) deleting the addition made by the AO held that since the expenditure crystallized during the relevant year it was, thus, allowable.

Although the decision of CIT(A) was in Assessee's favour, the Assessee invoked Rule 27 of the ITAT Rules and approached the ITAT contending that Revenue erred in making the addition by assessment order passed under Section 143(3) of the IT Act read with Section 153C of the IT

Act in a non-abated assessment order without any incriminating documents found during the course of search, and that on the date of search, the assessment was a concluded one.

Aggrieved, the Revenue preferred an appeal before the ITAT which dismissing the Revenue's appeal, allowed Assessee's plea based on Rule 27 of the ITAT Rules. Reliance was placed on the HC ruling in Sanjay Sawhney vs. Pr. CIT [2020-TIOL-943-HC-DEL-IT] wherein it was held that Rule 27 of the ITAT Rules embodied a fundamental principle that a Respondent who may not have been aggrieved by the final order of the lower authority, and therefore, had not filed an appeal against the same, was entitled to

defend such an order before the Appellate forum on all grounds, including the ground which had been held against him by the lower authority, though the final order was in its favour.

Further, the ITAT placing reliance on a plethora of judgments also observed that as the assessment was a completed one and the addition was not based on any incriminating material found during search, it deserved to be deleted.

Thus, directing the AO to delete the addition, the ITAT upheld the order of the CIT(A).



## ITAT classifies Headquarter Services and Technical Consultancy Services as Intra Group Services, not stewardship services

### Nalco Water India Limited 2021-TII-342-ITAT-PUNE-TP

The Assessee, was an Indian subsidiary of the Nalco group headquartered in the USA which was a leading global provider of water treatment and process improvement services, chemicals and equipment programs for industrial and institutional applications throughout the world.

The Assessee was primarily engaged in manufacturing and selling specialty chemicals, such as water treatment chemicals, industrial additives, oilfield chemicals and dematerialized water.

During AY 2009-10, the Assessee had filed its return declaring total income of INR 3.42 crores and reported two international transactions in Form No. 3CEB. Thereafter, AO made a reference to the TPO for ALP determination.

The international transactions were receipt of Headquarter services from Nalco, USA and receipt of technical consultancy services from Nalco Pacific Pte Ltd, Singapore.

In order to demonstrate that the international transactions were at ALP, the Assessee applied TNMM. The TPO observed that the services availed by the Assessee were pursuant to two separate agreements viz., one with Nalco Company, USA ('Services Agreement/SA') and another with Nalco Pacific Pte Ltd., Singapore ('Technical and Management Assistance Agreement/TAMA').

TPO took note of the relevant clauses of the two agreements for ascertaining the true nature of services and required the Assessee to show cause as to why the services, claimed as intra group services, not be treated as stewardship activity carried out by the AEs.

The assessee filed an exhaustive reply to the TPO's show cause notice, giving details of benefits derived from such services. TPO, however, countered such a reply and held that the services performed by the AEs were in the nature of stewardship activity.

The TPO, thereafter, determined Nil ALP for the transactions and made TP Adjustment.

Aggrieved, the Assessee approached the CIT(A) who held that the services received were not in the nature of stewardship activity. Since the TPO did not apply any particular method for determining the ALP, CIT(A) held that the ALP determined by the assessee did not warrant any interference.

Aggrieved, Revenue filed an appeal before the ITAT while rejecting the TPO's classification of support services received from foreign AEs in the field of Headquarter Services and Technical Consultancy Services as 'stewardship services'. ITAT held the activities which were undertaken by an enterprise to protect one's own interest were considered to be stewardship activities. However, rendition of services by Nalco, USA and Nalco Pacific Pte Ltd, Singapore had given effect only to the Assessee and had not resulted in protecting the individual interests of such companies.

Thereby, ITAT confirms CIT(A)'s order holding subject services rendered to be in the nature of intra-group services and not stewardship activity, thus dismisses Revenue's appeal.





## ITAT rules on selection of comparables for software developer; Grantsworking capital adjustment

### EIT Services India Pvt. Ltd. 2021-TII-328-ITAT-BANG-TP

The Assessee was engaged in software development, technical services and other related services that had filed its return of income. The case was selected for scrutiny and notice under Section 143(2) of the ALP was issued along with 142(1) of the IT Act.

On receipt of notices, representatives of the Assessee appeared before the AO and, filed requisite details. On verification of the details, the AO observed that the Assessee had international transactions exceeding INR 15 Crores and thus, referred the case to the TPO.

The TPO observed that the Assessee had used 6 comparables and used TNMM as MAM and OP/OC as PLI. However, not convinced with the TP study of the Assessee, the TPO rejected the same and also rejected the working capital adjustment in respect of the comparables used and made TP adjustment.

The AO accordingly passed the draft assessment order considering the TP adjustment made by the TPO.

Aggrieved, the Assessee approached the DRP which rejected all the objections raised by the Assessee, however, directed the AO to compute the working capital adjustment.

The AO accordingly passed the final assessment order without considering working capital adjustment. Aggrieved by which the Assessee approached the ITAT.

The ITAT accepting the Assessee's plea on removal of certain comparables added by the TPO, granted the working capital adjustment in respect of the original comparables selected by the Assessee.



## ITAT restricts TP-adjustment to 0.5% considering guarantee as international transaction; Follows Redington over Assessee's own case

### Rubamin Ltd 2021-TII-341-ITAT-AHM-TP

The Assessee was a limited company engaged in the business of manufacturing of various grade of Zinc Oxide and Zinc based chemicals, manufacturing of moly-based chemicals.

The Assessee held 90% shares of a company based in UAE namely M/s Rubamin FZC ('RFZC') which was incorporated in the year 2004-05. Likewise, the RFZC had two wholly owned subsidiaries companies in Democratic Republic of Congo ('DRC') namely Rubamin SPRL and Rubaco SPRL.

The RFZC was a trading company whereas the companies located in DRC namely Rubamin SPRL and Rubaco SPRL

were engaged in the business of manufacturing of cobalt concentrates from cobalt ore and copper concentrate from copper ore and mineral exploration and extraction respectively. Thus, the Rubamin group consisted of various companies.

A search was conducted on the Assessee under Section 132 of the IT Act as a result of which various documents were seized.

The AO opined that all the monetary issues including capital and debt, financial planning, business affairs, hedging activities, sales realizations, profits of RFZC were

controlled and managed by the Assessee. Further, it observed that the Assessee had made policy for hedging the copper and cobalt products of RFZC though it was not dealing in such products.

The AO further observed that on analyzing the entire flow of transactions right from the manufacturing of the goods in the companies based in DRC and subsequent sales to the parties were controlled by the Assessee. In other words, had the Assessee directly made the business transactions from the companies based in DRC, then it would have earned huge profit which would have been subject to tax in India.

The AO was, therefore, of the opinion that the purpose of creating the office of RFZC was to shift the profit from India by using a colourable device. Accordingly, the AO, vide show cause notice, sought an explanation from the Assessee on the above issues/observations.

The Assessee replied to the show cause notice. However, the AO not being convinced made additions in respect of corporate guarantee in the assessment under Section 153 A of the IT Act despite the fact that no incriminating material was found during the course search.

Aggrieved, the Assessee approached the DRP which upheld the additions made by the AO.

Aggrieved, the Assessee approached the CIT(A) who reiterated the findings of the AO which caused the Assessee to approach the ITAT.

Before the ITAT, the Assessee contended that the corporate guarantee furnished in connection with the loan taken by its AE was outside the ambit of international transaction under Section 92B of the IT Act and no ALP determination was required.

The ITAT perusing provisions envisaged in Section 92B and its corresponding explanations thereto observed that guarantee was included within the ambit of international transaction vide the Finance Act 2012 with retrospective effect.

Therefore, restricting the TP-adjustment to 0.5%, the ITAT placed reliance on the judgment of the HC in *PCIT v. Redington (India) Ltd.* [2020-TII-45-HC-MAD-TP] wherein the HC had held that the corporate guarantee extended to the AE was an international transaction that needed to be benchmarked even though the matter had been settled in the Assessee's own case in previous years remarking that it had been overruled by the judgment of the HC.

Thus, for want of evidence from the Revenue that the Assessee's previous cases before the ITAT had been overruled, the ITAT remitted the issue back to the file of the AO for fresh consideration.



## ITAT upholds re-classification of pass-through costs as intra-group services; restores adjustment made on location savings

### Parexel International (India) Private Limited 2021-TII-364-ITAT-BANG-TP

The Assessee was a company that conducted clinical trials in India. In the TP order of AY 2013-14, TPO relied on TP order for AY 2011-12, and alleged that conducting the clinical trial in India by the AEs through the Assessee resulted in location savings for the AEs since the regulatory and compliance cost as well as investigatory costs were significantly lower in India as compared to developed countries where AEs were located. Resultantly, the cost

savings that accrue to the AE ought to be shared with the Assessee in India.

During the given AY, TPO also observed that the Assessee had reported an international transaction of 'recovery of expenses.' Further as a response to TPO's query, the Assessee had submitted that this was the money paid to the various doctors who had conducted the clinical trial in

India for PICLPV. TPO noted that the investigators' payments were reimbursed with a mark-up and it was part of the total clinical services receipts and that interestingly, in the relevant assessment year it was shown under the head 'recovery of expenses' and that too without any mark up. TPO issued a show cause notice and the figure of 15.27% was arrived at on the basis of the Assessee's own admission of its profit percentage being at 15.27.

To make the adjustment on location savings, the TPO relied upon a random non-contemporaneous article titled 'Clinical Trial Magnifier Vol. 1:6 Jun 2008' published on the website [www.clinicaltrialmagnifier.com](http://www.clinicaltrialmagnifier.com) and computed location savings amounting to INR 29.11 Lakhs. The TPO then multiplied the said alleged savings as per clinical trial by the total number of clinical trials undertaken in India i.e., 149. Accordingly, the TPO arrived at a total cost savings of INR 43.38 crores. The said purported savings were split in the ratio of 50:50 between the AE and the Assessee and thereby, TPO proposed an adjustment of INR 21.69 crores on account of alleged location savings.

The TPO also disregarded the submissions made by Assessee in relation to the international transaction of 'recovery of expenses' and proceeded to propose an adjustment.

Both these adjustments made by the TPO were further upheld by DRP.

Aggrieved, Assessee preferred an appeal before ITAT with regard to the location savings adjustment made by the

TPO observed relying on the coordinate bench ruling in Assessee's own case that the coordinate bench restored the TP adjustment after stating that the location savings and advantages are relevant for limited purpose of carrying out exercise of examination and investigation of the transaction and not as a basis for determining the ALP. Following the same, ITAT restored the issue to the file of TPO/AO for fresh adjudication with similar directions as referred in the earlier order of ITAT.

Accordingly, ITAT remarked that it was an inter-group services provided by the Assessee to its parent company and the Assessee was required to charge some fee as it would have, had the services been provided to a third party.

To which the Assessee contended that remuneration for these services has already been included in the provision of clinical trial services and no separate fee was charged, ITAT thereby referring to OECD guidelines held that it was an intra-group services provided by the Assessee to its parent company for which the Assessee was entitled to remuneration.

Thus, upholding the charging of mark up by the TPO and making of the TP adjustment in relation to 'recovery of expenses', ITAT observed that the intra-group services rendered by the Assessee to the parent company could not be considered as reimbursement of expenses or pass-through costs and were separate services in itself for which the Assessee needed to determine ALP which the Assessee had failed to do.



## **CBDT notifies rules to effectuate Taxation Laws (Amendment) Act, 2021**

**Notification No. 118/2021  
October 1, 2021**

CBDT notifies Income Tax (31st Amendment) Rules, 2021 through which it inserts:

- Rule 11UE which provides for the specified conditions for eligibility to claim relief under the Taxation Laws

(Amendment) Act, 2021.

- Rule 11UF which provides the form and manner of furnishing the undertaking for withdrawal of pending litigation, claiming no cost, damages, etc.



## **CBDT exempts certain non-residents from furnishing return of income from AY 2021-22 onwards**

**Notification No. 119/2021  
October 11, 2021**

Exercising the powers conferred under Section 139(1C) of the IT Act, CBDT exempts the following class of persons from the requirement of furnishing the return of income under Section 139(1) from AY 2021-22 onwards, subject to prescribed conditions:

- A non-resident, not being a company or a foreign company not earning any income other than the income from investment in the specified fund referred to Explanation (c)(i) to Section 10(4D) during the previous year where the provisions of Section 139A are not applicable to the said class, subject to fulfilment of conditions in Rule 114AAB(1).

- A non-resident being an eligible foreign investor that:
  - o Transacted only on capital assets referred in Section 47(vii)(ab) listed on a recognised stock exchange located in any International Financial Services Centre and consideration on transfer of such capital asset is paid or payable in foreign currency.
  - o Does not earn any income in India other than income from transfer of capital asset referred to in Section 47(vii)(ab) during the previous year.
  - o To which the provisions of Section 139A are not applicable subject to fulfilment of conditions of Rule 114AAB(2A).



## **CBDT extends recently notified Rules 11UE/11UF to Section 119 of Finance Act, 2012**

**Notification No. 120/2021  
October 13, 2021**

CBDT notifies Relaxation of Validation (section 119 of the Finance Act, 2012) Rules, 2021 through which it extends

the applicability of recently notified Rules 11UE and 11UF to the first proviso to Section 119 of the Finance Act, 2012.



The subject rule was introduced to effectuate the retrospective amendments made to Section 9(1)(i) by the Finance Act, 2012 for taxing the indirect transfers. The retrospectivity of which was recently nullified by Taxation Laws (Amendment Act), 2021.

Further, CBDT provides the form and manner of furnishing undertaking under the explanation to fifth and sixth proviso to explanation 5 to Section 9(1)(i) as prescribed under Rule 11UE (1)/ (3) and Rule 11UF of the Income-tax

Rules, 1962, shall mutatis mutandis apply to clauses (i), (ii) and (iii) of the first proviso to Section 119 of the Finance Act, 2012.

Furthermore, CBDT also provides that the conditions for the purposes of clause (iv) of the explanation to fifth and sixth proviso to explanation 5 to Section 9(1)(i) as prescribed under Rule 11UE (2) shall also mutatis mutandis apply to clause (iv) of the first proviso to Section 119 of the Finance Act, 2012.



## **CBDT issues guidelines on the eligibility for exemption under Section 10(23FE) over borrowed sum invested in India**

**Circular No. 19/2021  
October 26, 2021**

CBDT issues guidelines, over lack of clarity on the term 'indirectly' used in the seventh proviso to Section 10(23FE) and addresses the issue of eligibility for exemption where the specified fund or its holding entity or any other entity in the chain of holding or any associate thereof (group concern) has any loans or borrowings.

Accordingly, CBDT states that the specified fund shall not be eligible for exemption under Section 10(23FE), if the loans and borrowings have been taken by the fund or any of its group concern specifically for the purposes of

making investment by the specified fund in India.

Further, where the loans and borrowings have been taken but not specifically for the purposes of making investment in India, it shall not be presumed that the investment in India has been made out of such loans and borrowings. The specified fund shall be eligible for exemption under Section 10(23FE) subject to the fulfilment of all the other conditions under the said clause, provided that the source of the investment in India is not from such loans and borrowings.



## Revenue cannot escape refund liability once order is sanctioned

### Savita Global Solutions Private Limited 2021-TIOL-1989-HC-ALL-GST

The Petitioner had filed a manual application for refund of IGST on export of services for the month of July 2019 which was duly passed by the Revenue. However, the Petitioner had not received the refund amount so sanctioned. The Revenue insisted the Petitioner to re-file online refund application on account of change in process on GSTN portal w.e.f. 26 September 2019 in terms of Circular No.125/44/2019-GST dated 18 November 2019. It was argued by the Revenue that due to this change in the system, the refund claimed by the Petitioner could not be processed. Aggrieved by the direction to file online refund application, the Petitioner preferred a Writ before the Allahabad HC seeking refund of IGST refund along with interest.

The HC observed that the provision for manual filing of the refund application, had been introduced vide Rule 97A of the CGST Rules. It was further observed that Circular dated 18 November 2019, which prescribed for online filing of refund application did not and could not override or negate the effect of law arising out of Rule 97A. In this regard, it was observed that as a settled principle in law, the delegated legislation would stand on a higher pedestal over a pure administrative instruction. It was further observed that since the application had been processed and order was passed which had already attained finality,

the Revenue cannot escape the plain effect of the same. Similarly, the Revenue authorities cannot escape from consequent interest implications.

#### Authors' Note

The Allahabad HC has rightly allowed the refund along with the applicable interest in the instant case. The Circular which prescribed online filing of the refund applications is merely clarificatory in nature and cannot veil the substantive rights of the assesses. The Hon'ble Madras HC in the case of Precot Meridian Limited [\[2020-TIOL-29-HC-MAD-GST\]](#), had held that a Circular cannot be cited by Revenue Authorities to deny refund of IGST paid on export and such circular cannot override statutory provisions.

It would further be pertinent to note that in RE: Bolpur Ratan Melting and Wire Industries [\[2008-TIOL-194-SC-CX-CB\]](#), the Apex Court had held that so far as the clarifications/circulars issued by the Government authorities are concerned, they represent merely their understanding of the statutory provisions. They are not binding on the courts. It was further held that the Court must declare what the particular provision of statute says and it is not for the Executive.



## HC: 'Any' Entity can file refund under GST, including SEZ

### Platinum Holdings Private Limited 2021-TIOL-2016-HC-MAD-GST

The Petitioner a SEZ unit, had filed refund applications for taxes paid under CGST/SGST and IGST. The said refund claims had been rejected on the ground that only a supplier of services would be entitled to refund and not the SEZ in terms of Section 54 of the CGST Act. Aggrieved, the petitioner preferred a writ before the Madras HC.

The HC observed that the provisions of Section 54 of the CGST Act, providing for a refund, apply to 'any person' who claims such refund. Therefore, the same shall also apply to SEZ units. It was further observed that the statutory scheme for refund admits applications to be filed by any entity that believes that it is so entitled, including the Petitioner. The HC also noted that the language of Rule 89,

also echoes that of section 54, and both the provision and the Rule commence with the phrase 'any person'.

In view of the above, the HC observed that the restriction read by the Revenue in the provisions of Section 54 and Rule 89 was misplaced. It was further held that as a settled position, there can be no insertion of a word or phrase in a statutory provision or in a Rule which must be read and applied, as framed. The Revenue cannot restrict or amplify the Rule by interpretation. Accordingly, the HC disposed off the Writ filed by the Petitioner.

### Authors' Note

The Madras HC has rightly held that 'any' entity is entitled to avail refund of tax paid u/s. 54 of the CGST Act and it has to include SEZ units as well. It would be pertinent to note that the Revenue cannot read in a restriction in a statute which has not been expressly provided by the legislature. The Apex Court in the case of Dharmendra Textile Processors [2008-TIOL-192-SC-CX-LB] had held that Court cannot read anything into a statutory provision or a stipulated condition which is plain and unambiguous.



## HC: Registration cannot be cancelled for Working from Home during pandemic

### International Value Retail Private Limited 2021-TIOL-1974-HC-KOL-GST

Owing to the COVID-19 pandemic, the Petitioner had undertaken the 'Work From Home' business model. The Revenue took note of the same and cancelled the GST registration of the Petitioner on the premise that business was not carried from principal place of business. Aggrieved, the Petitioner preferred a Writ before the Calcutta HC challenging the cancellation order on the grounds that the Revenue had not considered the prevailing circumstances and relevant material records.

The HC observed that the Petitioner had been following the 'Work from Home policy' due to the COVID-19 pandemic, and accordingly, at the time of inspection, the Petitioner was not available at the principal place of business. Accordingly, the HC directed the Revenue to

consider afresh and dispose of the application for revocation of cancellation in accordance with the law.

### Authors' Note

It would be pertinent to note that Section 29(2) of the CGST Act prescribes a list of violations, which the proper officer can rely upon to cancel the GST registration of a registrant. In the instant case, the registration of the Petitioner had been cancelled merely for the reason that they had not been conducting their business from their registered place, but from homes. This does not appear to be an offense or violation prescribed u/s. 29(2) of the CGST Act. Accordingly, the HC has rightly remanded the matter back for fresh adjudication.



## HC: GST pre-deposit required to be paid in cash

### Jyoti Construction 2021-TIOL-2007-HC-ORISSA-GST

The Petitioner had filed an Appeal before the Appellate authority under the CGST Act, for which pre-deposit

amounting to 10% of disputed tax had been paid vide ECrL. The Revenue dismissed the Appeal on the ground

that the pre-deposit can be discharged only by debiting ECL. Aggrieved, the Petitioner challenged the dismissal of Appeal before the Orissa HC.

The HC observed that Section 41(2) of the CGST Act, which limits the usage of the credit ledger for making pre-deposit, observed that the pre-deposit as required to be made in terms of sec 107(6) of the Act cannot be equated with output tax as defined u/s 2(82) of the Act. The HC also rejected the Petitioners contention to treat the provisions u/s 107(6) as machinery provision.

Accordingly, the HC didn't find any error in the Revenue's action of rejecting the Petitioners action of debiting the ECL for the purposes of making the payment of pre-deposit, and thus, dismissed the petition.

### Authors' Note

As far as the interpretation of Section 41(2) of the CGST Act is concerned, the HC has rightly held that the 'pre-deposit' for filing an Appeal cannot be equated to 'output tax'. However, one may so argue that pre-deposit is nothing but an advanced payment of disputed 'tax' since in case of unfavourable orders resulting in demand of tax, the pre-deposit can be adjusted. This could result in additional burden on the taxpayers who already have sufficient balance in their Credit Ledgers and yet have to make payment of pre-deposit in cash to pursue an appeal. Accordingly, a clarification in this regard by the CBIC would go a long way in avoiding unnecessary and trivial litigation burden at the appellate stage.



## ITC allowed on goods sold at discounted price

### Kanahiya Realty Private Limited 2021-TIOL-230-AAR-GST

The Applicant had offered electronic goods to retailers at reduced or discounted price on purchase of hosiery goods. In respect thereto, the Applicant had sought an advance ruling before the Kolkata AAR to ascertain whether supply of electronic goods would qualify as individual supply or mixed supply. The Applicant further sought to ascertain whether ITC would be available on procurement of such goods or not.

The AAR observed that as the supply of goods i.e., hosiery and those under promotional scheme, are not for a single price and accordingly, it would not qualify as mixed supply. It had been further observed that such supplies are neither naturally bundled nor supplied in conjunction with each other, therefore, it would not qualify as composite supply.

It had been further observed that the provision of providing the goods under the retail scheme circular

would undoubtedly qualify as an activity undertaken in the course or furtherance of business. Accordingly, it had been held that as the electronic goods are supplied at a price, although discounted, it cannot be termed as gift and therefore, ITC shall be available thereon.

### Authors' Note

Section 2(30) of the CGST Act defines the term 'composite supply' as supply of two or more taxable supplies which are made in conjunction to each to each other and are naturally bundled in the course of business and one of the supplies is a principal supply. While the hosiery goods and the electronic goods are not naturally bundled, the trade and industry need to look at the nature of promotional goods being sold treating them as composite supply or otherwise.



### AAAR: GST not applicable on amount collected from employees in absence of 'supply'

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

The Appellant had been providing canteen facility to its employees as mandated under the Factories Act. The Appellant used to bear part of the canteen cost and recover the balance from its employees. In respect thereto, The Appellant had sought advance ruling before the Gujarat AAR to ascertain whether GST is chargeable on recovery of such expenses from employees.

The AAR had held that GST is applicable on amount recovered from employees on account of provision of canteen services. Aggrieved, the Appellant filed an appeal before the AAAR. The AAAR observed that the Appellant is providing food facility to employees without making any profit and is working as mediator between the employees and the service provider. In view of the above, the AAAR held that GST is not applicable on amount collected by the

Appellant from employees as there is no supply of goods or service by the Appellant to its employees.

#### Authors' Note

It would be pertinent to note that GST is chargeable on all supplies in the course of furtherance of business. Further, the term 'business' includes activities which are not for pecuniary benefit as also any activity incidental to main business. Accordingly, one may argue that the contractor was providing services to the Appellant and the Appellant was in turn providing services to its employees at concessional cost. Thus, GST could have been said to be chargeable on the amount collected by the Appellant from employees.



### HC directs Revenue to de-block ITC after expiry of 1 year from blocking

#### AS Steel Traders (VSP) Private Limited 2021-TIOL-1802-HC-AP-GST

The ECrL of the Petitioner had been blocked in January 2020. Aggrieved, the Petitioner preferred a Writ before the AP HC challenging the ITC blocking provision and the Rule 86-A of the CGST Rules which empower the Revenue to block ITC.

Referring to Rule 86-A of the CGST Rules, the HC observed that the restriction of utilization of ITC shall cease to have effect after the expiry of a period of one year from the date of imposing such restriction. In the instant case, as a period of one year from the date of blocking ITC had lapsed, the HC directed the Revenue to de-block the ITC and permit

the Petitioner to utilize the same.

#### Authors' Note

The conditions u/s. 16 of the CGST Act provide conditions for availment of credit. 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. The Act provides for the provisional taking of credit on a self-assessment basis, and the blocking of credit goes against the scheme of the Act.





### Tribunal sets aside demand against EOU on remittances made to branch offices abroad

#### **Kusum Healthcare Private Limited 2021-TIOL-713-CESTAT-DEL**

The Appellant had established representative offices at several places outside the country, as cost centres. The Revenue had demanded Service Tax under RCM from the Appellant alleging that remittances made to their branches and offices abroad was 'consideration' for 'taxable service' procured from outside 'taxable territory'. Aggrieved, the Appellant preferred an Appeal before the New Delhi Tribunal.

Referring to Mumbai Tribunal's decision in Milind Kulkarni & others [2016-TIOL-709-CESTAT-MUM], the Delhi Tribunal observed that mere existence as a branch for overall promotion of objectives of primary establishment in India does not render transfer of financial resources to branch taxable.

The Tribunal further observed that the flow of funds was for maintenance and upkeep of the branch offices and that

has been presumed to be the quid pro quo for rendering of taxable service by the branch to the principal office. In view of the above, the Tribunal allowed the Appeal and held that the order demanding tax is contrary to the law.

#### **Authors' Note**

In the instant case, there had been no supply or provision of service from one unit to another. The Appellant merely provided financial support to its other units, which cannot be equated to provision of service. It would further be pertinent to note that the Mumbai Tribunal in another case of KPIT Technologies Limited [2017-TIOL-2387-CESTAT-MUM] had held that in the absence of an activity between the branch and the headquarters for an identified consideration, the remittance received from overseas customers through the branch to the appellant would not be liable to tax.



### Cash Refund of Service Tax paid post GST implementation

#### **Punjab National Bank 2021-TIOL-453-CESTAT-BANG**

The Appellant had filed its original return of service tax for period 01 April 2017 to 30 June 2017 on 30 August 2017. Thereafter, the Appellant had filed revised return for the said period on 04 September 2017 and as a result of which, the CENVAT credit had been increased. Thereafter, the Appellant had filed a refund application in 2018 for the CENVAT Credit under the CGST Act, which had been rejected on the premise that refund was time barred. Aggrieved, the Appellant preferred an Appeal before the

Bangalore Tribunal.

The Tribunal observed that whenever two options are available, an assessee may choose the option which is more beneficial for them. In instant case, as the Appellant had chosen to file refund claim under section 142(9)(b) of CGST Act which had overriding effect over section 11B of Central Excise Act, the Appellant had been entitled for refund.



## Compensation liable to duty payment even if it is received due to contract cancellation

### Rajasthan Prime Steel Processing Center Private Limited 2021-TIOL-714-CESTAT-DEL

The Appellant had entered into a contract with one of its suppliers for supplying auto parts. Subsequently, the contract was cancelled due to which the Appellant was left with surplus of finished goods which were sold as scrap resulting into loss. The Appellant however, recovered the differential loss amount from customer by raising a debit note. The Revenue raised a demand alleging that the consideration received by Appellant from supplier under the guise of compensation was liable to be included in the transaction value of goods. Aggrieved, the Appellant preferred an Appeal before the Delhi Tribunal.

The Tribunal observed that the amount received was to make up for the reduced price which the Appellant received from the sale of auto parts manufactured. However, the amount received pertains to the balance consideration received under the guise of compensation and, therefore, should be included in the transaction value.

Accordingly, in view of the peculiar nature of the business

arrangement between the Appellant, supplier and the buyers of auto parts, it was observed that the amount received by the Appellant from supplier has flown indirectly from the buyers. Thus, the same was liable to be included in the transaction value and be liable to tax. Accordingly, the Tribunal dismissed the Appeal.

#### Authors' Note

Applicability of tax for tolerating an act has always been a contentious issue, which has been carried forward in the GST regime as well. In the GST regime, it would be pertinent to note that the Bombay HC in the case of Bai Mamubai Trust [2019-TIOL-2158-HC-MUM-GST] had held that GST is not payable on damages/compensation paid for a legal injury. The principle laid down by the HC was that such payment does not have the necessary quality of reciprocity to make it a 'supply' and, therefore, GST is not payable on such amount.



Notification / Circular	Summary
<p>GSTN Advisory dated 17th October 2021</p> <p>Circular No. 163/20/2021-GST dated 6 October 2021</p> <p>And</p> <p>Circular No. 164/20/2021-GST dated 6 October 2021</p>	<p><b>GSTN Advisory on ITC for F.Y. 2020-21</b></p> <p>As per Section 16(4) of CGST Act, no taxpayer shall take ITC in respect records (invoices and debit notes) for supply of goods or services (or both) for F.Y. 2020-21 after the due date of furnishing the return for the month of September 2021. The due date for the GSTR-3B for September 2021 is either 20 October 2021 for monthly filers and 22 or 24 October 2021, as the case may be.</p> <p><b>CBIC clarifies on GST rates and classification on various goods and services</b></p> <p>Basis the recommendations of the GST Council in its 45th meeting, the CBIC vide Circular No. 163/19/2021-GST and 164/19/2021-GST both dated 06 October 2021 has clarified the applicability of GST levy on various goods. The key clarifications of the above-mentioned Circulars have been summarized hereunder:</p> <p><b>Services by cloud kitchens/central kitchens</b></p> <p>Service provided by way of cooking and supply of food, by cloud kitchens/central kitchens are classifiable as 'restaurant service' chargeable at 5% GST (without ITC);</p> <p><b>Supply of ice-cream by ice-cream parlors</b></p> <p>Where ice cream parlors sell already manufactured ice-cream and do not cook/prepare ice-cream for consumption, it is a supply of ice cream as goods and not as a service, even though it has certain ingredients of service, taxable @ 18% GST</p> <p><b>Over loading charges</b></p> <p>Overloading charges at toll plazas shall be exempted;</p> <p><b>Renting of vehicles</b></p> <p>Renting of vehicles or giving on hire to State Transport Undertakings or Local Authorities are eligible for the exemption;</p> <p><b>Services supplied by contract manufacturers</b></p> <p>Services by way of job work in relation to manufacture of alcoholic liquor for human consumption shall attract GST @ 18% and not 5%;</p> <p><b>Pharmaceutical goods falling under heading 3006</b></p> <p>The goods falling under heading 3006 shall be chargeable to 12% GST;</p> <p><b>All laboratory reagents</b></p> <p>Diagnostic or Laboratory Reagents, Certified Reference Materials etc. shall be chargeable at concessional GST @ 12%;</p>

Notification / Circular	Summary
	<p><b>External batteries along with UPS Systems/ Inverter</b></p> <p>Supply of UPS/ inverter would be chargeable to GST @ 18% under heading 8504, while external batteries would be chargeable to GST @ 28% under heading 8507;</p> <p><b>Solar PV Power Projects</b></p> <p>GST on Renewable Energy Projects can be paid in terms of the 70:30 ratio for goods and services, respectively, for the period of 01 July 2017 to 31 December 2018. Further, no refunds shall be granted if excess GST has been paid;</p> <p><b>Fibre Drums (corrugated/non-corrugated)</b></p> <p>GST paid on Fibre Drums (partially corrugated) for period prior to 01 October 2021 shall be treated as fully paid even if it paid at 12% GST (during the period from 1 July 2017 to 30 September 2021). It has been further clarified that no action on recovery of differential tax shall be taken if GST paid @ 12% and similarly no refund shall be granted for GST paid @ 18%.</p>
<p>Circular No. 160/16/2021-GST dated 20 September 2021</p>	<p><b>Advisory for taxpayers on Form GSTR-2B</b></p> <p>Form GSTR-2B is an auto-drafted ITC statement which is generated for every normal taxpayer on the basis of the information furnished by their suppliers in their respective GSTR-1/IFF, GSTR-5 (non-resident taxable person) and GSTR-6 (input service distributor). This statement indicates availability and non-availability of input tax credit to the taxpayer against each document filed by their suppliers and is made available to the taxpayers in the afternoon of 14th of every month</p>



## Application for amendment of Shipping Bill cannot be rejected on limitation

### Autotech Industries (India) Private Limited 2021-TIOL-717-CESTAT-MAD

The Appellant had inadvertently missed out on filing of Shipping Bills under the drawback scheme at the time of exports. Accordingly, the Appellant had filed an application in 2015 for conversion/amendment of free shipping bills to drawback shipping bills pertaining to the period 2012-2014. Thereafter, the application was in 2016 for the period 2000 to 2011. The Revenue rejected the application on the ground of limitation. Aggrieved, the Petitioner preferred an Appeal before the Chennai Tribunal.

Referring to Section 149 of the Customs Act, the Tribunal observed that the only requirement to allow amendment is that the exporter has to produce documentary evidence which was in existence at the time of export. The Appellants had furnished copies of Shipping Bills, BRC and ARE-1, which are sufficient documentary evidence to prove that goods were manufactured by them using imported inputs were exported. It was further observed that the said provision does not provide any time limit for filing of application for amendment.

Despite the absence of any limitation for amendment of Shipping Bill u/s. 149 of the Customs Act, it had been observed that an assessee cannot be permitted to take undue advantage. The remedy of amendment under section 149 should be sought within a reasonable time. In view of the above observations, the Tribunal set aside the rejection order for amendment application for the period 2012-2014 and upheld the rejection for the period 2001 to 2011.

#### Authors' Note

Whenever the Legislature uses the term 'reasonable time' in a Statute, it is bound to be litigated before the judicial forums. It would be pertinent to note that the Delhi HC in a similar case in *E.S. Lighting Technologies Private Limited [2019-TIOL-2629-HC-DEL-CUS]* had held that merely because no time limitation is prescribed under Section 149 for the purpose of seeking amendment/ conversion, it does not follow that a request in that regard could be made after passage of any length of time..



## Tribunal quashes proceedings in SCN issued by DRI, not being the proper officer

### Modern Insecticides Limited 2021-TIOL-652-CESTAT-CHD

The Appellant had challenged an order passed by the Commissioner of Customs, wherein the Show Cause Notice had been issued by the Addnl. Director General, DRI. The Appellant had submitted that the Addnl. Director General, DRI is not a 'proper officer' to issue a Show Cause Notice under the Customs Act, as held by the SC in *Canon India Private Limited [2021-TIOL-123-SC-CUS-LB]*. On the other hand, the Revenue submitted that a review Petition has been filed against the Canon India Judgement and therefore the matter shall be kept in abeyance.

The Tribunal observed that although a review petition has been pending against Canon India judgement, the Apex Court itself in the case of *Agarwal Metals and Alloys [2021-TIOL-233-SC-CUS-LB]* had again held the same as it did in *Canon India*. It was further observed that the Canon India judgement had been duly followed by various HCs. Accordingly, the Chandigarh Tribunal similarly followed the Canon India judgement and allowed the Appeal with consequential reliefs.



## Authors' Note

The SC judgement in Canon India is widely celebrated by the Trade and Industry as it practically nullifies even the recovery proceedings initiated by the DRI u/s. 28AAA of the Customs Act. It would be pertinent to note that even under the GST Law, the recovery provisions u/s. 73/74 of

the CGST Act uses the term 'proper officer'. Accordingly, it is expected that the GST Council is likely to take cognizance of this judgement and suitably amend the said provision to widen its scope to include the GST Intelligence Departments as 'proper officers' to avoid litigations on similar lines under the GST regime as well.



## Tribunal quashes Corrigendum to SCN enhancing the demand

### Ave Maria Enterprises 2021-TIOL-627-CESTAT-MAD

The Appellant had been subjected to a Show Cause Notice proposing confiscation of goods, and demand of differential duty along with applicable interest and penalties. The Appellant had duly paid the duty demanded along with applicable interest and penalty. Thereafter, the Appellant requested the Department to conclude the matter.

However, the Revenue issued two Corrigenda to the Show Cause Notice and an adverse order. Aggrieved, the Appellant preferred an Appeal before the Chennai Tribunal. It was observed that as the duty had been paid and such payment was endorsed by the notice issuing authority, revision of SCN by way of corrigenda in such circumstances and subsequent adjudication was impermissible.

It was further observed that such action defeated the very purpose of Sections 28(5) and Section 28(6) of the Customs Act, which understandably, is to reduce litigation. In view of the above, the Tribunal set aside the adverse order issued by the Revenue.

## Authors' Note

It would be pertinent to note that the provision of deemed conclusion of proceedings was introduced in the Section 28 so as to bring about closure to the cases where the dues to the Government could be realized without going through the process of adjudication on one hand and to cut the protracted litigation which generally follows the adjudication on the other. Accordingly, issuing a Corrigendum to widen the scope of the original notice is ultra vires to the very principle of the law.

It would further be pertinent to note that as a settled principle of law, a corrigendum issued only for change of jurisdiction, monetary limit, re-assignment, etc. and not to enhance the duty demanded. In *Gupta Dyeing and Printing Mills [2002-TIOL-2786-SC-MISC]*, it had been held that corrigendum can be issued only to rectify the grammatical or arithmetical issues in the order.



## Goods cannot be detained when permitted to be cleared provisionally

### Kaka Overseas Limited 2021-TIOL-1942-HC-MUM-CUS

The Petitioner had filed SBs for export of silk carpets and transported the goods to the CFS. Thereafter, the goods had been seized on the suspicion of fraud and retained certain documents along with a sum of cash. Subsequently, the relevant officers informed the CFS to hold up the export consignment with a direction not to allow any amendment in cargo declaration. The Petitioner requested for clearance of the goods, however, the request went unattended. Aggrieved, the Petitioner preferred a Writ before the Bombay HC.

From a cumulative reading of Sections 110(1) and (2) r/w. Section 124(a), it was observed that for seizure of goods, the proper officer is under an obligation to give a notice in

respect of such seized goods and if he has not given a notice within six months of the seizure of the goods, the goods are liable to be returned to the person from whose possession they were seized, subject to an extension.

Accordingly, it had been observed that in the event the goods have suffered detention beyond the period of six months without any extension being granted, the goods cannot be retained by the officer who has seized the goods. It had been further observed that the seized goods had already been permitted to be cleared provisionally. In view of the above observations, the HC directed the Revenue to follow the law and issued a Notice as expeditiously as possible.



Notification/Circular	Key Updates
<p>Circular No. 22/2021-Customs dated 30 September 2021</p>	<p><b>Clarification on E-scrip to avail the benefits of scheme i.e., RoSCTL, RoDTEP</b></p> <p>The CBIC has developed an E-scrip module to provide a digital service to exporters for availing benefits under various incentive schemes like RoSCTL and RoDTEP. In respect thereto, vide Circular No. 22/2021-Customs dated 30 September 2021, it has been clarified that the above-mentioned schemes provide rebate of State and Central taxes and levies (RoSCTL) which are not refunded under any other duty remission schemes. Until the facility for making the claim of RoSCTL on shipping bill of export is operationalized, the eligibility for grant of benefits will function on exporter having already filed shipping bill from 01.01.2021 onwards exercising its claims for both RoDTEP and Duty Drawback.</p> <p>Once the facility is operationalized the procedure prescribed for availing the E-scrips should be followed by the exporter:</p> <ul style="list-style-type: none"> <li>• Exporter shall make a claim for RoSCTL/RoDTEP in the shipping bill by making a declaration;</li> <li>• Once EGM is filed, claim will be processed by Customs;</li> <li>• Once processed, a scroll with all individual Shipping Bills containing details of the shipping bill would be generated and made available in the exporters electronic ledger maintained in the customs automated system;</li> </ul> <p>The exporter can generate e-scrips within one year of generation of scroll if not the available duty credits in scroll shall be combined Customs station wise and sent to the exporter as an e-scrip which is valid for a period of one year from the date of its generation. Unutilized duty credit in the e-scrip shall lapse after the validity is expired.</p>
<p>Trade Notice No. 19/2021-2022 dated 01 October 2021</p>	<p><b>Date for mandatory e-filing of Non-preferential Certificate of Origin</b></p> <p>DGFT has extended the date for Mandatory electronic filing of Non-Preferential Certificate of Origin (CoO) through the Common Digital Platform to 31 October 2021.</p> <p>The Electronic platform has been expanded to facilitate electronic application for Non-Preferential CoO and on the request of certain Chambers/Associations this electronic method has not been made mandatory. Hence, the submission and issuance of CoO (Non-Preferential) by the issuing agencies through their paper-based systems may continue further up to 31 October 2021.</p>



### HC holds Central Government empowered to authorise freezing of assets, disgorgement of property under Companies Act

**Shriraj Investment and Finance Ltd & Ors. vs. Union of India & Anr.**  
**W.P.(CrI) No.1823/2020 & W.P.(CRL) 1414/2021**

The Petitioner approached the HC seeking quashing of order/letter issued by the SFIO, which called for freezing and disgorgement of assets of 157 companies to be sold, despite the fact such companies were functional, for offences under the Companies Act, inter alia on the ground that as per Section 212(14) of the Companies Act, if the final SFIO report is filed before the Central Government, it needs to be examined by it and after taking legal advice it may initiate the prosecution.

The HC observed that the Central Government may at any stage, on the basis of any material before it, form an opinion to file petition under the said section, and in the instant matter, though the Central Government had decided to file the same after receipt of SFIO report, the Act puts no fetters upon the Central Government to await SFIO report, to form its opinion that the affairs of the Company were being conducted in a manner prejudicial to the public interest and of the Company. Further, the 'disgorgement' occurring in Section 212(14A) of the

Companies Act could not be read in blissful isolation whereas, the length and breadth of the Act, chapter and verse bespoke of such properties/shares/debentures, to be frozen/liquidated/disposed/ sold for utilization in furtherance of public interest by way of sale, recovery of undue gains to alleviate the wrong done to persons/ financial institutions.

Thus, dismissing the Petition, the HC observed that the Central Government could authorise initiation of proceedings and the relief of freezing assets and disgorgement of property, inasmuch as disgorgement was a civil action in nature of an equitable relief and not a penal action.

#### Authors' Note

In the instant case, the HC rightly noted that the Companies Act was a complete code in itself and hence statutory mechanism under it could not be bypassed.



### SC holds dishonour of cheque issued as 'security' attracts consequences under Section 138 of Negotiable Instruments Act

**Sripati Singh vs. The State of Jharkhand & Anr.**  
**Criminal Appeal Nos. 1269-1270 of 2021**

The Appellant and the Respondent are known to each other through family acquaintance and the Respondent on learning that the Appellant was involved in business, had approached him and sought financial assistance to the tune of INR 1 Crores so as to enable the Respondent to invest the same in his business. Since the Respondent had assured that the same would be returned, the Appellant placed trust in him and advanced further sum and in all a total sum of INR 2 Crores.

The said amount was paid to Respondent by transferring from the account of Appellant's daughter and also from the account of the Appellant. Towards the said transaction, four agreements had been entered acknowledging the receipt of the loan. The Respondent issues cheques to Appellant as security of amount received by him. The loan was promised to be return in June/July 2015.

The Appellant had been stated to have met Respondent during July 2015 when the respondent assured that the

amount would be repaid during October 2015. Based on such assurance, the Appellant presented the cheques for realisation in October 2015.

On presentation, the said cheques were returned due to 'insufficient funds' in the bank account of Respondent.

The Appellant therefore got issued a legal notice as contemplated under Section 138 of the Negotiable Instruments Act ('N.I. Act').

Since the Respondent had taken the money on the assurance that the same would be returned but had deceived the Appellant, the Appellant contended that the Respondent had cheated him and accordingly the complaint was filed both under Section 420 of IPC as also Section 138 of N.I. Act.

The Appellant had submitted the sworn statement of himself and witnesses. The learned Judicial Magistrate took cognizance and issued summons to the Respondent.

The Respondent on appearance filed a miscellaneous petition seeking discharge from the criminal proceeding, which was rejected. Aggrieved, the Respondent approached the HC in the said criminal miscellaneous petitions which were allowed by the HC.

Aggrieved, the Appellant approached the SC which noted that under the loan agreement in question, the Respondent though had issued the cheques as security, he had also agreed to repay the amount during June/July 2015.

The cheque which was held as security was presented for realization in October 2015, which was after the period agreed for repayment of the loan amount and the loan advanced had already fallen due for payment, however,

the said cheque was dishonoured.

Observing that the Appellant could not be non-suited for proceeding with the complaint filed under Section 138 merely due to the fact that the cheques presented and dishonoured were shown to have been issued as security, as indicated in the loan agreement, SC opined that such contention would arise only in a circumstance where the debt has not become recoverable and the cheque issued as security had not matured to be presented for recovery of the amount. Further, to contend that the cheque should be held as security even after the amount had become due and payable was not sustainable.

Thereby, holding that there was a transaction between the parties towards which a legally recoverable debt was claimed by the Appellant and the cheque issued by the Respondent was presented. On such cheque being dishonoured, cause of action had arisen for issuing a notice and presenting the criminal complaint under

Section 138 of N.I. Act on the payment not being made.

Thus, allowing the Appellant's appeal, SC restored the order of the Judicial Magistrate issuing summons to Respondent against Appellant's complaint under Section 138 of N.I. Act holding that the dishonour of cheque issued as a 'security' against a loan which had matured for payment, could attract offence under Section 138 of the Act.

### Authors' Note

It would be interesting to note that in the instant case, the HC had observed that a cheque issued towards security could not attract the provision of Section 138 of N.I. Act. However, the SC rightfully set this observation aside for being erroneous.





### SC holds arbitrator has 'substantial discretion' in awarding interest, HC order reducing interest-rate not justified

#### **Punjab State Civil Supplies Corporation Ltd. & Anr. vs. Ganpati Rice Mills & Anr.** **SLP(C) No. 36655/2016**

The Arbitrator had granted interest at the rate of 18% per annum from January 1, 2003 till the date of realization. On consideration of the objections under Section 34 of the Arbitration Act filed by the Respondent, the rate of interest was reduced to 12% per annum by the District Judge. On appeal by the Respondent to the HC the rate of interest had further been reduced to 9% per annum.

Aggrieved the Appellant approached the SC which observed that its judgment in A.P. State Trading Corporation Ltd. vs. G.V. Malla Reddy and Company [2010 SCC OnLine SC 1081], relied upon by HC while reducing the interest rate, could not be referred to, since it pertained to arbitration proceedings under the Arbitration Act of 1940, whereas the present dispute relates to arbitration under the Arbitration Act 1996.

Thus, the SC allowing the appeal, restored the rate of interest as awarded by the District Judge considering that

the Appellant had accepted the decision of the District Judge reducing the rate of interest to 12% per annum and also observed that the HC was not justified in reducing the interest rate as Section 31(7) of the Arbitration Act, 1996 granted substantial discretion to the arbitrator in awarding interest.

#### **Authors' Note:**

Section 31(7) of the Arbitration Act inter alia provides that, unless otherwise agreed by the parties, where and in so far as an arbitral award is for the payment of money, the arbitral tribunal may include in the sum for which the award is made interest, at such rate as it deems reasonable, on the whole or any part of the money, for the whole or any part of the period between the date on which the cause of action arose and the date on which the award is made.



### SC holds limitation starts running once IBC-order pronounced, not open for appellant to await certified-copy

#### **V Nagarajan vs SKS Ispat and Power Ltd.& Ors** **Civil Appeal No. 3327 of 2020**

Cethar Ltd, a corporate entity which was engaged in engineering and project consultancy, was undergoing liquidation. The Appellant was appointed as its interim resolution professional and resolution professional. After an unsuccessful attempt at resolution, the Appellant was appointed as its liquidator. The Appellant instituted proceedings under Sections 43 and 45 of the IBC to avoid preferential and undervalued transactions of the Corporate Debtor in favour of SKS Ispat and Power Ltd ('Respondent No 1') with respect to a contract dated March 15, 2011.

No relief was sought against SKS Power Generation Chhattisgarh Ltd ('Respondent No 10'). The Appellant claimed to have subsequently discovered that Respondent No 1 and its subsidiary- Respondent No 10 had colluded with the promoters of the Corporate Debtor and defrauded the latter of over INR 400 crores by entering into a fraudulent settlement of only INR 4.58 crores.

The Appellant also alleged that these transactions formed a part of the ongoing investigation by the Central Bureau of Investigations and the Enforcement Directorate.

Respondent No 10, allegedly at the behest of Respondent No 1, sought to invoke certain bank guarantees issued by the Corporate Debtor for its failure to perform its engineering services.

The Appellant filed a Miscellaneous Application to resist the invocation of this performance guarantee until the liquidation proceedings are concluded.

On December 31, 2019, the NCLT held that the performance guarantees were not a part of 'Security Interest', as defined under Section 3(31) of the IBC and refused to grant an injunction against the invocation of the bank guarantee until the liquidation proceedings were complete.

The Appellant did not dispute his presence before the NCLT when this order was pronounced in open court. However, the Appellant stated that a copy of the NCLT's order dated December 31, 2019 was uploaded on the NCLT website only on March 12, 2020, that set out the incorrect name of the Judicial member who had passed the order. The corrected order was uploaded on March 20, 2020.

Subsequent to the corrected order being uploaded, the Appellant claimed to have awaited the issue of a free copy and sought the free copy on March 23, 2020, under the provisions of Section 420(3) of the Companies Act, read with Rule 50 of the National Company Law Tribunal Rules, 2016. According to the Appellant, the free copy had not been issued till date.

The Appellant stated that owing to the lockdown on account of the COVID-19 pandemic, the appeal before the NCLAT was filed on June 8, 2020 with an application for exemption from filing a certified copy of the order as it had not been issued.

The NCLAT placing reliance on Section 61(2) of the IBC which mandated a limitation period for appeals to be

thirty days, extendable by fifteen days, observed that the appeal filed under Section 61(1) was barred by limitation.

The NCLAT further observed that the Appellant had not provided any evidence to prove that a certified or free copy had not been issued to him. In any event, the IBC circumscribes the discretion to condone delays up to fifteen days, which had already elapsed.

Further, The NCLAT also noted that even on merits, there were no grounds for interference since a performance guarantee was explicitly excluded from the ambit of a 'Security interest' which was subject to a moratorium under Section 14 of the IBC.

Aggrieved by the order of the NCLAT, the Appellant preferred an appeal before the SC.

The SC dismissing the appeal challenging NCLAT order rejecting Appellant's application seeking interim relief against invocation of a bank guarantee by Respondent, for being barred by limitation, observed that it was not open for a person aggrieved by an order under IBC to await the receipt of a free certified copy and prevent limitation as provided under Section 61(2) of IBC from running, as accepting such a construction would upset the timely framework of the IBC.

### Authors' Note:

The IBC is a watershed legislation which seeks to overhaul the previous bankruptcy regime which was afflicted by delays and indefinite legal proceedings. When timelines are placed even on legal proceedings, reading in the requirement of an "order being made available" under a general enactment would do violence to the special provisions enacted under the IBC where timing was critical for the workability of the mechanism, health of the economy, recovery rate of lenders and valuation of the corporate debtor.



### HC holds RBI fully empowered to supersede SREI NBFCs' Boards, refuses plea to quash order

#### Adisri Commercial Pvt. Ltd. & Anr. vs. Reserve Bank of India & Ors. Writ Petition (L) No.22872 of 2021

The Petitioners (shareholders and former directors of Respondents) through a writ petition to the HC sought squashing of an RBI order dated October 1, 2021 and the related press release dated October 4, 2021 by which RBI superseded the Board of Directors of SREI Infrastructure Finance Ltd., SREI Equipment Finance Ltd. (NBFCs - 'Respondents') owing to governance concerns and defaults by the aforesaid companies in meeting their various payment obligations, in exercise of powers conferred upon it by Section 45-IE (1) of RBI Act and appointed an Administrator with an intention to initiate CIRP against the Respondents.

Before the HC, the Petitioners submitted that the order had been issued abruptly and in extreme haste, thus arbitrarily, and there was no proximate cause for taking such a drastic step. On the other hand, RBI submitted that it was a clear case of complete financial mismanagement by the Respondents and there were serious allegations against both NBFCs of misdirection of companies' funds.

On perusing the RBI order, the HC observed that the statutory inspection conducted by RBI revealed serious deterioration in Respondent's financial position as well as default in payment obligations in respect of bank borrowings, which was a matter of serious concern, and

that owing to such defaults, RBI passed the impugned order in exercise of its powers under RBI Act. Accordingly, outlining RBI's powers under the RBI Act, the HC rejected the Petitioners' contention that there was no proximate cause for issuance of the impugned order, and opined that there need not be any proximate cause for an action like the impugned one and it could not be said that Reserve Bank of India had acted without jurisdiction or in violation of the principles of natural justice.

Thus, dismissing the writ petition seeking quashing of RBI order and the related press release, the HC observed that this was not a fit case for it to invoke its extraordinary jurisdiction under Article 226 of the Constitution.

#### Authors' Note:

It would be interesting to note that the HC in the instant case also remarked that these were matters of financial, economic and corporate decision making to handle which, statutory bodies like RBI were fully empowered and competent. It would be hazardous and risky for the courts to enter into such domain which are dealt with by expert bodies. Court should be very circumspect in interfering in such matters.



### NCLAT holds 'void ab initio', share-transfer to outsiders disregarding pre-emptive right under AoA

#### Niklesh Tirathdas Nihalani vs. Shah Poddar Nihlani Organisers Pvt. Ltd. & Ors. Company Appeal (AT) No. 167 of 2020

The Respondent was constituted by 3 families and in case of transfer of shares of the Respondent, the AoA provided pre-emptive rights to the shareholders, However, disregarding this pre-emptive right of the shareholders, the Respondent, transferred the shares to outsiders and amended Article 13 of the AoA which prior to amendment, specifically provided that 'no shares shall be transferred to a person who is not a member of the company. This led to reduction of shareholdings of the Appellant.

Aggrieved, the Appellant approached the NCLT contending that inducting new shareholders, i.e. outsiders in the Respondent company and providing them with shareholding was an act of fraud on the Appellant, as being an existing shareholder of the Company it was not offered shares in the exercise of their pre-emptive right as per Article 13 of the AoA and this amounted to mismanagement and oppression on account of the Respondent against its shareholders. This contention of the Appellant was rubbished by the NCLT which caused the Appellant to approach the NCLAT.

The NCLAT allowing the appeal, observed that the transfer of Respondent's shares to outsiders (i.e. not from family of existing shareholders), in complete disregard of the pre-emptive right available to existing shareholders under the AoA, was void ab initio and accordingly, directed the Respondent to rectify the register of Members, opining that the act of the Respondents to amend the AoA while Appellant's application challenging the aforesaid transfer was pending before NCLT, to be a deliberate act with the sole motive to frustrate the Company Appeal and thereby holding transfer of shares without providing the pre-emptive right to the existing shareholders against the AoA and MoA of the Respondent to be unsustainable

#### Authors' Note:

In the instant case, the NCLAT rightly observed that the Respondents were able to illegally transfer the Company's shares to outsiders, against the original AoA due to their majority in the Board of Directors deliberately causing a reduction in Appellant's shareholding.



### Extension of authority to practicing Cost Accountant to issue share reconciliation capital audit report

Securities and Exchange Board of India vide notification no. SEBI/LAD-NRO/GN/2021/53 dated October 26, 2021 has notified Securities and Exchange Board of India (Depositories and Participants) (Second Amendment) Regulations, 2021 through official gazette notification. The sub-regulation (1) of regulation 76 has been amended to authorize practicing Cost Accountant to issue the share reconciliation capital audit report. As per erstwhile provision, a practicing Company Secretary and a qualified Chartered Accountant were only authorized issuer of the share reconciliation capital audit report on quarterly basis. However same has been amended to prescribe that a practicing Cost Accountant may issue the share reconciliation capital audit report.

#### Authors' Note:

For more than 15 years, the share reconciliation capital audit report is a mandatory quarterly compliance which has practicing Company Secretary and Chartered Accountant as only authorized issuers. However over a period of time emergence of other professional bodies has been there and SEBI isn't limited to few professionals the way they used to be earlier and hence limitation of authorities has become less relevant in current scenario. Keeping this in view SEBI has now included the practicing Cost Accountants.



### Relaxation on levy of additional fees for annual financial statement filings

Pursuant to representations received from various stakeholders, MCA has notified vide General Circular no. 17/2021 that no additional fees shall be levied upto 31.12.2021 for the filling of e-forms AOC-4, AOC-4(CFS), AOC-4 XBRL, AOC-4 Non-XBRL and MGT-7/MGT-7A in respect of the financial year ended on 31.03.2021 under the Companies Act, 2013.

In view of the extraordinary disruption caused due to the pandemic, it has been decided that if annual financial statements for the financial year 2020-21 is filled by 31st December, 2021 then there would be no levy of additional fees and only normal fees shall be payable for filling of aforementioned e-forms.

Consequently, as per Section 137(1) of the Companies Act, 2013 the annual accounts for the financial year ended on 31st March, 2021 shall be filed in e-form AOC-4, AOC-4(CFS), AOC-4 XBRL and AOC-4 Non-XBRL within 30 days from the holding Annual General Meeting for the

financial year 2020-21 by the company. And as per Section 92(4) of the Companies Act, 2013 the annual returns for the financial year ended on 31st March, 2021 shall be filed in MGT-7/MGT-7A within 60 days from the holding Annual General Meeting for the financial year 2020-21 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 AOC-4, AOC-4(CFS), AOC-4 XBRL, AOC-4 Non-XBRL and MGT-7/MGT-7A may be filed within the extended timeline i.e. 31.12.2021 without any additional fees.

#### Authors' Note:

This relaxation was expected as similar relaxations were given in previous year as well i.e. to align the annual financial statements 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.





### Introduction of Revised Regulatory Framework for NBFCs: Scale Based Regulations

Reserve Bank of India vide notification no. RBI/2021-22/112 dated October 22, 2021 has introduced a revised regulatory framework for NBFCs (Scale Based Regulations). The SBR encompasses different facets of regulation of NBFCs covering capital requirements, governance standards, prudential regulations, etc. The SBR guidelines shall be effective from October 01, 2022 while instructions relating to ceiling on IPO funding will come into effect from April 01, 2022. As per erstwhile provisions, the NBFCs were categorized into three categories named as NDFC-D (deposit taking), NDFC-ND-SI (Non deposit

taking but systemically important) and NDFC-ND (neither deposit taking nor systematically important). However now they will be re-categorized into four layers termed as Base Layer, Middle Layer, Upper Layer and Top Layer.

All current NBFCs will be categorized under Base Layer and Middle Layer whereas RBI specifically identified NBFCs will be classified under Upper Layer but Top Layer will be populated by RBI only if RBI is in opinion that there is a substantial increase in the potential systemic risk from specific NBFCs in the Upper Layer.

#### Composition of new layers shall comprise of the following NBFCs:

Base Layer	(a) NBFCs-ND below the asset size of ₹1000 crores and (b) NBFCs undertaking the following activities- (i) NBFC-Peer to Peer Lending Platform (); (ii) NBFC-Account Aggregator (NBFC-AA); (iii) Non-Operative Financial Holding Company (NOFHC) and (iv) NBFCs neither availing public funds nor having any customer interface
Middle Layer	(a) all deposit taking NBFCs (NBFC-Ds), irrespective of asset size; (b) non-deposit taking NBFCs with asset size of ₹1000 crores and above and (c) NBFCs undertaking the following activities- (i) Standalone Primary Dealers (SPDs); (ii) Infrastructure Debt (IDFNBFCS); (iii) Core Investment Companies (CICs); (iv) Housing Finance Companies (HFCs) and (v) Infrastructure Finance Companies (NBFC-IFCs)
Upper Layer	<ul style="list-style-type: none"> <li>On the basis of established parameters and scoring methodology by RBI.</li> <li>The top ten eligible NBFCs in terms of their asset size shall always reside in the upper layer, irrespective of any other factor</li> </ul>
Top Layer	Until Reserve Bank of India is in opinion that there is a substantial increase in the potential systemic risk from specific NBFCs in the Upper Layer, this layer will remain empty

As SBR Framework has introduced vast changes in norms and regulation for NDFCs, some of the salient changes have been discussed below:

#### Salient Charges

Applicability of existing regulations / directions issued by the RBI	<ul style="list-style-type: none"> <li>The existing regulations and directions notified for NBFCs will continue to apply other than the changes introduced under the SBR Framework</li> <li>From 1 October 2022, all references under existing regulations would be construed as</li> </ul>
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	<ul style="list-style-type: none"> <li>NBFC-BL or NBFC-ML or NBFC-UL</li> <li>Any regulatory stipulation applicable to a lower layer will automatically apply to a higher layer, unless otherwise notified</li> </ul>
Changes to minimum capitalization requirements for specified NBFCs	<ul style="list-style-type: none"> <li>The RBI has increased the minimum net owned fund (NOF) requirement for NBFC-ICC from INR 2 crores to INR 10 crores. For NBFC-MFI and NBFC-Factor, the NOF requirement has been increased from INR 5 crores to INR 10 crores.</li> <li>These requirements to be complied in transitional matter by 31 March 2027.</li> <li>However, the RBI has exempted NBFCs which do not have any customer interface and public funds from these changes in minimum capitalization.</li> </ul>
Changes to NPA classification norms	<ul style="list-style-type: none"> <li>The RBI has prescribed a uniform overdue period of more than 90 days for classification of a NPA by all categories of NBFCs.</li> <li>RBI has provided a transition period to comply with the changes i.e. 31 March 2026.</li> </ul>
Key changes to capital and prudential norms	<ul style="list-style-type: none"> <li>Middle and upper layers NBFCs are required to undertake a thorough internal capital assessment taking into account various risks associated with their business.</li> <li>Upper layer must maintain common equity tier 1 capital of at least 9% of its risk weighted assets.</li> <li>The RBI has prescribed a single credit concentration limit for NBFCs in the middle and upper layers which is determined with reference to Capital Tier 1.</li> <li>The RBI has prescribed that exposure of NBFCs in the middle and upper layers to capital market and commercial real estate would be considered as sensitive sector exposures, requiring such NBFCs to set internal limits as per Board approved policy for such exposures.</li> <li>The RBI has also prescribed a limit of INR 1 crore per borrower for financing subscription to IPOs.</li> </ul>
Key changes to corporate governance norms	<ul style="list-style-type: none"> <li>The RBI has prescribed that at least one director appointed by all NBFCs must mandatorily have prior professional experience of working in a bank or NBFC</li> <li>All NBFCs must have a Board approved policy for grant of loans to directors, senior officers, and relatives of directors.</li> <li>All NBFCs must constitute a risk management committee for evaluating various risks whose report must be submit to the Board of the NBFC</li> <li>KMPs of NBFCs in the middle and upper layers must not hold any office in any other NBFCs in such layers. Such NBFCs have been provided with time until 30 September 2024 to comply with this requirement</li> <li>Mandatory appointment of Chief Compliance Officer for all NBFCs in middle and upper layer who would be in charge of an independent compliance function.</li> <li>All NBFCs in the upper layer must be mandatorily listed within three years from its identification as an NBFC-UL</li> <li>The RBI has prescribed that an independent director must not simultaneously hold more than three directorship positions in NBFCs falling in the middle and upper layers. Such NBFCs have until 30 September 2024 to ensure compliance</li> <li>All NBFCs in the middle and upper layers must adopt a whistle-blower mechanism</li> </ul>

### Authors' Note:

This move would bring in more systematic approach towards regulatory framework considering the risk profile of the NBFC. This step by RBI was very expected as in

January 2021 RBI itself shows interest towards this approach by issuing a discussion paper titled as 'Revised Regulatory Framework for NBFCs- A Scale Based approach'

for public comments. Such interest of RBI was drawn out of the evolution of sector in terms of size, complexity, and interconnectedness within financial sector due to which many entities need to align the regulatory framework for

NBFCs keeping in view their changing risk. With such changes, it is evident that RBI wants to regulate and focus more on NBFCs on bases of their risk profiles rather than general framework.



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

Pursuant to representations received from various stakeholders, MCA has further 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 30th November, 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 further 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.



## Amendment in Securities and Exchange Board of India (Issue of capital and Disclosure Requirements) Regulations, 2018 to provide relaxation to SR Shareholders during initial public offer

Securities and Exchange Board of India vide notification no. SEBI/LAD-NRO/GN/2021/52 dated October 26, 2021 has notified Securities and Exchange Board of India (Issue of capital and Disclosure Requirements) (Fourth Amendment) Regulations 2021 through gazette notification. The regulation 6 of Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulations Act, 2018 has been amended to relax the limitations on Individual SR Shareholders (shareholders having Equity Shares with Superior Voting Rights) to have net worth of upto 1000 crores and to have holding of SR equity shares for three months prior to issue of Red Herring Prospectus. As per erstwhile provisions, if

issuer of Initial Public Offer has issued SR equity shares to its promoters/ founders, allowed to do an initial public offer of only ordinary shares for listing on the Main Board only if the SR shareholder is not part of the promoter group whose collective net worth is more than rupees 500 crores and the SR equity shares have been held for a period of at least 6 months prior to the filing of the red herring prospectus. However same has been changed to prescribe that rather than cumulative net worth of promoter group, individual SR shareholder's net worth to be considered. And holding period has been reduced to three months period prior to filling of Red Herring Prospectus.

### Authors' Note:

This move is aligned with SEBI's endeavour to encourage stock listing for more and more companies and considering the current traction in market, it is important

to relax such norms. However at the same time, SEBI has to be more vigilant while approving the public issue of companies so that investor's interests are protected at all times.



## Granting of permission to Foreign Portfolio Investors (FPIs) to purchase debt securities issued by InvITs and REITs

Financial Markets Regulation Department of Reserve Bank of India vide notification no. 396(1)/2021-RB dated October 13th, 2021 has amended the Schedule 1 to grant the permissions to Foreign Portfolio Investors(FPIs) to purchase the debt securities issued by InvITs and REITs. This notification has further amended Regulation 2 to introduce definitions of InvITs (Infrastructure Investment Trust) and REITs (Real Estate Investment Trust) which states that it will mean same as a business trust in sub-clause (ii) of clause 13A of section 2 of the Income-tax Act, 1961.

As per erstwhile provisions, Foreign Portfolio Investors was not permitted to purchase any of securities issued by Infrastructure Investment Trust and Real Estate Investment

Trust. However, same has been amended to permit purchase of only debt securities issued by Infrastructure Investment Trust and Real Estate Investment Trust.

### Authors' Note:

This amendment in relevant legislations was much awaited as it was earlier announced in Union Budget 2021-22 that FPI will be enabled later to invest in debt securities issued by InvITs and REITs through suitable amendments. FPIs can now acquire debt securities issued by InvITs and REITs under the Medium-Term Framework (MTF) or the Voluntary Retention Route (VRR).



## G20 Finance Ministers & Central Bank Governors endorse two-pillar solution, call for swift development on Rules

G20 Finance Ministers and Central Bank Governors at their fourth meeting held on October 13, 2021 discussed the tax challenges arising from the digitalisation of the economy and ways to address the same. Accordingly, the final political agreement as set out in the Statement on a two-pillar solution and in the Detailed Implementation Plan was endorsed and released by the OECD/G20 Inclusive Framework on Base Erosion and Profit Shifting ('BEPS').

Further, the G20 Ministers and the Central Bank Governors called upon the OECD/G20 Inclusive Framework on BEPS to swiftly develop the model rules and multilateral instruments as per the Detailed Implementation Plan to make it effective in 2023.

### Reference:

<https://www.g20.org/4th-g20-finance-ministers-and-central-bank-governors-meeting.html>



## OECD releases fourth peer-review report of BEPS AP 13 acknowledging India's EOI-processes consistent with reference terms

The OECD has released the fourth peer-review report of BEPS AP 13 acknowledging India's EOI-processes to be consistent with reference terms. The key takeaways of the report were as follows.

- The peer review report contained the findings of the fourth annual peer review process undertaken by an Ad Hoc Joint Working Party 6 / Working Party 10 sub-group referred to as the "CbC Reporting Group".
- The peer review focused on each jurisdiction's domestic legal and administrative framework, its exchange of information network, and its measures to ensure the confidentiality and appropriate use of CbCR.
- 33 jurisdictions had received a general recommendation to put in place or finalise their domestic legal or administrative framework and 43 jurisdictions received one or more recommendations for improvements to specific areas of their framework in the peer review report.
- The report highlighted that 89 jurisdictions had undergone an assessment by the Global Forum on Transparency and Exchange of Information for Tax Purposes ('the Global Forum') concerning confidentiality and data safeguards in the context of implementing the AEOI standard and did not receive

any action plan. Further, 10 jurisdictions were currently working on an action plan issued by the Global Forum as a consequence of its review.

- OECD clarified that certain number of Inclusive Framework members were not included in this peer review report, either because they joined the Inclusive Framework after December 1, 2020 (at which point it was too late to incorporate them into the current peer review process) or they opted out of the peer review in accordance with the peer review terms of reference.
- The report stated that the peer review of the BEPS Action 13 minimum standard was an annual process and thus the work would continue to monitor the implementation and operation of CbC reporting by members of the Inclusive Framework and to highlight progress made by jurisdictions to address recommendations that had been made.

The review stated that India continued to meet all terms of reference. However, OECD recommends India should amend or clarify the annual consolidated group revenue threshold calculation rule and applies it in a manner consistent with OECD guidance on currency fluctuations in respect of an MNE Group whose Ultimate Parent Entity is located in a jurisdiction other than India (which has remained unchanged since 2017/2018 peer review). It was



also recommended that India amended its legislation or take steps to ensure that local filing is only required in the circumstances contained in the terms of reference.

Further, it was also pointed out in the report that India's recommendation to take steps to put in place all the necessary processes and written procedures to ensure 'exchange of information' was conducted in a manner consistent with terms of reference relating to the exchange

of information framework, was now in place and thus, the recommendation was removed.

### Reference:

[https://read.oecd-ilibrary.org/taxation/country-by-country-reporting-compilation-of-2021-peer-review-reports\\_73dc97a6-en#page5](https://read.oecd-ilibrary.org/taxation/country-by-country-reporting-compilation-of-2021-peer-review-reports_73dc97a6-en#page5)



## OECD releases Stage 2 peer review reports on progress under BEPS Action 14 for 7 jurisdictions including China, Russia

The Stage 2 peer review monitoring reports of BEPS Action 14 was released by OECD, evaluating the progress made by Brazil, Bulgaria, China, Hong Kong (China), Indonesia, Russia and Saudi Arabia in implementing recommendations resulting from their Stage 1 peer review. The reports took into account the developments in the period January 19 to July 20 and build on the Mutual Agreement Procedure ('MAP') Statistics for 2016-2019.

The Multinational Instrument was signed by Bulgaria, China, Hong Kong, Indonesia, Russia and Saudi Arabia and ratified by Indonesia, Russia and Saudi Arabia. This has brought a substantial number of treaties in line with the Action 14 minimum standard.

According to the report, all the concerned jurisdictions

had issued or updated their MAP guidance.

The report further stated that while Brazil, Bulgaria, China, Hong Kong (China) and Saudi Arabia had added more personnel to the competent authority function and/or had made organisational improvements with a view to handle MAP cases in a more timely, effective and efficient manner. Russia, Hong Kong (China) and Saudi Arabia have closed MAP cases within the pursued average time of 24 months.

### Reference:

<https://www.oecd.org/tax/beps/progress-continues-in-making-tax-dispute-resolution-more-effective-and-in-improving-tax-transparency-through-country-by-country-reporting.htm>



# 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 Appellate 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



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



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

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

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

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