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THE CHAMBER'S JOURNAL

Vol. VII | No. 8 May 2019

YOUR MONTHLY COMPANION ON TAX & ALLIED SUBJECTS

AMENDMENTS IN GST LAW IN FY 2018-19

(INCLUDING REAL ESTATE) & AMNESTY SCHEME FOR MVAT

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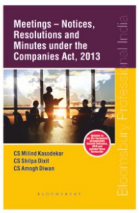

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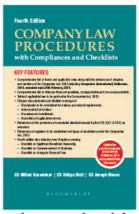
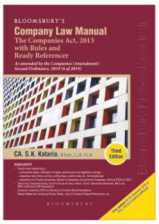


This book attempts to provide a master key to professionals connected to the Companies Act and is responsible for compliance management in an organisation. It aims at making a professional's life simple by providing a quick review of various provisions and rules, in the form of a checklist for day to day activities carried out by an organisation. it also contains the relevant references of sections, rules, applicable e-forms/returns, circulars & notifications etc.

CS Milind Kasodekar, CS Shilpa Dixit and CS Amogh Diwan; INR 2295/-; 1394 pages

Bloomsbury's Company Law Manual – The Companies Act, 2013 with Rules and Ready Referencer



Updated till 15 April, 2019

Contains the Companies Act, 2013 with Rules, Ready Referencer

- Contains comparative table with Section-wise referencing to:

– enforcement dates, notification no., legislative amendments, with full text, lists, orders, accompanying Ind AS, Secretarial Standards, I&B Code, SEBI LODR and ICDR Regulations

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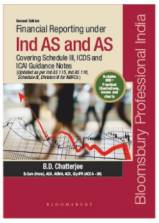

This book has the latest updates and provides the entire gamut of laws, ASs, and Guidance Notes of ICAI, applicable to corporates and one place while preparing financial statements. The book incorporates inter-linkages, comparisons, illustrations, diagrams, flow charts and summaries.

B.D. Chatterjee; INR 2295/-; 1460 pages

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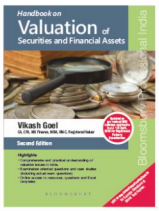

This book is designed keeping in mind the dual needs of a professional who is preparing for the Registered Valuation Examination and a practicing or aspiring valuer. The book would be immensely useful for the chartered accountants, company secretaries, lawyers and management professionals while undertaking the valuation examination as it gives the provisions of different statutes covered under Valuation examination syllabus in a summarised manner.

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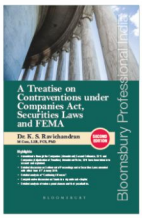
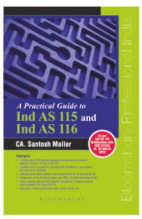


Compounding of offences, adjudication of penalties and prosecution against offences under the Cos. Act, 2013, securities laws and FEMA are comprehensively explained by a practioner in these subjects.

Amendments by the Companies (Amendment) Second Ordinance, 2019 and Companies (Adjudication of Penalties) Amendment Rules, 2019 have been taken into account and explained.

Dr. K. S. Ravichandran; INR 2,295/-; 1285 pages

A Practical Guide to Ind AS 115 and Ind AS 116



This book covers the provisions of Ind AS 115 (Revenue from Contracts with Customers, corresponding to IFRS 15, notified by the MCA vide notification dated 28 March 2018, w.e.f 1 April 2018) and Ind AS 116 (Leases, corresponding to IFRS 16, notified by the MCA vide notification dated 30 March 2019, w.e.f 1 April 2019). A very useful guide for accounting and auditing professionals, practitioners, corporates and students studying for professional body qualifications.

CA. Santosh Maller; INR 1795/-; 1006 pages

Bloomsbury's The Companies Act, 2013 and Rules

This book includes, in an easy to read layout: Companies Act, 2013 [As amended by the Companies (Amendment) Ordinance, 2019], Notified Rules amended upto 15 February, 2019, Listing of Forms, Effective date of the section with corresponding section of the 1956 Act, section cross referenced to the relevant rule(s) and forms.

INR 1595/-; 1448 pages

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THE CHAMBER OF TAX CONSULTANTS

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The Chamber's Journal

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Editorial

Dear Friends,

The last two phases of the General Election 2019 are remaining. The stakes are high for all the concerned parties. However, in the name of campaign what is generated is noise. It seems time has not yet come in the largest democracy of the world to have, a meaningful debate on the issues relevant to the society and nation. The incumbent dispensation has come up with its vision. The opposition is not providing counter narrative in spite of loads of intellectuals in its camp. Any narrative which is not challenged in its earnest is not beneficial to democracy. For this sorry state the fourth pillar of democracy – the media is also equally responsible along with the political parties. Everyone is eagerly waiting for 23rd May to know the outcome of the elections. In this general elections, around 90 crore people are eligible to vote. There is an increase of about 9 crore voters compared to last time. It is estimated that there are equally large number of voters who are first-time voters. Holding elections in India, world's seventh largest nation by area and second most populous country is a complex process. However this task so far has been successfully completed. It will be interesting to see which political party is able to garner maximum support to reach the magic figure for forming the government. Dance of democracy will be at its peak.

Judiciary was hardly a topic of discussion during the run up to the 2014 Lok Sabha elections. But in the last five years the judiciary in general and the Apex Court in particular was in limelight for all wrong reasons. The Hon'ble Supreme Court in its wisdom struck down the National Judicial Appointment Commission Act brought out by 99th Amendment to the Constitution. This resulted in less than smooth interaction between the executive and the judiciary. The unprecedented press conference by the four senior most judges of the Supreme Court after Chief Justice of India sent signals to the public that all is not well in the top Court which is the last resort for the citizens. The recent allegation of sexual harassment against the CJI has dented the sanctity of the office. The recent controversy of tampering with the Court's order has further raised several question before the highest Court. The damage to the post and the institution is irreparable. The real challenge before our judiciary is to ensure its independence and retain the trust reposed in it by the 130 crore citizens of our country.

Dr. Madhava Menon who left for heavenly abode few days back is known as the architect of modern legal education in India, having built spectacular National Law Universities across the country. He was a visionary who conceived an inter-disciplinary approach to legal education. Which was way ahead of its times, and blended it with problem-based learning methodologies, which instantly catapulted students to higher thresholds of excellence. When he established the National Law School at Bangalore, all he had was four derelict rooms in the corner of a non-descript building. He brought together brilliant teachers from across the country and built an ecosystem which not only nurtured, but also credited meritocracy. Within a span of few years, the National Law School came to be known as the Harvard of the East. One book, one pen, one teacher can change a student's life and through him the entire nation.

The special story of this issue deals with amendments in GST. Eminent professionals have spared their valuable time to educate us. I thank all the contributors to this issue for sparing their valuable time.

My best wishes to all.

K. GOPAL
Editor

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From the President

"nuestra riqueza no está definida por el dinero, sino por algo que el dinero no puede comprar"

… in Spanish, means – ***'Our wealth isn't defined by money, but by something that money can't buy!'*** it also means ***commitment, dedication and motivation breed success.***

It stands so much true for an institution like The Chamber, where we define wealth as nothing more and nothing beyond imparting knowledge. At Chamber, we believe in counting our wealth by the extent of learning we impart and the impact we make by contributing towards the growth of this nation as an important stake holder. The real wealth is generated when we learn, expand our knowledge base, spread knowledge, do something which stays with us till the end, something which actually money can't buy! While one is never content with the amount of money one owns, one should never be content with the amount of knowledge he has, too.

In Steve Job's words – "Stay Hungry, Stay Foolish!"

This is my second last communication as President and as said by George Bernard Shaw ***"Life is no brief candle to me. It is a sort of splendid torch which I have got hold of for a moment, and I want to make it burn as brightly as possible before handing it on to the future generations".*** My journey as President is aptly said in the words of Rabindranath Tagore ***"I slept and dreamt that life was joy. I awoke and saw that life was service. I acted and behold, service was joy."***

The month of May has some interesting events lined up! India, this month will see getting its 17th Lok Sabha elected with five hundred and forty three members being voted by a hundred and twenty crore Indians. I hope every citizen of this country has responsibly and rightfully used the greatest power conferred upon him by the Constitution, that is – the right to vote! This month will also make the world, witness a rousing Cricket World Cup which happens once in four years with ten teams participating in this exhilarating

competition. This month also marks the day of birth, enlightenment and death of *Gautama Buddha*, a spiritual leader and the founder of Buddhism. *Buddha Purnima* is celebrated across various countries of the world including India, Cambodia, China, Indonesia, Japan, Malaysia, Mongolia, Myanmar, Nepal, Korea, Philippines, Singapore, Sri Lanka, Taiwan, Vietnam etc.

In Gautama Buddha's words – ***"Never stop learning, because life never stops teaching!"***

CTC News and Events

We had few programmes planned by Delhi Chapter which has become active with two days workshop on ***Litigation Skill Management*** inaugurated by Mr. G. S. Pannu, Hon Vice-President of ITAT and Mr. R. P. Tolani, Ex-VP – ITAT. Delhi Chapter also organised two day ***FEMA Conference jointly with RBI,*** Central office New Delhi. We have planned full day seminars at Amravati and Nagpur in May and June to spread CTC activities and awareness.

Every member should try to learn some foreign language to increase his business and expand his work area. The Chamber has also joined hands with Indo-Japanese Association to provide ***Japanese Language Conversation Course*** at the CTC Conference Room every Friday from 6-8 pm and every Saturday from 9.30-11.30 am.

Industrial visit to CTRL's Data Center – The largest in Asia and India's only Tier-4 Data Center at Navi Mumbai was an eye opener with almost 30% of all financial transactions of country processed in that center.

The 5th International Study Tour with 92 plus delegates will depart on 25th May for 10 days and arrive on 5th June covering Central European countries of Austria, Slovenia, Slovakia, Croatia and Hungary. Amidst the beautiful countries of Europe, learning will see a new experience with visit to Vienna University.

There is an ever-increasing need for financial valuation services pertaining to ownership interests and assets in non-public companies and subsidiaries, divisions, or segments of public companies. A ***Study course on valuation*** has been scheduled on the 8th June. The programme also introduces the basics of business valuation, various valuation methods and interpretation of the results of valuation.

Few unique activities like ***Panel discussion on RTI and Writ petition*** and ***Lecture meeting on RTI*** were very well appreciated by members. Another first time feature of ***Technology Clinic*** is planned to help members for new technology tools and solutions to run their practice more efficiently.

A ***Student Orientation Course*** is scheduled on the 14th and 15th June in the western suburbs, to acquaint the students in some of the important aspects of articleship. This course would give students a sneak-peek into the nature

of work that they would be engaged during training and to provide basic knowledge of all the day-to-day activities at office along with understanding of subjects in practical manner to the students.

There is a need to refresh the amendments made relating to demonetisation and also relearn the applicability of Section 68 in the light of the recent Supreme Court ruling in the case of NRA Steel. ***A half day Seminar on recent controversies and issues under Income-tax Act*** has been scheduled on the 14th June.

Professionals face severe issues in filing income tax return and CPC Bangalore is issuing notices u/s 139(9) due to defective filing of return and even automated intimation u/s. 143(1) are received making adjustments proposed u/s. 143(1)(a) which are not factually and legally correct. A half day ***workshop on return filing provisions under the Income Tax Act*** has been scheduled on the 28th June.

Our ***13th Residential Conference on International Taxation*** at Surat has crossed another milestone of highest ever enrolment of 240 numbers and we are confident to cross 280 to 300 delegates. We have extended the early bird discount rates until 31st May. We guarantee 4 days of fun, food and frolic along with education.

Representations

During the month, Chamber has made several representations to Ministry of Corporate Affairs for issues in forms.

Publications

We have embarked on ambitious plan for release of few publications namely, 4th edition of ***"Compendium on International Taxation"*** in four volumes, 2nd Edition of ***"Transfer Pricing Manual"*** in two volumes, book on ***"Issues and Law related to Section 56(2)"*** and ***"Model Deeds and Drafts"*** by end of June, 2019. Work is at an advance stage and we expect to release these books on AGM day.

Special Story for May, 2019 on **"Amendments in GST Law in FY 2018-19 (Including Real Estate) and Amnesty Scheme for MVAT"** is very timely and will be useful for members. I thank Mr Mandar Telang and Mr. Kush Vora for preparing the design and structure of this special story, which is unique and conceptual, and also senior authors who have spared their time and made timely contribution.

I request members to kindly send their comments and feedback on matters related to Chamber on office@ctconline.org and hineshdoshi67@gmail.com.

Thanking you.

Gracias.

Hinesh R. Doshi
President


CA Yash Dadda & CA Shuchi Sethi

Significant Law Amendments in CGST Act (Part-I)

The President of India, on August 29, 2018, has given his assent to the four crucial amendment bills of GST law, which got published in the official Gazette of India and the following Acts have been brought in force with effect from 1st February, 2019[1]:

- CGST (Amendment) Act, 2018
- SGST Amendment Acts of the respective States
- IGST (Amendment) Act, 2018
- UTGST (Amendment) Act, 2018
- GST (Compensation to States) (Amendment) Act, 2018

In this part of the publication, efforts have been made to cover an analysis of amendments in following Sections of CGST Act, 2017 along with related rules made thereunder:

- Section 7 read with Schedules I, II, III – Scope of Supply
- Section 9 – Levy and Collection
- Section 25 – Procedure for registration
- Section 29 – Cancellation of registration
- Section 34 – Credit and debit notes
- Section 79 – Recovery of tax
- Section 107 – Appeals to Appellate Authority
- Section 112 – Appeals to Appellate Tribunal
- Section 129 – Detention, seizure and release of goods and conveyances in transit
- Section 143 – Job work procedure

Section 7 – Scope of Supply

Section 7(1) of CGST Act, 2017 provided as under:

For the purposes of this Act, the expression "supply" includes—

(d) The activities to be treated as supply of goods or supply of services as referred to in Schedule II.

1 Notification No. 02/2019-Central Tax, dt. 29-1-2019

Clause (d) above has been omitted and a new sub-section (1A) has been inserted with retrospective effect (applicable from 1-7-2017) as under:

(1A) Where certain activities or transactions, constitute a supply in accordance with the provisions of sub-section (1), they shall be treated either as supply of goods or supply of services as referred to in Schedule II.

The above amendment has brought in a crucial change in the scope of expression 'supply' which earlier expressly included the activities referred in Schedule II. Now the anomaly has been removed and according to the new sub-section (1A) the purpose of Schedule II has now been restricted only to classify activities or transactions which constitute supply as per Section 7(1) either as supply of goods or supply of services.

Now, this amendment brings huge implications on transactions or activities which were earlier construed as supply only because of Schedule II. The said position may need a review now, as the same may not qualify as supply *per se*.

Liquidated Damages

In respect of Schedule II, one of the debatable issues is levy of GST on liquidated damages. Following decisions have been held by Advance Ruling and Appellate Advance Ruling Authorities in respect of liquidated damages pre-amendment:

1. Appellate Authority for Advance Ruling, Maharashtra in case of Maharashtra State Power Generation Co. Ltd., upheld an order of ARA that payment of liquidated damages by the contractor to the appellant is covered by the term 'Obligation' to tolerate an 'act' or a 'situation' and hence covered under entry (e) of clause 5 of Schedule II and is taxable under the provisions of the CGST Act.
2. Authority for Advance Rulings, Maharashtra in case of North American Coal Corporation India (P.) Ltd., held that liquidated damages that may be awarded to the applicant by ICC, when approached for arbitration in respect of claims to be recovered/received by one party from the other in view of violations or termination of the Agreement would clearly be taxable for the supply of services as per Sr. No. 5(e) of Schedule II of the CGST Act, 2018.

Taxability was held in above orders on basis of Schedule II and now Schedule II activities have been excluded from supply and restricted to classification w.e.f. 1-7-2017. Now, the levy of GST on liquidated damages can only be established if the same constitutes a supply as per Section 7(1). Hence, now whether liquidated damages have the essentials of supply (activity, consideration and business) of service is the test to settle the question of levy.

According to Section 103(2), advance rulings pronounced shall be binding unless the law, facts or circumstances supporting the original advance ruling have changed. This retrospective amendment in Section 7 even raises a challenge on applicability of above orders.

Renting of immovable property

Entry 5(e) of Schedule II provides that renting of immovable property shall be treated as supply of services. Due to Section 7(1)(d) earlier renting of immovable property was a supply but post amendment while applying the test of supply as per Section 7(1) to construe a supply, a factor of consideration is that whether all such transactions of renting can be subjected to GST.

The key elements in definition of supply under Section 7(1)(a) are activity of renting, consideration and business. The test of business on activity of renting may produce

varied results depending upon case-to-case basis. For instance renting of a commercial space by a senior citizen, which is devolved to her by her deceased husband might not constitute supply (due to absence of business intention) as compared to same being rented out by a trader brought from his business funds.

Transfer of Business Assets

Entry 4(a) and (b) of Schedule II classifies permanent disposal or private transfer of business assets in specific situations as supply of goods or supply of services respectively. The said clauses covers the situation wherein transfer may be without consideration also.

Now with given amendment to Section 7, the situations where transfer is without consideration needs to be treated as supply *per se* only in such cases where it is covered by Section 7(1)(d) i.e., instances of Schedule I only.

The reinsertion of Section 7(1A) is retrospective in nature and Section 7(1)(d) has been omitted, it opens up an debate for tax paid on various transactions treating them as supply due to combined operation of Section 7(1)(d) and Schedule-II between July 2017 to February 2019. If on such transactions, the tax is not required to be paid after 1-2-2019 due to amendment, then the registered person should not have paid tax before 1-2-2019 also. In those cases, whether refund can be claimed of tax paid earlier needs to be examined on case-to-case basis only.

Schedule I – Activities to be treated as supply even if made without consideration

In Entry 4 to Schedule I, the word 'person' has been substituted for the words 'taxable person'.

Earlier only import of services by a taxable person were covered under Schedule I, now import of services from related persons or foreign establishments, without consideration even when made by an unregistered person in course of business will also be covered under supply and attract levy of tax.

This may have impact on foreign entities having establishments in India not liable to registration otherwise. Since service supplied by any person who is located in a non-taxable territory to any person located in the taxable territory is taxable on reverse charge basis as per Notification No. 10/2017-IT (Rate) under Section 5(3) of IGST Act, 2017, such unregistered establishments having establishments outside India may have to get mandatory registration as per Section 24(iii) of CGST Act, 2017 as an effect of this amendment and pay tax on import of services from related persons or foreign establishments.

Business entities exclusively engaged in making exempt supplies shall consider the implications of registration and liability to pay tax on such import of services.

Schedule III – Activities or transactions which shall be treated neither as a supply of goods nor a supply of services

According to Section 7(2) of CGST Act, 2017 activities or transactions specified in Schedule III shall be treated neither as a supply of goods nor a supply of services. The amendments to Schedule III are prospective and shall be applicable from 1-2-2019 only. Following activities or transactions have been added in Schedule III:

> *7. Supply of goods from a place in the non-taxable territory to another place in the non-taxable territory without such goods entering into India.* [Drop Shipment/ Out and out supply]
>
> *8. (a) Supply of warehoused goods to any person before clearance for home consumption;* [In-bond supplies]

(b) *Supply of goods by the consignee to any other person, by endorsement of documents of title to the goods, after the goods have been dispatched from the port of origin located outside India but before clearance for home consumption.* [High Seas Sales]

Insertions of above transactions in Schedule III would clear the ambiguity on taxability of such transactions surrounding the industry due to diverse opinions and advance rulings in this regard.

Earlier, circulars were issued for High Seas Sales and In-bond sales as follows:

CBEC has issued Circular No. 33/ 2017-Cus dated 1-8-2017 clarifying that in respect of High Seas Sales of imported goods, IGST would be levied only once, at the time of customs clearance.

Circular No. 46/2017 – Customs, dated 24-11-2017 clarified that when imported goods are sold to another person before clearance from customs bonded warehouse, the IGST shall be payable by the importer. The IGST shall be levied again and recovered from the buyer at the time of removal of such goods from the warehouse. This has resulted in double taxation of same transaction.

To remove this anomaly, Government has issued a Circular No. 3/1/2018-IGST dated 25-5-2018 to clarify that IGST would be levied and collected only when the goods are cleared for home consumption from the customs bonded warehouse, i.e., at the time of filing the ex-bond bill of entry but the same was applicable from 1-4-2018.

Although point of levy and collection was clarified, there was no clarity on the nature and treatment of such transactions in the hands of the supplier whether as exempt supply or otherwise. An advance ruling in the case of *BASF India Ltd., [2018] 95 taxmann.com 1 (AAR - Maharashtra)* given by the Maharashtra Authority for Advance Ruling, it has been held that the goods sold on High Seas Sale basis would come in the category of exempt supply as per Section 2(47) ibid being non-taxable supply. Therefore, the input tax credit to the extent of inputs, input services and common input services would be required to be reversed by the applicant as per Section 17 of the CGST Act.

Now it has been clarified that such transactions are not supply and parallel amendment to the provisions of input tax credit under Section 17(3) clarify exclusion of such activities from value of exempt supplies for the purpose of input tax credit reversals, hence input tax credit in relation to these supplies does not attract reversal under Rule 42 or 43.

One issue which may arise due to such change is that since all above transactions are not 'supply' as per the amendment, they cannot be termed as 'zero rated supply' as per Sec. 16(1) of IGST Act, 2017 even if goods are taken out of India to a place outside India. Although input tax credit reversal is not required for such supplies but where such goods have been exported outside India or to a SEZ developer or a SEZ unit, refund of any input tax credit in relation to such supplies may be questionable on such grounds. For eg., input tax credit of expenses of duty free shops may face above complication in grant of refund.

Also, amendment to Schedule-III is prospective in nature. Hence for taxability on given transactions which are now part of Schedule–III for the period from July 2017 to January 2019 shall be an issue for judicial debate in the years to come.

Section 9 – Levy and Collection

Section 9 (4) of CGST Act, 2017 provided that tax on supplies by unregistered supplier to a registered person shall be paid on reverse charge basis.

A blanket exemption from payment of tax under RCM under above Section was brought in effect from 1-7-2017 *vide* Notification No. 8/2017 – CT (Rate) but a proviso in the said notification restricted the exemption till aggregate value of supplies under Section 9(4) was up to ₹ 5,000/- in a day. Further, such proviso was omitted *vide* Notification No. 38/2017- CT(Rate) dated 13-10-2017 and it was provided that the exemption contained in Notification No. 38/2017- CT(Rate) after omission of proviso (that means the blanket exemption) shall apply to all registered persons till 31-3-2018 which was further deferred till 30-9-2019.

Now all such exemptions in respect of RCM in respect of supplies from unregistered persons have been withdrawn with effect from 1st February 2019. The notifications have been rescinded since the section for such levy itself has been amended w.e.f. 1-2-2019 and there is no need of such exemption notifications now.

Post amendment, Section 9(4) of CGST Act reads as under:

(4) The Government may, on the recommendations of the Council, by notification, specify a class of registered persons who shall, in respect of supply of specified categories of goods or services or both received from an unregistered supplier, pay the tax on reverse charge basis as the recipient of such supply of goods or services or both, and all the provisions of this Act shall apply to such recipient as if he is the person liable for paying the tax in relation to such supply of goods or services or both.

Now RCM on supplies from unregistered persons shall be applicable only on a specified class of registered persons in respect of specified categories of goods or services, as notified from Government.

Drawing power from said section, certain notifications have been issued on 29th March 2019[2] which have huge implications on the real estate sector.

Section 25 – Procedure for registration

Separate registration for SEZ unit

A new proviso has been inserted under Sec. 25 to provide that a person having a unit in SEZ or being a SEZ developer shall have to apply for a separate registration, as distinct from his place of business located outside the SEZ in the same State or Union territory.

Earlier provision for separate registration of a SEZ unit or SEZ developer was only prescribed under Rule 8 of CGST Rules but there was neither any mandate nor any power to prescribe such mandate for separate registration under the Act.

Separate registration for multiple places of business instead of business verticals

The concept of business verticals has been removed from GST law and now place of business wise registration can be taken. Section 25(2) of CGST Act, 2017 provides that a person seeking registration under this Act shall be granted a single registration in a State or Union territory. As per an earlier proviso to this section, multiple business verticals may be granted a separate registration only for a separate business vertical and business verticals had to be justified as per scope of the term defined in Sec. 2(18) of CGST Act, 2017.

Following proviso has been substituted for the earlier proviso to Section 25(2):

Provided that a person having multiple places of business in a State or Union territory may be granted a separate registration for each such place

2 Notification No 3/2019-CT (Rate), 4/2019-CT(Rate) & 7/2019-CT(Rate) [All dated 29.03.2019]

of business, subject to such conditions as may be prescribed.

Also, definition of business vertical under Section 2(18) has been omitted.

Hence multiple places of business may now take separate registration for each place of business subject to following conditions prescribed in Rule 11 of CGST Rules, 2017:

(a) such person has more than one place of business as defined in clause (85) of section 2;

(b) such person shall not pay tax under section 10 for any of his places of business if he is paying tax under section 9 for any other place of business;

Explanation for clause (b) – Where any place of business of a registered person that has been granted a separate registration becomes ineligible to pay tax under section 10, all other registered places of business of the said person shall become ineligible to pay tax under the said section.

(c) All separately registered places of business of such person shall pay tax under the Act on supply of goods or services or both made to another registered place of business of such person and issue a tax invoice or a bill of supply, as the case may be, for such supply. [Cross Charge]

A registered person opting to obtain separate registration for a place of business shall submit a separate application in FORM GST REG-01 in respect of such place of business.

Further Rule 41A has been inserted is CGST Rules 2017 to prescribe procedure for Transfer of credit on obtaining separate registration for multiple places of business within a State or Union Territory for a person who intends to transfer, either wholly or partly, the unutilised input tax credit lying in his electronic credit ledger to any or all of the newly registered place of business. **FORM GST ITC-02A** shall be furnished within 30 days from obtaining such separate registrations.

The Input Tax Credit shall be transferred to the newly registered entities in the ratio of the value of assets held by them at the time of registration and 'value of assets' means the value of the entire assets of the business whether or not Input Tax Credit has been availed thereon.

The transferee shall accept the details furnished by transferor on portal and the unutilised input tax credit specified in **FORM GST ITC-02A** shall be credited to his electronic credit ledger upon such acceptance.

The given amendment allows the entities dealing in common business product but having different premises in a state with separate accounting, compliance and business teams to undertake GST compliance and liability independently which shall be consistent with their business setup.

The above amendment will also resolve issues faced by manufacturing units in special areas where scheme of budgetary support under GST regime was notified by Department of Industrial Policy & Promotion to grant certain amount of refund of tax paid through ECL of eligible unit only. Where one unit in a state was eligible and the other was not, identification of tax paid for one unit out of total debit through ECL of a GSTIN was difficult. Separate registrations for such units having separate place of business will resolve the issue.

An issue which may arise post amendment is that now separate registration cannot be obtained for separate business verticals until and unless both are operated from separate place of business. Even the separate registrations already granted for separate

business verticals operated at same place of business may face controversies.

Section 29 – Cancellation of registration

Suspension of registration

Provisions have been inserted in Section 29 for suspension of registration for a prescribed period during pendency of the proceedings relating to cancellation of registration.

Rule 21A has been inserted in CGST Rules for suspension in following manner:

- Registration shall be deemed to be suspended from the date of submission of the application or the date from which the cancellation is sought, whichever is later, pending the completion of proceedings for cancellation of registration under Rule 22.
- Proper officer may suspend the registration of such person with effect from a date to be determined by him, pending the completion of the proceedings for cancellation of registration under Rule 22.
- During suspension, the registered person shall not make any taxable supplies and shall not be required to furnish any return under Section 39.
- The suspension of registration shall be deemed to be revoked upon completion of the proceedings by the proper officer under Rule 22 with effect from the date on which the suspension had come into effect

Section 34 – Credit and debit notes

Pre-amendment, Section 34(1) and 34(3) and rules made thereunder, mandated an registered person to issue one Credit Note or Debit Note against a unique Tax Invoice to carry the adjustment in tax liability. Such requirement posted an undue hardship in all those cases where a supplier had to pass on a pre-decided discount on supplies made in a conventional manufacturer-distributor-retailer model. Since each Credit Note was required to be linked to a single tax invoice, it increased the cost, volume and complexity of accounting. It was ultimately leading to a situation wherein Credit Note under Section 34(1) was not being prepared and thus due to this, the supplier was not allowed to reduce his output tax liability in compliance of Section 15(3) [regarding adjustment in transaction value for post supply discount].

To overcome such hardship, the said sections have been amended to allow the issue of consolidated credit or debit notes with respect to multiple invoices issued during a financial year.

Also, Rule 53(1A) has been inserted to provide that a credit or debit note as per Section 34 shall contain following particulars which *inter alia* includes

(g) **Serial number(s) and date(s) of the corresponding tax invoice(s)** or, as the case may be, bill(s) of supply.

Such change shall remove the hardship caused where credit or debit notes had to be issued for price revision or passing discounts in respect of a large number of invoices issued during a period.

Although a change on GST portal is yet to be made to allow reporting of such consolidated credit or debit notes without linking to one specific invoice already reported.

Section 79 – Recovery of tax

Section 79 empowers a proper officer to recover dues from any other person and the

term 'person' is defined under Section 2(84) of CGST Act, 2017 which indicates separate legal entities. By adding an explanation to this section to include distinct persons under Section 25(4) or 25(5) in the word person, the power of proper officer has been enhanced to enable recovery from distinct persons of a registered person.

Thus with given amendment now recovery of tax due can be made against a branch office of a registered person which may be in the same state or in a different state having separate registration. It may lead to a situation where tax is due from a GSTIN of a company in State A and refund is due to GSTIN of same company in State B, then, jurisdictional officer of State A may ask the jurisdictional officer of State B to appropriate due refund for tax liabilities as due in State A of the same company.

Section 107 – Appeals to Appellate Authority

For filing an appeal before the First Appellate authority, a pre-deposit equal to 10% of the disputed demand is required for filing the appeal. However there was no upper monetary cap for such pre-deposit.

Now, the maximum limit of pre-deposit for filing an appeal to appellate authority has been capped at ₹ 25 crore.

Section 112 – Appeals to Appellate Tribunal

For filing an appeal before the second appellate authority, a pre-deposit equal to 25% of the disputed demand is required for filing the appeal. However there was no upper monetary cap for such pre-deposit.

The maximum limit of pre-deposit for filing an appeal to appellate authority has been capped at ₹ 50 crore.

Section 129 – Detention, seizure and release of goods and conveyances in transit

The time limit for the person transporting any goods or the owner of the goods to pay tax and penalty under Section 129(1) has been increased from 7 days to 14 days and further proceedings under Section 130 [For confiscation of goods or conveyances and levy of penalty] can only be initiated thereafter.

Section 143 – Job work procedure

The inputs or capital goods sent on job work may be either brought back to its own premises or may be further supplied from the premises of job worker by the principal within a period of one year and three years respectively. Such time limit was fixed and no discretionary power was available with proper officer to extent the same in genuine cases.

Commissioner has now been empowered with discretionary powers to extend the time limit for return of inputs or capital goods sent to job worker by one additional year for inputs and additional two years for capital goods.

There are certain job work processes such as fabrication/manufacture of huge machineries or vessels, etc., which require longer duration of time for completion and the implications under law for not returning inputs or capital goods within such time limits are huge. Hence considering the business exigencies, The aforesaid amendment relaxes legal position by providing discretion to the authorities to extend the timeline.

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CA Parimal Kulkarni & CA Yatish Vernekar

Significant Law Amendments in CGST Act (Part II) and IGST Act

Amendments in Sections 16, 17, 49, 49A, 49B and 140 of CGST Act; Amendments in Section 2, 5, 12, and 13 related to IGST Act
SIGNIFICANT GST AMENDMENTS – THE SOONER THE BETTER

"Plans are only good intentions unless they immediately degenerate into hard work."

— Peter Drucker

Background

After more than a decade of research, the model GST law was placed in public domain in June, 2016. Thereafter, in July 2017, immediately after implementation of the mammoth GST Legislation is when the actual effects of good intentions started to throw up results – some expected, many unexpected. According to Guy Kawasaki "A good idea is about ten per cent and implementation and hard work, and luck is 90 per cent". Further as is said the proof of pudding is in the eating. Over the last two years continuous hard work has been put in not only by the GST council and the Government but by the industry as well to make this legislation work. When both industry and the Government want to achieve the same goal, there is no way that GST will not succeed but ***time is of the essence***. In this article our focus is on some significant GST amendments in Sections 16, 17, 49, 49A, 49B and 140 of CGST Act and Amendments in Sections 2, 5, 12, and 13 related to IGST Act. Let us approach them one by one:

1. Bill-to-Ship to in Services

One of the conditions for eligibility of input tax credit (ITC) under section 16 is that the registered person should have received the goods, services, or both. There was an explanation that, if any other person on the directions of the registered person receives "goods", the ITC is eligible to the registered person. However, there was no such provision in case of services. From 1st February, 2019 this explanation has been substituted which now allows ITC even if services are delivered by the supplier to recipient or any other person on the direction of the said registered person. This amendment

is most beneficial for those service providers who outsource services or sub-contract services like warranty services, etc. The question arises what happens to the period from 1st July, 2017 till 31st January, 2019. In the view of the authors, even during this period, ITC should be available as deemed receipt of services, as services are intangible in nature. However, if the lawmakers provided more clarity, a substantial litigation is avoidable on this procedural infraction ground, if any.

2. Extension of ITC entitlement

This is one of the most talked about amendment in the GST law through insertion of a provision *vide* removal of difficulty order[1].

a. *Vide* this proviso a registered person was granted an extension in his entitlement to take input tax credit. (Here we are not getting into the issue whether GSTR-3B can be considered as "THE" return u/s. 39 as that would make for an article/ essay itself). The earlier due date was 25th October, 2018[2] being GSTR-3B due date. *Vide* the insertion of the proviso such entitlement of ITC was extended till 23rd April, 2019[3]. The extension was in respect of any invoice or invoice relating to such debit note for supply of goods or services or both made during the financial year 2017-18, the details of which have been uploaded by the supplier u/s. 37(1) till the due date of furnishing of details for March 2019 u/s. 37(1).

b. Section 37(1) speaks about filing details of outward supplies in Form GSTR-1. Due date being 30th April, 2019 for quarterly returns (Jan. 2019 to Mar. 2019) and 13th April, 2019 for March 2019 GSTR-1 returns. Thus, the way the proviso is worded, it appears that the original due date relating to the period of Sept. 2018 has not be fully extended. Once the details are filed in GSTR-1 by the supplier, the recipient is expected to see them in Form GSTR-2A. The registered person will have taken ITC of those inward supplies which are received by him and eligible. This gives rise to four situations. A registered person has taken credit for FY 2017-18 before the due date i.e. 25th October, 2018. This amount is either appearing in 2A or not appearing in 2A. He has taken further credit for FY 2017-18 not taken earlier before 23rd April, 2019. This amount may or may not be appearing in 2A. Based on the plain reading of the proviso, it appears that those credits which are taken up to 23rd April, 2019 and appearing in 2A only will be eligible.

c. The rest of the credits, even if eligible will not be available and shall lapse. The tax may have been paid in 3B while the GSTR1 may not have been filed by the supplier or vice versa. The GSTR1 may have wrongly showed the amount as B2C instead of B2B. All these issues and more are open but notices have started demanding why the ITC as per 3B is higher than the ITC as per 2A and why the difference should not be demanded for reversal with interest and penalties. All this for no fault of the hapless recipient who has become the victim of this process. For sure, a series of litigations are expected on this aspect. Further, not

1. Order No. 02/2018-Central Tax dated 31-12-2018
2. The revised due date of furnishing of the return under section 39 for the month of September, 2018 (GSTR-3B)
3. The revised due date of furnishing of the return under section 39 for the month of March, 2019 (GSTR-3B)

activating GSTR-2 and GSTR-3 have not granted the recipient an option to submit the details of invoices in his hand to substantiate his claims of ITC. Substantive benefits should not be denied for procedural deficiencies. The law is new and the Government itself is expected to provide relief to industry. The concept of substance over form should prevail. Further, the recipient cannot be thrust upon with conditions, which are impossible to perform.

3. Apportionment of Credit and Blocked Credits

The next set of important amendments are in section 17.

a. Explanation has been added to section 17(3). The essential objective achieved through this explanation is that no credit reversal will be required in cases falling under Sch III – including High Seas Sales, Merchant Trading, etc except those related to sale of land and, subject to clause (b) of paragraph 5 of Schedule II, sale of building. However, this explanation has been made with effect from 1st Feb. 2019. The issue that remains open as to what happens to those transactions for the period from July 1, 2019 till 31st January, 2020. For example, in case of warehoused goods, first there was a Circular No. 46/2017-Customs dated 24th November 2017 which approved double taxation. This circular is still active for that period before clarification was issued *vide* circular 3/1/2018-IGST dated 25th May, 2018. This circular clarified that integrated tax shall be levied and collected at the time of final clearance of the warehoused goods for home consumption. However, the circular stated that the it would be applicable on or after the 1st April, 2018. Amendment in Section 3(8A) of the Customs Tariff Act, 1975 was carried out on 29th March, 2018. The questions regarding whether these transactions are non-taxable supply or not a supply at all for the period July 1, 2019 till 31st January, 2019 remain unanswered. In the case of M/s. BASF India Ltd. (TS-275-AAR-2018-NT), the AAR Maharashtra ruled that High Seas Sales transaction are non-taxable supply and hence covered as "exempt supply". Further, they have also ruled that reversal of ITC is necessary. This will have implication on transactions for the period prior to 1st Feb. 2019. The AAR Kerala in the case of Synthite Industries Ltd., stated the applicant is neither liable to GST on the sale of goods procured from China and directly supplied to USA nor on the sale of goods stored in the warehouse in Netherlands, after being procured from China, to customers, in and around Netherlands as the goods are not imported into India at any point. Thus, merchant trading transactions have been held to be "not a supply at all" under GST. In the humble view of the authors, even High Seas Sales transaction is "not a supply at all" under GST. Merely its inclusion in Schedule III and adding of explanation under section 17(3) does not mean otherwise for the period prior to 1st February 2019.

b. Section 17(5) primarily provided for blocked credits. This whole sub-section has been substituted with effect from 1st February 2019. The credit restriction on motor vehicles is narrowed to only those motor vehicles that are meant for transportation of persons, that too having seating capacity of less than 13 seats including the driver. In other words, there is no blocked credit for motor vehicles that are either having 13 seater or more, or those that are not

meant for transportation of persons. Pre-amendment, credit blockage issues were faced by dumpers, work-trucks, fork-lift trucks and other special purpose motor vehicles. ITC is also allowed for motor vehicles used for transportation of money for or by a banking company or a financial institution. Money being excluded from the definition of goods there were issues faced here that are also resolved now.

c. One may like to draw special attention to usage of two different phrases 'transportation of persons' and 'transportation of passenger' in the amended law. While the amendment has resulted in restriction only for motor vehicles meant for transportation of persons, there is a clear exception when the vehicle is used for transportation of passengers. The reason to restrict credit for motor vehicles for transport of persons is very clearly the element of personal usage, while the exception carved out using the word 'passenger' could be for the commercial usage of the vehicle. It gets interesting to note that the word "passenger" is neither defined in the GST Act nor in the Motor Vehicles Act 1988. In the view of the authors the usage of the word passenger may be tilted towards referring to a person travelling in a hired vehicle typically for a fare. This understanding would also synchronise with the reasoning that the legislature may have had while carving out the exception. Hence, appropriate registration under the RTO laws would be of utmost importance to justify the same.

d. The amendment now also raises question on permissibility of certain types of cross-vehicles having an enclosed 4 door cabin and also an open cargo area namely Isuzu D max, Mahindra Scorpio Getaway, Tata Xenon which have elements of both, two rows for passenger transport as well as a goods trolley. Will such vehicles be categorised as for "transport of persons" is a question that could be deeply deliberated based on the facts of the case.

e. The substituted sub-section makes a restriction on vessels and aircraft when these are not used for further supply of vessels and aircrafts, transportation of passengers, training on navigation/ flying, transportation of goods.

f. More importantly, sub-section (ab) now aligns itself to above criteria and credit on vehicle insurance, servicing, repair is also permitted only for the vehicles/vessels/ aircrafts that meet criteria specified. In the pre-amended law the words "In respect of motor vehicles" were interpreted to only refer to purchase of motor vehicle and ITC on repairs/servicing was understood as available as long as tests in section 16 were met. To this extent there will be a restriction on ITC w.e.f. 1st Feb. 2019. While unrestricted credit on such servicing, repairs and insurance continues to a manufacturer of motor vehicles or general insurance companies the legislative intent on blockage for others does not appear to be in the course or furtherance of business causing loss to the industry.

g. 17(5)(b) is also amended wherein all the items listed therein (namely, food & beverages, outdoor catering, beauty treatment, health services, cosmetic and plastic surgery, leasing renting and hiring of motor vehicles (except for specified purposes), life insurances & health insurance, membership of a club,

health and fitness centre, travel benefit extended to employees on vacation such as leave or home travel concession) are now permissible for ITC if it's obligatory for an employer to provide these to their employees under any law for the time being in force or if they are part of outward supply.

h. One may note that the phrase "Rent-a-Cab" no longer finds place in the amended law. This had created interpretational issues previously as the phrase was not defined in the GST Act.

i. In case of the items listed above (other than Membership of a club, health and fitness centre, employee vacation travel benefits) ITC would also be available if an inward supply of such goods or services or both are used for providing outward supply of the same category or as an element of mixed or composite supply.

4. Sequence of Utilisation of ITC

The two new sections 49A and 49B have been inserted *vide* the Amendment Act and the order and manner of utilisation of credit has been given a new sequence.

a. The objective was to make sure the assessee used up the IGST before CGST and SGST. The wording of section 49A resulted in an interpretation that Central tax credit was left unutilised whereas State tax had to be paid in cash creating huge working capital cashflow blockage in the process. As a remedy, Rule 88A was inserted in GST rules which gave relief from the above difficulty and also to achieve the condition that entire IGST credit is completely exhausted first before utilisation of CGST/SGST. Circular No. 98/17/2019-GST dated the 23rd April 2019 is also issued with relevant examples. It is clarified that after the insertion of the said rule, the order of utilisation of input tax credit will be as per the order (of numerals) given below:

Input tax credit on account of	**Output liability on account of Integrated tax**	**Output liability on account of Central tax**	**Output liability on account of State tax/Union Territory tax**
Integrated tax	(I)	(II) – In any order and in any proportion	
(III) Input tax Credit on account of Integrated tax to be completely exhausted mandatorily			
Central tax	(V)	(IV)	Not permitted
State tax/Union Territory tax	(VII)	Not permitted	(VI)

b. Further as per the circular, the common portal supports the order of utilisation of input tax credit in accordance with the provisions before implementation of the provisions of the CGST (Amendment) Act i.e., pre-insertion of Section 49A and Section 49B of the CGST Act. Therefore, till the new order of utilisation as per newly inserted Rule 88A of the CGST Rules is implemented on the common portal, taxpayers may continue to utilise their input tax credit as per the functionality available on the common portal. Thus, we now have a situation where the Act and Rules say one thing while the portal says another. The common portal is an important aspect of this whole process of implementation of law.

5. Transition of Credit of Cess to GST

Section 140(1) – A retrospective amendment has been made to provide that CENVAT Credit on only "Eligible duties" can be availed. Transition to GST of Credit of Education Cess, Secondary and Higher education cess and Krishi Kalyan Cess (Cess Credit as is commonly called) has been denied retrospectively w.e.f. 1st July, 2017. Further CVD u/s. 3(1) of Customs Tariff Act has been excluded from eligible duty. The amendment uses phrases such "shall always have been deemed to be omitted". This has been done in spite of the fact that the Government always stated that these would be subsumed in GST. If service tax, excise duty were subsumed in GST, cess too should have been allowed to be subsumed in GST. Businesses should not be asked to bear the cost of the cess. Those who have claimed the credit may still choose to appeal against this as this matter is already in litigation. Even if there is reversal required, the same should be allowed to be made without interest liability due to retrospective amendment carried out.

6. Export of services but payment in Indian Rupees

Where the payment for export of services is received in Indian Rupees and such receipt is permitted by the RBI the same shall be sufficient to satisfy criteria for export of services. An amendment in the conditions for export of services has been carried out in the IGST Act with effect from 1st February, 2019. **This amendment may also provide specific relief to export of services to Nepal/Bhutan which though was permitted by RBI was causing hindrance in getting qualified as exports under GST.** In our view, this should also be allowed for the period prior to the amendment. Under service tax regime too, there have been cases where the same has been upheld. In case of Sun-Area Real Estate Pvt. Ltd. versus Commissioner of service tax, Mumbai 2015 (5) TMI 885 CESTAT Mumbai as well as AGM India Advisors pvt ltd versus Commissioner of Service tax, Mumbai 2015(10)TMI 2411 CESTAT Mumbai the Tribunal had held that such transaction was eligible for being treated as an export.

7. Non-Taxable Online Recipient

GST law has carved out special provisions for taxing OIDAR (Online Information Database Access & Retrieval Services) services which have been placed in section 14 of the IGST Act. In a situation where such services are received by unregistered persons, a problem is who is liable to pay GST since supplier is located in non-taxable territory and recipient located in India may not be registered **(Non-taxable Online Recipient)**. So this type of a situation is taken care of by making the supplier liable for paying IGST when such services are provided to non-taxable online recipient. The definition of Non-taxable online recipient in Section 2(16) covers Governmental authority in its scope. The explanation below Section 2(16) that defines Government authority has been now widened to cover establishments/authorities that carry out any functions entrusted to a panchayat under Article 243G. Thus, the Foreign Service provider will be required to pay GST in such cases as well.

8. Section 5(4)

The objective to amend Section 5(4) of the Act is to empower the Central Government to notify selected classes of registered persons to pay tax on reverse charge basis in respect of receipt of supplies of certain specified Categories of goods or services or both from unregistered suppliers. Earlier, the section was suspended several times to a future date *vide* various notifications.

The first notification under this section has been released on 29th March 2019 bearing No. 7/2019 Integrated tax (Rate) I.R.O. the Builder-promoters liability to pay tax on certain supplies procured from unregistered vendors.

9. Place of Supply of Services in case of transportation of goods

A provisio has been now added to IGST section 12(8) which states "Provided that where the transportation of goods is to a place outside India, the place of supply shall be the place of destination of such goods. Thus, place of supply of goods transportation services shall be same as destination of the goods". If the destination is outside India, the goods transportation services too may qualify for export (subject to other conditions) even if both the location of supplier and recipient is in India. This is a welcome move.

10. Treatment or process on foreign goods

Place of supply restrictions have been further relaxed and are extended beyond repairs of goods. From 1st February 2019 treatment or process carried out on any goods temporarily imported and re-exported will also qualify as exports. Earlier this proviso covered only repairs. By including treatment or process, a big boost is granted to those industries that carry out treatment or processes on goods, which are temporarily brought into India and re-exported. For example, services provided by job worker to foreign parties, who send their material, temporarily to India, will now be treated as export of services since place of supply of their services shall be outside India.

11. Procedure for furnishing return and availing input tax credit (Section 43A)

On one hand, we have the GST council representing the Central and State Governments, which have come out with first amendment to the Act, 19 months after the implementation of the law. Then we have a common GST portal, which needs time to make changes to the functionalities to implement the changes or even to provide the initial requirements still pending to be implemented. Somewhere it needs to be understood that the industry is badly affected with this kind of ping-pong situation. Now there is new scheme of return filing which is expected to start sooner than later. Section 43A is going to regulate this process through the rules. A detailed feasibility study is necessary to ensure that working capital of business flows smoothly in this process. The industry (specifically the MSME sector) cannot wait for long in a circuitous position and needs urgent rectifications to the law, else it may breakdown causing huge loss to all.

While the amendments to the rules had started immediately from July 2017 itself, the first set of amendments to the GST Act were carried out only with effect from 1st February, 2019 (the Presidential assent was received in August, 2018). Though this is welcome, there are many pertinent issues like applicability of interest on Gross or Net liability, anti-profiteering provisions, taxation of land development rights, streamlining of records and returns and many more which need an early resolution for prosperous implementation of GST. As we are all aware, when industry thrives and blooms like a flower, then the Government can tax it like a honeybee.

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CA Umang Talati

Amendments in GST Rates, Exemptions & RCM (Goods/Services including exemptions)

GST collections rose to approx. ₹ 11.77 lakh crore for the FY April 2018 - March 2019. The Finance Ministry in a statement issued said that the monthly average GST revenue was 9.2% higher than the previous fiscal year.

The GST Council held 8 meetings during the FY 2018-19 (27th meeting held on 4th May 2018 to 33rd meeting held on 24th February 2019). In these meetings, the council discussed various items in the agenda ranging from e-Way bill, the new system of returns filing, review of the revenue position and considered representations received from the trade and industry for the applicability of GST on certain types of transactions and clarificatory circulars issued in this regard to the refitment of GST rates on various goods and services.

In this article, we draw your attention to the major rate changes in respect of goods as well as services including RCM during the FY 2018-19.

Readers are also advised to read the exact notifications while interpreting the same.

The article is divided into 2 parts:

A. GST Rates & Exemptions

B. RCM

A. Important Amendments to GST rates notifications

During the financial year 2018-19 Notification No. 13/2018 to 21/2018- CT dated 26th July 2018 was issued amending the rate of tax on certain goods and services with effect from 27-7-2018 and Notification Nos. 24/2018 to 30/2018- CT dated 31st December 2018 were issued amending the rate of tax on certain goods and services with effect from 1-1-2019.

The discussion is done broadly into categories so as to facilitate reading and future reference.

1. Goods

The exercise majorly was to reduce the rate of tax. However, there were cases where description of goods or the HSN code therein were amended/corrected.

1.1 Amendments w.e.f. 27-7-2018

CONSUMER GOODS (w.e.f. 27-7-2018)				
Rate reduction from 28% to 18%/New insertions	**Rate reduction for others – 5%/New insertions**	**Rate reduction for others – 12%/New insertions**	**Rate reduction for others – 3%/ New insertions**	**Rate reduction – Exempted/new insertions**
• Refrigerators, freezers and other refrigerating or freezing equipment • Washing machines • Vacuum Cleaners • Shavers, hair clippers etc. • Electric instantaneous or storage water heaters and immersion heaters, hair dryer etc. • Television set (including LCD or LED television) of screen size not exceeding 68 cm	• Handmade carpets and other handmade textile floor coverings • Bangles, beads and small ware • Footwear having a retail sale price not exceeding ₹ 1000 per pair (changed to sale value not exceeding ₹ 1000 w.e.f. 1-1--2019)	• Handbags including pouches and purses; jewellery box • Tableware and kitchenware of clay and terracotta, other clay articles	• Handmade imitation jewellery	• Sanitary towels (pads) or sanitary napkins; tampons • Deities made of stone, marble or wood
AUTOMOBILE INDUSTRY (w.e.f. 27-7-2018)				
Rate reduction from 28% to 18%/New insertions	**Rate reduction for others – 5%/New insertions**	**Rate reduction for others – 12%/New insertions**	**Rate reduction for others – 3%/ New insertions**	**Rate reduction – Exempted/new insertions**
• Special purpose motor vehicles like fire fighting vehicles, concrete-mixer lorries, road sweeper lorries • Works trucks, self-propelled, not fitted with lifting or handling equipment etc. and its parts • Trailers and semi-trailers; other vehicles, not mechanically propelled; parts thereof, animal drawn vehicles	• Ethyl alcohol supplied to Oil Marketing Companies for blending with motor spirit	• Fuel Cell motor vehicles		

CONSTRUCTION INDUSTRY (w.e.f. 27-7-2018)				
Rate reduction from 28% to 18%/New insertions	**Rate reduction for others – 5%/ New insertions**	**Rate reduction for others – 12%/New insertions**	**Rate reduction for others – 3%/ New insertions**	**Rate reduction – Exempted/new insertions**
• Paints and varnishes (including enamels and lacquers) based on synthetic polymers or chemically modified natural polymers - dispersed or dissolved in a non-aqueous/aqueous medium • Other paints and varnishes (including enamels, lacquers and distempers) • Non- refractory surfacing preparations for facades, indoor walls, floors, ceilings or the like		• Bamboo Flooring		
TEXTILE INDUSTRY (w.e.f. 27-7-2018)				
Rate reduction from 28% to 18%/New insertions	**Rate reduction for others – 5%/ New insertions**	**Rate reduction for others – 12%/New insertions**	**Rate reduction for others – 3%/ New insertions**	**Rate reduction – Exempted/new insertions**
	• Handmade lace • Hand-woven tapestries • Hand-made braids and ornamental trimming in the piece	• Handmade/ hand embroidered shawls of sale value exceeding ₹ 1000 per piece		

	• Hand embroidered articles • Handmade/ hand embroidered shawls of sale value not exceeding ₹ 1000 per piece			
OTHERS (w.e.f. 27-7-2018)				
Rate reduction from 28% to 18%/New insertions	**Rate reduction for others – 5%/ New insertions**	**Rate reduction for others – 12%/New insertions**	**Rate reduction for others – 3%/ New insertions**	**Rate reduction – Exempted/new insertions**
	• Fertilizer grade phosphoric acid • Coir articles • Coir mats, matting, floor covering and handloom durries • All goods [other than coconut coir fibre] including yarn of flax, jute, other textile bast fibres, other vegetable textile fibres; paper yarn, including coir pith compost put up in unit container and bearing a brand name	• Handcrafted candles • Wooden frames for painting, photographs, mirrors etc • Carved wood products, art ware/decorative articles of wood (including inlay work, casks, barrel, vats) • Statuettes & other ornaments of wood, wood marquetry & inlaid, jewellery box • Hand paintings drawings and pastels		• Coir pith compost other than those put up in unit container and bearing a registered brand name • Vegetable materials, for manufacture of jhadoo or broom sticks

1.2 Amendments w.e.f. 1-1-2019

CONSUMER GOODS (w.e.f. 1-1-2019)				
Rate reduction from 28% to 18%/New insertions	**Rate reduction for others – 5%/New insertions**	**Rate reduction for others – 12%/New insertions**	**Rate reduction for others – 3%/ New insertions**	**Rate reduction – Exempted/new insertions**
• CCTVs, television cameras, digital cameras and video camera recorders etc. • Television set (including LCD or LED television of screen size not exceeding 32 inches). • Computer monitors not exceeding 32 inches, set top Box for Television (TV). • Video game consoles, articles of funfair, table or parlour games such as pintables, billiards etc.	• Footwear of sale value not exceeding ₹ 1000 per pair • Walking-sticks including seat sticks.			• Vegetables (uncooked or cooked by steaming or boiling in water), frozen • Vegetables provisionally preserved – unfit for immediate consumption
AUTOMOBILE INDUSTRY (w.e.f. 1-1-2019)				
Rate reduction from 28% to 18%/New insertions	**Rate reduction for others – 5%/New insertions**	**Rate reduction for others – 12%/New insertions**	**Rate reduction for others – 3%/ New insertions**	**Rate reduction – Exempted/new insertions**
• Retreaded or used pneumatic tyres of rubber, tyre treads and tyre flaps etc.	• Parts and accessories of carriage for disabled persons			
CONSTRUCTION INDUSTRY (w.e.f. 1-1-2019)				
Rate reduction from 28% to 18%/New insertions	**Rate reduction for others – 5%/New insertions**	**Rate reduction for others – 12%/New insertions**	**Rate reduction for others – 3%/ New insertions**	**Rate reduction – Exempted/new insertions**
	• Marble & travertine, crude or roughly trimmed.			

2. Services

In terms of services, there were very few but important changes in the rate notifications.

2.1 Hotel Accommodation: Shift from 'declared tariff' to value of supply

The Hotel industry was given major relief by determining the rate of tax on accommodation service on transaction value instead of declared tariff. Prior to the amendment on 27-7-2018, the slab rates for accommodation services were based on declared tariff. Besides the fact, that there was a lot of difference of opinions and concerns regarding what constitutes declared tariff (from the different sources where the tariff is declared as also in respect of the inclusions and exclusions while calculating declared tariff). This was a welcome change for the hotel industry. The revised rates are tabulated as under:

Value Of Accommodation Service (instead of declared tariff)	Effective Rate of Tax (%) w.e.f. 27-7-2018
– Below INR 1,000 per unit per day.	Nil
– INR 1,000 and above but less than INR 2500 per unit per day.	12
– INR 2500 and above but less than INR 7,500 per unit per day.	18
– INR 7500 and above per unit per day.	28

2.2 Supply of food by IRCTC/Indian Railways in train or at platform

A new Entry was also inserted in the rate notification w.e.f. 27-7-2018 for supply of food by IRCTC/ Indian Railways or their licensees, whether in trains or at platforms. Such supply will be regarded as supply of services. The same is in direct contradiction to a the ruling given in the advance ruling by the Delhi Authority for Advance Ruling in the case of M/s. Deepak & Co. (02/DAAR/2018) dated 28th March, 2018 which held that the supply of food and beverages (cooked/MRP/packed) by the applicant to the passengers/general public at the rates fixed by the Indian Railways/IRCTC at food stalls at Railway platforms does not have any element of service and hence the same shall be considered as pure supply of goods and GST shall be charged on individual items at their respective applicable rates.

2.3 Services of Multi-modal transport of goods

The Government prescribed w.e.f. 27-7-2018 the GST rate of 12% with full ITC under forward charge for composite supply of multimodal transportation.

Multi-modal transport is also defined in the notification. It means carriage of goods, by at least two different modes of transport from the place of acceptance of goods to the place of delivery of goods by a multi-modal transporter. The mode of transport of goods can be by road, rail, air, inland waterways, seas etc. However, it is specified that the person must undertake such a contract as a principal who assumes responsibility of performance of the contract and not as an agent of the consignor or consignee of goods or of the carrier participating in the multi-modal transport. He must undertake to perform the contract against freight only.

2.4 Services by way of transportation of goods for export from customs station

The Government extended the exemption granted on outward transportation of all goods by air and sea by another one year i.e. up to 30th September, 2019 as relief to the exporter of goods by amending the rate notification.

2.5 Supply of e-books

Supplies consisting of only e-books was inserted in the rate notification w.e.f. 27/07/18 as a green initiative at 5%.

2.6 Supply of renewable energy devices & parts for their manufacture along with service by way of construction or engineering or installation or other technical service

If renewable energy devices such as bio-gas plant, solar power based devices, Solar power generating system, wind mills, wind operated electricity generator (WOEG), waste to energy plants/devices, ocean waves/tidal waves energy devices/plants are supplied along with the construction/engineering or installation provided in relation to such devices then, the government through the rate notification has provided for a deemed valuation mechanism in terms of such composite supply of renewable energy devices. With effect from 1-1-2019, it is assumed that the value of supply of goods for the purposes of such a composite supply shall be deemed as 70% of the gross consideration charged for all such supplies, and the remaining 30% of the gross consideration charged shall be deemed as service chargeable to 18%.

Composite supply of renewable energy devices	Deemed as supply of	Effective Rate of Tax (%) w.e.f. 1-1-2019
– 70% of gross consideration charged	Goods	5
– 30% of gross consideration charged	Service	18

2.7 Services by way of admission to exhibition of cinematograph films

The Government reduced the rate of tax on admission to films from 28% w.e.f. 1-1-2019. Ticket prices below ₹ 100 would attract tax at 12% while above ₹ 100 would attract tax at 18%.

Ticket Prices	Effective Rate of Tax (%)
– INR 100 or less.	12
– Above INR 100	18

B. RCM

During the year 2018-19, few changes/clarifications were made to the existing services covered under reverse charge along with the introduction of 4 new services.

Category of Supply	Supplier of service	Recipient of Service	RCM w.e.f
Services supplied by individual Direct Selling Agents (DSAs) (other than a body corporate, partnership or LLP firm to bank/NBFCs)	Individual DSA other than a body corporate, partnership or LLP firm	A banking company or a NBFC - located in the taxable territory.	27-7-2018
Services provided by business facilitator (BF) to a banking company	Business facilitator (BF)	A banking company - located in the taxable territory	1-1-2019

Category of Supply	Supplier of service	Recipient of Service	RCM w.e.f
Services provided by an agent of business correspondent (BC) to business correspondent (BC).	An agent of business correspondent (BC)	A business correspondent - located in the taxable territory.	1-1-2019
Security services (services provided by way of supply of security personnel) - to a RP: Will not apply to[1] • Dept. of CG/SG/UT/ Local Auth/Govt Agency - has taken registration only for deducting TDS u/s. 51 and not for making a taxable supply of goods or services or • RP paying tax under Section 10 (Composition)	Any person other than a body corporate	A RP - located in the taxable territory.	1-1-2019
Explanations added in Notification No. 15/2018 CTR dt. 26-7-2018. "Renting of immovable property" means allowing, permitting or granting access, entry, occupation, use or any such facility, wholly or partly, in an immovable property, with or without the transfer of possession or control of the said immovable property and includes letting, leasing, licensing or other similar arrangements in respect of immovable property.			
It was also clarified in Notification No. 29/2018 CTR dt. 31-3-2018 that RCM Notifications in so far as they apply to the CG & SG, shall also apply to the Parliament and State Legislatures.			

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Great results are attained only by great patience, great curage, and great attempts.

— *Swami Vivekananda*

Unchaste imagination is as bad as unchaste action.

— *Swami Vivekananda*

CA Ashit Shah

Amendments relating to Small Scale Suppliers (including changes in composition schemes, registration provisions, orders etc.)

In the process of preparation of GST law aimed to create a national market comprising of an organised sector across the country, the Government was well aware that this regime would result in various difficulties for small taxpayers. Accordingly, provisions for composition levy had been incorporated in this law aimed at smoothening the issues of small taxpayers. Further the scheme of composition levy and subsequent changes pertaining to same are discussed below:

Particulars	Composition Scheme for supply of goods and specified service	Composition Scheme for supply of goods or services or both
Applicable Date	1st July 2017	1st April 2019
Turnover Limit	Up to aggregate turnover of INR 1.50 Crores[1] w.e.f. 1-4-2019[2]	Up to aggregate turnover[3] of INR 50 lakh
Turnover limit in specified States[4]	Up to aggregate turnover of INR 75 lakh w.e.f. 1-4-2019[5]	No such separate limit for specified States
Maximum amount of turnover	INR 1.50 crore	INR 50 lakh
Threshold limit exemption of INR 20 lakh	Not available	Yes. But registration or intimation would be from 1st April 2019
Supply of service is eligible	Yes. Taxpayer may supply services of value not exceeding 10% of turnover in the immediately preceding financial year or INR 5 lakh, whichever is higher. This provision is applicable from 1-2-2019	Yes

1 INR 75.00 lakhs *vide* N. No. 08/2017 – Central Tax, dated 27-6-2017

2 Turnover limit enhanced to INR 1.50 crore *vide* N. No. 14/2019 – Central Tax, dated 7-3-2019

3 Value of supply of exempt services by way of extending deposits, loans or advances in so far as the consideration is represented by way of interest or discount, shall not be taken into account

4 Specified States are Arunachal Pradesh, Assam, Manipur, Meghalaya, Mizoram, Nagaland, Sikkim, Tripura and Himachal Pradesh.

5 Turnover limit enhanced to INR 75 lakh *vide* N. No. 14/2019 – Central Tax, dated 7-3-2019

Particulars	Composition Scheme for supply of goods and specified service		Composition Scheme for supply of goods or services or both
	through CGST Amendment Act, 2018. [N. No. 2/2019 – Central Tax, dated 29-1-2019]		
How to exercise option	Intimation in Form GST CMP-02, prior to the commencement of the financial year; and Furnish statement in Form GST ITC-03 within 60 days from the commencement of relevant financial year.		Intimation in Form GST CMP-02, by selecting category of registered person as "any other supplier eligible for composition levy" as listed at S. No. 5(iii) of the said Form, latest by 30-4-2019; and Furnish statement in Form GST ITC-03 within 60 days from the commencement of relevant financial year. Persons who want to avail this option at the time of registration, may do so by indicating the option at S. Nos. 5 & 6.1 (iii) of Form GST REG-01.
Effective date for Composition Levy.	i. In case of already registered person, who opts to discharge tax liability u/s. 10, effective date would be from beginning of financial year. ii. In case of person who had opted to discharge tax liability at the time of obtaining registration, effective date would be from date of registration.		i. In case of already registered person, he has to exercise option at the beginning of the financial year. ii. In case of person who had opted to discharge tax liability at the time of obtaining registration, effective date would be from date of registration. Circular No. 97/16/2019 – GST – Dated 5-4-2019.
Intimation to be filed every financial year.	No. There is no need to file fresh intimation every year.		No. There is no need to file fresh intimation every year.
Validity of Composition Levy	It shall remain valid till he satisfies all the conditions mentioned in S. 10 and Chapter II of CGST Rules.		It shall remain valid till he satisfies all the conditions mentioned in S. 10 and Chapter II of CGST Rules.
Rate of Tax[6]	Category of person	Rate of Tax	6%
	Manufacturer	1 % of turnover[7]	

6 Total Tax liability under Central and State GST

7 Substituted for 2% w.e.f. 1-1-2018 vide N. No. 01/2018 – CT, dated 1-1-2018

Particulars	Composition Scheme for supply of goods and specified service		Composition Scheme for supply of goods or services or both
	Supply of food or article for human consumption or Non-alcoholic drink	5% of turnover	
	Other suppliers	1% of taxable supplies of goods and services[8]	
Manufacturer of Notified goods not allowed to opt under scheme.	(i) Ice cream and other edible ice, whether or not containing cocoa (HSN 2105 00 00) (ii) Pan Masala (HSN 2106 90 20) (iii) All goods i.e., Tobacco and manufactured tobacco substitutes. (HSN 24)		(i) Ice cream and other edible ice, whether or not containing cocoa (HSN 2105 00 00) (ii) Pan Masala (HSN 2106 90 20) (iii) All goods i.e., Tobacco and manufactured tobacco substitutes (HSN 24)
Tax to be discharged under Reverse Charge Mechanism – Ss. 9(3) & 9(4)	Yes, such taxpayers are required to discharge tax liability, if any on such inward supply which attracts RCM provisions at applicable rate of tax.		Yes, such taxpayers are required to discharge tax liability, if any on such inward supply which attracts RCM provisions at applicable rate of tax.
Conditions to be fulfilled	i. Not engaged in supply of services except supply of food or article of human consumption or drink ii. Not engaged in supply of any goods which are not leviable to tax under this Act (e.g. Liquor, Specified Petroleum products) iii. Not engaged in making any inter-State outward supply of goods iv. Not engaged in making any supply of goods through an electronic commerce operator who is required to collect tax at source u/s. 52 v. Not manufacturer of such goods as may be notified. [S. 10(2) of CGST Act, 2017]		i. Aggregate turnover in the preceding financial year was INR 50 lakh or below ii. Not eligible to pay tax u/s. 10 iii. Not engaged in supply of any goods which are not leviable to tax under this Act (e.g. Liquor, Specified Petroleum products) iv. Not engaged in making any inter-State outward supply v. Not registered as casual taxable person or a non-resident taxable person vi. Not engaged in making any supplies through an electronic commerce operator who is required to collect tax at source u/s. 52 vii. Taxpayers have to discharge tax liability under RCM at the applicable rate of tax.

8 Substituted for the words "goods" w.e.f. 1-2-2019 *vide* N. No. 03/2019 – CT, dated 29-1-2019

Particulars	Composition Scheme for supply of goods and specified service	Composition Scheme for supply of goods or services or both
		viii. Where any registered person who has availed of input tax credit opts to pay tax under this notification, he shall pay an amount, by way of debit in the electronic credit ledger or electronic cash ledger, equivalent to the credit of input tax in respect of inputs held in stock and inputs contained in semi-finished or finished goods held in stock and on capital goods as if the supply made under this notification attracts the provisions of Section 18(4) of the said Act and the rules made thereunder and after payment of such amount, the balance of input tax credit, if any, lying in his electronic credit ledger shall lapse.[9] [N. No. 2/2019 – Central Tax (Rate), dated 7-3-2019]
Additional Conditions	i. Goods held in stock as on 1-7-2017 and opted to pay tax under this scheme, should not have been purchased – a. In the course of inter-State trade or commerce b. Imported from outside India c. Received from branch situated outside the State d. Agent or principal located outside State. ii. Goods held in Stock by him have not been purchased from an un-registered supplier and where purchased, has to discharge tax liability u/s. 9 (4) iii. He shall mention the words "composition taxable person,	i. The registered person shall issue, instead of tax invoice, a bill of supply as referred to in S. 31 (3) (c) of the said CGST Act with particulars as prescribed in rule 49 of CGST Rules, 2017. ii. The registered person shall mention the following words at the top of the bill of supply, namely: – 'taxable person paying tax in terms of N. No. 2/2019-Central Tax (Rate) dated 7-3-2019, not eligible to collect tax on supplies'.

9 Inserted *vide* N. No. 9/2019 – Central Tax Rate, dated 29-03-2019 w.e.f. 1-4-2019

Particulars	Composition Scheme for supply of goods and specified service	Composition Scheme for supply of goods or services or both
	not eligible to collect tax on supplies" at the top of the bill of supply issued by him. iv. He shall mention the words "composition taxable person" on every notice or signboard displayed at a prominent place at his principal place of business and at every additional place or places of business.	
Whether all persons under same PAN issued under Income-tax Act, 1961, have to mandatory opt under scheme	Yes	Yes
Collect tax from customer or client	No	No
Can avail Input tax credit on his inward supplies	No	No
Exit from the Scheme	Day on which his aggregate turnover during a financial year exceeds turnover limit as specified above or on non-compliance of any of the conditions specified in S. 10 and Rules made thereunder. Intimate in Form GST CMP-04 within 7 days of occurrence of such event.	Day on which his aggregate turnover during a financial year exceeds turnover limit as specified above i.e., INR 50 lakh. Intimate in Form GST CMP-04 within 7 days of occurrence of such event.
Withdrawal from Scheme	Intimate in Form GST CMP-04 before the date of such withdrawal; and Submit a statement in FORM GST ITC-01 containing details of the stock of inputs and inputs contained in semi-finished or finished goods held in stock by him on the date on which the option is withdrawn or denied, within a period of thirty days from the date from which the option is withdrawn.	Intimate in Form GST CMP-04 before the date of such withdrawal; and Submit a statement in FORM GST ITC-01 containing details of the stock of inputs and inputs contained in semi-finished or finished goods held in stock by him on the date on which the option is withdrawn or denied, within a period of thirty days from the date from which the option is withdrawn. Para-3 of Circular No. 97/16/2019 – CGST, dated 5-4-2019

Particulars	Composition Scheme for supply of goods and specified service	Composition Scheme for supply of goods or services or both
Issuance of Invoice	Issue Bill of Supply and he shall mention the words "composition taxable person, not eligible to collect tax on supplies" at the top of the bill of supply issued by him and it should contain details as provided under Rule 49.	Issue Bill of Supply and he shall mention the words 'taxable person paying tax in terms of N. No. 2/2019-Central Tax (Rate) dated 7-3.2019, not eligible to collect tax on supplies' at the top of the bill of supply issued by him and it should contain details as provided under Rule 49.
Returns	Quarterly Return in Form GSTR – 4 till 18th of the month succeeding such quarter and payment of tax have to be by debiting Electronic Cash Ledger. Rule 62 of CGST, Rules, 2017. This provision is applicable only till 22-04-2019. Quarterly Statement in Form GST CMP – 08, till 18th of the month succeeding such quarter w.e.f. 23-4-2019 *vide* N. No. 21/2019 – Central Tax, dated 23-04-2019.	Quarterly Statement in Form GST CMP – 08, till 18th of the month succeeding such quarter w.e.f. 23-04-2019 *vide* N. No. 21/2019 – Central Tax, dated 23-4-2019.
Annual Return	Form GSTR-9A on or before 31st December following the end of such financial year. This provision is applicable only till 22-04-2019. Form GSTR-4 on or before the 30th April following the end of such financial year. N. No. 21/2019 – Central Tax, dated 23-04-2019.	Form GSTR-4 on or before the 30th April following the end of such financial year. N. No. 21/2019 – Central Tax, dated 23-04-2019

It is interesting to note that when the person discharging tax pursuant to Section 10, violates any other conditions, viz. his turnover of goods had exceeded the prescribed threshold limit of INR 1.00 Crores in the month of October 2018 and this fact had been came under notice in the month of May 2019 then at present, GSTIN portal is not allowing such tax payers to withdraw out of the scheme because Rule 6(3) provides that an application in Form GST CMP-04 is to be made before the date of such withdrawal.

Conclusion

It appears that Government is making conscious efforts in making more and more simpler provisions for small tax payers so that lesser compliances ultimately lead to ease of doing business for them which is the essence of the day.

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CA Jayesh Gogri

Amendments relating to GST Refunds (including related Circulars)

1. Brief Introduction

The concept of 'refund' is very important in the GST regime. In the previous era, exporters were not supposed to claim refund generally. There were various forms based on which, exporters used to purchase goods without payment of tax/duty. For example, merchant exporters (trader exporters) were allowed to purchase goods without payment of Central Sales Tax (CST) / Value Added Tax (VAT) against 'H' form and without payment of Central Excise by issuing CT 1 certificates. Similarly, manufacturing exporters could procure duty-free raw materials against ARE forms. One of the objectives of introducing GST law was to reduce such forms and paperwork. Consequently, GST law was drafted in a manner whereby exporters were supposed to pay GST at the stage of procurement and claim a refund later on. However, due to portal glitches, exporters were unable to get refunds even after a lapse of considerable time. Therefore, the concept of pay now, claim a refund later was diluted over a period of time during the phase of the GST regime. The rules pertaining to refunds were amended from time-to-time based on the experience and demand of the industry.

In this article, various important amendments related to 'refund' that took place in the last financial year (F.Y. 2018-19) have been tried to capture.

2. Provisions of GST law pertaining to 'Refunds'

Provisions relating to 'refunds' are laid down in Chapter XI of the Central Goods and Services Tax Act, 2017 (CGST Act). The chapter in turn, consists of 5 Sections. These provisions are mirrored in the respective State Goods and Services Tax (GST) Laws. These provisions are also borrowed by Integrated Goods and Services Tax Act (IGST Act)[1] as well as Union Territories Goods and Services Tax Act, 2017 (UTGST Act). It may be noted that refund is not only granted to exporters of goods or services but also various other persons. The detailed provisions are provided in the following Sections:

Sections

54. Refund of tax: Provides for the time limit to claim a refund, manner of claiming a refund,

1 Section 20 of IGST Act and Section 21 of UTGST Act

persons entitled to claim a refund, conditions in which refund can be withheld/be credited to Consumer of welfare fund, manner of approving refund, etc.

55. Refund in certain cases: Provides power to Government for notifying any specialised agency of United Nation Organisation or any Multilateral Financial Institution and organisation, consulate or embassy of foreign countries to be eligible to claim a refund on notified supplies received by them.

56. Interest on delayed refunds: Lays down provision for payment of interest on delay in disbursing the refund

57. Consumer Welfare Fund: Empowers – Government to constitute Consumer Welfare Fund and specifies the amount that can be credited to the Fund

58. Utilisation of fund: Provides power to Government for prescribing the manner in which sums credited in Consumer Welfare Fund shall be utilised.

Rules

89. Application for refund of tax, interest, penalty, fees or any other amount: Lays down the manner in which application for claiming a refund on account of inverted duty structure, excess balance in cash ledger, exports without payment of tax-, supply to SEZ, deemed exports, etc. It also prescribes the refund application form and formula for determining the maximum refund amount.

90. Acknowledgement: Prescribes to scrutinise refund application and issue acknowledgement if the application is complete otherwise issue deficiency memo communicating deficiencies in refund application and requiring the applicant to file a fresh application.

91. Grant of provisional refund: Provides that proper officer to issue an order sanctioning provisional refund if he is *prima facie* satisfied that the amount claimed as refund is due to an applicant within 7 days of acknowledgement. Provisional refund order shall be followed by payment advice for the amount sanctioned and electronically credit in a bank account.

92. Order sanctioning refund: Mandates proper officer to issue order for sanctioning refund after examination containing amount provisionally refunded or any outstanding demand adjusted or amount of refund withheld along with reasons. Further, the order for rejecting may be issued after providing an opportunity of being heard to the applicant.

93. Credit of the amount of rejected refund claim: Stipulates that the amount of refund shall be recredited to the electronic credit ledger to the extent of rejection.

94. Order sanctioning interest on delayed refunds: Prescribes proper officer to issue order for sanctioning interest due and payable along with payment advice.

95. Refund of tax to certain persons: Provides special persons specified u/s. 55 and eligible to claim refund to file application every quarter along with the statement of inward supplies.

96. Refund of integrated tax paid on goods or services exported out of India: Stipulates the procedure to claim a refund on exports with payment of tax. Also, prescribes that shipping bill shall be deemed as the application for refund in case of goods and data will be exchanged between customs portal and GST portal for granting such refund.

96A. Export of goods or services under bond or Letter of Undertaking: Prescribes person exporting goods or services without payment of tax to furnish bond or Letter of Undertaking (LUT) along with some conditions and safeguards.

97. Consumer Welfare fund: Mandates amount to be credited to Consumer Welfare Fund (CWF), vests responsibilities on Government to maintain fund subject to audit by Comptroller

and Auditor General (CAG), constitute a Standing Committee for providing a recommendation of proper utilisation and welfare of consumers.

97A. Manual filing and processing: Clarifies that any reference to electronic filing of an application, intimation, reply, declaration, statement or electronic issuance of notice, order or certificate, etc., under refund chapter shall include manual filing of the said application, intimation, reply, declaration, statement or issuance of said notice, order or certificates, etc.

3. Various amendments in the manner of calculating refund of unutilised ITC in case of zero-rated supply without payment of tax

Rule 89(4) of the CGST Rules, 2017 prescribes the formula for determining the maximum amount of claiming refund on account of zero-rated supply without payment of tax. The formula was amended as under:

i. Amendment on the introduction of Notification No. 48/2017 – CT dated 18-10-2017

This notification was issued to notify certain exports as deemed exports under GST laws such as supply of goods against Advance Authorisation (AA), supply of goods against Export Promotion Capital Goods Authorisation (EPCG), Supply of goods to Export Oriented Unit, (EOUs) and Supply of gold by a bank or Public Sector Undertaking (PSU)[2] against Advance Authorisation.

The introduction of this notification led to two amendments in Rule 89 of the CGST Rules, 2017. Firstly, one new sub-rule i.e., (4A) was inserted[3] after Rule 89(4) to specifically provide for a refund on account of deemed exports as notified under Notification No. 48/2017 – CT dated 18-10-2017. Secondly, the consequent amendment was made by amending the term "Net ITC" in the formula prescribed under Rule 89(4) for determining maximum refund on account of zero-rated supply without payment of tax. The term "Net ITC" was amended to exclude input tax credit availed on inputs and inputs services for which refund is claimed under Rule 89(4A) of CGST Rules, 2017.

ii. Amendment on the introduction of Notification No. 40/2017 – CT(R) and Notification no. 41/2017 – IT(R) both dated 23-10-2017

These notifications provided the benefit of charging a lower rate of GST (0.05% in case of CGST & 0.10% in case of IGST) to registered persons supplying taxable goods to a registered recipient for exports (Merchant Exporter) subject to certain conditions.

The introduction of these notifications also led to two amendments in Rule 89 of the CGST Rules, 2017. Firstly, one new sub-rule i.e., (4B) was inserted[4] after Rule 89(4A) to specifically provide for a refund of unutilised ITC of supplies received from supplier availing benefit of Notification No. 40/2017 – CT(R) and Notification No. 41/2017 – IT(R). Secondly, a consequential amendment was made to the term "Net ITC" in the formula prescribed under Rule 89(4) for determining maximum refund on account of zero-rated supply without payment of tax. The term "Net ITC" was amended to exclude input tax credit availed on inputs and inputs services for which refund is claimed under Rule 89(4B) of CGST Rules, 2017.

iii. Amendment on the introduction of Notification No. 78/2017 – Customs and Notification No. 79/2017 – Customs both dated 13-10-2017

Sub-rule (4B) of Rule 89 of CGST Act, 2017 was amended by way of insertion of two separate clauses viz.

2 Specified in the notification no. 50/2017 – Customs dated 30-6-2017
3 Inserted vide notification no. 75/2017-CT dated 29-12-2017 w.e.f. 23-10-2017
4 Inserted vide notification no. 75/2017-CT dated 29-12-2017 w.e.f. 23-10-2017

(a) One for a refund of unutilised ITC of supplies received from supplier availing benefit of Notification No. 40/2017 – CT(R) and Notification No. 41/2017 – IT(R).

(b) Other for a refund of unutilised ITC on availing benefit under Notification No. 78/2017 -Cus and 79/2017-Cus.

iv. Amendment in Adjusted Total turnover: The formula prescribed under Rule 89(4) of the CGST Rules, 2017 is as under:

Refund Amount = (Turnover of zero-rated supply of goods + Turnover of zero-rated supply of services) x Net ITC ÷ Adjusted Total turnover

The meaning of 'Adjusted Total Turnover' (denominator) was not in line with 'Turnover of zero-rated supply of services' (numerator) because the manner of determining 'Turnover of zero-rated supply of services' as specifically provided in the Clause (D) of the formula was different from determining the Turnover of zero-rated supply of services in normal situations.

The manner of determining the "Turnover of zero-rated supply of services" as per Clause (D) of the formula is as under:

> *(D) "Turnover of zero-rated supply of services" means the value of zero-rated supply of services made without payment of tax under bond or letter of undertaking, calculated in the following manner, namely:-*
>
> *Zero-rated supply of services is the aggregate of the payments received during the relevant period for zero-rated supply of services and zero-rated supply of services where supply has been completed for which payment had been received in advance in any period prior to the relevant period reduced by advances received for zero-rated supply of services for which the supply of services has not been completed during the relevant period."*

Hence, the meaning of Adjusted Total turnover was amended[5] by excluding turnover of services as per normal situations and including turnover of zero-rated supply of services in terms of Clause (D).

4. Amendment in the refund of integrated tax on account of exports with payment of tax[6]

Rule 96 of the CGST Rules, 2017 deal with refund of integrated tax paid on export of goods and services exported out of India. The introduction of notification notifying certain supplies as deemed exports[7], lower rate of GST on supplies to merchant exports subject to conditions[8], exemption of IGST on goods imported by EOUs[9] and exemption of IGST on import of goods under AA/EPCG Schemes[10], also led to amendment in Rule 96 of the CGST Rules, 2017 along with Rule 89 of the CGST Rules as discussed above.

The said Rule 96 of the CGST Rules, 2017 was amended four times as under:

i. As per the first amendment[11] in Rule 96 of CGST Rules, 2017 the option to claim a refund of integrated tax by opting for exports with payment of tax was restricted in those cases where an applicant was receiving supplies on which supplier:

5 As amended *vide* Notification No. 39/2018 dated 4-9-2018

6 Rule 96(10) of CGST Rules, 2017

7 Under notification No. 48/2017 – CT dated 18-10-2017

8 Under Notification No. 40/2017 – CT(R) dated 23-10-2017 and Notification No. 41/2017 – IT(R) dated 23-10-2017

9 Under Notification No. 78/2017 – Customs dated 13-10-2017

10 Under Notification No. 79/2017 – Customs dated 13-10-2017

11 Amended *vide* Notification No. 75/2017-CT dated 29-12-2017 w.e.f. 23-10-2017

a) Undertook benefit deemed exports[12].

b) Undertook benefit of a lower rate of GST was undertaken by suppliers[13]

ii. The second amendment[14] in Rule 96 of CGST Rules, 2017 further restricted the benefit of refund of integrated tax on exports where the applicant was receiving supplies on which supplier undertook benefit of exemption of IGST on imports by EOUs[15] and on imports of goods under AA/EPCG Schemes[16].

iii. The rule was further amended[17] for the third time because the second amendment provided that the supplier is availing benefits of exemption of IGST on imports by EOUs and on imports of goods under AA/EPCG schemes. However, in fact such benefits of exemption of IGST on imports by EOUs and on imports of goods under AA/EPCG schemes were available to applicant unlike the case wherein the benefit of deemed exports and supplies to merchant exporter was available to the supplier. Therefore, Rule 96 of the CGST Rules, 2017 was amended by segregating two clauses as under:

a) One mentioning that persons claiming a refund of Integrated Tax paid on exports of goods and services should not have received supplies on which benefits of deemed exports and merchant exporter has been availed.

b) Second mentioning that the persons claiming refund of Integrated Tax paid on exports of goods and services should not have availed the benefit of exemption of IGST on imports by EOUs and on imports of goods under AA/EPCG schemes.

iv. Several proposals were received from trade and industry after the second amendment for not restricting the benefit of a refund to the extent it is related to the receipt of capital goods against Export Promotion Capital Goods Scheme. Therefore, the same was considered and Rule 96 of the CGST Rules, 2017 was amended[18] for the fourth time to exclude restriction of the refund amount to the extent it was related to the receipt of capital goods against Export promotion Capital Goods Scheme.

5. Amendment in the formula for determining the maximum amount of refund on account of Inverted Tax Structure

Rule 89(5) of the CGST Rules, 2017 prescribes the manner of determining refund under inverted tax structure by way of a formula. Earlier the said formula provided only for the turnover of inverted rated supply of goods and did not contain turnover of inverted rated supply of services. These led to various issues in the trade and industry, therefore, representations were made before the Government to resolve the same. As a result, the formula was amended[19] retrospectively to include even the turnover of inverted rated supply of services in the numerator. The formula is reproduced as under:

12 Under Notification No. 48/2017 – CT dated 18-10-2017
13 Under Notification No. 40/2017 – CT(R) dated 23-10-2017 and Notification No. 41/2017 – IT(R) dated 23-10-2017
14 Amended vide Notification No. 03/2018-CT dated 23-1-2018 w.e.f. 23-10-2017
15 Under Notification No. 78/2017 – Customs dated 13-10-2017
16 Under Notification No. 79/2017 – Customs dated 13.-10-2017
17 Amended *vide* notification no. 39/2018-CT dated 04.09.2018 and Notification No. 53/2018 dated 9-10-2018 w.e.f. 23-10-2017
18 Amended *vide* Notification No. 54/2018 dated 9-10-2018
19 Amended *vide* Notification No. 21/2018 CT dated 18-4-2018 and made retrospective effect from 1-7-2017 *vide* Notification No. 26/2018 CT dated 13-6-2018

Formula before amendment:
Maximum Refund Amount = {(Turnover of inverted rated supply of goods) x Net ITC ÷ Adjusted Total Turnover} – tax payable on such inverted rated supply of goods and services.

Formula after amendment:
Maximum Refund Amount = {(Turnover of inverted rated supply of goods **and services**) x Net ITC ÷ Adjusted Total Turnover} – tax payable on such inverted rated supply of goods and services.

6. Principle of unjust enrichment applicable on supplies made to SEZ

Section 54(8) enlists situations wherein the principle of unjust enrichment does not apply for the purpose of claiming a refund. One of such situations was refund on account of zero-rated supplies. The term zero-rated supplies also include supplies made to SEZ units/ developers. However, the term 'zero-rated supplies' in Section 54(8) was substituted by the term 'exports'[20] therefore, the principle of unjust enrichment will apply to supplies made to SEZ units/developers.

Consequential amendments are made in Rule 89(2)[21] and FORM GST RFD-01A[22] requiring supplier to submit a declaration that tax has not been collected from SEZ, at the time of filing application for refund.

7. Amendment in the meaning of relevant date for inverted tax structure

Refund of the unutilised balance of input tax credit on account of inverted tax structure is available[23]. An application for refund claim has to be filed within 2 years from the relevant date. The meaning of relevant date for claiming a refund on account of such inverted tax structure was the end of the financial year in which such claim for refund arises[24]. The meaning of relevant date is amended as the due date for furnishing of return under section 39 for the period in which such claim for refund arises[25].

8. The meaning of relevant date for claiming a refund on exports realised in Indian currency added

One of the criteria for qualifying any services as export of services was that the payment for such service has been received by the supplier in convertible foreign exchange[26]. This criterion is amended, to include even those situations where payment is received in Indian Rupees wherever permitted by RBI, as export of services[27].

The meaning of relevant date in case of services exported out of India was the date of receipt of payment in convertible foreign exchange where the supply of services was completed prior to receipt of such payment[28]. Therefore, the meaning or relevant date applicable to the export of services where the payment was received in convertible foreign exchange, was amended to include export of services wherein payment is received in Indian Rupees as permitted by RBI[29].

20 Amended *vide* section 23 of the CGST (Amendment) Act, 2018
21 Amended *vide* Notification No. 03/2019-CT dated 29-1-2019 w.e.f. 1-2.2019
22 Amended *vide* Notification No. 03/2019-CT dated 29-1-2019 w.e.f. 1-2-2019
23 As per section 54(3)(ii) of the CGST Act, 2017
24 As per clause (e) to Explanation 2 of section 54 of CGST Act, 2017
25 Amended vide section 23 of the CGST (Amendment) Act, 2018
26 As per section 2(6) of IGST Act, 2017
27 As per section 2 of IGST (Amendment) Act, 2018
28 As per clause (c) to Explanation 2 of section 54 of CGST Act, 2017
29 Amended *vide* section 23 of the CGST (Amendment) Act, 2018 and clarified vide circular no. 88/07/2019 – GST dated 1-2-2019

9. Amendments related to grant of provisional refund

Refund claimed on account of zero-rated supply of goods or services is required to be disbursed provisionally to the extent of 90% of the total amount so claimed (excluding the amount of ITC accepted provisionally). On such provisional sanction, a provisional refund order in Form GST RFD-04 needs to be issued along with payment advice in Form GST RFD-05. In order to speed up the sanction and disbursal of such refunds, provisos are added providing:

i. that the order issued in FORM GST RFD-04 shall not be required to be revalidated[30] by the proper officer and

ii. that the payment advice in FORM GST RFD-05 shall be required to be revalidated where the refund has not been disbursed within the same financial year in which the said payment advice was issued[31].

10. Amendment related to order sanctioning refund:

On similar lines of abovementioned amendment for grant of provisional refund, a similar amendment[32] has been introduced for final order sanctioning refund as well. This amendment also looks forward to speedy sanction as well as disbursement of refunds. The amendment is reproduced as under:

> *"Provided that the order issued in FORM GST RFD-06 shall not be required to be revalidated by the proper officer:*
>
> *Provided further that the payment advice in FORM GST RFD-05 shall be required to be revalidated where the refund has not been disbursed within the same financial year in which the said payment advice was issued."*

11. Clarifications

Though circulars do not amend the law relating to refund however, some of the clarifications issued by circulars are having far-reaching implications and therefore, worth noting:

a. Circular no. 79/53/2018-GST dated 31-12-2018

- Refund of accumulated ITC on account of Inverted Tax Structure is available even in cases where there are several inputs and few of them are having lower GST rate than output rate because the formula prescribed for calculating claim of such refund provides that the term 'Net ITC' covers the ITC availed on all inputs in the relevant period, irrespective of their rate of tax.
- This can be clearly understood with the help of the following example:

Particulars	Value (in ₹)	Rate (%)	Tax Amount (₹)
Input A	500	5	25
Input B	2000	18	360
Net ITC			385
Output Y	3000	12	360

- In the above example, assuming that claimant has no other outward supplies but Y, his turnover of inverted rated supply and adjusted total turnover will remain the same. The get Net ITC is ₹ 385/- and multiplying such Net ITC by the ratio of turnover of inverted rated supply and adjusted total turnover will again give the figure of ₹ 385/-. Therefore, we get the maximum amount of refund as ₹ 25/- i.e., (₹ 385 – ₹ 360)

30 As per proviso to Rule 89(2) of CGST Rules, 2017 inserted *vide* Notification No. 03/2019-CT dated 29-1-2019 w.e.f. 1-2-2019

31 As per proviso to Rule 89(3) of CGST Rules, 2017 inserted *vide* Notification No. 03/2019-CT dated 29-1-2019 w.e.f. 1-2-2019

32 Inserted vide notification no. 03/2019-CT dated 29-1-2019 w.e.f. 1-2-2019

b. Transitional Credit cannot be part of "Net ITC":

Refund of the unutilised input tax credit is allowed in two scenarios[33] viz., zero-rated supplies made without payment of tax and inverted tax structure. Further, sub-rules (4) and (5) of Rule 89 of the CGST Rules, prescribes the formula to determine the maximum amount of refund that can be claimed. The formula uses the phrase 'Net ITC' and defines the same as "input tax credit availed on inputs and input services during the relevant period other than the input tax credit availed for which refund is claimed under sub-rules (4A) or (4B) or both". Therefore, it was clarified that as the transitional credit be treated as part of 'Net ITC' since transitional credit pertains to th earlier tax regime[34].

c. Clarification on Net ITC

As per rule 89(4) of the CGST Rules, 'Net ITC' means ITC availed on inputs and input services during the relevant period. Relevant period means the period for which the refund claim has been filed.

ITC can be said to have been 'availed' when it is entered into the electronic cash ledger of the registered person.

ITC may be claimed on or before the due date of filing of the return for the month of September following the financial year to which the invoice pertains or the date of filing the annual return, whichever is earlier[35].

Therefore, it is clarified[36] that input tax credit of invoices issued in August 2017 and availed in September 2017 cannot be excluded from the calculation of refund amount for the month of September 2017

d. Refund in case of mismatch between FORM GSTR-1, GSTR-3B and shipping bills/bill of export:

Refund claims were stuck on account of mismatches between data contained in GSTR-1, GSTR-3B and shipping bills/bill of export. In such cases the tax payers can rectify the errors through amendment table 9 of GSTR-1 and such rectification will be considered while processing refund claims on account of zero-rated supplies[37].

e. Refund in case of discrepancy between value of GST invoice and shipping bill/ bill of export

In case of discrepancy between value of GST invoice and shipping bill/bill of export, the refund claim shall be sanctioned based on lower of the two values[38].

f. Clarifications *vide* circular no. 45/19/2018-GST dated 30-5-2018

i. On refund claim by an Input Service Distributor (ISD) composition taxpayer or Non-Resident Taxable Person (NRTP)

It is mandatory[39] to file GSTR-1 of the tax period for which refund claim was applied. However, ISD, composition dealer and NRTP are not required to furnish GSTR-1. Therefore, it was clarified *vide* circular no. 45/19/2019-GST dated 30-5-2018 that ISD, composition taxpayer and NRTP can file refund application even without filing GSTR-1.

ii. On application for refund of IGST paid on export of services to SEZ units/developers:

Certain registered persons committed errors while filing GSTR-3B by declaring exports under Table 3.1(a) instead Table 3.1(b) whilst the same was correctly

33 Under section 54(3) of CGST Act, 2017
34 As clarified *vide* circular no. 37/11/2018-GST dated 15-3-2018
35 Section 16(4) of the CGST Act, 2017
36 Clarified vide circular no. 79/53/2018-GST dated 31-12-2018
37 As clarified *vide* circular no. 37/11/2018-GST dated 15-3-2018
38 As clarified *vide* circular no. 37/11/2018-GST dated 15-3-2018
39 *Vide* circular no. 24/24/2017-GST dated 21-12-2017

declared under GSTR-1. Such registered persons were unable to file refund applications in FORM RFD-01A because of internal validation check on the portal. it is clarified that for the tax periods commencing from 1-7-2017 to 31-3-2018, such registered persons shall be allowed to file the refund application in FORM GST RFD-01A on the common portal subject to the condition that the amount of refund of integrated tax/cess claimed shall not be more than the aggregate amount of integrated tax/cess mentioned in the Table under columns 3.1(a), 3.1(b) and 3.1(c) of FORM GSTR-3B filed for the corresponding tax period.

iii. Clarification on refund claimed by Merchant Exporter

The supplier supplying goods to Merchant Exporter can avail the benefit to charging GST @ 0.10%[40] (or 0.05% plus 0.05%)[41] subject to certain specified conditions. Merchant Exporters are allowed to claim the refund of the unutilized input tax credit on account of zero-rated supplies without payment of tax under Rule 89(4B) of the CGST Rules, 2017.

It is clarified that Merchant Exporters shall apply for refund under the category "any other" instead of "refund of unutilized ITC on account of exports without payment of tax" in FORM RFD-01A along with all supporting documents for substantiating the refund claim under category "refund of unutilised ITC on account of exports without payment of tax."

If the proper officer is satisfied about refund claim after scrutinising the application for completeness and eligibility, he shall request the taxpayer to debit the amount from electronic credit ledger through FORM GST DRC-03.

On receiving proof of such debit, he shall proceed to issue refund order in FORM GST RFD-06 and the payment advice in FORM GST RFD-05.

g. Clarifications *vide* circular no. 79/53/2018-GST dated 31-12-2018:

a) Simplified procedure for filing refund application

Earlier applicants were required to follow the following procedure:

i. Submit refund application online in form GST RFD-01A on the common portal.

ii. On successful submission, ARN is generated

iii. Thereafter, physical copies of application along with ARN so generated and documents/statements / invoices, etc., as required were to be furnished to the jurisdictional officer.

Therefore, in order to simplify the procedure, the circular has issued the following instructions:

i. Application in Form RFD-01A & supporting documents need not be submitted physically.

ii. The statement of invoices along with those invoices which are not reflected in GSTR-2A shall be furnished electronically at the time of filing refund claim in form RFD-01A.

iii. ARN will be generated on completing the filing process, uploading all supporting documents and debit in electronic cash/credit ledger (wherever required).

iv. The application along with supporting documents shall be transferred to jurisdictional officer electronically.

40 As per notification no. 41/2017-Integrated Tax (R)dated 23rd October, 2017

41 As per notification no. 40/2017-Central Tax (R) dated 23rd October, 2017

v. Thereafter, application and supporting documents will be scrutinised for completeness within 15 days from date of electronic transfer to jurisdictional officer and an acknowledgement for the complete application or deficiency memo, as the case may be shall be issued.

vi. In case of deficiencies, the applicant shall file a fresh application manually after rectifying the deficiencies using the original ARN unless portal is equipped with a facility of allowing fresh application online.

b) Clarification on refund application already generated on the portal but not physically received by the jurisdictional tax offices:

The following guidelines were laid down for the application which have been generated on the common portal before the issuance of this circular and which had not been physically received in the jurisdictional offices:

- **Refund claim less than ₹ 1,000:** All such applications will be rejected and the amount will be recredited to the electronic credit ledger through the issuance of FORM GST RFD-01B
- **Refund claim greater than ₹ 1,000**
  1. A list will be compiled of those applications which have not been received in the jurisdictional tax office within a period of 60 days from the date of generation of ARN.
  2. A communication may be sent to all such claimants on their registered e-mail IDS informing that the application needs to be physically submitted to the jurisdictional tax office within 15 days of the date of the e-mail.
  3. The application will be summarily rejected if the claimant fails to physically submit the application within 15 days of the date of such email and the debited amount, if any, shall be recredited to the electronic credit ledger.

h. Clarification on the meaning of the term 'inputs'

As per the GST Act, there is no specific restriction on availment of ITC on the grounds that certain items such as stores, spares, packing materials, materials purchased for machinery are not directly consumed in the manufacturing process and do not qualify as 'input'. Therefore, it was clarified that-

- The ITC of the GST paid on inputs shall be available to a registered person as long as he/she uses or intends to use such inputs for the purposes of his/her business and/or for effecting taxable supplies, including zero-rated supplies, and the ITC for such inputs is not restricted under section 17(5) of the CGST Act; and
- Capital goods[42] has been defined to mean as goods whose value has been capitalised in the books of account and which are used or intended to be used in the course or furtherance of business. Therefore, stores and spares which are charged as revenue expense in the books of account cannot be held to be capital goods.

12. Conclusion

GST law is at a developing stage and therefore, it requires a lot of angles to be considered. Taxmen would require law to safeguard revenue interest whereas, the industry would require ease of doing business. Government is trying its best to balance both the divergent needs and therefore various amendments. As a taxpayer or tax advisor or tax collector, one will have to keep in mind all these developments and clarifications. Hope this compilation becomes a handy tool for tracking the important changes that happened so far in relation to 'Refunds'.

❍□❍

42 Section 2(19) of the CGST Act, 2017


CA Naresh K Sheth & CA Harshit Soni

Real Estate related Amendments Part-1 Recent GST Amendments related to Real Estate sector – 'A Bird's Eye View''

Preamble

GST Council, in its meetings held on 24th February 2019 and 19th March 2019, proposed far reaching amendments with avowed objective to boost up the growth of residential segment of Real Estate sector. Detailed minutes of aforesaid GST council meetings (33rd and 34th) are not yet in public domain. Following notifications are released on 29th March 2019 to operationalise new scheme of taxation for Real Estate sector:

Notifications	Amendments in brief
03/2019-CT (Rate)	Reduction in tax rates for sale of under construction flats/ units.
04/2019-CT (Rate)	Exemptions granted in respect of transfer of Development Rights / FSI and upfront premium payable on long term lease used for sale of under construction residential units.
05/2019-CT (Rate)	Reverse Charge Mechanism (RCM) prescribed for transfer of Development Rights / FSI and long term lease of land.
06/2019-CT (Rate)	Deferment of GST liability in joint development project in respect of: • Construction services; • Transfer of Development rights, FSI or TDR; • Upfront premium paid for long term lease.
07/2019-CT (Rate)	RCM is prescribed for procuring cement, capital goods and inputs / input services procured from unregistered person.
08/2019-CT (Rate)	Tax rate prescribed for Goods [other than capital goods and cement] liable to GST under RCM as per Notification No. 07/2019-CT (Rate).
16/2019-CT	Amendments in Rules 42 and 43 prescribing reversal of input tax credit (ITC) for unsold flats/ units.

This article gives 360° view of new taxation scheme for Real Estate Sector applicable w.e.f. 1st April 2019.

Readers are requested to read this article along with other articles dealing elaborately with various aspects of new scheme of taxation.

Probable reasoning for revising Taxation Scheme

Comparative effective tax rates for sale of under construction flats/ units in pre and post GST regime:

Particulars	Pre-GST regime			GST Regime
	Service Tax	VAT	Total	
Sale of under-construction affordable residential flats	4.50% (with ITC of input services and capital goods)	1% (Without ITC)	**5.50%**	**8%** (With ITC of Input, input services & capital goods)
Sale of under-construction residential flats (other than affordable)	4.50% (with ITC of input services and capital goods)	1% (Without ITC)	**5.50%**	**12%** (With ITC of Input, input services & capital goods)
Sale of under construction commercial units	4.50% (with ITC of input services and capital goods)	1% (Without ITC)	**5.50%**	**12%** (With ITC of Input, input services & capital goods)

There was an apparent hike in tax incidence by 6.5% for home buyers. Government granted ITC to developers on the presumption that in GST regime, ITC benefits will be higher than increased tax rates and developers passing on such ITC benefits would result into cheaper houses in GST regime.

However, homebuyers were cribbing that developers were not passing on ITC benefits resulting into higher prices for housing in GST regime. This factor has become a politically sensitive issue for ruling party in election year. Moreover, ITC was always a disputed issue between Developers and tax authorities. The developers were also worried about adverse implications of anti-profiteering provisions. The Government, therefore, thought it fit to revamp taxation scheme for Real Estate sector.

One time option for Developers

Generally, Real Estate Projects have long gestation periods. Sudden change of taxation scheme from higher tax rate with ITC to lower rate without ITC would have been unfair for Real Estate sector as developers would have committed sales at agreed price after factoring ITC likely to be availed by him. Most of the developers would have huge accumulated ITC as on cut off date to be liquidated against future instalments due from customers.

Government, therefore, divided projects into two broad categories i.e. Ongoing Projects and New Projects (i.e., Projects other than Ongoing Projects) and allowed the developers to exercise one-time option for ONGOING PROJECTS to pay tax on residential apartments at:

- Existing GST rates: 8% (with ITC) or 12% (with ITC); **or**
- Concessional GST rates: 1% or 5% (without ITC)

The option is not available for projects **other than ongoing project** or projects commencing on or after 1st April 2019.

Developer has to file a Notified Form on or before 10th May 2019 with jurisdictional officer intimating the option selected by him.

In case of failure to exercise option within time frame, developer will be liable to discharge tax at 1% or 5% (without ITC) for instalments due on or after 1st April 2019.

Tax implications of option to tax ongoing projects under old scheme

Tax implications for developer opting for old scheme in respect of ongoing project are as under:

- Accumulated ITC as on 31st March 2019 remains intact. Developer is not obliged to reverse accumulated ITC of project.
- Developer will be entitled to credit of inputs, input services and capital goods procured on or after 1st April, 2019.
- Developer can discharge his output tax liability from ITC balance (credit ledger) also.
- There will not be any obligation relating to procurement of 80% of input and input services from registered vendors.
- Developer will not be liable to pay GST under RCM on procurement of cement and capital goods from unregistered vendors.
- The applicable tax rates would be as under:

Particulars	Effective GST Rate
Sale of under-construction affordable residential apartments (including houses under Specified Schemes)	8% (with ITC)
Sale of under-construction residential apartments (other than affordable)	12% (with ITC)
Sale of under-construction Commercial Apartments	12% (with ITC)

Tax implications under New Scheme

The new scheme would apply to ongoing projects for which option to go for old scheme is not exercised and also the projects commencing on or after 1-4-2019

Tax rates and mode of discharging liability under New Scheme are as under:

Particulars	Effective GST Rate	ITC availability	Mode of payment
Sale of under-construction affordable residential apartments (Including houses under Specified Schemes)	1%	No	Cash
Sale of under-construction residential apartments (other than affordable)	5%	No	Cash
Sale of under-construction commercial apartments in Residential Real Estate Project (RREP)	5%	No	Cash
Sale of under-construction commercial apartments in Real Estate Project (other than RREP)	12%	Yes	Cash / Credit
Sale of under-construction commercial apartments (in exclusive commercial project)	12%	Yes	Cash / Credit
Sale of completed flats / Units Post OC	Nil	No	NA

Developer opting for New Scheme has to comply with following conditions:

- Developer is **not entitled to ITC** in respect of construction services taxed at concessional GST rates.
- Developer is required to **reverse the ITC availed** from inception of project to the extent it relates to construction services to be taxed at 1% or 5%.
- Developer will have to procure 80% of supplies (other than cement and capital goods) from registered persons for each project. If such procurement is less than 80% in a financial year, the developer is obliged to pay GST under RCM at 18% on amount of shortfall.
- Any procurement of Cement and capital goods from unregistered person will be taxed under RCM at applicable rate.

Works contract service for affordable Residential Apartments

Works contract service in respect of Affordable Residential Apartments (other than specified schemes) will be taxed **at 12%** subject to fulfilment of condition that carpet area of Affordable Residential Apartments in a project should be **50% or more than the total carpet area of the project.**

In case it finally turns out that the carpet area of such affordable Residential Apartments booked or sold before or after completion was less than 50% of total carpet area of project, Recipient of Service (i.e. Developer) will be liable to pay GST under RCM for the differential amount of GST.

Important definitions

- **"Project"** shall mean a Real Estate Project **(REP)** or Residential Real Estate Project **(RREP).**
- **"Real Estate Project"** is having same meaning as assigned u/s 2(zn) which defines REP as the development of a building or a building consisting of apartments, or converting an existing building or a part thereof into apartments, or the development of land into plots or apartment, as the case may be, for the purpose of selling all or some of the said apartments or plots or building, as the case may be, and includes the common areas, the development works, all improvements and structures thereon, and all easement, rights and appurtenances belonging thereto.
- **"Residential Real Estate Project (RREP)"** means a REP in which carpet area of the commercial apartments is not more than 15% of the total carpet area of all the apartments in the REP.
- **"Carpet Area"** shall have same meaning as assigned u/s 2(k) of RERA which defines it as the net usable floor area of an apartment, excluding the area covered by the external walls, areas under services shafts, exclusive balcony or verandah area and exclusive open terrace area, but includes the area covered by the internal partition walls of the apartment.
- **"Apartment"** shall have same meaning as assigned u/s 2(e) of RERA which defines "Apartment" whether called block, chamber, dwelling unit, flat, office, showroom, shop, godown, premises, suit, tenement, unit or by any other name, as a separate and self-contained part of any immovable property, including one or more rooms or enclosed spaces, located on one or more floors or any part thereof, in a building or on a plot of land, used or intended to be used for any residential or commercial use such as residence, office, shop, showroom or godown or

for carrying on any business, occupation, profession or trade, or for any other type of use ancillary to the purpose specified.

- **"Residential Apartment"** means an apartment intended for residential use as declared to Real Estate Regulatory Authority or to competent authority.

- **"Commercial Apartment"** means an apartment other than a residential apartment.

- **"Ongoing project"** would mean a project complying with all following conditions:

  a) Commencement certificate is issued by the competent authority on or before 31st March, 2019; **and**

  b) Any of the following authorities certifies that construction has started on or before 31st March, 2019; **and**

  – Registered Architect

  – Registered Chartered Engineer

  – Licensed surveyor of local body or development or planning authority

  c) Completion certificate has not been issued or first occupation of the project has not taken place on or before the 31st March, 2019; **and**

  d) Apartments have been, partly or wholly, booked on or before the 31st March, 2019.

  Where commencement certificate is not required from competent authority, however, conditions stipulated above in (b), (c) and (d) are complied with, then such project is regarded as Ongoing Project.

- **"An apartment booked on or before 31st March, 2019"** shall mean an apartment which meets all the following three conditions:

  a) part of supply of construction of which has time of supply on or before the 31st March, 2019;

  b) at least one instalment has been credited to the bank account of the registered person on or before 31st March, 2019; **and**

  c) an allotment letter or sale agreement or any other similar document evidencing booking of the apartment has been issued on or before the 31st March, 2019.

- **"Commencement Certificate"** means the commencement certificate or the building permit or the construction permit, by whatever name called issued by the competent authority to allow or permit the promoter to begin development works on an immovable property, as per the sanctioned plan.

- Construction shall be considered to have started on or before 31st March, 2019 if:

  – Earthwork for site preparation is completed; and

  – Excavation of foundation has started.

- **Affordable Residential Apartment**

Particulars		Conditions
A residential apartment – in a project commencing on or after 1st April 2019 or – in an ongoing project (for which developer opted New Scheme)	Metropolitan Cities*	House having carpet area up to 60 sq. mt. (approx. 644 sq. ft. – RERA Carpet); **and** having gross amount up to ₹ 45 lakh
	Non-metropolitan cities/towns	House having carpet area up to 90 sq. mt. (approx. 968 sq. ft. – RERA Carpet); **and** having gross amount up to ₹ 45 lakh
An apartment in an ongoing project	Covered under specified schemes [under Notification No. 11/2017-CT(R)] for which the developer has not exercised option to pay tax under old scheme.	

Transition of ITC for ongoing projects (opting for New Scheme)

Developer is obliged to reverse accumulated ITC as on 31st March, 2019 attributable to instalments due on or after 1st April, 2019 (to be taxed at concessional rate). Reversal is to be worked out project wise. Developer will compute such **ITC (on input and input services)** as per formula given in Annexure I and Annexure II in relation to construction of:

- Residential portion in REP (having time of supply on or after 1st April 2019); and
- Residential and commercial portion in RREP (having time of supply on or after 1st April 2019).

Readers are requested to refer article of CA Abhay Desai dealing with aforesaid this topic in great detail.

Taxability of Development Rights, TDR / FSI and Long term lease (premium)

- Exemptions are granted in respect of:
  - Supply of Development Rights, TDR or FSI on or after 1st April 2019 for construction of residential apartments sold before issuance of completion certificate or before its first occupation;
  - Upfront premium payable for long term lease of 30 years or more on or after 1st April 2019 provided it is used for construction of residential apartments which are sold before issuance of completion certificate or before its first occupation.
- Developer will be liable to pay GST under RCM on value of aforesaid supplies attributable to residential apartments remaining unbooked as on date of completion certificate or first occupation of project.

Readers are requested to refer article of Advocate Harsh Shah dealing with this topic in great detail.

Manner of ITC reversal under Rule 42

Rule 42 provides for reversal of ITC attributable to exempt supplies. This rule is thoroughly amended and it provides for reversal of ITC in respect of unsold flats/ units on the date of completion of project. The developer will be obliged to reverse ITC for entire project period in proportion of aggregate carpet area of unsold apartments to the total area of apartments in the project.

Readers are requested to refer article of CA Pritam Mahure dealing with aforesaid topic in great detail.

Conclusion

Real Estate Sector is confused and clueless about impact of these changes. It is struggling to comprehend the amendments and assess its financial impact. The sector is anticipating huge loss and hike in prices of the apartments. Time will tell whether such amendments would yield desired results of boosting the growth of Real Estate sector or it will burden the sector which is already in turmoil.

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CA Abhay Desai

Real Estate related Amendments Part-2 Transitional Provisions relating to Input Tax Credit under Notification No. 3/2019-CTR

Introduction

1. Indirect taxation and the Real Estate Sector have an unusual bond right from the earlier days when the tax on the said sector was imposed for the first time. The bond is unusual due to the fact that it involves the supply of goods, services as well as immovable property. Carving out the taxable event and carrying out the valuation thereof has always been debatable. Miserly is further increased when one considers the extent of the input tax credit ("ITC") which can or cannot be availed/utilised by the said sector.

2. Come 1st July, 2017 with the implementation of GST, it was thought that the misery of the sector would be reduced to a greater extent given the fact that now goods as well as services shall be taxed under a single legislation. Hence the expectation was that the earlier disputes related to the identification of the taxable event as well as valuation thereof would be done away with. Grant of ITC to the sector was also expected to keep the prices of the property unchanged even if the rate of tax was much higher than the cumulative rate in the earlier regime.

3. However the reality turned out to be different. The uncertainty towards the ITC which would be allowable coupled with the outward tax on the total value less 1/3rd land deduction (which was highly inadequate especially in metro cities) did not lead to the situation which the Government expected. Hence the desire to bring back transparency in the pricing along with the desire to remove the uncertainty regarding the eventual amount of ITC which can be availed, resulted in the decision of bringing back the composition scheme for the said sector. Slew of notifications came to be issued on 29-3-2019 ushering in the new era for taxing the said sector. With regard to the ongoing projects, a one-time option has been granted to either continue to pay the tax under the old scheme or to shift to the new scheme w.e.f. 1-4-2019 and pay the tax at the lower rates (i.e. 1%/5%). If option to continue to pay the tax under the old scheme for the ongoing projects is not exercised by 10th May, 2019 it would be deemed that the new scheme has been opted. For the new projects it is mandatory to pay the tax as per the new scheme. Number of conditions have been imposed for the taxpayer desiring (for ongoing

project) or mandated (for new project) to pay the tax as per the new scheme. In the present article we shall be dealing with the conditions related to the ITC.

Conditions related to ITC

4. Notification No. 03/2019 – Central Tax (Rate) dt. 29-3-2019 has substituted certain entries in the parent rate Notification No. 11/2017 – Central Tax (Rate) dt. 28-6-2017 dealing with the applicable rates on supply of various services. Against Sr. No. 3 of the said parent notification, Entry Nos. (i), (ia), (ib), (ic) & (id) have been inserted which provides for the reduced effective rate of 1%/5% in case of residential apartments in any Real Estate Project ("REP") as well as commercial apartments in case of Residential Real Estate Project ("RREP"). Said lower rates shall be mandatory for any new project on or after 1-4-2019. For ongoing projects, an option has been granted to either continue to pay the tax under the old scheme or to shift to the new scheme w.e.f. 1-4-2019 and pay the tax at the lower rates (i.e. 1%/5%). Thus if the promoter exercises the option to pay the tax as per the new scheme, then the conditions stipulated against the referred entries providing for the lower rates have to be abided. Two such conditions, to be analysed in the present article, dealing with ITC reads as under:

"Provided also that credit of input tax charged on goods and services used in supplying the service has not been taken except to the extent as prescribed in Annexure I in the case of REP other than RREP and in Annexure II in the case of RREP.

Provided also that the registered person shall pay, by debit in the electronic credit ledger or electronic cash ledger, an amount equivalent to the input tax credit attributable to construction in a project, time of supply of which is on or after 1st April, 2019, which shall be calculated in the manner as prescribed in the Annexure I in the case of REP other than RREP and in Annexure II in the case of RREP."

5. The first proviso referred above thus provides that the ITC in respect of goods and services used in supplying the services (taxed at the effective rates of 1%/5%) has not been taken except to the extent permissible. Hence the promoter shall be required to calculate the ITC which shall be permissible. Said permissible amount shall be calculated as per Annexure I (in case of REP other than RREP) and Annexure II (in case of RREP).

6. Second proviso referred above further provides that the amount of ITC attributable to construction in a project time of supply of which is on or after 1st April, 2019 (referred as ineligible ITC) shall also be calculated as per the referred Annexures and the said amount needs to be debited in the electronic credit ledger (if credit is available to the said extent) or to electronic cash ledger (i.e., the balance amount to be paid by cash). It must also be noted that the calculations shall be done separately for each tax type (i.e., separate calculations for CGST, SGST & IGST). Further the working shall be done project-wise.

7. With the above background let us now understand the calculations provided in both the Annexures. It must also be noted that the below referred calculations shall also aid in deciding whether to continue under the old scheme or shift to the new scheme for the ongoing projects. We shall first deal with Annexure I and then shall go to Annexure II.

Annexure I

8. Said Annexure applies to a Real Estate Project which is not a Residential Real Estate Project. As per clause (xix) of the Notification No. 03/2019 – CT (R) a REP wherein the carpet area of the commercial apartments is not more than 15% of the total carpet area of all the apartments shall be construed as a RREP. Annexure I applies to only such projects which are not RREP. In other words, it applies to projects wherein the carpet area of commercial apartments exceeds 15% of the total carpet area

of all the apartments. Further the said Annexure applies only in the context of the construction of residential portion in the said non-RREP project. Hence a fully commercial project shall not be covered by the said Annexure. This is because such project shall continue to be taxed as per the normal rates (i.e. 12%) with ITC (subject to reversal as per Rule 42 & 43).

9. Said Annexure is further sub-divided into two parts. Hence we shall deal with each part separately.

Annexure I – Part 1

10. Methodology prescribed in Part 1 applies only when the percentage completion as on 31st March 2019 is not zero or where there is inventory in stock. In other words said part applies to such non-RREP projects wherein some percentage of work has already been done as on 31st March 2019 or there is inventory in stock (i.e,. procurements have happened on or before 31st March, 2019).

11. Essentially the objective of the working is to arrive at the ITC in respect of the construction of residential portion which has time of supply on or before 31st March, 2019. This is because only the said amount of ITC attributable to residential apartments shall be eligible as the corresponding supply has been taxed at the earlier higher rates (8%/12%). Further since the project is a non-RREP, the under-constructed commercial apartments supplied even on or after 1st April, 2019 shall continue to be taxed at the higher effective rate of 12%. Hence even ITC in respect of commercial area shall be eligible. Thus eligible ITC (Te) shall be as under:

Te = Tc (ITC attributable to the construction of the commercial portion) + Tr (ITC attributable to the construction of residential portion which has time of supply on or before 31st March, 2019).

12. Hence the ineligible ITC denoted by Tx shall the be derived as under:

Tx = T – Te

What shall "T" include

13. In the above equation T is the total ITC availed (utilised or not) on inputs and input services used in construction of the non-RREP from 1st July, 2017 to 31st March 2019 including transitional credit taken on 1st July, 2017. Following observations can be made while computing the amount of T:

a. ITC to be considered shall be the ITC availed irrespective of the fact as to whether the same has been utilised or not.

b. Said ITC has to be calculated project-wise and not entity-wise.

c. Only ITC in respect of inputs and input services is to be considered. Hence ITC in respect of capital goods are not to be considered.

d. Even transitional credit availed for the project in question needs to be considered.

14. Above observations will surely lead to the difficulty of the identification of the availed ITC (including transitional credit) attributable to the particular project. This is because Sec. 35(1) of the CGST Act, 2017 read with Rule 56 of the CGST Rules, 2017 do not provide for maintaining records project-wise of the ITC availed. Further in cases where the transactional credit has been claimed of the balance available in the last return, such balance is of the amount remaining after the utilisation thereof and not of the credit availed. Hence bifurcating the said balance project-wise would be very difficult especially considering the fact that the FIFO rule (Rule 14(2)) for CENVAT utilisation was abolished. Hence unless such rule is applied, the attribution of such transitional credit to a particular project shall be a challenge.

15. Now Te, which is eligible ITC, is the sum total of (a) ITC attributable to the construction of the commercial portion (Tc) and (b) ITC attributable to the construction of residential portion which has time of supply on or before 31st March, 2019 (Tr).

Calculation of "Tc"

16. Tc as stated above is the ITC attributable to the construction of the commercial portion. Said ITC is calculated by applying the proportion of the carpet area of commercial apartment to total carpet area of the commercial and residential apartment. Same can be illustrated as under:

No. of apartments in the project	100	units
No. of residential apartments in the project	75	units
Carpet area of the residential apartment	70	sqm
Total carpet area of the residential apartments	5250	sqm
No. of commercial apartments in the project	25	units
Carpet area of the commercial apartment	30	sqm
Total carpet area of the commercial apartments	750	sqm
Total carpet area of the project (Resi + Com)	6000	sqm
ITC Availed (T)	₹ 1	crore
Tc = Tx (carpet area of commercial apartments in the REP/ total carpet area of commercial and residential apartments in the REP)	₹ 0.125	crore

17. Hence as seen above, ITC attributable to the commercial apartment shall be INR 0.125 crore. Said ITC shall be eligible because in the case of a non-RREP, the applicable effective rate on commercial apartments shall continue to be 12% and hence ITC attributable to such units shall be admissible. It remains to be seen as to how Rule 42 can come into play on completion of the said project to the extent of the unbooked commercial apartments.

Calculation of "Tr"

18. Tr stands for the ITC attributable to the construction of the residential portion which has time of supply on or before 31st March, 2019. Similar to Tc, even Tr shall be eligible since the same relates to construction of residential portion which has time of supply on or before 31st March, 2019 and hence tax has been paid at the earlier higher rates (12%/8%). Tr shall be calculated as under for the above referred example:

Value of each residential apartment	₹ 0.60	crore	–
Percentage completion as on 31-3-2019	20%		As declared to RERA or determined by registered architect or a chartered engineer
No of residential apartments booked before transition	40	units	–
Total carpet area of the residential apartments booked before transition	2800	sqm	40 (apartments) * 70 sqm
Value of booked residential apartments	₹ 24	crore	40 (apartments) * 0.6 (value of each apartment) – It may be noted that value of each apartment may not be same and hence total of the value of all booked apartments shall be considered.

Percentage invoicing of booked residential apartments on or before 31-3-2019	20%		Figure to be derived by dividing the value of invoicing done on or before 31st March from the total booked value.
Total value of supply of residential apartments having TOS prior to transition	₹ 4.8	crore	As the percentage invoicing is 20%, TOS shall be 20% of the total booked value i.e. 24*0.2.
ITC Availed (T)	₹ 1	crore	It shall include transitional credit.
Tr = T x F1 x F2 x F3 x F4			
F1	0.875		Carpet area of residential apartments/total carpet area of commercial + residential apartments.
F2	0.533		Total carpet area of residential apartments booked on or before 31st March, 2019/Total carpet area of residential apartments.
F3	0.200		Such value of supply of construction of residential apartments booked on or before 31st March, 2019 which has time of supply on or before 31st March, 2019/Total value of supply of construction apartments booked on or before 31st March, 2019
F4	5		1/% completion of construction as on 31st March, 2019.
Tr = T x F1 x F2 x F3 x F4	₹ 0.467	crore	Amount of eligible ITC.

19. Above working can be easily understood as under:

1st Step: Gross up the ITC for determining the eligible amount for the entire project. In the above case, ITC availed is INR 1 crore and the work completed is 20%. Hence if the entire project is completed, pro-rata ITC would have been INR 5 crore (i.e., 1*5 (1/20%)). This is F4.

2nd Step: From the grossed up ITC, the amount attributable to the residential apartment needs to be worked out. This is because the ITC attributable to the commercial apartment shall continue to remain available. In the above case, 87.5% of the area in the project is for residential apartment. This is F1. Hence the ITC of INR 4.375 crore out of the total grossed up ITC of INR 5 crore shall be now considered for further steps as the said amount relates to the residential apartments.

3rd Step: From the grossed up ITC attributable to the residential apartments, ITC attributable only to the booked apartments shall be available. This is because the unbooked apartments shall now suffer tax at the lower rates of 1%/5% or no tax when booked on or after 1-4-2019. In the above case the area of the booked residential apartments to the total area of residential apartments is 53.3%. This is F2. Hence of the grossed up ITC of residential apartments, only 53.3% shall be admissible. Hence only INR 2.33 crore (4.375 * 53.3%) shall be admissible.

4th Step: Even in respect of booked residential apartments, ITC shall be available only in respect of that construction which has time of supply on or before 31st March, 2019. This is because the time of supply arising on or after 1st April, 2019 shall be subjected to lower rates of 1%/5%. In our case the time of supply in

respect of booked apartments has arisen only to the extent of 20% of the value of apartments booked as invoicing to the extent of only 20% has been done. This is F3. Hence 80% of the value of booked apartment shall suffer tax at the reduced rates on or after 1-4-2019. Hence only INR 0.467 crore (2.33 * 20%) shall be admissible. It may be noted that if percentage of invoicing done is more than the work completed (let us say 30% of invoicing is done when work completed is 20%), such 30% shall be considered in the present step (however please see 25% rule discussed later in this regard).

Total Admissible ITC

20. Now the total admissible ITC shall be ITC attributable to the commercial portion (Tc) which is INR 0.125 plus ITC attributable to residential portion which has time of supply on or before 31st March, 2019 (Tr) which is INR 0.467 crore. Hence eligible ITC (Te) shall be INR 0.592 crore (0.125 + 0.467). Hence the ITC attributable to the construction of the residential portion which has time of supply on or after 1st April, 2019 (Tx) shall be total ITC (T) which is INR 1 crore less Te which is INR 0.592 crore. Hence Tx shall be INR 0.408 crore.

21. Second proviso mentioned earlier provides that the said amount needs to be paid, by adding the same as part of the output tax liability, either by debiting the electronic credit ledger, if balance is available, or to be paid by cash by debiting the electronic cash ledger. Said amount needs to be paid by the due date for filing the return for the month of September, 2019. A registered person may also seek monthly instalment for payment of such dues which may be granted by the Commissioner. However such instalment period cannot exceed 24 months and the said instalment shall be paid with interest. Application has to be made in FORM GST DRC – 20 and the order to pay in instalment shall be granted in FORM GST DRC – 21.

22. Annexure – I further provides that if the amount of Tx is negative i.e., ITC eligible is more than the ITC availed till 31st March, 2019, the registered person shall be eligible to take ITC to the extent of the difference, on the goods or services received for the said project on or after 1st April, 2019.

23. Further registered person can calculate Tc (i.e., ITC attributable to commercial apartments) and utilise the same for paying the tax on the commercial apartments till the compete calculation for Tx is carried out and submitted.

24. In case where the percentage completion is zero and only goods or services have been procured on or before 31st March, 2019 the ITC attributable to the residential portion which has time of supply on or after 1st April, 2019 shall also be done as per the above formula only. The percentage completion (for calculating F4) in the said case shall be the percentage completion as certified by the registered Architect or Chartered Engineer which can be achieved with the inputs services received and the inputs in stock as on 31st March, 2019.

Annexure I – Part 2

25. Methodology prescribed in Part 2 shall apply where % completion is zero as on 31st March, 2019 but invoicing has been done having time of supply before 31st March, 2019 and no input services or inputs have been received as on 31st March, 2019.

26. Hence the methodology prescribed in the said Part 2 shall apply wherein no procurements of inputs or input services have happened and hence no construction has started but apartments have been booked in respect of which time of supply has arisen before 31st March. In other words as per the agreement, in respect of booked apartments, the liability to pay the instalment has arisen before 31st March, 2019.

27. In the above referred methodology only following changes may be noted. Rest shall remain the same.

28. Since no inputs or input services have been procured, the amount of ITC (Tn) which is to be taken as the base shall be the ITC on such inputs and input services received in FY 2019-20. F4 as stated above shall not be taken into account since no construction has begun as on 31st March, 2019. It is surprising to note that the law expects the promoter to calculate the eligible amount before the due date for furnishing the return for the month of September, 2019. The same cannot be calculated for Part 2 since the ITC (Tn) to be considered for the calculation can only be known after the end of FY 2019-20.

Annexure II

29. Methodology given under Annexure II shall apply in case of a Residential Real Estate Project. In case of RREP it may be noted that even the commercial apartments shall be taxed at 5%. Hence even ITC in respect of commercial apartments which have time of supply on or after 1st April, 2019 shall not be admissible. Hence as opposed to Annexure I wherein eligible ITC (Te) comprised of Tc (ITC attributable to commercial apartments irrespective of the time of supply) and Tr (ITC attributable to residential portion which has time of supply before 31st March, 2019), eligible ITC for RREP ("Te") as per Annexure II shall only comprise of the ITC attributable to commercial as well as residential portion which have time of supply on or before 31st March 2019. This is because any supply of service in respect of commercial as well as residential portion on or after 1st April, 2019 shall be taxable at the reduced effective rate of 1%/5%.

30. Similar to Annexure I, even Annexure II comprises of two parts. Part I applies to cases where percentage completion as on 31st March, 2019 is not zero or where there is inventory in stock. Part II applies in cases where percentage completion as on 31st March is zero but invoicing has been done having time of supply before 31st March, 2019 and no input services or inputs have been received as on 31st March, 2019.

31. Working for both the parts shall be similar to the working done under Annexure I. Only difference would be that working for Tc shall not be required and Tr of Annexure I (here referred only as Te) shall comprise of residential as well as commercial apartments.

25% Rule

32. The stated rule applies to both the annexure's discussed above. Where percentage invoicing is more than the percentage completion and the difference between percentage invoicing (per cent points) and the percentage completion (per cent points) of construction is more than 25 per cent points; the value of percentage invoicing shall be deemed to be percentage completion plus 25 per cent points. Hence let us say percentage invoicing is 60% whereas percentage completion is only 20%. Since the difference is of more than 25 per cent points, the percentage invoicing shall be deemed to be only 45% (i.e., percentage completion (20%) + 25%). It may be noted that the difference is to be measured in per cent points (which is absolute) and not a relative difference by applying 25% to the percentage of completion.

33. Similarly where the value of invoices issued on or prior to 31st March, 2019 exceeds the consideration actually received on or prior to 31st March, 2019 by more than 25 per cent of consideration actually received; the value of such invoices for the purpose of determination of percentage invoicing shall be deemed to be actual consideration received plus 25 percent of the actual consideration received.

34. Also where, the value of procurement of inputs and input services prior to 1st April, 2019 exceeds the value of actual consumption of the inputs and input services used in the percentage of construction completed as on 31st March, 2019 by more than 25 per cent of value of actual consumption of inputs and input services, the jurisdictional commissioner or any other officer

authorized in this regard may fix the Te based on actual per unit consumption of inputs and input services based on the documents duly certified by a chartered accountant or cost accountant submitted by the promoter in this regard, applying the accepted principles of accounting.

35. In a nutshell the logic behind the above provisions seems to be that the variance to the extent of 25% points between completion *vis-à-vis* invoicing, invoicing *vis-à-vis* actual receipts & value of procurements *vis-à-vis* value of actual consumption shall be considered as within the normal range and in this case the actual figures shall be considered for determination of the eligible ITC. However if the variance is more than the 25% points, then in case of difference between completion *vis-à-vis* invoicing and invoicing *vis-à-vis* actual receipts, only figures u pto the 25% points variance shall be considered. Excess is to be ignored. In case of difference between the value of procurement *vis-à-vis* value of actual consumption exceeds 25% points, the jurisdictional commissioner to determine the Te based on the documents certified by a Chartered Accountant or Cost Accountant.

36. Perhaps the intention seems to be that the variation exceeding 25% points is unusual and hence can only be on account of some tax planning to claim higher ITC and hence is sought to be ignored. Author submits that applying the said rule without seeing the underlying reasons for variance exceeding the said 25% points is unjust and needs to be relooked by the Government.

What happens to ITC of capital goods

37. It may be noted that ITC availed on capital goods do not form part of the above calculations. Hence a clarification is required as to whether the ITC attributable to capital goods to the extent of the unexpired period (out of 60 months) shall require any reversal or not. Plain reading of the notification do not suggest such reversal.

What happens to new projects

38. A new project can be either a REP which is a RREP or a non-RREP. If time of supply has arisen on or before 31st March, 2019 but input services or inputs have not been received, calculation of eligible ITC shall be as per Part 2 of the Annexure I (in case of non-RREP) or Annexure II (in case of RREP). Hence ITC only to the extent of supply taxed at the higher rates shall be available. In all other new projects (i.e., where time of supply has not arisen on or before 31st March, 2019) the above referred Annexures shall not apply.

Conclusion

39. Above discussions show that lot of work needs to be done by the concerned promoters of the Real Estate Projects to arrive at the amount of ITC which shall be required to be paid back (as will happen in majority of cases). Accurate working can aid in deciding for the ongoing projects whether to opt for the new scheme or to continue under the old scheme. Accuracy of the working can also minimise the cost and shall enable to plan for the cash flow requirements to avoid higher interest cost, if instalments are sought.

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Work on ! Hold on ! Be brave !

Dare anything and everything !

— Swami Vivekananda

CA Rajkamal Shah

Real Estate related Amendments Part-3 RCM Notifications and Changes in Works Contract (excluding Redevelopment Rights)

Amendments relating to works contract by Notification No. 03/2019-CT (R)

The Government has thrown surprise by omitting Entry (ii) under section 5 in Notification No. 11/2017-CT (R) *vide* Notification No. 3/2019 – CT(R) dtd. 29-3-2019. The omitted entry is as follows:

"Composite supply of works contract as defined in clause 119 of section 2 of Central Goods and Services Tax Act, 2017 [CGST 9% + SGST 9%]".

In substitution to the deletion of above Entry, a new Entry (va) is inserted in Notification No. 3/2019 to cover only the composite supply of works contract, supplied by way of construction, erection, commissioning, installation, completion, fitting out, repair, maintenance, renovation, or alteration of affordable residential apartments in a project which commences on or after 1st April, 2019, or in an ongoing project in respect of which the promoter has opted for new rate. This means that this Entry is applicable only to contractor and sub-contractor providing service to the developer who undertake construction service in relation to the affordable residential apartments, the rate of tax shall be CGST 6% + SGST 6%.

It is to be noted that service in respect of RREP & REP new projects from 1-4-2019 as well as ongoing projects in respect of which the developer has opted for new rate of tax, ongoing projects for which the developer has opted to continue in existing rates, low cost housing up to carpet area of 60 sqm. per house in an affordable housing project having status of infrastructure projects *vide* the Notification of Government of India, Ministry of Finance, Department of Economic Affairs *vide* F. No. 13/6/2009- INF dtd. 30-3-2017 and under various schemes like PMAY, RAY, etc. are continued to be covered in construction service.

Interestingly, the following conditions in relation to affordable residential apartments in Entry (va) need to be satisfied by the developer.

1. Carpet area of affordable residential apartments should be minimum 50% of total carpet area in the project. However, if this condition is not satisfied at a later stage, the developer shall be liable to pay such amount of tax on reverse charge basis as is equal to the difference between the tax payable on account of differential area and the tax actually paid.
2. For the purpose of determining whether the apartments at the time of supply of the service are affordable residential apartments or not due to the condition of value up to ₹ 45 lakh, value of the apartments shall be the value of similar apartments booked

nearest to the date of signing of the contract for supply.

The question arises as to how the sub-contractor would know about the satisfaction of the conditions by the developer as regards allocation of minimum 50% of carpet area of the project for the affordable housing so as to apply full rate of tax i.e., 18% instead of 12% (inclusive of CGST & SGST).

Effect of the amendment in composite works contract

- Omission of works contract Entry (ii) from Notification No. 11/2017 – CT(R) results in redundancy of Section 2(119) in general (other than the specified entries).
- Entry (xii) is a residuary Entry for levying tax on construction services. By virtue of change in classification under Scheme of Classification of Services as specified in the annexure to Notification No. 11/2017 – CT(R), all works contracts fall under construction service. This has resulted in compelling the assessee to classify the 'works contract service' as 'construction service' under Clause (xii) as substituted from 1-4-2019.
- The assessee is now compelled to pay GST on total value of the agreement including the value of land.

By this amendment, the definition of works contract has now become upside down. Though, as per the definition of works contract as contained u/s. 2(119) of CGST Act, 2017 includes construction, now by way of the annexure of Scheme of Classification of Service, works contract is a part of 'construction service'.

With this, the settled principle that a building contract is a specie of works contract is given go-by. It is worth noting that in *Commr. of C.Ex. & Cus. vs. Larsen & Toubro Ltd. – 2015(39) STR 913,* the Hon'ble Supreme Court held that prior to 1-6-2007, service tax was leviable only on contracts simpliciter and not composite indivisible works contract. The same principle is pronounced by the Hon'ble Supreme Court in *K. Raheja Development Corporation vs. State of Karnataka- 2006 (3) STR 337 (SC)* and Hon'ble Bombay High Court in case of *MCHI vs. UOI- 2012 – TIOL – 1095- HC-MUM-VAT.*

Condition of new rate of tax – procurement of supplies from registered dealers

- The taxpayer shall procure at least 80% inputs and input services from registered vendors only. However, such procurement would not include:
  - Services by way of grant of development rights, long term lease of land or FSI (including additional FSI),
  - Electricity
  - High speed diesel, motor spirit, natural gas
  - Capital goods
- Inputs and input services on which tax is paid on RCM shall be deemed to have been purchased from registered persons.
- Any shortfall from 80% shall be paid by the developer under RCM and shall **first be allocated to purchase of cement** from unregistered dealers on which 28% tax shall be attracted. The balance of shortfall shall attract 18% GST under Entry 39 inserted *vide* Notification No. 03/2019- CT (R).
- Maintain project-wise account of inward supplies from registered and unregistered suppliers.
- The tax liability on shortfall from inward supplies shall be calculated at the end of F.Y. and shall be added to output tax liability not later than the month of June following the end of F.Y.
- Tax on cement received from unregistered person shall be paid in the month in which cement is received.
- The taxpayer shall declare ITC not availed every month, as ineligible credit in GSTR-3B [Row No. 4 (D)(2)].

Illustration III of Notification No. 03/2019-CT (R)

According to the example given in illustration III, the promoter has procured 50% of goods and services from registered vendors. Hence, he did not satisfy the condition of 80% procurement from registered vendors during the financial year under new dispensation. Therefore, GST on shortfall of 30% from mandatory purchase has to be discharged by promoter under RCM. The promoter has to first pay GST on cement @ 28% (inclusive of CGST & SGST) and the remaining shortfall shall be paid by the promoter @ 18% (inclusive of CGST & SGST) under RCM.

Conditional exemption in respect of GST on development rights, etc., for construction of residential apartments

Exemption is granted in respect of transfer of development rights or FSI (incl. additional FSI) on or after 1-4-2019, long term lease of land (30 years or more) for construction of residential apartment, against consideration in form of upfront payment (in form of premium, salami, development charges, cost, price, or by any other name) to the extent sale of under constructed residential apartments as provided in Entry 5(b) of Sch. II of the CGST Act, 2017.

The payment in respect of transfer of development rights etc. would not exceed 1% (0.5% CGST & 0.5% SGST) of the value of affordable residential apartment and 5% (0.5% CGST & 0.5% SGST) of the value of other than affordable residential apartment that remains unbooked on the date of issue of completion certificate or first occupation of the project, as the case may be.

The value of supply of service by way of transfer of development rights or FSI (incl. additional FSI) by a person to the promoter against consideration in the form of residential or commercial apartments shall be deemed to be equal to the value of similar apartments charged by the promoter from the independent buyers nearest to the date on which such development rights or FSI is transferred to the promoter.

Value of portion of residential or commercial apartments remaining unbooked on the date of issuance of completion certificate or first occupation, as the case may be, shall be deemed to be equal to the value of similar apartments charged by the promoter nearest to the date of issuance of completion certificate or first occupation, as the case may be.

However, the promoter is liable to pay for construction of a project under RCM against service by way of transfer of development right or FSI (incl. additional FSI), long term lease of land (30 years or more) against consideration in form of upfront payment (in form of premium, salami, development charges, cost, price, or by any other name) and / or periodic rent.

Relevant Definitions

- **Ongoing Project**
  The following conditions need to be satisfied simultaneously,
  - Commencement Certificate is issued and certified by specified persons that the construction of project has started

    OR
  - Where the commencement certificate in respect of the project is not required to be issued by the competent authority it is certified by specified persons that the construction of project has started
- Completion Certificate has not been issued

  OR

  First occupation of the project has not taken place
- The apartments being constructed under the project have been, partly or wholly booked (at least 1 installment should have been credited in the bank account on or before 31-3-2019)

The apartment is said to be **partly or wholly booked on or before 31-3-2019** if:

part of supply of construction has time of supply on or before 31-3-2019

&

At least 1 installment credited on or before 31-3-2019

&

An allotment letter or sale agreement or any other similar document evidencing booking of the apartment has been issued on or before the 31st March, 2019.

- **RREP & REP**
  - The term "Residential Real Estate Project (RREP)" means a REP in which the carpet area of the commercial apartments is not more than 15 per cent of the total carpet area of all the apartments in the REP.
  - REP is as defined as referred to in S.2(zn) of Real Estate Regulation Act, 2017 (RERA) which is other than RREP.

- **Affordable Residential Apartments**
  - Carpet area is up to 60 sqm. (for metropolitan cities) and 90 sqm. (for non-metropolitan cities) & Gross amount charged is up to ₹ 45 lakh
  - Entry (va) inserted in S. 5 w.e.f 1-4-2019 in NN. 11/2017 gives option to developer for paying GST only service component under 'Works Contract' entry – however restricted to Affordable Housing only.
  - An apartment being constructed in an ongoing project under the schemes specified in clause 3(iv)(b) to (db), 3(v)(b) to (da) and 3(vi)(c) covered under Notification No. 11/2017-CT (R) (e.g. PMAY, infrastructure status, projects under Public Private Partnership, etc.)

Meaning of Gross amount =

Consideration charged as per agreement

(+) Amount charged for the transfer of land or undivided share of land, as the case may be incl. by way of lease or sub-lease.

(+) Any other amount charged incl. preferential location charges, development charges, parking charges, common facility charges etc.

- **"Promoter"** shall have the same meaning as assigned to it in clause (zk) of section 2 of the Real Estate (Regulation and Development) Act, 2016 (16 of 2016)
- **"Project"** shall mean a Real Estate Project (REP) or a Residential Real Estate Project (RREP)
- **"Floor space index (FSI)"** shall mean the ratio of a building's total floor area (gross floor area) to the size of the piece of land upon which it is built.
- **"Apartment"** shall have the same meaning as assigned to it in clause (e) under section 2 of the Real Estate (Regulation and Development) Act, 2016 (16 of 2017).
- **"Carpet area"** shall have the same meaning as assigned to it in clause (k) under section 2 of the Real Estate (Regulation and Development) Act, 2016 (16 of 2017).

Conclusion

The dispensation as regards composite works contract service has thrown controversial issues having repercussions on real estate industry. On one hand, the residuary entry as regards composite works contract is omitted and on the other hand, it has become part of construction service as against the definition of works contract service under the Act. No reason for such treatment is forthcoming and it would be interesting to know the legal developments in this regard.

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Harsh Shah, *Advocate*

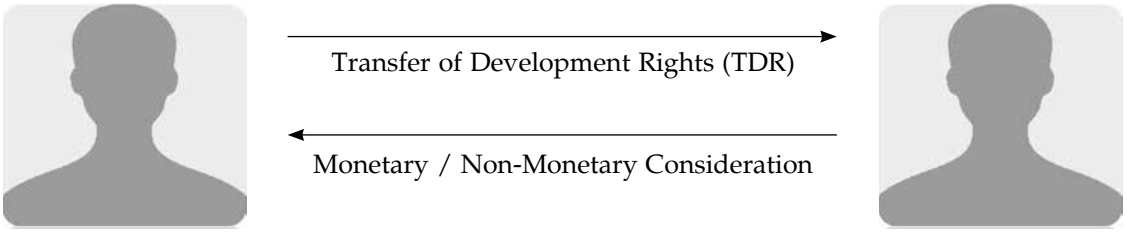
Real Estate related Amendments Part-4 Taxability of Redevelopment Rights

1. Real Estate business by nature is highly local and hence it is not uncommon to witness differences in price from one locality to another, albeit in the same vicinity. While service tax was levied uniformly across the country, the levy of Value Added Tax on Real Estate differed from State-to-State. With the introduction of Goods and Services Tax ('GST'), there is uniformity in the taxation of Real Estate transactions across the country. Be it as it may, the age old saying that tax is the resultant effect of business has virtually been turned upside down in the context of Real estate. The number of changes in taxation that the sector has been witnessing has actually had an effect on how the business is to be conducted.
2. The localised nature of the sector can also be witnessed from the manner in which business is conducted. While, there is a horizontal expansion in the Real Estate sector in most parts of the country, in metro and other big cities, where there is scarcity of land, the Real Estate sector witnesses vertical development. These are the cases where the redevelopment rights actually come into the picture.

Typical transactions of development rights can be envisaged in the following situations:

Nature of transaction	**Particulars**
Joint Development Agreement	The land owner enters into an agreement with the developer wherein the land owner grants development rights and both of them agree to jointly develop the land for an agreed manner of consideration which is generally in the form of area share or revenue share
Slum Rehabilitation Arrangement	The developer provides rehab houses to slums and gets a right to develop the land.
Society redevelopment	Societies grant development rights to the developer who normally provides corpus, new units, rent allowance, hardship allowance, etc., to the existing members and sells a portion of such redeveloped society
Individual (own use)	A landowner agrees to grant development rights to the developer in lieu of the developer agreeing to construct a house for such individual and any other construction

The transaction can also be diagrammatically explained as under:



It can thus be observed that all re-development arrangements of such a nature typically involve two transactions:

A. Transfer of development rights as per above

B. Consideration, whether monetary or non-monetary (in the form of construction/area share), paid by the developer

3. The first and the foremost question that arises is whether GST, being in the nature of a tax on goods and services, should *per se* be leviable on transfer of development rights. The answer to this question lies in the definition of 'goods' and 'services' under GST.

4. The definition of 'goods' under Section 2(52) of the CGST Act covers all movable property and the definition of 'services' is more of a residuary definition under Section 2(102) of the CGST Act and covers all supplies other than goods unless exempted or excluded. The only relevant exclusion in this context in under Entry 5, Schedule III, to the CGST Act which excludes transactions of sale of land and sale of building where the occupation certificate has been received. Thus, transfer of development rights, not being exempted or excluded is subject to GST being in the nature of supply of service.

5. In the context of the definition of 'service' under the pre-GST and GST regime, it is important to note that the definition under the pre-GST regime excluded from its purview, a transfer of title in goods or immovable property, by way of sale, gift or in any other manner and by virtue of such exclusion, the industry has been adopting a view that no service tax is payable on transfer of development rights.

6. In this context, it is important to note that despite the above exclusions, Show Cause Notices have been issued to certain developers alleging that service tax is payable on transfer of development rights under the pre-GST regime essentially on the aspect that what is sought to be taxed is the act of transfer of the right and not the development rights *per se*. Having said so, it is important to examine the taxation of development rights, especially in light of the recent amendments.

7. While the definition of land under several Acts, including but not limited to Land Acquisition Act, 1894, includes rights arising out of land, the Government *vide* Notification No. 4/2018 dated 25th January 2018 and *vide* the recent amendments in the GST law including Notification 3/2019 dated 29th March 2019 have made it clear that GST is leviable on the development rights.

8. The Real Estate sector has once again witnessed a sea change in terms of the

GST implications on its transactions. The Government has introduced several notifications which are effective from April 1, 2019 and one of the important amongst these in the context of taxation of construction services or development rights is Notification 3/2019 – Central Tax (Rate) dated 29th March 2019.

9. Notification No. 3/2019 provides various options to a developer for the purpose of determining the manner in which the real estate transactions would be taxed. The manner in which construction services would be taxed in cases of transfer of development rights has been discussed in proviso (iv) to column (5) of Entries 3(i) to (id) of Notification No. 3/2019 and the same is as under:

Provided also that where a registered person (landowner-promoter) who transfers development rights or FSI (including additional FSI) to a promoter (developer-promoter) against consideration, wholly or partly, in the form of construction of apartments, -

(i) the developer-promoter shall pay tax on supply of construction of apartments to the landowner-promoter, and

(ii) such landowner–promoter shall be eligible for credit of taxes charged from him by the developer-promoter towards the supply of construction of apartments by developer-promoter to him, provided the landowner-promoter further supplies such apartments to his buyers before issuance of completion certificate or first occupation, whichever is earlier, and pays tax on the same which is not less than the amount of tax charged from him on construction of such apartments by the Developer-promoter.

Explanation

(i) "Developer-promoter" is a promoter who constructs or converts a building into apartments or develops a plot for sale,

(ii) "landowner-promoter" is a promoter who transfers the land or development rights or FSI to a developer-promoter for construction of apartments and receives constructed apartments against such transferred rights and sells such apartments to his buyers independently.

10. In addition to the said proviso, it is also important to refer to the *Explanation 2A* that has been introduced in the said Notification as under:

"2A. Where a registered person transfers development rights or FSI (including additional FSI) to a promoter against consideration, wholly or partly, in the form of construction of apartments, the value of construction service in respect of such apartments shall be deemed to be equal to the total amount charged for similar apartments in the project from the independent buyers, other than the person transferring the development rights or FSI (including additional FSI), nearest to the date on which such development rights or FSI (including additional FSI) is transferred to the promoter, less the value of transfer of land, if any, as prescribed in paragraph 2 above."

Let us now examine the taxation of construction services by developer in a transaction involving development rights and taxation of supply by way of development rights to the developer.

Taxation of construction services wherein the consideration, whether fully or partly, is in the form of development rights

11. The taxation of construction services where the consideration, whether fully or partly, is in the form of development rights can be understood as follows.

- Taxability: In terms of the said proviso, where construction services are provided by the developer, where the development rights are

transferred to him as part of the consideration, whether fully or partly, against construction services, the developer is required to pay tax on such construction services.

- Rate : The rate of tax on such construction services would be 1% (in case of affordable) and 5% (in case of other than affordable) residential apartments. This is the same rate that is applicable on sale of units by the developer to independent buyers. It is, however, important to note that the proviso is applicable only where registered person transfers the development rights.
- Value : The value of such construction services has been provided in *Explanation 2A*. As per the said explanation, the value of such construction service shall be deemed to be equal to the amount charged by the developer for sale of similar apartments to independent buyers. Further, value of similar apartments sold nearest to the time of transfer of development rights should be considered. However, it may be worthwhile to note that the said explanation also applies only when a registered person transfers development rights.
- When to pay the tax: By virtue of Notification No. 6/2019, the Central Government, in exercise of powers in terms of Section 148 has held that the liability of a promoter to pay tax on construction services in such cases shall arise on the date of issuance of completion certificate for the project or its first occupation whichever is earlier. This is a little similar to Notification No. 4/2018 dated 25th January 2018 whereby in exercise of powers of Section 148, the liability to pay Central tax arose when the developer transferred possession or the right in the constructed building to the person supplying the development rights by entering into a conveyance deed or similar instrument. To bring in a legal perspective, Section 148 of the CGST Act gives powers to the Government for prescribing procedures to be followed by specified persons with regard to registration, furnishing of returns, payment of tax and administration of such persons. Technically therefore, there are no powers in Section 148 to define the time of supply although the Government can determine procedure regarding payment of tax.
- Credit eligibility : One of the requirements of Notification No. 3/2019 for cases where the developer chooses to pay tax at a lower rate (5% or 1%) is that credit on the goods and services used for providing the services should not be taken where the time of supply is on or after April 1, 2019. Accordingly, for all such supplies credit would not be available to the developer where he pays tax @ 5% / 1%.

12. Interestingly, the proviso states that the landowner-promoter would be eligible for credit of taxes charged by the developer promoter towards such construction services, provided that the landowner promoter further supplies such apartments to his buyers before issuance of completion certificate and pays the tax on the same which is not less than the amount of tax charged to him by the developer. Thus, a landowner promoter is eligible to avail credit of the GST on the construction services charged by the developer subject to the dual conditions as follows:

(a) The landowner-promoter supplies such apartments to his buyers before issuance of OC

(b) Tax paid by landowner-promoter on (a) above, is not less than the tax charged by the developer.

13. It is worthwhile to note that the proviso does not speak about proportionate credit in the hands of the landowner in cases where the landowner-promoter pays less tax than what is charged by the developer. For instance, if the developer charges tax on a value of ₹ 100 and the landowner-promoter pays tax on a value of ₹ 98 (assuming there is only 1 unit), then as per the strict reading of the proviso, the landowner promoter shall not be able to avail credit of the GST charged by the developer. Another important finding from the Notification is that the first condition for developers opting to pay tax @ 1% or 5% is that the amount of GST needs to be paid in cash. Thus, on one hand, the proviso permits availment of credit in the hands of the landowner -promoter, on the other hand there is a restriction for payment of tax by credit under the relevant entries providing for a lower rate. On a harmonious reading of the two, it seems that it may be possible to take a view that a landowner-promoter may be eligible to avail credit subject to fulfilment of the above conditions and utilise the credit while making payment on supplies of under-construction units by him.

14. In addition to the above, it is also important to note that the proviso may not be applicable for any and all development rights transactions.

- The proviso is applicable only for transactions wherein the developer has opted for options (i) to (id) as provided in the Notification i.e. the various situations wherein the developer can charge GST as per the new rate i.e. 1% or 5% as the case may be depending on whether it is an affordable residential apartment or otherwise. The **proviso is therefore not applicable where the developer continues to pay tax as per the existing schemes i.e., effective rate of 8% / 12%.**

- The proviso is applicable only in a situation where the consideration, whether wholly or partly, is in the form of construction of apartments. It is thus clear that the said **proviso may not be applicable in a situation where the consideration for the development rights is wholly monetary.**

15. It can thus be observed that in cases such as those highlighted above, the proviso shall not be applicable, and the taxation shall be as applicable prior to this amendment. In the said context, several players in the industry, after considering the valuation provisions and Rules, had adopted a view that value of construction services in such cases would be equivalent to the cost of construction + 10%. The authorities have been disputing the same on the grounds that the value should be equivalent to the value of similar flats sold to independent buyers.

Taxation of development rights

16. Having examined the taxation of construction services involving development rights, it will also be worthwhile to examine the taxation of development rights. In this regard, as mentioned above, the position on taxability of transfer of development rights *per se* has once again been affirmed by the Government by introduction of the recent notifications. As diagrammatically represented in Para 2 above and also explained in Para 4 above, the supply of

development rights is taxable under GST. Having examined the same, it is important to note the changes made in taxation of the same effective April 1, 2019.

- Taxability : As mentioned earlier, transfer of development rights constitutes supply of services under the provisions of the GST law. Accordingly, such transactions are subject to GST, unless specifically exempt.
    - Supplies by way of transfer of development rights in a residential project : In this regard, it is important to refer to Notification No. 4/2019 dated 29th March 2019 which amends Notification 12/2017 providing for exemptions under GST. As per Notification 4/2019, as exemption has been provided for supply by way of transfer of development rights on or after April 1, 2019 for construction of residential apartments by a promoter, intending for sale (wholly or partly) to the buyer, except where the entire consideration is received post completion certificate. Such exemption is conditional, and the exemption is available only in a scenario where the developer supplies all the units prior to issuance of completion certificate. To the extent of units remaining unsold at the time of issuance of completion certificate, the developer (being the recipient of service of transfer of development rights), is required to pay GST under reverse charge mechanism. For instance, if the developer constructs 100 units using the development rights and 80 of those units are sold before OC, then the exemption to the development rights is only to the extent of 80 units and the developer would be required to pay GST under reverse charge mechanism to the extent of units remaining unsold at the time of issuance of completion certificate i.e., 20.
    - Supplies by way of transfer of development rights in a commercial project : There is no exemption provided under the GST laws in respect of transfer of development rights in a commercial project. Further, in a case involving residential and commercial apartments, Notification No. 4/2019 specifically provides that the exemption shall be only to the extent of the residential units.
    - While the Notification covers regarding the aspect of taxation *qua* development rights, it unfortunately does not specify anything in respect of transactions involving a Slum Rehabilitation Scheme. This aspect was immediately bought to the notice of the legislators and the Government has referred the issue of taxation w.r.t. Slum Rehabilitation Schemes to the Group of Ministers ('GoM') which had been formed to look into the issues pertaining to the Real Estate sector.
- Rate: The rate of tax on supplies involving transfer of development

rights shall be 18%. Under the GST law, any goods or services for which the rate has not been prescribed, generally fall under the omnibus entry covering taxability of any items for which a specific rate has not been prescribed.

- Value : It may be noted that by virtue of Notification No. 4/2019, a paragraph has been added in Notification No. 12/2017 indicating that the value of supply of services by way of TDR or FSI to a promoter against consideration in the form of residential or commercial apartments shall be deemed to be equal to the value of similar apartments charged by the promoter from independent buyers nearest to the date on which such development rights is transferred to the promoter.

  It is further interesting to note that the exemption provided under Notification No. 4/2019 provides a cap on the GST to be paid by the promoter under reverse charge mechanism. As per the exemption, the value of GST payable by the promoter shall not exceed 1% / 5% (as the case may be) of the value of flats that remain unsold at the time of completion certificate. The value of such unsold flats shall be deemed to be equal to the value of similar apartments charged by the promoter nearest to the date of issuance of completion certificate.

- When to pay the tax: The liability to pay the tax, as in the case of construction services as mentioned in 11 above, shall arise on the date of issuance of completion certificate or its first occupation whichever is earlier.

- Person liable to pay the tax: Notification 5/2019 dated 29th March 2019 has amended Notification No. 13/2017 (providing for categories of services on which tax is payable under reverse charge mechanism) to state that in respect of services supplied by any person by way of transfer of development rights or FSI, for construction of a project by a promoter, the promoter shall be liable to pay GST.

  On a separate note, factually, there are several cases where the FSI/ development rights are transferred to another person and such person (intermediate person) may in turn sell it to a developer who may use such rights/FSI for construction of the project. In such a case, one view that emerges is that the original transaction of FSI / development rights may not be exempt since it is not supplied for construction of a project by the promoter. However, if this view has to hold good, it would make the entire transactions of development rights unviable. It would lead to GST being levied at 18% by the first seller to the intermediate person with no corresponding credit in his hands as when such intermediate person would transfer the development rights to the developer, the same would not be taxable in the hands of the intermediate person. Considering the same, it appears that it may be possible to take a position that as long as the development rights are used (final use as opposed to immediate use) for the purpose of construction of a project, the same should be exempt from GST.

  It may be interesting to note that the liability on the promoter for

paying GST under reverse charge mechanism appears to be in respect of all projects and not only in respect of residential projects. Hence, unlike a differentiation as regards exemption to GST to the extent of residential units sold pre-OC, there is no distinction as regards the person liable to pay GST which shall be the developer independent of whether the rights are to be used for residential projects or commercial projects.

- Credit eligibility

  Residential projects

  The development rights are normally used by a developer for the purpose of construction of units. As per the amendment provisions under the GST law, in respect of an ongoing project or projects which commence on or after April 1, 2019 where the developer pays tax @ 1% / 5%, there is a restriction in availment of credit of any goods or services. Hence, in such cases the credit of GST paid by him under reverse charge mechanism for development rights would not be available.

  Commercial projects

  It is worthwhile to note that there has been no amendment in the GST laws essentially with respect to taxability of development rights when used for commercial projects. In such cases, while the GST payment responsibility has been shifted to a developer under the reverse charge mechanism, the developer shall be eligible to avail credit of the GST paid on such development rights and use the same against the GST liability on sale of under-construction commercial units.

17. The below table summarizes the various aspects of taxation of construction services in a case where, part of consideration is in the form of transfer of development rights.

Particulars	Pre-GST regime	GST regime upto 31st March 2019	GST regime from 1st April, 2019
Taxability	Taxable	Taxable	Taxable
Value	Cost of construction	Cost of construction + 10%	Cost of similar flats or cost of construction + 10% as the case may be
Rate	15%	18%	1% / 5% or 18% as the case may be
Time of supply	As per milestones, being in the nature of continuous supply of service or receipt of advance	Effective January 25, 2018, when the Developer transferred possession or the right in the constructed building to the person supplying the development rights	The date of issuance of completion certificate for the project or its first occupation whichever is earlier
Person liable to pay the tax	Developer	Developer	Developer
Credit eligibility	Credit of goods and services availed for providing such services shall be eligible	Credit of goods and services availed for providing such services shall be eligible	Credit may not be eligible as one of the conditions for payment of tax at 1% / 5%

18. A summary of taxation of development rights is given below.

Particulars	Pre-GST regime	GST regime up to 31st March 2019	GST regime from 1st April, 2019
Taxability of transfer of development rights	Not applicable	Taxable	Residential project - Exempt, subject to number of units being sold by the developer before issuance of OC Commercial project - Taxable
Value	NA	Transaction value / open market value of the development rights	Value of similar apartments sold by the promoter to independent buyers nearest to the time when the rights are transferred.
Rate	NA	18%	18%
Time of supply	NA	Effective January 25, 2018, when the Developer transferred possession or the right in the constructed building to the person supplying the development rights	The date of issuance of completion certificate for the project or its first occupation whichever is earlier
Person liable to pay the tax	Service provider	Supplier	Developer under RCM
Credit eligibility	Recipient may be eligible to the extent of supply of taxable services	Recipient may be eligible to the extent of supply of taxable services	For residential, if the Developer goes for 1% / 5%, no credit shall be eligible. For commercial projects, credit shall be available to the extent of supply of such units under construction

It can be observed from the above that while there has been a constant effort from the legislators to bring in clarity on the aspect of taxation of Real Estate, certain ambiguities continue to exist considering the very peculiar nature of the sector. To summarise the efforts of the legislators and the various real estate related associations, it is a realistic and wishful thinking that going forward, the complexity in taxation of these transactions would reduce.

The above article does not constitute legal advice and the views expressed herein are personal views of the author

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Blessed are they whose bodies get destroyed in the service of others.

— *Swami Vivekananda*

CA Pritam Mahure

Real Estate related Amendments Part-5 Changes in Input Tax Credit Provisions under CGST Rules, 2017 relating to Real Estate Sector

In the last decade, from indirect tax policy perspective, Real Estate (RE) Sector has seen enough policy flip-flops. Out of nowhere, in the year 2010, service tax was introduced on sale of under-construction properties. Later, in 2012, due to cascading effect of taxes, Input Tax Credit (ITC) on input services and capital goods was granted. On 1st July 2017, with introduction of GST in India, GST @ 12% was levied with full ITC.

Now, suddenly after twenty-one months in GST regime, from 1st April 2019, the RE sector is detached from the ITC chain with the new effective rates of 1% on affordable houses, 5% for residential properties. The denial of ITC is certainly is a retrograde step, as in the erstwhile Service Tax regime, atleast credit on input services and capital goods was available.

Further, the policy-level flip-flops itself seem to undermine the fact that RE sector is one of the significant contributors to Indian GDP and is the second largest employment generator after agriculture.

In this article, the author discusses the key changes in Rules, can these changes be retrospective and few unanswered questions on these changes.

1. What are the changes in CGST Rules?

1.1 The methodology for reversal Input Tax Credit is prescribed under Rule 42 (for input and input service) and Rule 43 (for capital goods) in case of commonly used goods and services for taxable and exempt supply. The GST Rules provide for reversal on **monthly** (provisional) basis and then on a final basis.

1.2 Now, amended Rule 42 (3) of the CGST Rules, w.e.f. 1st April 2019, specifically provide reversal, for real-estate sector, for the period **from** the commencement of the project or **1st July 2017,** whichever is later, **to the completion** or first occupation of the project, whichever is earlier. Further, now, *explanation* in Rules 42/ 43 specifically provided that during the stage of construction the value of exempt supply, during the construction phase will be '**zero**' (as only after completion certificate or first occupation of the project, one can compute the unbooked area).

1.3 Thus, as per the amended Rules, the reversal is expected to trigger for all the credit availed from 1st July 2017 till the date of completion. This computation is to be done separately for each project and also separately for CGST, SGST, UTGST and IGST.

1.4 This reversal should be done first on monthly basis from April 2019 and then on or before the due date for furnishing of the return for the month of **September following the end of financial year** in which the completion certificate is issued or first occupation takes place.

2. Can the changes in Rules apply retrospectively?

2.1 As per Section 16 of CGST Act, subject to such conditions and restrictions as may be prescribed, a registered person can take credit of input tax charged on any supply of goods or services or both to him which are **used or intended to be used** in the course or furtherance of his business.

2.2 Further, Section 17 of CGST Act provides for apportionment and **blocked** credits. In this regard, section 17(2) of CGST Act states that if the goods or services or both are **used** by the registered person partly for effecting taxable supplies including zero-rated supplies and partly for effecting **exempt supplies**, the amount of credit is restricted to so much of the input tax as is **attributable** to the said taxable supplies including zero-rated supplies.

2.3 It may also be noted that section 17(2) of CGST Act specifies that *'…credit shall be restricted to so much of the input tax as is attributable to the said taxable supplies…'*. Thus, GST Law is restricting the credit to the extent of taxable supplies, rather than specifically providing for reversal of credit pertaining to 'exempt supplies'.

2.4 By doing so, the GST Act has placed **onus** on the GST payer to substantiate that the ITC claimed is pertaining to 'taxable supplies'. Even further, section 155 of CGST Act provides that *'Where any person claims that he is eligible for Input Tax Credit under this Act, the burden of proving such claim shall lie on such person'*. Thus, the onus to claim ITC will be on the GST payer. Given this, unless it's substantiated by the GST payer that the ITC is validly available as per GST Law, the same may not be available.

2.5 Input tax credit in indirect tax laws is typically subject to conditions and restrictions. Also, in respect of specific procurements the credit may be specified in the legislation as blocked credit. It may be noted that, in spite of non-provision of prescribed methodology for real estate sector, which is provided w.e.f. 1st April 2019, one may state that reversal can trigger based on the basis of rational methodology such as carpet area (kindly refer judgment of *Orion Appliances Ltd. [2010 (19) STR 205].*

2.6 As regards: Can the Rules be made retrospective, it may be noted that Section 164 (3) of CGST Act has already conferred the power to give retrospective effect to the rules. Also, when it comes to fiscal legislation, the **Legislature has power** to make the provision retrospectively[1]. Law can be made retrospective expressly or by even by implications.

2.7 It is well-settled that **right to take advantage of a statutory provision cannot be said to be an accrued right** and cannot be permitted to be enforced[2].

2.8 Even otherwise, the credit provisions are to avoid the cascading effect of the duties payable and it may not create any vested right. Further, credit will be a vested right, only if, the tax paid at time of procurement is established as qualifying to be eligible credit (by usage of procurement for outward taxable supply). Also, works contract services is also excluded specifically at section 17(5) (c) and (d) of CGST Act and thus, it will be difficult to contend that the ITC for a developer is a vested right.

2.9 Even as per section 17(3) of the CGST Act, the value of 'exempt supply' under sub-section (2) shall be such as may be prescribed, and it, includes, *inter-alia*, *'sale of land and, subject* to clause (b) of paragraph 5 of Schedule II, sale of *building*'. Thus, it may be stated that the Legislators always intended inclusion in the 'exempt supply' the of value of apartments sold after completion certificate.

2.10 Also, under GST Act, credit is not an absolute but a restricted or conditional right. Given this, the amendment in Rule 42 and Rule 43 of CGST Rules, were necessitated by lack of computational methodology and to prevent the misuse of the credit and thus, it does not take away or impair vested right, if any, of the developer.

1 Jayam & Co. 2018 (19) GSTL 3 (SC)

2 Howrah Municipal Corporation & Others vs. Ganges Rope Co. Ltd. & Others [(2004) 1 SCC 663]

2.11 Also, the Apex Court has held that no individual can acquire a vested right from a defect in a statute and seek a windfall from the legislature's mistakes[3].

2.12 As regards, retrospective implications (i.e. for the period from 1st July 2017 to 31st March 2019), it may be noted that the law can be retrospective even **by necessary implications** may have been given retrospective operation[4]. Typically, if the amendments are curative in nature (i.e., curing a defect in the law), by their very nature are intended to operate upon and affect past transaction having regard to the fact that they operate on conditions already existing[5].

2.13 Additionally, the amendment is along with a Removal of Difficulty Order[6] (ROD 4/2019 w.e.f. 1st April 2019). From the terminology of the ROD, it can be observed that the same is intended to remove a lacuna (non-prescription of credit mechanism specifically for real-estate sector). It's a settled principle that while interpreting the law, previous state of law, the amendment and the lacuna it addresses needs to be considered[7]. Given this, it can be construed that the amended provisions will be applicable even for the past period once the final completion certificate is issued for the project.

2.14 Alternatively, as per another school of thought it can be said that the fiscal legislation imposing liability is generally governed by normal presumption that it is not retrospective[8]. Further, it is observed that the Rules are not specifically made applicable retrospectively (though made by implication). Even the Removal of Difficulty Order is applicable with effect from 1st April 2019. Also, the transitional credit (transferred through TRAN-1) does not even qualify as 'input tax credit' as per section 2 (62) of CGST Act. Thus, it can be contended that ITC being an **indefeasible right** [refer *Dai Ichi Karkaria Ltd. [1999 (112) ELT 353 (SC)* and *Eicher Motors Ltd. [1999 (106) ELT 3 (SC)]*, reversal of ITC may not be required. Also, relying on the judgment of *Alembic Ltd. [2019-TIOL-358-CESTAT-AHM]* one can contend that reversal may not trigger after completion as the amendments will operate prospectively than retrospectively.

3. Is GST Council enforcing the new rates?

3.1 It is pertinent to note that, for projects other than on-going projects, new GST rates are compulsory. From cursory glance of the notifications issued on 29th March 2019, it appears that the GST Council themselves want to enforce the new rates (without ITC).

3.2 It may be recalled that in the very first real estate related Press Release (PR) dated 15th June 2017 (F. No. 296/07/2017-CX.9), the CBIC clarified that *"… incidence of Central Excise duty, VAT, Entry Tax, etc. on construction material is also currently borne by the builders, which they pass on to the customers as part of the price charged from them. This is not visible to the customer as it forms a part of the* ***cost of the flat…*** *What the customer does not see is the embedded taxes on account of cascading and sticking of input taxes in the cost of the flat, etc…* ***The input credits should take care of the headline rate of 12%...****"*

The aforesaid PR clearly stated two aspects:

a. In Pre-GST regime, incidence of excise and VAT on inputs was borne by developers and it forms part of cost of flat

b. ITC should take care of headline rate of 12%

If the aforesaid is taken at its face value, then, following aspects clearly emerge:

3 Ujagar Prints [1988 (38) ELT 535 (SC)]
4 Keshavan Medhava Menon vs. State of Bombay - AIR 1951 SC 128
5 ITW Signode India Ltd. 2003 (158) ELT 403 (SC)
6 It is pertinent to note that 'Removal of Difficulty' provisions are not new in the law as even the Constitution of India has it (refer Article 392 Constitution of India) and even Service Tax legislation contained similar provision (refer Section 95 of Finance Act, 1994)
7 Pappu Sweets and Biscuits 2004 (178) ELT 48 (SC)
8 Halsbury's Laws of England Vol.36 p.425

a. After 1st April 2019, denial of ITC will again form part of flats

b. ITC denial will result in cost to the extent of 12% or higher

3.3 Thus, it's apparent that GST Council knows that again the flat prices are expected to increase (to the extent of ITC denial) and additionally, home buyer will pay GST (1% or 5% as applicable). This cost increase will go on to pinch the home buyers. If GST Council knows about aforesaid then, why the changes, which are unlikely to benefit most home buyers (except few premium properties in say Mumbai and Delhi) are introduced?

4. Why double whammy of GST levy and credit denial?

4.1 Globally, exempt supplies are considered as 'input taxed supplies' as such supplies are unable to recoup ITC. However, in India, now the RE sector will have a unique distinction of being both i.e., 'input taxed supplies' and 'output taxed supply'.

4.2 Its important to note that the entire value of procurement (i.e., goods and services) has already suffered GST, thus, ideally denial of ITC can take care of tax collections. As the developer will procure supplies with GST then is it justified to levy GST again be levied (either @ 1% or 5%) on RE properties (before completion) along with Stamp Duty of 6%? Isn't this a case of triple taxation (i.e. denial of credit on procurements, GST on supply of under-construction property and stamp duty).

4.3 Also, GST is levied on transactions of goods and services which are, typically, intended for consumption. Apart from consumption, there are certain procurements, which are not only for consumption but rather an investment avenue. One of such examples is procurement of gold which attracts GST @ 3% (with ITC). RE sector, like gold, is an investment avenue an investment (wherein most of the home buyers invest their life time savings) and thus, levying GST @ 5% on flats (other than affordable) without ITC amounts to levying three taxes (input taxed supply, 5% on output and ~7% stamp duty).

4.4 Rarely, any country taxes RE sector so heavily like India is! Rather, to make residential properties affordable, neighbouring countries like UAE have made it a 'zero rated' supply (at par with export). This makes one wonder whether there is any economic rationale (than higher collection of taxes) to levy GST and at the same time treat the supply as 'exempt' supply' to deny ITC.

4.5 It is pertinent to note that it is well-settled that tax laws are subject to fundamental rights under Articles 14 and 19 of the Constitution of India. Thus, the step of levying GST @ 5% and denying ITC, may tantamount to Government denying real estate sector equality before the law (as compared to similar sector i.e., gold (which is also an investment avenue) as required under Article 14 of Constitution of India.

5. Way forward

5.1 In days to come Courts will debate question as to whether GST Council, which is a body formed under Constitution of India, can ignore the fact that Constitution of India has kept **'land and buildings'** under the ambit of States (Entry 49 to List II of Schedule VIII) to propose to levy GST on under-construction properties and even the development rights or FSI or upfront premium.

5.2 Also, as there is no much discussion in Parliament or Legislative Assemblies about the changes in GST law (though these changes are affecting citizens), questions can be raised about excessive delegation of powers to GST Council.

5.3 Now, only time will tell whether the classification of all projects into the basket of 'on-going' and 'new' projects was actually discriminatory (and thus, void) and whether the intended benefit (if there is any!) reaches the home buyers.

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CA Kiran G. Garkar

Maharashtra Settlement of Arrears of Tax, Interest, Penalty or Late Fee Scheme, 2019

Preface

Goods and Services Tax Law was introduced w.e.f. 1-7-2017. As period of about two years is to be complete and the Department has to march towards its implementation with full force, it was necessary to wipe off old luggage. Large number of cases and litigations are pending under the repealed laws which are subsumed in the Goods and Services Tax Act. Substantial amount of revenue is locked in the repealed laws. It was therefore, considered expedient to provide for a scheme for settlement of arrears of tax, interest, penalty or late fee under the Relevant Acts, which were levied or imposed for the periods ending on or before the 30th June 2017.

The legislated scheme attempts to safeguard the undisputed tax and partial recovery of disputed tax, interest, penalty or the late fee, subject to the conditions.

Ordinance No. V of 2019 dated 6-3-2019 has been promulgated to provide for settlement of arrears of tax, interest, penalty or late fee, which were levied, payable or imposed, respectively under various enactments, which are now administered by the Goods and Services Tax Department.

The Ordinance is known as, **"Maharashtra Settlement of Arrears of Tax, Interest, Penalty or Late Fee Ordinance, 2019"** [Hereinafter *referred to as* ***'Amnesty Scheme'***]. It has come into force w.e.f. 6-3-2019.

The Ordinance consists of 20 Sections, Annexure 'A' and Annexure 'B'. It comes as a separate piece of enactment, having definitions, modalities, rules and powers.

Scope of the Amnesty Scheme:

The Amnesty Scheme will be in operation in two phases from 1-4-2019 to 30-6-2019 and from 1-7-2019 to 31-7-2019, unless otherwise extended. It covers any period up to 30-6-2017 under all the relevant Acts being administered by Sales Tax Department/State GST Department [as defined in Section 2(1) (k)].

The term "arrears of tax, interest, penalty or late fee" has been defined under Section 2(1)(c) so as to mean the amount of tax, interest, penalty or late fee, as the case may be, -

(i) payable by an assessee as per any statutory order under the Relevant Act; or

(ii) admitted in the return or, as the case may be, the revised return filed under the

Relevant Act and which has not been paid either wholly or partly; or

(iii) determined and recommended to be payable by the auditor, in the audit report submitted as per section 61 of the Value Added Tax Act, and accepted by the assessee either wholly or partly, whether the notice under section 32 or 32A of the Value Added Tax Act has been issued or not; or

(iv) in respect of which a notice has been issued, in relation to any proceeding under the Relevant Act; or

(v) determined to be payable by the assesse where no notice in relation to any proceeding under the Relevant Act is issued, and such arrears of tax, interest, penalty or late fee, pertains to specified period.

Section 2(1)(o) defines ***"statutory order"*** meaning any Order passed under the Relevant Act, raising the demand of tax, interest, penalty or late fee payable by the applicant.

The ***"requisite amount"*** has been defined under Section 2(1) (l) so as to mean an amount required to be paid during the First Phase or the Second Phase and shall be the aggregate of-

(i) **undisputed** amount of tax; and

(ii) the amount of **disputed tax, interest, penalty, late fee, post assessment penalty or post assessment interest,** whether levied or not, as determined under section 10 and specified in ***Annexure-A*** or ***Annexure-B*** appended to the Ordinance.

As per the Ordinance the expression ***"applicant"*** has been defined under Section 2(1)(d) means a person who desires to avail the benefit of settlement. This means an applicant, whether registered or not under the Relevant Act, shall be eligible to make an application for settlement, whether such arrears are disputed in appeal under the Relevant Act or not. Such application may be preferred irrespective of the fact as to whether the benefits under any of the earlier Amnesty Scheme or under the Maharashtra Settlement of Arrears in Disputes Act, 2016 **[Section 6]**.

Section 10 refers to ***"Determination of Requisite Amount and the Extent of Waiver".*** The duration of phases under the Ordinance, the Un-disputed or Disputed Tax, Interest, Penalty or Late Fees the extent of payment and applicable waiver, for the First Phase and Second Phase as per **Annexure "A"** and **Annexure "B"** have been summarised in the Chart given below:

Annexure "A"

For the period up to 31-3-2010

Sr. No.	Amount	First Phase		Second Phase	
		1-4-2019 to 30-6-2019		1-7-2019 to 31-7-2019	
		Amount to be paid	Amount of waiver	Amount to be paid	Amount of waiver
1	Undisputed Tax	100%	0%	100%	0%
2	Disputed Tax	50%	50%	60%	40%
3	Interest payable as per any statutory order or returns or revised returns	10%	90%	20%	80%
4	Outstanding Penalty as per any statutory order	5%	95%	10%	90%

Sr. No.	Amount	First Phase		Second Phase	
		1-4-2019 to 30-6-2019		1-7-2019 to 31-7-2019	
		Amount to be paid	Amount of waiver	Amount to be paid	Amount of waiver
5	Post Assessment Interest or penalty or both leviable but not levied upto the date of application by the dealer under Relevant Act	0%	100%	0%	100%
6	Late Fees payable in respect of returns filed during the period 01-04-2019 to 31-07-2019	0%	100%	0%	100%

Annexure "B"					
For the period from 1-4-2010 to 30-6-2017					
Sr. No.	Amount	First Phase		Second Phase	
		1-4-2019 to 30-6-2019		1-7-2019 to 31-7-2019	
		Amount to be paid	Amount of waiver	Amount to be paid	Amount of waiver
1	Undisputed Tax	100%	0%	100%	0%
2	Disputed Tax	70%	30%	80%	20%
3	Interest payable as per any statutory order or returns or revised returns	20%	80%	30%	70%
4	Outstanding Penalty as per any statutory order	10%	90%	20%	80%
5	Post Assessment Interest or penalty or both leviable but not levied upto the date of application by the dealer under Relevant Act	0%	100%	0%	100%
6	Late Fees payable in respect of returns filed during the period 01-04-2019 to 31-07-2019	0%	100%	0%	100%

The terms ***"disputed tax"*** and ***"undisputed tax",*** have been defined in the Ordinance. Now, what is disputed and undisputed amount of tax?

The ***"disputed tax"*** as defined under Section 2 (1) (g) means the tax other than 'undisputed' Tax. The ***"undisputed Tax"*** is defined under Section 2 (1) (q).

To elaborate the term 'un-disputed tax':-

(1) Taxes collected separately: Any amount reflected as 'Tax collection' as per the books of account maintained by the applicant under the relevant Act. This would cover the taxes collected separately in the sales invoices and / or accounted for in the books of account as such.

(2) Taxes collected separately as per statutory order: Deduction allowed by the authority in the statutory order towards tax collected separately. In the statutory order passed by the assessing authority a separate deduction towards tax collection has been allowed, then such tax collection.

(3) Taxes Shown Payable in Returns or Revised Returns: Any amount shown as 'Tax Payable' in the Returns / Revised Returns' filed for the specified period under the Relevant Act. Balance tax payable, whether in full or part, reflecting in the Returns or Revised Returns would be considered as Un-disputed tax.

(4) Deductions Claimed or Allowed under Rule 57 of MVAT Rules or Other Similar Rules under Relevant Acts: The Deduction claimed towards sale price inclusive of taxes where claimed by the applicant or deduction allowed towards sale price inclusive of taxes by the designated authority under the relevant Act.

Where the applicant has not collected taxes separately and the sale price is inclusive of taxes or such deduction has been allowed by the designated authority under Rule 46A of the BST Rules, 1959 or Rule 57 of the MVAT Rules, 2005 or under other relevant Act.

Where there is a dispute in rate of tax towards sale price inclusive of taxes and the applicant has claimed reduction at lower rate by disclosing the same in the Return or Revised Return the said amount would be considered as undisputed Tax. If the same transaction is considered as taxable at higher rate of tax in the course assessment and the designated authority has restricted the reduction from sale price only to the extent of lower rate of tax, then the balance tax payable would be considered as disputed tax.

Where there is a dispute in rate of tax towards sale price inclusive of taxes and the applicant has claimed reduction at lower rate by disclosing the same in the Return or Revised Return but the designated authority has wrongly allowed deduction from sale price at higher rate, then, such deduction allowed at higher rate would be considered as undisputed tax.

(5) Amount Forfeited under Statutory Order: An amount forfeited towards excess tax collection. For Example: An Amount forfeited under Section 46 of the BST Act, 1959, under Section 60 of the MVAT Act, 2002 or under provisions of other Relevant Acts.

(6) Excess collection shown in returns / revised returns or as per audit report in Form 704 under MVAT Act: On the same lines, an amount shown as excess tax collection in Returns / Revised Returns under relevant Acts or in the audit report in Form 704 under MVAT Act would be considered as undisputed Tax.

(7) Any amount of tax, interest or late fee determined & recommended to be payable by the Auditor and accepted by the applicant, either wholly or partly, as per Audit Report in Form 704: An amount of tax, interest or late fee recommended to be payable by the Auditor and accepted by the applicant, whether in full or part would be considered as undisputed tax irrespective of the fact whether any notice under Section 32 or 32A of the MVAT Act has been issued or not.

In so far as interest is concerned, the same is charged under Section 30(2) of the MVAT Act. Where the Interest under Section 30(2) has been recommended to be payable by the auditor and accepted by the applicant either fully or partly would be considered as undisputed interest, to the extent it is accepted.

Late Fee, if the same has been recommended to be payable by the auditor and accepted by the applicant, either fully or partly, would be considered as undisputed in respect of which no waiver would be available.

In respect of the Returns pertaining to the period up to 30th June 2017 which are filed during the Amnesty Period from 1st April 2019 to 31st July 2019 complete waiver of Late Fees shall be available. The same has been clarified in the Trade Circular No. 9T of 2019 dated 8th March 2019 in Para 3.1(5).

It may be noted, the Amnesty Scheme provides that no arrears of tax, interest, penalty or late fee shall be settled in respect of the Specified Period where the Statutory Orders are made or Returns or Revised Returns are filed after the 15th July 2019. **[Section 5(3)]**

In respect of tax, interest or late fee reflected in the Returns or Revised Returns pertaining to Specified Period i.e., up to 30th June 2017 and are filed during the period from 1st April 2019 to 15th July 2019 the position would be as under. In this case the tax is admitted and hence the same is undisputed. The interest, if not paid, is disputed amount. As such, the applicant may opt for waiver of interest and / or late fee and avail amnesty in respect of such Returns or Revised Returns. One may note that in respect of Revised Return, late fees are not captured by the system.

(8) Tax Deducted At Source (TDS) under Relevant Act: The provision for TDS was under the (1) The Maharashtra Sales Tax on the Transfer of Property in Goods involved in the Execution of Works Contract (Re-enacted) Act, 1989; and (2) The Maharashtra Value Added Tax Act, 2002. Under both the enactments TDS deducted by an employer would be considered as un-disputed, whether the same has been deposited into the Govt. Treasury or not.

(9) Tax Collected at Source (TCS) under Sec. 31A of MVAT Act: TCS has been provided only under the MVAT Act. The same is on par with TDS and hence, TCS collected would be considered as undisputed Tax.

Adjustment of any payment under the Amnesty Scheme

The Amnesty Scheme provides for **'Adjustment of any payment'** made under Relevant Act and settlement of arrears of tax, interest, penalty or late fee, if any. Sec. 5(1)(a) of the Ordinance provides that any payment made on or before the 31st March 2019 against any demand made as per the Statutory Order, shall first be adjusted –

(1) Towards the amount of tax

(2) Then towards the interest

(3) The balance amount remaining unadjusted towards the penalty

(4) And then late fee, sequentially

This is in contradiction to the provisions of Section 40 of the MVAT Act, 2002 but a unique feature drafted for the Scheme.

Section 5(1)(b) provides that after adjustment of amount as specified in clause (a), the amount outstanding as on the 1st April 2019, shall only be considered for the settlement and

the amount required to be paid during the first phase or second phase shall be determined as specified in Annexure-A or Annexure-B.

Eligibility for Settlement: (Section 6)

Any person whether Registered or not can opt of Settlement of Arrears of Tax, Interest, Penalty or Late Fee etc., due under the relevant Act and for specified period, irrespective of the fact as to whether any appeal has been filed or not. The applicant who might have availed benefits under any of the earlier Amnesty Schemes is also eligible to avail benefit under the present Amnesty Scheme, 2019.

Conditions for Settlement of Arrears: (Section 7)

An applicant is required to make a separate application for each class of arrears as defined in Section 2(1)(c) of the Ordinance. The said application is to be made to the designated authority in the Forms as are prescribed by an Order issued in that behalf under section 9(2) of the Ordinance *vide* No. ORD. / MMB-2019 / 1 / 2019 / ADM-8.

Where the applicant desires to opt of amnesty in respect of the Returns / Revised Return dues under the relevant Act, then it is expected that the applicant shall submit online separate applications for each of such Return / Revised Return. The applicant at his option may make a single application in respect of one or more such Returns / Revised Returns pertaining a financial year.

Where the applicant files any Revised Return after 6-3-2019 whereby the liability to pay tax and or / interest is reduced on any account, for whatsoever reason, then he is prevented from opting for amnesty in respect of such Revised Return.

However, it is provided that if filing of such Revised Return results in reduction of tax / interest on account of credit towards payment of tax during the intervening period (made from date of submission of original return to date of submission of revised return), then the applicant may opt for the Amnesty Scheme in respect of such return.

Enclosures with the application

Online application shall be accompanied with proof of payment of requisite amount paid during the Amnesty Scheme and other documents such as –

For "FORM I":-

(a) A copy of Statutory Order against which settlement is sought for.

(b) Original Order of Withdrawal of Appeal or in case the Appeal Withdrawal Order is not received then the request letter submitted for Withdrawal of Appeal. (Duly acknowledged and stamped).

(c) Copies of Challans of Payment of amount paid after the date of Order till the 31st March 2019 and for the payment of the requisite amount made for the settlement.

For "FORM - IA"

(a) A copy of the Return/Revised Return/ Audit Report Recommendations against which settlement is sought for.

(b) Copy of the notice in relation to the initiation of any proceeding in respect of which the settlement is sought.

(c) In case no notice is issued then the self-assessed tax, interest or late fee liability in respect of which settlement is sought.

(d) Declarations undertaking under the Settlement Ordinance.

(e) Copies of challans of payment of against the aforesaid dues made till the

31st March 2019 and the payment of the requisite amount.

Where the first or the second Appellate Authority including Court has remanded the matter back to the designated authority for the purpose of recomputation / Fresh Assessment to determine the liability to pay tax, interest or penalty then such order has to be passed before 15-7-2019. In case, such recomputation order is not passed before 15-7-2019, then the applicant is permitted to recompute his own liability to pay tax, interest or penalty at his own risk and make an application for availing amnesty. Under no circumstances the undisputed tax is available for the benefit under the Amnesty Scheme.

The payment of requisite amount shall be the aggregate of undisputed tax amount in full and such percentage of the disputed tax, interest, penalty or late fee as given in Annexure-A or Annexure-B depending on the date of submission of application and date of payment of the requisite amount.

Where the applicant has availed the ITC under MVAT Act or has availed set off of Entry Tax paid prior to 30-6-2017 and has carried forward such claim of refund into the GST era and the applicant wishes to avail the benefit of the Amnesty Scheme for the specified period, then it will be obligatory on the part of the applicant to reverse such credit and then to avail the Amnesty Scheme. The credit taken in the Electronic Credit Ledger or Cash Ledger under GST can be reversed by debiting the ECL or CL by filing FORM – GST-DRC-03.

Withdrawal of Appeal: (Sec. 8)

One of the conditions as provided under Sec. 7(9) of the Ordinance for availing benefit under the Amnesty Scheme in respect of arrears is 'Withdrawal of Appeal'. To avail the benefits under the Ordinance, the applicant is required to withdraw the pending appeal, reference, writ petition or the Special Leave petition, un-conditionally, filed before any appellate authority, Tribunal or the Hon'ble Court.

Where the applicant desires to withdraw the appeal in respect of certain issues and desires to continue the appeal for certain other issues, then, the applicant shall specify such details in the appeal withdrawal application prescribed in Form-II as per Order issued under section 19(2) of the Ordinance.

In the Ordinance itself it is clarified that the acknowledgement issued by the appellate authority, Tribunal or the Court towards the receipt of the withdrawal application (Form II) shall be considered as sufficient proof towards the partial / full withdrawal of appeal. The authorities with whom the withdrawal application is filed has to pass withdrawal order at later stage and shall provide a copy of the said order to the applicant as well as concerned nodal officer.

It is possible that while making an application for partial / full withdrawal of appeal, the concerned authority may point out that certain proceedings such as audit objection, revision, reassessment, rectification initiated at earlier stage are pending. **In such circumstances, the application for such withdrawal is not permitted.** In that case, it is the responsibility of the applicant to approach the concerned authority and to request him to pass an appropriate order at the earliest and positively before 15th July 2019. In that case, such an order passed in appeal can be considered as a 'Statutory Order' against which the applicant may opt to avail benefit under the Amnesty Scheme.

It is clarified that where no proceedings are pending in respect of which Appeal is filed and the appellant approaches the concerned

authority for partial / full withdrawal of appeal, then said authority is required to pass the order allowing the Withdrawal of appeal as has been applied for in Form II, without any choice.

Powers of Commissioner to notify transactions that may constitute an issue: (Sec. 9)

Section 9(1) of the Ordinance empowers the Commissioner to notify the transactions that may constitute an issue. Accordingly, in exercise of the powers conferred under section 9(1) of the Ordinance, the Commissioner has issued the Notification bearing No. Sett / MMB-2019 / 1 / ADM-8 on 7th March 2019 published in the Maharashtra Government Gazette, Part-I, Extra-ordinary No.-27 dated the 7th March 2019. It is also provided that, the decision of the Commissioner to classify the transactions that may constitute an issue shall be final and non-appealable and cannot be challenged before any forum.

The issues notified by the Commissioner in the Notification are as under –

(a) The declarations or, as the case may be, the certificates such as 'C', 'F', 'H', 'E-1', 'E-II' or 'I' as provided under the Central Sales Tax Act, 1956 and such declarations or certificates are defective, partly received or partly not received and additional tax liability is estimated therefor or Statutory Order is passed disallowing the claim in that behalf.

(b) Where set-off as provided under the relevant Act is disallowed due to, —

  (i) Purchases made from non-genuine dealer or from the dealer whose registration certificate cancelled at the time of such purchases,

  (ii) Purchases made from the supplier (selling dealers) who has not filed Return (non-filer),

  (iii) Purchases made from the supplier of goods who has **OPTED** for the lump-sum payment in lieu of tax i.e., Composition Dealer under Maharashtra Valued Added Tax Act, 2002.

(c) Mismatch of set-off where gross purchase claimed by the buyer in Annexure-J2 as shown in the Audit Report or as the case may be in the Return and gross sales figures declared in the Annexure-J1 as shown in the Audit Report or as the case may be in the Return by the supplier.

(d) Where in the opinion of the dealer, assessing authority or the appellate authority has committed an error in computation of the set-off or retention of set-off or, as the case may be, the denial of set-off, as provided under any rule made in this behalf under the Maharashtra Value Added Tax Rules, 2005, for the contingencies provided therein or any of the provisions of the relevant Act.

(e) Where assessing authority or the appellate authority, in any order has disallowed any deduction claimed by the applicant or has applied the wrong rate of tax in respect of any transaction of sales or certain income receipts are treated as taxable sales.

The applicant who desires to opt for filing the application under the Amnesty Scheme to settle the arrears of tax, interest or penalty in respect of one or more issues where the appeal is filed shall clearly state said issues in the application to be filed in Form – I and in Form – II.

Payment of Requisite Amount: [Sec. 10(3)]

Payment of the requisite amount under the Ordinance shall be made in the Challan Form-MTR-6 as provided in Rule 45 of the MVAT Rules, or, as the case may be, in the Challan Form as prescribed under the Relevant Act.

The payment of the requisite amount shall be made on or before the last date specified for the payment under Section 4 and considering the phase of the settlement and the Annexure-A or Annexure-B appended to the Ordinance.

Pro-rata Benefit Available: [Section 10(4) & (5)]

Section 10(4) of the Ordinance provides for proportionate benefit in case the amount paid under the Amnesty Scheme is lesser than the requisite amount payable. It is clarified that the applicant will still be eligible for the proportionate benefit of waiver of disputed tax, interest, penalty or the late fee. The applicant shall not be entitled to any waiver in respect of undisputed tax and **therefore such undisputed tax amount needs to be paid in full. No proportionate benefit shall be available towards the undisputed amount.** Also while determining the requisite amount, the applicant shall consider the amount outstanding, the quantum of undisputed tax, disputed tax, interest, penalty or the late fee as also the period for which the settlement is sought.

Where, the applicant has submitted the application in the first phase i.e. on or before the 30th June 2019, but the payment towards the requisite amount is made short, and such short payment is made at any time between 1st July 2019 to 31st July 2019 i.e., after the end of the first phase but before the end of the second phase then, the proportionate benefit should be calculated to the extent of the amount paid in the first phase and to the extent of the amount paid in the second phase, respectively. In no case, the applicant will be denied benefit of the waiver for any minor or small amount of short payment. Para 3.14(4)(e) of the Trade Circular No. 9-T of 2019 has explained this situation with example.

The possibility of an application filed during the second phase and amount falling short, if paid after 31st July 2019 is also considered and it is stated that in such circumstances, proportionate benefit to the extent of the amount paid during the second phase will be considered and no waiver will be allowed in respect of an amount paid after 31st July 2019. Such remaining amount after considering the proportionate benefit shall be recovered as an arrear under the relevant Act.

Verification of correctness and completeness of application and issuance of defect notice: (Section 11)

It is provided that on receipt of the application the designated authority shall first thoroughly verify the necessary documents and declarations that are submitted by the applicant with the record available. Any defect or shortcoming in the application including that of short payment shall be communicated to the applicant by issue of a defect notice, as far as possible, within 15 days from the date of receipt of the application. For that purpose a notice in Form III shall be issued clearly specifying the defects including the amount paid short. Only one defect notice shall be issued pointing out all the defects to the applicant. Within 15 days from the date of receipt of defect notice, the applicant is supposed to correct defects and also make good the payment positively before 31st July 2019. In no case such payment shall be made beyond the 31st July 2019 i.e., the last date for the second phase.

The Ordinance also provides that in case the applicant fails to correct the defects so communicated including the additional payment, if any, then, the designated authority may pass an appropriate order after hearing the applicant but in no case the said authority shall deny the proportionate benefits as may be available to the said applicant depending on the phase in which the requisite amount is paid. To emphasize the fact, Section 10(5) of the Ordinance specifically provide that *'No application shall be rejected merely on the ground that the payment made by the applicant during the first phase or the second phase under the ordinance is less than the requisite amount.'*

Passing of order of settlement, bar on reopening of settled cases and rectification of an order passed under settlement: (Secs. 12, 15)

Where the application for availing benefit under the Amnesty Scheme filed, is found correct in all respects the designated authority shall pass an order of settlement in the prescribed **Form IV**. Though **there is no maximum time limit prescribed under the Ordinance, within which the designated authority is supposed to pass 'order of settlement'**, the said authority is supposed to pass such order within a reasonable time. A copy of the order shall be provided to the applicant. On passing of such order the applicant is discharged from the liability under the relevant Act to the extent of the amount of waiver stated in the order of the settlement. Sec. 15 of the Ordinance provides that, once an order of settlement is issued under sub-section (1) of section 12 it shall be conclusive as to the settlement of arrears covered under that order, and the matter covered by such order of settlement shall not be reopened in any proceeding or review or revision or any other proceedings under the relevant Act.

The section also provides that, where the application for settlement of arrears is not in accordance with the provisions of this Ordinance, then the designated authority, after giving an opportunity of being heard, may reject the application and pass an order to that effect in **Form IV**.

In so far as rectification of order passed under the Amnesty Scheme in **Form IV** is concerned, it is provided that the designated authority within six months from the date of the service of the order of settlement, may, on his own motion or on an application of the applicant made in that behalf, rectify any error apparent from the record. In an order that is adversely affecting the applicant the designated authority is required to issue a prescribed Notice in **Form V**. In case the application for rectification is to be filed by the applicant, then an application Form VI has been prescribed.

Appeals against the order passed under the ordinance: [Sec. 13]

In case the applicant is aggrieved by an order of settlement passed in Form IV, then, within 60 days from the date of receipt of the order, the applicant may prefer an appeal against such order before the –

a. Concerned Deputy Commissioner, if the order of settlement is passed by the Sales Tax Officer or the Assistant Commissioner of Sales Tax.

b. Joint Commissioner of State Tax, in charge of the concerned division if the order of settlement is passed by the Deputy Commissioner of Sales Tax.

It is clarified in the Trade Circular No. 9-T of 2019 that the appeal against the Order of settlement **shall not be filed** with the Deputy Commissioner or the Joint Commissioner **who is holding the charge of the Appeals**. In case there is any delay in preferring the appeal the

same shall be subject to condonation only on the sufficient and justifiable grounds and due to the situation that is beyond the control of the applicant.

Powers of the Authorities: (Sec. 14)

Where the applicant has filed an application for withdrawal of appeal in Form II, then the appellate authorities including the Tribunal shall NOT proceed to decide any such appeal under the relevant Act relating to the specified period, in respect of and to the extent of one or more issues or all the issues for which an application for withdrawal is made.

It is also provided that, the assessing authority, revisional authority, reviewing authority, the appellate authority including the Tribunal, shall have the right to decide the assessment, revision, review or appeal, respectively, in accordance with the relevant Act to the extent of the issues for which no application for settlement is filed by applicant.

These authorities are also empowered to decide such assessment, revision, review or appeal, respectively, in case the Application for Settlement is rejected, provided that no appeal against said order has been filed under section 13 of the ordinance.

Revocation of order of settlement: [Sec. 16]

Where it appears to the designated authority that the applicant has availed the benefit of the Amnesty Scheme by-

(a) suppressing material information or particulars; or

(b) furnishing any incorrect or false information; or

(c) suppression of material facts, concealment of any particulars found in the search and seizure proceedings under the relevant Act then the order of settlement may be revoked at anytime within two years from the end of the financial year in which the order of settlement has been served on the applicant.

In the circumstances stated above, the designated authority is required to issue a show cause notice and after giving an opportunity of hearing to the affected applicant, pass an order revoking the order of settlement recording the reasons in writing for passing such revocation order.

Where such revocation order is passed, then the authorities concerned may initiate proceedings for assessment, revision, or appeal under the relevant Act notwithstanding the provision relating to the withdrawal of appeal under Sec. 8 or bar for reopening of the proceedings under Sec. 15 of the Ordinance.

Resultantly, such assessment, appeal, review or revision shall be revived or reinstated and the concerned authorities shall be empowered to decide such assessment, review, revision or appeal. In order to pass appropriate order the applicant shall be given an opportunity of hearing. The time limit provided under the relevant act shall not be applicable and the said proceedings may be completed within two years from the date of revocation of the order of settlement by passing of an appropriate order.

Review: (Sec. 17)

It is provided that the Commissioner on his own motion, at any time within twelve months from the date of service of order of settlement, may call for the record of such order of settlement passed by the designated authority and after noticing an error therein, which is prejudicial to the interest of the revenue, may serve on the assessee a notice and then pass an order to the best of his judgment.

No refund of the amount paid under the Ordinance: [Sec. 18]

Section 18 of the Ordinance provides that the applicant shall not be entitled to any refund of any amount paid under this Ordinance on any account. However, in case the application filed for the settlement of arrears is rejected under section 12(2) of the Ordinance, then the amount paid under the relevant Act shall be considered to have been paid under the relevant Act.

The powers of the Commissioner to issue instructions and directions under the Ordinance: [Sec. 19]

Under the Ordinance, the Commissioner is empowered to issue instructions and directions to the designated authorities for carrying out the purposes of this Ordinance. By resorting to this provision, the Commissioner has already issued an Order No. ORD. / MMB-2019 / 1 / 2019 / ADM-8 Dt. 7th March 2019.

Power to remove difficulty: [Sec. 20]

The Government has taken the powers to issue orders and remove difficulties that may occur during the implementation of this Ordinance.

Issues

(1) Issue of late fees need some clarification from the department as at one point it is stated that late fees would be eligible only for returns uploaded from 1-4-2019 to 15-7-2019.

(2) It is possible that against the decision of the Tribunal, the department might have filed a Reference Application and the same is still pending disposal before the Tribunal or an appeal filed under the MVAT Act filed by the department is pending before the High Court. The issue needs clarification from the department.

(3) Issue notified by the Commissioner in clause (b) consists of three sub-items. Does it mean that all items taken together one has to opt for amnesty? If the applicant has got a proof that selling dealer whose set off is denied has now filed the returns in Amnesty Scheme itself, has the dealer compulsorily paid off the set off denied *qua* such supplier?

(4) If the appeal is to be withdrawn partially, then earlier Settlement Scheme provided as to how part payment is to be apportioned *qua* issues not withdrawn. This scheme is silent on this aspect. Impliedly, entire part payment is to be washed off and issue kept open in appeal will be prone to recovery subject to decision in appeal. If the appeal is decided against then entire amount confirmed in appeal would be recoverable.

(5) How one has to opt for Amnesty *qua* PTEC Act towards pending dues also needs some clarity as there is no separate return provided under the said Act.

If any reader is faced with these issues, it is likely that Commissioner may come out with clarifications/ FAQs on some of these issues as briefed in recent service cell meeting.

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So long as you have faith and honesty and devotion, everything will prosper.

— *Swami Vivekananda*

B. V. Jhaveri, *Advocate*

DIRECT TAXES
Supreme Court

1. Section 43B – Expl. 3C – Loan from Bank – Adjustment of interest liability in new loan – Expl. is attracted

CIT vs. Gujarat Cypromet Ltd. Civil Appeal No. 5347 of 2010 [2019] 103 taxmann.com 346 (SC)

1. The assessee had taken loan from a bank on interest. The assessee instead of making payment of the interest liability accrued, obtained further loan from the bank and sought to adjust the interest liability in the new loan. The assessee claimed the deduction of interest liability which was converted into the new loan by the assessee and as a result, the interest was not actually paid back to the bank. The AO applying the *Explanation 3C* to the Section 43B of the Act disallowed the deduction claimed by the assessee and added the amount of interest to the total income of the assessee.

2. On appeal, both the appellate authorities, the CIT(A) and the Tribunal, allowed the claim of the assessee.

3. Thereafter the appeal was filed by the revenue before the Gujarat High Court. Dismissing the appeal of the revenue, the Gujarat High Court dismissed the appeal by relying on the case of CIT vs. Bhagwati Auto Gas Ltd., 261 ITR 481, whereby the issue has been decided in favour of the assessee and the Tribunal has followed the same decision.

4. On further appeal by the revenue, the Supreme Court allowing the appeal held as under:

"12. The interest liability which accrued during the relevant assessment year was not actually paid back by the assessee rather was sought to be adjusted in the further loan of ₹ 8 crore which was obtained by the IDBI Bank."

"13. The judgment of Delhi High Court [M. M. Aqua Technologies Ltd. 376 ITR 498] relied upon by learned counsel for the appellant refers to Section 43B as well as Explanation 3C and held that Explanation 3C having retrospective effect from 1-4-1989 shall be applicable to the year in question. The Delhi High Court in its judgment has referred to the judgment of

Madhya Pradesh High Court in Eicher Motors Ltd. [315 ITR 312]. It is useful to refer to paras 11 and 12 of the judgment.

"14. In so concluding, this Court is supported by the decision of the Madhya Pradesh High Court in Eicher Motors Ltd. (supra) and subsequently, the judgment of the High Court of Telangana and Andhra Pradesh in CIT vs. Pennar Profiles Ltd. [(2015) 376 ITR 355]. ..... ."

"15. In the impugned judgment, the Gujarat High Court has relied upon Bhagwati Autocast Ltd. (supra) which was not a case covered by Section 43B (d) rather was a case of Section 43B (a). The provision of Section 43B covers a host of different situations. The statutory Explanation 3C inserted by the Finance Act, 2006 is squarely applicable in the facts of the present case. It appears that the attention of the High Court was not invited to Explanation 3C, we are, thus, of the view that the Assessing Officer has rightly disallowed the deduction as claimed by the assessee. The Appellate Authority, ITAT and the High Court erred in reversing the said disallowance."

"16. As a result, the appeal is allowed. The question of law is answered in favour of Revenue."

2. Section 68: The High Court held that once the genuineness, creditworthiness and identity of investors were established, no addition could be made as cash credit on ground that shares were issued at excess premium. The SLP against the decision of the High Court was dismissed

Pr. CIT vs. Chain House International (P.) Ltd. SPL (Civil) Diary No(s). 1992 of 2019 [2019] 103 taxmann.com 435 (SC)

1. The case pertained to the AY 2012-13 and 2013-14. The search, seizure and survey proceedings u/ss. 132/133A of the Act were conducted on the premises of the assessee along with the other group concerns. A notice under section 153A was issued to the assessee and in response thereto, the assessee filed its returns of income.

2. During the course of search, it had been allegedly revealed that the assessee had received an unsecured loan from company 'BSPL' who in turn had received a bogus share application money and premium from five entry providing companies during the F. Y. 2011-12 and 2012-13. It was alleged that the accommodation entries were received by BSPL in the form of share capital along with the exorbitant share premium from the said five companies against payment of unaccounted cash. Further, it was allegedly found that BSPL had transferred the said receipts of bogus share capital and premium to the main group companies as unsecured loan which was transferred to the assessee company in tranches and to another company named, RCCPL. During the investigation, it was allegedly found that commission had been charged by the said five entry providing companies for providing accommodation entries, therefore, commission was also added to the total income on the assessee company for infusion of accommodation entries as unexplained expenditure.

3. The investigation wing issued notices u/s. 131(1A) of the Act to the investor companies and also to its directors. The

investigation wing, Delhi was having some information relating to statements of two persons who had stated that they were engaged through the web of various companies including the five companies who had contributed to the share capital of BSPL in providing accommodation entries to various entities.

4. During the assessment proceedings, the AO also issued notice u/s. 133(6) of the Act to all the investor companies and also their directors separately and all of them confirmed the investment made in the assessee-company and in support thereof furnished the relevant supporting documents including the ledger account of BSPL in their books of account, copy of ITRs, bank statements and also explained their source of investments.

5. While passing the assessment order the AO did not agree with the evidences filed and treated the amount of share capital along with the share premium as income of the assessee company under section 68 of the Act on the basis of statement/evidence of various persons, which were recorded behind the back of the assessee-company.

6. In appellate proceedings, the CIT(A) allowed the appeal of the assessee-company. Thereafter, the order of the CIT(A) was upheld by the ITAT, Indore by dismissing the appeals of the revenue.

7. On further appeal by the revenue, the Madhya Pradesh High Court dismissing the appeal held as under:

> *"53. Once the genuineness, creditworthiness and identity are established, the revenue should not justifiably claim to put itself in the armchair of a businessman or in the position of the Board of Directors and assume the role of ascertaining how much is a reasonable premium having regard to the circumstances of the case."*
>
> *"54. There is no dispute about the receipt of funds through banking channel nor there is any dispute about the identity, creditworthiness and genuineness of the investors and, therefore, the same has been established beyond any doubt and there should not have been any question or dispute about premium paid by the investors therefore, unless there is a limitation put by the law on the amount of premium, the transaction should not be questioned merely because the assessing authority thinks that the investor could have managed by paying a lesser amount as share premium as a prudent businessman. The test of prudence by substituting its own view in place of the businessman's has not been approved by the Supreme Court in the decisions of CIT vs. Walchand & Co. (P.) Ltd. [1967] 65 ITR 381 and J. K. Woollen Mfg. vs. CIT [1969] 72 ITR 612 (SC)."*

8. The revenue thereafter filed the Special Leave Petition ('SLP') before the Supreme Court and the said SLP was dismissed on the ground that no reason was found to interfere with the order of the High Court.

3. Section 14A – No exempt income – disallowance under section 14A of any amount was not permissible. The SLP filed against said decision of the High Court was dismissed

Pr. CIT vs. Oil Industry Development Board, Special Leave Petition (Civil) Diary No. 2755 of 2019 [(2019) 103 taxmann.com 326 (SC)]

1. The AO and CIT(A) made the disallowance u/s. 14A of the Act of ₹ 1,62,49,000/- after considering only the investment pattern of the assessee.

2. On further appeal, the ITAT, Delhi observed that the CIT(A) had relied on the Special Bench decision of the ITAT, Delhi in the case of *Cheminvest Ltd. vs. ITO [124 TTJ 577 (Del.) (SB)]* wherein it was held that "if an expenditure is incurred in relation to income which does not form part of total income, it has to suffer disallowance irrespective of the fact whether any income is earned or not." However, the Hon'ble ITAT, Delhi further observed that the said decision of the Special Bench was overruled by the Delhi High Court in *Cheminvest Ltd. vs. CIT [(2015) 378 ITR 33 (Delhi)]* and accordingly the ITAT Delhi held that "when the assessee has not earned any exempt income during the year under assessment, no disallowance is permissible u/s. 14A of the Act."

3. On further appeal by the revenue, the High Court dismissing the appeal of the Revenue held that ITAT, Delhi had correctly considered the decision in the case of *Cheminvest Ltd. vs. CIT [(2015) 378 ITR 33 (Delhi)]* and no substantial question arose requiring its consideration.

4. Being aggrieved, the revenue preferred the SLP before the Supreme Court. After considering the decision in the case of *CIT vs. Essar Teleholdings Ltd. through its Manager [(2018) 401 ITR 445 (SC)]*, the Supreme Court dismissed the SLP filed by the Revenue.

Editorial Note:

In the case of *PCIT vs. State Bank of Patiala (99 taxmann.com 286 SC)* the Supreme Court upheld the decision of the Punjab & Haryana High Court that the amount of disallowance u/s. 14A is to be restricted to the amount of exempt income only and not at a higher figure.

4. Section 36(1)(iii) – Interest free funds were available with the assessee which were sufficient to meet its investment in subsidiaries. It was held that the appellate authorities were justified in allowing assessee's claim for deduction

CIT vs. Reliance Industries Ltd. Civil Appeal Nos. 35, 37, 38 & 39 of 2019 [(2019) 102 taxmann.com 52 (SC)]

1. The assessee had given interest free funds to its subsidiaries and had availed loans from the banks. The assessee company also had reserve funds at its disposal.

2. The AO in the assessment order disallowed the interest claim of the assessee on the ground that interest expenditure claimed by the assessee would not have been payable had the assessee utilised the reserve funds available with the assessee and not availed loans from the banks. In appeal, the CIT(A) upheld the order of the AO. In further appeal, the ITAT, Mumbai deleted disallowance of interest u/s. 36(1)(iii) of the Act.

3. Thereafter, the case came up before the Hon'ble Bombay High Court (86 taxmann.com 24) and it was held as under:

> *"33. We do not see how when the Assessing Officer's views are that in cases of the interest free loans and interest given by the assessee to its subsidiary companies are in the above sums, still, the principle laid down by this Court that if there are funds available to them interest free and overdraft*

or loans taken, would not apply. This view of the Assessing Officer is ex facie contrary to the settled principle that a presumption would arise that the investment would be out of the interest free funds generated or available with the company. Then, the borrowed capital in hand in that case and interest expenditure was deductible under Section 36(1)(iii) of the I.T. Act, 1961. The Tribunal held that the interest free funds available to the assessee is sufficient to meet its investment. It can be presumed that investments were made from interest free funds available with the assessee. This position clearly emerges from the record and for the current assessment year as well. We do not see how a different view in the facts and circumstances can be taken. If the Tribunal had followed the earlier view and on facts, then, there is no perversity when nothing contrary to the factual material was brought on record by the revenue. In such circumstances, the concurrent view on disallowance of interest was reversed and the appeal of the assessee to that extent was partly allowed. We do not see any substantial question of law arising from such a view of the Tribunal."

4. On being aggrieved, the revenue filed the appeal before the Supreme Court. The question raised before the Supreme Court was as under:

"1. Whether the High Court is correct in holding that interest amount being interest referable to funds given to subsidiaries is allowable as deduction under Section 36(1)(iii) of the Income- tax Act, 1961 (for short 'the Act') when the interest would not have been payable to banks, if funds were not provided to subsidiaries."

5. The Supreme Court dismissing the Revenue's appeal held as under:

"7. In-so-far as the first question is concerned, the issue raises a pure question of fact. The High Court has noted the finding of the Tribunal that the interest free funds available to the assessee were sufficient to meet its investment. Hence, it could be presumed that the investments were made from the interest free funds available with the assessee. The Tribunal has also followed its own order for Assessment Year 2002-03."

"8. In view of the above findings, we find no reason to interfere with the judgment of the High Court in regard to the first question. Accordingly, the appeals are dismissed in regard to the first question."

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Those who work at a thing heart and soul not only achieve success in it but through their absorption in that they also realize the supreme truth – Brahman. Those who work at a thing with their whole heart receive help from God.

— Swami Vivekananda

Paras S. Savla, Jitendra Singh, Nishit Gandhi, *Advocates*

DIRECT TAXES
High Court

1. Business Expenditure – Section 37(1) of Act, 1961 – Expenditure incurred after production of films on cost of print as well as publicity and advertisement – governed by section 37(1) of the Act – Hence, the same are allowable. [A.Ys. 2006-07 & 2009-10]

CIT vs. Dharma Productions (P.) Ltd. [2019] 104 taxmann.com 211 (Bombay)

The assessee before the Hon'ble Bombay High Court was a private limited company engaged in business of production and distribution of films. In the return filed by the assessee for the assessment year 2006-07, it had shown income from a feature film "KAAL". The film received certification from the Censor Board on 21-4-2005 and the film was released on 29-4-2005. The assessee had claimed an expenditure for positive prints and further expenditure on account of advertisement expenses. The expenditure on advertisement was incurred after release date. The Assessing Officer while passing the order of assessment did not disturb these claims. However, in the appeal against the order of assessment, the Commissioner of Appeals was *prima facie* of the view that such expenses were not allowable. Therefore, after putting the assessee to notice, in his appellate order, he disallowed such claim in terms of Rule 9A of the Income-tax Rules. He was of the opinion that any expenditure which was not allowable under Rule 9A could not be granted in terms of Section 37 of the Income-tax Act, 1961 ("the Act" for short). He made a detailed discussion why in his opinion, such expenditure was covered by Rule 9A of the Rules. Similarly, for assessment year 2009-10, the assessee had produced a film named "DOSTANA" and sold the distribution rights to one Yash Raj Films Pvt. Ltd. The assessee received the film certification from Censor Board on 3-11-2008 and the film was released on 14-11-2008. The assessee had incurred advertisement expenditure of ₹ 4.44 crore and claimed the same as deduction. The Assessing Officer noticed that the assessee had incurred the advertisement expenditure after issuance of certificate by the Censor Board. He was of the opinion that such expenditure was not allowable deduction in terms of Rule 9A and 9B of the Rules. The CIT(A) confirmed the view of the Assessing Officer upon which

the assessee carried the matter before the Tribunal. The Tribunal allowed the assessee's appeals.

The department being aggrieved by the order of the Appellate Tribunal, filed an appeal before the Hon'ble Bombay High Court. The short question of law before the High Court was whether the expenditures for print and advertisement were liable to be disallowed in terms of Rule 9A of the Rules. And if yes whether these expenses could alternatively be allowed u/s. 37 of the Act.

The Court observed that sub-rules (2) to (4) of Rule 9A make special provisions for deduction in respect of profits and gains of the business of production of feature film. For example, in terms of sub-rule (2) of Rule 9A, where a feature film is certified for release by the Board of Film Censors in any previous year and in such previous year, the film producer sells all rights of exhibition of the film, the entire cost of production of the film shall be allowed as a deduction in computing the profits and gains of such previous year. However, a film producer may either himself exhibit the film on a commercial basis or sell the rights of exhibition of the film in respect of some of the areas or he himself exhibits the film in certain areas and sells the rights in the rest and the film is released for exhibition at least 90 days before the end of such previous year, the cost of production of the feature film will be allowed as a deduction in computing the profits and gains of such previous year. As per sub-rule (3) of Rule 9A, if the feature film is not released for exhibition on commercial basis at least 90 days before the end of previous year, a different formula for allowing the cost of production would apply. These provisions thus make special scheme for deduction for cost of production in relation to the business of production of feature films. The Court held that no part of the cost of production as defined in clause (ii) of explanation to sub-rule (1) is to be denied to the assessee permanently. It is only to be deferred to the next assessment year under certain circumstances. The Court further held that if a certain expenditure is claimed by the assessee by way of business expenditure, which does not form part of cost of production of a feature film, Rule 9A would have no applicability. In such a situation, the assessee's claim of expenditure would be governed by the provisions of the Act. If the assessee satisfies the requirements of Section 37 of the Act, there is no reason why such expenditure should not be allowed as business expenditure. The Court thus held that the cost of print and the cost of publicity and advertisement (which was incurred after the production and certification of the film by the Censor Board) do not satisfy the description "expenditure in respect of cost of production of feature film". Rule 9A specifically excludes the expenditure for positive print and cost of advertisement incurred after certification by the Board of Film Censors. What would therefore, be governed by the formula provided under Rule 9A is the cost of production minus these costs. The legislature never intended that those costs which are in the nature of business expenditure but are not governed by Rule 9A due to the definition of cost of production are not to be granted as business expenditure. The Court thus held that the Tribunal was correct in concluding that such expenditure did not fall within the purview of Rule 9A and therefore, the assessee's claim of deduction was governed by Section 37 of the Act.

2. Reassessment – Section 147 of the Act, 1961 – Reopening of assessment after four years from the end of relevant assessment year on the basis of information received from the investigation wing without

making any independent enquiry – unjustified [A.Y. 2011-12]

South Yarra Holdings vs. ITO [2019] 104 taxmann.com 216 (Bombay)

The assessee before the Hon'ble Bombay High Court had filed its return of income for the previous year relevant to assessment year 2011-12 declaring taxable income of ₹ 12.52 lakh. The return was picked up for scrutiny assessment. The AO after considering the relevant details and submissions finalized the assessment under section 143(3) of the Act determining total income of the assessee at ₹ 20.14 lakh. The AO, after the expiry of four years from end of relevant year, issued notice under section 148 of the Act on the basis of certain information received from investigation wing that M/s. Nivyah Infrastructure & Telecom Services Ltd. was a penny stock listed in BSE which used to facilitate introduction of unaccounted income of members in form of share capital and, assessee was one of those beneficiaries. The assessee filed its objections wherein it had contended that it had dealt with a company called "S. V. Electricals Ltd." and not with M/s. Nivyah Infrastructure & Telecom Services Ltd. The name of company "S.V. Electricals Ltd." had subsequently changed to M/s. Nivyah Infrastructure and Telecom Ltd. It had also pointed out in its objection that during the regular assessment proceedings, details of the petitioner's dealing in scrip namely "S. V. Electricals Ltd." had been submitted during the regular assessment proceedings. Thus, the reasons as recorded, display total non-application of mind while forming reason to believe that income chargeable to tax has escaped assessment. The AO rejected the objection filed by the assessee and initiated the reassessment proceedings. The assessee filed Writ Petition before the Hon'ble Bombay High Court challenging the reassessment proceedings. Hon'ble High Court was pleased to quash the notice issued under section 148 of the Act by observing that in this case, the reasons indicate that the Assessing Officer has not carried out such exercise and accepted the report of the Deputy Collector of Income Tax (Investigation), Mumbai to conclude that the petitioner had dealt with Nivyah Infrastructure and Telecom Services Ltd. Admittedly, there was no company by name "M/s. Nivyah Infrastructure & Telecom Services Ltd." in existence during that year for consideration. On receipt of information, the least that is expected of the Assessing Officer is to examine the same in the context of the facts of this case and satisfy himself whether the information received does *prima facie* lead to a reasonable belief that income chargeable to tax has escaped assessment. The Assessing Officer should have to examine the information received in the context of the facts on record. If such an exercise were to be done, it is likely that the Assessing Officer would have come to the conclusion that there was no failure to disclose truly and fully all material facts necessary for assessment. The Court observed that the Assessing Officer acted on the satisfaction of the Deputy Collector of Income Tax (Investigation) that income chargeable to tax has escaped assessment. It further observed that the impugned notice was issued beyond the period of four years from the end of the relevant assessment year in a case, where the assessment was completed under section 143(3) of the Act. Therefore, the Assessing Officer would have to examine the information received in the context of the facts on record.

3. Penalty – Section 271(1)(c) of the Act, 1961 – revised return filed after the due date for filing the revised return – revised return was filed to offer certain income which has remained to be accounted

due to mistake of accountant – AO passed the assessment order without making further addition over and above the income declared in the revised return – levy of penalty on income offered in the revised return unjustified [A.Y. 2009-10]

Pr. CIT vs. M/s. Padmini Trust [ITXA No. 424 of 2017 order dated 30-4-2019, Bombay High Court]

The assessee before the Hon'ble Bombay High Court is a Trust. The assessee filed a return of income for the assessment year 2009-10. The return filed by the assessee was taken up for scrutiny proceedings. When the assessment proceedings were pending, the assessee tried to rectify the return by making certain declarations and enlarging certain liability. The taxes on such income was also paid. The AO did not accept the revised return on the ground that the same was filed after the last day for filing such revised return. The AO, however, made no further additions over and above the declaration made by the assessee in such return. Thereafter, the AO levied penalty under section 271(1)(c) of the Act on the income not disclosed in the original return. On appeal the first appellate authority upheld the action of the AO in levying the concealment penalty. The assessee being aggrieved by the order passed by Ld. CIT(A) preferred an appeal before the Hon'ble Mumbai Appellate Tribunal. The Appellate Tribunal deleted the penalty levied by the AO.

The department being aggrieved by the order of Appellate Tribunal, preferred an appeal before the Hon'ble Bombay High Court. The Department submitted that the assessee had filed a false declaration in the original return. Only after the return was taken in scrutiny, it attempted to revise the return. Such attempt would not give immunity to the assessee from the penalty. It was further contended that is not necessary for imposition of the penalty and the penalty is a civil consequence. The Department further argued that very few returns filed by the assessees are taken in scrutiny, and merely because the assessee had later on surrendered the income to tax would not mean that the penalty should not be initiated, failing which the deterrent effect of the penalty would disappear. Though the Court agreed with Department's contentions that once the assessee is served with a notice of scrutiny assessment, corrections to the declaration of his income, would not grant an immunity from penalty. Particularly, in a case where the assessee during such scrutiny assessment is confronted with a legally unsustainable claim which he thereafter forgoes, may not be a ground to delete penalty. However, the Court observed that in the present case the assessee had made a fresh declaration of revised income voluntarily before it was confronted with the incorrect claim. The assessee had blamed the accountant for an error in filing the return. Affidavit of the occupant was also filed. The Court further observed that such error was committed by other group assessees also. Some of them corrected the error even before the scrutiny notices. Considering the facts, the Court held that Tribunal was correct to conclude that the original declaration of income suffered from a *bona fide* unintended error, and hence the Department appeal was dismissed.

4. Remission of liability – Section 41(1) of the Act, 1961 – Assessee reflecting creditors from Timber business – Timber business closed since 10 years and switched to recruitment business – addition

made by the AO u/s. 41(1) justified. [AY 2003-04]

M/s. West Asia Exports & Imports (P) Ltd. vs ACIT [Tax Case Appeal No. 302 of 2008 order dated 11-3-2019, Madras High Court]

The assessee before the Hon'ble Madras High Court was a private limited company. For AY 2003-04 the AO added back a sum of ₹ 58,60,105/- on account of the cessation of liability of sundry creditors in the hands of the assessee. The assessee was earlier engaged in the business of timber, but about 10 years back from assessment year, it closed that timber business and switched over to the business of recruitment of employees for sending to Gulf countries on behalf of certain foreign companies. The sundry creditors, about 16 in number, totalling to ₹ 58,60,105/- represented the suppliers in the timber business of the assessee and shown as sundry creditors in the Balance Sheet of the assessee for the said Assessment Year 2003-04 also. The Assessing Authority asked the assessee to produce the confirmations from those sundry creditors about the current existence of its liability in respect of the above parties. But, the assessee company submitted that these are old balances outstanding for last several years and therefore, it was unable to produce such written confirmations. The Assessing Authority, therefore, held that the liability of the assessee towards such Sundry Creditors had ceased to exist and therefore, the same was liable to be added back as income of Assessee as per Section 41(1) of the Act. The appeals filed by the Assessee against such addition in the income under Section 41(1) of the Act also came to be dismissed by both the Appellate Authorities, namely, Commissioner of Income Tax (Appeals) as well as the Income Tax Appellate Tribunal.

Before the High Court the assessee contended that unless the assessee writes off such liability in its books of account, the liability to pay such debts of the assessee continues in law and merely because the Sundry Creditors had not made a claim against the assessee in this regard and the assessee failed to produce the confirmations in writing from such sundry creditors as they were very old dues, it did not amount to cessation of liability under Section 41(1) of the Act. Therefore, the additions made by the Authorities below, up to the Tribunal, were not sustainable. It was submitted that in order to attract the provisions of Section 41(1) of the Act, there should have been an irrevocable cessation of liability without any possibility of the same being revived. Since the assessee continued to reflect the said outstanding in the balance sheet of its company and no credit entry had been made in the Profit and Loss Account or in the books of the assessee in the previous year, it amounted to the 'acknowledgment' of the debt for the purpose of Section 18 of the Limitation Act, 1963, by the assessee company. Therefore, the outstanding balances reflected as payable, could not be brought to tax under Section 41(1) of the Act. It was further contended that the burden lies upon the Revenue to establish that the liability of the assessee towards creditors had ceased in law or has been remitted by creditors finally. The burden of the Revenue to summon such creditors for establishing that the liability had ceased could not be shifted upon the assessee and since no such material was brought on record by the Assessing Authority, to establish such creditors were fake, additions under Section 41(1) cannot be made. The Department rebutted stating that the timber business had been closed by the assessee about ten years back prior to the present Assessment Year and not only none of the creditors had made any claim from the assessee with regard to the said dues and the assessee failed to produce the confirmations from these creditors and the assessee had changed its business which was entirely a different business altogether. In absence of any continuity of the debt

or continued business relationship with those creditors, there was no question of treating the said trade liabilities as perennial and indefinitely continuing forever and for all practical purposes, the liability of the assessee to pay off those sundry creditors, who were suppliers to his timber business, had ceased and therefore, the authorities were justified in bringing the said amount of liability to tax under Section 41(1) of the Act. The Department argued that mere book entries in the Balance Sheet or keeping such credit entries alive in the Balance Sheet of the assessee, even for a different business, could not indefinitely postpone the applicability of Section 41(1) of the Act.

The Court observed that crucial words in the section 41(1) are the 'remission or cessation' of such trading liability which has been claimed as an allowance or deduction taken by the assessee in a previous year and if such liability is remitted by the creditor or had ceased to exist, then in the year of remission or cessation, the said trading liability can be brought to tax as profit chargeable to tax under the said provision. Obviously, the word "cessation" in the said provision means cessation *de facto* and *de jure.* The cessation of liability should cease to exist in the eye of law. While the remission of liability can be by way of conscious act on the part of the creditor, the cessation of such liability can be inferred on the basis of facts and circumstances surrounding such trading liability. After *Explanation* was added on Section 41(1), it can be even by the unilateral act on the part of assessee viz., by writing back or writing off such liability amounting to cessation of liability in his hands attracting Section 41(1) of the Act and attracting tax thereon. The Court observed that in the present case, where the trading liability incurred by the assessee in the course of its erstwhile timber business, which was discontinued ten years ago and nobody claimed a single penny from the assessee in the last ten years and the assessee even failed to produce the written confirmations from such trade creditors, it could very well be inferred by the Assessing Authority that such trading liability of the assessee ceased to exist in law and not only the claims became barred by limitation, but in fact, no creditor came forward to make any claim from the assessee. The fact that the assessee still continued to show its erstwhile sundry creditors did not entitle it to claim that the liability of such creditors still continues in the eye of law. The inference of cessation of liability will not solely depend upon the accounting entries made by the assessee nor the omission of the assessee to make such accounting entries. The accounting entries are not the sole determinative factor, but they may still be relevant. Entries in the books of account or more particularly balances drawn year after year in the Balance Sheets cannot perennially or indefinitely postpone the applicability of Section 41(1) of the Act on the ground of cessation of trading liability. Such an interpretation would defeat the very object of enacting such a provision. Further though the burden lies upon the Revenue to establish that such liability had ceased in law to apply Section 41(1) of the Act, the initial burden of Revenue in this case was discharged by calling upon the Assessee to produce the written confirmations from such trade creditors and thus, the onus, thereupon shifted on the assessee to either produce the written confirmations or to produce the creditors themselves as witnesses to establish that the trade credit or liability to pay continues to exist *de facto* and *de jure*. With these conclusions, the High Court dismissed the appeal and decided against the assessee.

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Neelam Jadhav, Neha Paranjpe & Tanmay Phadke, *Advocates*

DIRECT TAXES
Tribunal

Unreported Decisions

1. Section 44AD r.w.s 28(v) – The remuneration and interest received from a partnership firm cannot be construed as a gross receipt and turnover from the eligible business and the said income cannot be taxed on the basis of presumptive taxation u/s. 44AD

Mr. A. Anandkumar vs. ACIT, Circle – 2 (ITA 573/Chny/2018) [Assessment Year: 2012-13], Order dated 30-1-2019

Facts

In this case, the assessee is a partner in the various partnership firms. During the relevant assessment year, the assessee received remuneration and interest amounting to ₹ 58,53,000/- from the partnership firms. While filing the return of income, the assessee applied the presumptive rate of 8% as mentioned u/s. 44AD of the Act to the total income received from the said partnership firms and determined the total income of ₹ 4,68,240/- which was offered for tax under the head "Income from Business or Profession". During the course of assessment proceedings, the learned AO opined that the said income cannot be determined on presumptive basis since the assessee had not carried out any eligible business independently as provided u/s. 44AD and he is only a partner in the said partnership firms. The learned AO also observed that the remuneration and interest received by the assessee cannot be construed as a gross receipt as mentioned u/s. 44AD. Thus, while passing the assessment order, the learned AO denied the benefit of presumptive taxation u/s. 44AD and brought to tax the entire income earned by assessee on account of remuneration and interest from the said partnership firms as business/professional income. On appeal, the learned CIT(A) upheld the action of the learned AO and dismissed the appeal of the assessee. Being aggrieved by the order of learned CIT(A), the assessee preferred an appeal before Hon'ble ITAT. After considering the submission of both parties, Hon'ble ITAT arrived at following conclusion.

Held

Before Hon'ble ITAT, the assessee argued that section 28(v) clearly specified that interest, salary, bonus, commission or remuneration due to or received by a partner of a firm

from a firm shall be assessed under the head "Profits and Gains of Business or Profession". Further, it was contended that as per explanation to section 44AD, an eligible business includes any business other than the business of plying, hiring or leasing up to ten goods carriage. Thus, the remuneration and interest received from the partnership firm became the "Profit and Gains of Business and Profession" from the eligible business u/s. 44AD. After considering Assessee's arguments, Hon'ble ITAT observed that as per proviso to section 28(v), certain payment as mentioned in section 40(b) shall not be allowed to deduct while computing the income under the head "profit and gains from business and profession". However, section 40(b)(iv) & (v) provide exemption for the payments to the extent as mentioned in sub-clauses (iv) & (v) of sub section (b) of section 40. It was also observed that a partner should not be disentitled from claiming reasonable remuneration who is a working partner and also should not be denied reasonable interest on the capital invested in the firm. If these charges are not made in the accounts of the firm, then the pro-rata profits of the firm would be higher which result in higher taxes to the firm. The payments therefore have to be construed indirectly as a type of distribution of profits of a firm, for which otherwise the firm would have been taxed. From this, it is clear that the legislature has chosen such remuneration and interest as part of "Profits from Business and Profession" and the same cannot be treated as gross receipts or turnover of a business independently carried on by a partner. Further, relying on the CBDT Circular No. 5/2010 dated 3-6-2010, Hon'ble ITAT observed that the intention behind introducing the provisions of presumptive taxation u/s. 44AD is to help small businesses to comply with taxation provisions and intention was not to construe a partner's remuneration or interest as business income. In view of the same, Hon'ble ITAT came to the conclusion that the assessee was not entitled for the benefit of presumptive taxation u/s. 44AD of the Act. In light of the abovementioned observations the issue was decided against the assessee and in favour of the revenue.

Reported Decisions

2. Conversion of a private limited company into a limited liability partnership – Tax implications – Section 2(47) r.w.f. (47xiiib)

ACIT vs. Celerity Power LLP (ITA 3637/Mum/2015) [Assessment Year: 2011-12], Order dated 16-11-2018, [2018] 100 taxmann.com 129 (Mumbai – Trib.)

Facts

The assessee is a limited liability partnership ("the LLP" for short) and the assessment year under consideration is 2010-11. For the said year, the assessee had initially filed its return of income electronically declaring the total income at ₹ 5.41 cr. Later on, the assessee revised its return, claimed the set off of brought forward loss of ₹ 5.80 cr and declared the revised income at ₹ Nil. Subsequently, the said return was selected for the scrutiny assessment and during the course of assessment proceedings, the learned AO observed that the present assessee was erstwhile a private limited company and acquired the status of "LLP" on 28-9-2010. It was further observed by the learned AO that the entire business undertaking including assets and liability of the erstwhile private limited company were transferred to the said LLP. On the aforesaid observations, the learned AO asked the assessee to explain as to why the said conversion did not give any rise to capital gain tax in the hands of the assessee. In response to the same, the

assessee submitted that the said conversion did not result in any transfer as per the provisions of the Income-tax Act, 1961 ("the Act for short") and due to absence of a transfer, there was no liability to pay any capital gains on the assessee. It was further submitted before the learned AO that even assuming that there had been a capital gains tax liability on account of the said conversion the same would fall back on the shoulders of the erstwhile private limited company and the present assessee is not liable to pay the same at all since no transfer of capital assets was ever effected by the assessee itself. However, the said submissions did not impress the learned AO and the assessment proceedings were completed by adding an amount of ₹ 1.76 crore as capital gains u/s. 47A(4) of the Act to returned income of the assessee. In addition thereto, the learned AO declined the claim of the assessee with regard to carry forward of depreciation of the erstwhile private limited company. Being aggrieved by the stand taken by the learned AO, the assessee preferred an appeal before the learned CIT(A) and partly succeeded. The learned CIT(A) did not accept the main contention of the assessee and came to the conclusion that there was a transfer of the assets from the erstwhile private limited company to the assessee by virtue of the provision of section 47(xiiib) of the Act. However, on other hand, the learned CIT(A) held that though there was a transfer, there was no capital gains tax liability as the difference between the transfer value and the cost of acquisition was admittedly Nil. As far as the claim of carry forward of depreciation was concerned, the learned CIT(A) denied the same. Being aggrieved by the order of the learned CIT(A) both, the assessee as well as the revenue, filed the appeal/cross objection before Hon'ble ITAT. During the course of hearing, both the parties put forth their respective contentions. After hearing both the parties, Hon'ble ITAT held as under:

Held

The observations of Hon'ble ITAT are summarised into four parts keeping in mind the core issues before it.

I. Whether the conversion of erstwhile private limited company into an LLP u/s. 56 of the Limited Liability Act, 2008 amounted to a transfer under the Act

For determining the above-mentioned issue, Hon'ble ITAT considered the relevant provisions of the Limited Liability Partnership Act, 2008 ("the LLP Act, 2008" for short) and the Act. It further perused Section 47(xiiib) introduced by the Finance Act 2010 with effect from 1-4-2011 in detail. Hon'ble ITAT noticed that that the said section does not consider the conversion of a private limited company to an LLP as a transfer under the Income-tax Act only if certain conditions mentioned therein are complied with. Keeping in mind the applicability of the said section and facts under consideration, Hon'ble ITAT held that the protection/exemption as enshrined u/s. 47(xiiib) of the Act is not applicable to the present assessee since the assessee admittedly did not comply with all the conditions of the said section. During the course of hearing, the assessee argued before Hon'ble ITAT that non-compliance of sec 47(xiiib) of the Act does not per se result in any transfer u/s. 45 of the Act. To buttress its contention, the assessee placed reliance on the decision of Hon'ble Bombay High Court in the case *"CIT vs. Texspin Engg. & Mfg. Works" [2003] 263 ITR 345.* However, the said contention did not impress Hon'ble ITAT to change its view. Hon'ble ITAT noticed that in the aforesaid decision of Hon'ble Bombay High Court, Hon'ble Bombay High Court was dealing with a situation of conversion of a firm into a private limited company under part IX of the Companies Act 1956. It was noticed that Hon'ble Bombay High Court rested its

decision on one of the observations that on conversion of a firm into a private limited company under part IX of the Companies Act 1956, there is a statutory vesting in the company and the cloak given to the firm is replaced by a different cloak and the same firm is now treated as a company. However, Hon'ble ITAT noticed that there is no statutory vesting of the assets of a private limited company into an LLP under the LLP Act, 2008. It was observed by Hon'ble ITAT that the definition of "convert" given in clause 1(b) of the third schedule of chapter X of LLP Act itself mentions a conversion as a transfer. Thus, Hon'ble ITAT did not find any similarity in the facts of the decision of Hon'ble Bombay High Court cited by the assessee and rejected its applicability. Finally Hon'ble ITAT decided the issue against the assessee and in favor of the revenue by upholding that a conversion of the erstwhile private limited company into an LLP under the LLP Act, 2008 amounted to a transfer under the Act.

II. Whether the learned AO was right in invoking section 47A(4) of the Act in the present case and subsequently holding that the assessee was liable for capital gains tax

Hon'ble ITAT perused the aforesaid section and came to the conclusion that the said section can be pressed into service only for the purpose of withdrawing an exemption which is earlier availed by an assessee u/s. 47(xiiib) of the Act. It is observed that in the present case there was no claim of an exemption as provided u/s. 47(xiiib) of the Act and consequently there is no application of the provision of section 47A(4) of the Act. Hon'ble ITAT concluded that the "capital gains", if any, arising from the 'transfer' of the capital assets on conversion of the private limited company to the Assessee, de hors the applicability of Sec. 47A(4), could not have been principally brought to tax under Sec. 45 as 'Capital gains' in the hands of the assessee. However after coming to the aforesaid conclusion, Hon'ble ITAT perused the provisions of Sec 170(2) of the Act and came to the conclusion that though the "Capital gains", if any, involved in the transfer of the capital assets on conversion of the erstwhile private limited company to the Assessee *de hors* applicability of Sec. 47A(4) to the facts of the case, would not be liable to be assessed in the hands of the assessee as per Sec. 45 r.w. Sec. 5 of the Act, however, the same would be subject to the liability of the Assessee u/s. 170 of the Act.

III. Whether the conversion of the erstwhile private limited company into an LLP resulted in any capital gains

Hon'ble ITAT noticed that in the present facts, admittedly, the transfer of the entire understanding including the assets and liabilities took place at the book value. Relying on the proposition laid down by Hon'ble Apex Court in the cases of *CIT vs. George Henderson and Co. Ltd. [1967] 66 ITR 622* and *CIT vs. Gillanders Arbuthnot and Co. [1973] 87 ITR 407 (SC),* Hon'ble ITAT concluded that the full value of consideration cannot be adopted other than the book value which is an agreed consideration between the parties. While deciding the cost of acquisition, Hon'ble ITAT referred to various decisions of High Courts. Finally, Hon'ble ITAT concurred with the observation of the learned CIT(A) that though there was a transfer of capital assets from the erstwhile private limited company to the Assessee by virtue of the provisions of Sec. 47(xiiib), however, as the difference between the transfer value and the cost of acquisition was Nil, therefore, while computing the 'capital gains' the machinery provision was rendered as unworkable.

IV. Whether the assessee was entitled to carry forward the losses of the erstwhile private limited company

While deciding this issue, Hon'ble ITAT first considered the provisions of Section 72A(6A) of the Act and came to the conclusion that the assessee was not entitled to carry forward any accumulated loss or unabsorbed depreciation of the erstwhile private limited company since the conditions enshrined u/s. 47(xiiib) of the Act were never complied with in the present case. Hon'ble ITAT further gave a thoughtful consideration to the argument of the assessee that the said section has no applicability in light of the fact that Section 58(4) of the LLP Act, 2008 is a non-obstante clause which provides that notwithstanding anything contained in any other law for the time being in force, all tangible (movable or immovable) and intangible property vested in the company, all assets, interests, rights, privileges, liabilities, obligations relating to the company shall be transferred to and shall vest in the LLP without any further assurance, act or deed. Hon'ble ITAT rejected the said contention by observing that Section 58(4) of the LLP Act, 2008 is only in context of the tangible and intangible property, interests, rights etc., and has nothing to do with the 'carry forward' of losses, which is the creation of a specific statute in the form of the Act. Hon'ble ITAT also considered the 'Memorandum' explaining the Finance Act, 2010 and noticed that the said benefit of carry forward is available only after the fulfilment of the conditions mentioned u/s. 47(xiiib) of the Act. In light of the above mentioned observations, this issue was decided against the assessee and in favour of the Revenue.

3. Section 263 r.w.s 50C of the Act – when the stand taken by the learned AO is patently untenable in law, the same can be revised by the learned CIT by invoking his jurisdiction u/s. 263 of the Act

Babulal S. Solanki vs. ITO (ITA 3493/Ahd/2016) [Assessment Year: 2012-13], Order dated 4-3-2019, [2019] 104 taxmann.com 155 (Ahmedabad – Trib.)

Facts

The assessment in the assessee's case for the relevant assessment year was completed *vide* assessment order dated 24-3-2015 passed u/s. 143(3) of the Act. Subsequently, the learned CIT initiated the revision proceedings u/s. 263 of the Act contending that the assessment was finalised by the learned AO without making proper investigation and enquiry regarding a sale of the land and capital gains arising therefrom. Thus, the assessment order is erroneous and prejudicial to the interest of the revenue. The learned CIT observed that the assessee along with four co-owners had sold the land bearing Survey Nos. 193 and 194, situated at Gota, Ahmedabad. Further, on perusal of the sale deed, it was observed that while computing assessee's share of taxable capital gains, the full value of consideration was taken at ₹ 4,50,000/- being sale consideration received by the assessee instead of jantri value of ₹ 7,13,67,350/- on which the stamp duty was paid. Thus, as per the learned CIT, the income of ₹ 52,73,470/- remained untaxed which resulted in under assessment of income under the head 'capital gains'. In the said background, the assessee was served with a notice u/s. 263. In reply to the same, the assessee explained that while passing the assessment order, the learned A.O. had specifically looked into the said issue and after due verification of records and evidences, the assessment was finalised. The learned CIT was of the view that there is no specific mention in the assessment order as to why the sale consideration was accepted and stamp duty value was not adopted as full value of consideration as per section 50C. Thus, the learned CIT *vide* order dated 7-10-2016 passed

u/s. 263 directed the learned A.O. to examine the matter afresh as per law. Being aggrieved by the said order, an appeal was preferred before Hon'ble ITAT. After considering the submissions of both the parties, Hon'ble ITAT observed as under:

Held

Hon'ble ITAT observed that in the course of assessment proceedings, the assessee in reply to the letter of the learned AO explained that the land sold was an agricultural land and the *jantri* value of said land was ₹ 4,900 per sq. mtr. The stamp duty was paid at the value of ₹ 11,750 per sq. mtr. which is pertaining to the non-agricultural land. Further, it was stated that the sale consideration was less than the stamp duty value for the land sold and the computation of conversion premium paid by the assessee was on the basis of valuation of agricultural land. Hon'ble ITAT perused the provisions of section 50C of the Act and came to the conclusion that the case in which a sale consideration is lesser than a stamp duty valuation, there is an applicability of section 50C subject to its other provisions. Hon'ble ITAT held that the contentions of the assessee are not acceptable in law on the basis of this explanation. There can be other aspects on which the *jantri* value may, or may not, be applicable but that is a different issue. The claim made by the assessee was clearly something which should have provoked further examination. Where the sale consideration received by the assessee for sale of land, building or both is less than the stamp duty value, the applicability of section 50C has to be verified. However, learned AO chose to remain silent on the said issue. While setting aside the assessment order, Hon'ble ITAT categorically observed the role of an assessing officer in assessment proceedings and after referring to the decision of Hon'ble Delhi High Court, in the case of *Gee Vee Enterprises vs. ACIT 99 ITR 375 (Del.),* it was held that an Assessing Officer is not only an adjudicator but also an investigator. He cannot remain passive in the face of a return which apparently calls for further inquiry. Thereafter, Hon'ble ITAT referred to the decision of Hon'ble Supreme Court in the case of *Malabar Industrial Co Ltd vs. CIT (243 ITR 83)* and came to the conclusion that the order passed by the learned AO without considering the applicability of section 50C to the fullest is erroneous as well as prejudicial to the interest of the revenue since the stand of the learned AO of not applying the provisions of section 50C despite the fact that the sale consideration received is lesser than the stamp value is totally unsustainable in law. Though Hon'ble ITAT set aside the order and restored it back to the learned AO The argument of the assessee that the stamp duty value does not reflect the fair market value is not considered on merits and the same is directed to be considered by the learned AO in light of the abovementioned observations, the appeal filed against the order passed u/s. 263 was decided against the assessee giving direction to the learned AO to adjudicate the issue on merits.

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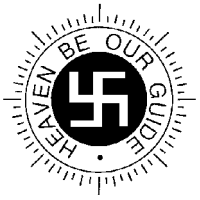
Man never progresses from error to truth, but from truth to truth, from lesser truth to higher truth – but it is never from error to truth.

— Swami Vivekananda



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CA Tarunkumar Singhal & Sunil Moti Lala, *Advocate*

INTERNATIONAL TAXATION
Case Law Update

A. HIGH COURT

1. 'On-spot' control and supervision exercised by the company to whom the employees are deputed is not the deciding factor for determining the real employer, rather the right to terminate the service of the employee is a relevant factor. Accordingly, Indian employer having deputed his employees to Kuwait based company was not liable to deduct TDS u/s. 195 on salary payments to such non-resident employees working outside India

Pr. CIT vs. Smt. Supriya Suhas Joshi – [TS-202-HC-2019(Bom)] – Income Tax Appeal No. 382 of 2017

Facts

(i) The assessee, a sole proprietor, had entered into an agreement with a Kuwait based company for providing manpower to the said company as per its requirements. As per the individual contract executed for supplying the person, the said company paid a fixed sum to the assessee, out of which the assessee remunerated the employee.

(ii) The AO opined that the assessee ought to have deducted TDS u/s. 195 while making payment to the deputed employees and thus made a disallowance u/s. 40(a)(ia) (sic).

(iii) The assessee contended that the persons deputed were in employment with the assessee and were only loaned to the Kuwait based company to carry out work as per the requirement of the said company and the payment to such deputed employees who were all non-residents were towards their salary. Accordingly, since payments of income chargeable under the head "Salaries", are specifically excluded from the scope of section 195, there was no liability to deduct tax under the said section. [N.B.- As evident from the Tribunal order, before lower authorities, it was also submitted that since the employees were working outside India and remunerations were paid to them from assessee's bank account situated outside India, no income had accrued / arisen in India so as to attract TDS provisions of section 192 as well as 195. However, there is no finding in the Tribunal order or the High Court order in this regard].

(iv) The CIT(A) and the Tribunal accepted assessee's contention and decided in her favour.

(v) Aggrieved, the Revenue filed an appeal before the High Court.

Held

(i) On perusal of the contract, the Court held that the contract indicated that the deputed person was the employee of the assessee. It noted that (i) as per the preamble of the contract, the assessee had supplied Commissioning Engineer (employee) to the said company on deputation basis for its on-going project (ii) deputation charges of US $5500 per month was payable to the assessee, out of which US $4000 per month was paid to the employee and the balance was retained by the assessee.

(ii) The Court rejected Revenue's contention that looking to the supervision and control of the Kuwait based company over the employee, it must be held that he was under the employment of the said company and not that of the assessee. It held that the test of the extent of control and supervision of a person by the engaging agency are undoubtedly relevant factors while judging the question whether the person was an agent or an employee. However, in a situation where the person employed by one employer is either deputed to another or is sent on loan service, the question of dual control would always arise. In such circumstances, the mere test of on-spot control or supervision in order to decide the correct employer may not succeed.

(iii) The Court held that it was inevitable that in a case as the present one, the Kuwait based company would enjoy considerable supervising powers and control over the employee as long as the employee was working for it. Neverthless, the assessee continued to enjoy the employer-employee relationship with the said person. It supported the above conclusion by stating that for example, if the work of such person (employee) was found to be wanting or if there was any complaint against him, it would only be the assessee who could terminate the service.

(iv) Accordingly, it dismissed Revenue's appeal.

2. Amount received from an Indian company by the non-resident assessee on account of reimbursement of service tax paid by it is not taxable as it does not form part of the 'amount' specified in section 44BB(2)

DIT (International Tax) vs. Schlumberger Asia Services Ltd. [(2019) 104 taxmann.com 353 (Uttarakhand)] – IT Appeal Nos. 40 of 2012 & 44 of 2014 & Others.

Facts

(i) The assessees, being companies incorporated outside India, were non-residents within the meaning of the Act. They execute contracts all over the world, including in India, in connection with exploration and production of mineral oils. They entered into agreements with ONGC for giving rigs / plant & machinery on hire.

(ii) The assessees filed their returns declaring income from charter hire of the rig / plant and machinery, to be used in the extraction or the production of mineral oils in India, and offered to pay tax under section 44BB(1) r.w.s. 44BB(2) of the Act. While doing so, the assessees did not include the amounts reimbursed to them by the ONGC (towards the service tax paid by them earlier to the Government of India) in their gross revenues for computing income under section 44BB of the Act.

(iii) The AO, however, included the said amount in the assessees' gross receipts, and subjected it to tax under section 44BB of the Act.

(iv) The question before the Court was whether the amount reimbursed to the assessee

by ONGC, representing the service tax paid by the assessee to the Government of India, should be included in computing the amount referred to in section 44BB(2) of Act being amounts paid to non-resident assessees on account of provision of services and facilities in connection with, or supply of plant and machinery on hire used, in the prospecting for, extraction or production of mineral oils in India.

Held

(i) The Court held that service tax, collected by the assessee, did not fall within the scope of the amount received on account of 'provision of services and facilities', as specified in section 44BB(2) since reimbursement of service tax was not on account of services rendered but was a statutory duty imposed on the assessee. Accordingly, it held that service tax does not fall within the "amount" stipulated in section 44BB(1) of the Act since the assessee only collected service tax from ONGC and paid it to the Government and such reimbursement did not contain any element of profit or income in it.

(ii) It relied on the CBDT Circulars dated 28-4-2008 and 13-1-2014 directing that tax should be deducted at source only on the net amount paid towards rent (under section 194-I) or as fees for services rendered by the service provider (under section 194-J), i.e. the total amount paid less service tax, for the reason that service tax, on such payment, was not "income". The Court held that the Circulars issued by the CBDT reflected its understanding that service tax paid by the assessee was not "income" and thus service tax would not form part of the amounts referred to in Section 44BB(2) of the Act.

iii Accordingly, the Court decided the issue in favour of the assessees.

3. Though, ordinarily, the final culmination of the MAP could not be projected in the determination of ALP without any adjustment, however, since (i) the MAP had considered all relevant aspects and (ii) the APA for subsequent year also mentioned that MAP outcome applicable for US based transactions would be applicable for the non-US based transactions, Revenue could not argue the contrary in the impugned year (i.e., prior year)

PCIT vs. J.P. Morgan Services India Pvt. Ltd. [TS-228-HC-2019(Bom)-TP] – ITA No 4 & 170 of 2017

Facts

(i) The assessee-company was inter alia engaged in providing Information Technology Enabled Service (ITES) to its Associated Enterprise (AE) and 96% of its transactions were with US based AE and remaining 4% with non-US based AEs.

(ii) The US based AE had initiated Mutual Agreement Procedure (MAP) proceedings under Article 27 of the India-USA DTAA which culminated into an order being formally passed in this regard i.e., for 96% of transactions.

(iii) In appeal filed before the Tribunal, against the adjustment made by the TPO (and confirmed by the DRP) to the international transaction of rendering ITES to AEs, the assessee contended that the parameters which were considered for determining the ALP in the MAP proceedings for US based transactions should also be accepted for the non-US based transactions.

(iv) The Tribunal accepted the assessee's contention noting that no distinction had been made by assessee as well as the lower authorities between US and non-US transactions.

(v) Aggrieved, the Revenue filed an appeal before the High Court against the Tribunal's aforesaid approach of applying parameters

of US based transactions to the non-US based transactions also.

Held

(i) At the outset, the Court held that in absence of any other material on record, it doubted if the final culmination of the MAP could be projected in the determination of ALP in the mechanism envisaged under the Act, that too, without any other adjustment or consideration.

(ii) However, noting that (i) the MAP had been drawn after consideration of relevant aspects giving rise to transfer pricing and (ii) in the Advance Pricing Agreement (APA) entered into between the assessee and the CBDT for subsequent year, it was specifically mentioned that outcome agreed under the MAP proceedings for international transactions with US based AEs would also be applicable for transactions with non-US based AEs, the Court held that it was wholly inappropriate to allow Revenue to argue the contrary in the impugned year.

(iii) Accordingly, it dismissed Revenue's appeal.

4. Rolta India Ltd. and KLG Systels Ltd. cannot be considered as comparable to a company engaged in IT enabled design engineering services as they are functionally different

Pr. CIT vs. Dona India Technical Centre Pvt. Ltd. [TS-315-HC-2019(Bom)-TP] – Income Tax Appeal No. 308 of 2017

Facts

(i) The assessee was engaged in the business of providing IT enabled design engineering services. The TPO included Rolta India Ltd. and KLG Systels Ltd. in the set of comparables while benchmarking the aforesaid services.

(ii) The assessee objected to such inclusion on the ground that functionality of the two companies was different since they were engaged in entirely differently areas.

(iii) The Tribunal accepted assessee's contention, following the Co-ordinate Bench decision in the case of *Behr India Ltd. vs. Addl. CIT [ITA No. 1376/PN/2010 & 568/PN/2013]* wherein it was held that Rolta India Ltd. and KLG Systels Ltd. had to be excluded as comparable as both these companies were functionally different than the concern providing IT enabled design engineering services. Thus, it held that the said companies were not comparable on account of distinct nature of business, functional dissimilarity, size and diversified products.

(iv) Aggrieved, the Revenue filed an appeal before the High Court.

Held

(i) The Court noted that on the facts of the case, the Tribunal had reached the conclusion that Rolta India Ltd and KLG Systels Ltd. were not comparable since they were functionally different.

(ii) Further, noting that Revenue had not filed an appeal against the Tribunal's earlier decision in the case of Behr India Ltd. (supra), on which reliance was placed by the Tribunal, the Court dismissed Revenue's appeal.

5. IRCA Management Consultancy Services Ltd. and Kinetic Trust Ltd. are comparable to a company engaged in providing non-binding investment advisory services

Pr. CIT vs. Temasek Holdings Advisors India Pvt. Ltd. [TS-316-HC-2019 (Bom)-TP] – Income Tax Appeal No. 304 of 2017

Facts

(i) The assessee was *inter alia* engaged in providing non-binding investment advisory services to its AE. It had disclosed a mark-up margin of 21.4% with respect to the aforesaid international transaction and arrived at an arm's length margin of 14.84% based on 7 comparables selected by it.

(ii) During assessment, the TPO *inter alia* excluded IRCA Management Consultancy Services Ltd. and Kinetic Trust Ltd. (forming part of the aforesaid 7 comparables) from the set of comparable companies on the grounds that (i) IRCA Management Consultancy Services Ltd. - was engaged in various fields of advisory which the assessee was not performing and (ii) Kinetic Trust Ltd. - had a very low turnover.

(iii) The TPO had also added a 3% mark-up to the average of comparable margins determined by him on the ground that the assessee, in addition to investment advisory services, had also rendered portfolio management services and for such additional function it should have earned higher revenue.

(iv) The Tribunal accepted the assessee's contention for inclusion of the aforesaid two companies, holding that (i) providing advisory / consultancy services in various fields did not materially affect the revenue or net profits of IRCA Management Consultancy Services Ltd. and thus it was functionally comparable and (ii) Kinetic Trust Ltd., was functionally comparable and since the assessee as well as TPO had not applied turnover filter at the time of selection process, the same could not be used at a later stage as a tool for cherry picking.

(v) It also relied on the Co-ordinate Bench decision in the assessee's own case for earlier assessment years wherein also these companies were included in the set of comparables despite Revenue's opposition.

(vi) Further, the Tribunal deleted the 3% mark-up added by the TPO, noting that the asssessee had not performed any additional function which was not included in the investment advisory services.

(vii) Aggrieved, the Revenue filed an appeal before the High Court.

Held

(i) The Court dismissed Revenue's ground of appeal pertaining to inclusion of IRCA Management Consultancy Services Ltd. and Kinetic Trust Ltd. as comparable, noting that it had earlier also dismissed Revenue's appeal against the Tribunal's order for earlier year on the same issue.

(ii) It also dismissed Revenue's appeal against the deletion of 3% mark-up adopted by the TPO, relying on the Tribunal's finding that there was no evidence that the assessee had rendered any additional services.

B) Tribunal Decisions

6. India–UK DTAA – Taxability of Fees for Technical Services – Application of the Concept of "Make Available" – Tribunal accepts applicability of "make available" condition to development and transfer of technical plan or design – Held in favour of the assessee

Buro Happold Limited vs. DCIT [TS-76-ITAT-2019 (Mum)] Assessment Year : 2012–13

Facts

(i) The assessee, a company incorporated in the UK and a resident in the UK, is involved in the business of providing engineering design and consultancy services to Indian customers through its Indian affiliate, BHEI. As a part of such services, the assessee provides structural and MEP (Mechanical, Electrical and Public Health) engineering for various buildings. For

the tax year under consideration, the assessee filed its return of income declaring NIL income.

(ii) In the course of assessment proceedings, the AO observed that the assessee had earned INR 10.9m by way of providing consulting engineering services to BHEI and had also received INR 10.1m from BHEI as a cost recharge towards common expenses incurred at the head office (HO expense).

(iii) The assessee submitted that since it had not made available any technical knowledge or skill to BHEI while providing engineering consultancy services, such amount would not qualify as FTS and has to be characterised as business income under the DTAA. Such business income cannot be brought to tax in India in the absence of a PE of the assessee in India. The assessee further submitted that the amount received towards HO expense is not taxable in India, since such amount is a part of cost allocation made on a cost-to-cost basis without any profit element.

(iv) The Revenue contended that:

- The services include supply of design/drawing to BHEI and the provision of other services are ancillary to the supply of designs and drawings. BHEI is responsible to the Indian customers and BHEI had sub-contracted certain specialised services (like master planning, acoustic engineering, environmental engineering etc.) to the assessee, in the absence of the necessary skills with BHEI.
- As per the DTAA, payment received for development and transfer of a technical plan or a technical design would be in the nature of FTS, irrespective of whether it also makes available technical knowledge, experience, skill, knowhow, etc. Furthermore, since the assessee provided technical/ engineering consultancy advice as well as technical design to BHEI, enabling it to further apply and re–apply such technology for rendering services to its customers in India, the condition of "making available" was satisfied.
- The cost recharge relates to and is ancillary to the provision of consulting engineering services which has been held to be in the nature of FTS and, hence, taxable in India.
- The CIT(A) agreed with the Tax Authority's contention on the premise that provision of a specific design and drawing requires application of mind by various technicians having knowledge in the field of architectural, civil, electrical and electronic and overseeing its implementation and execution at site in India by the assessee's technical personnel would amount to making available technical services.

Decision

On assessee's appeal, the Tribunal held in its favour as follows:

(i) The Tribunal held that the amount received towards consulting engineering services is not in the nature of FTS under the DTAA, since the assessee did not "make available" technical knowledge, experience, skill, knowhow or processes to BHEI, through the development and supply of a technical plan or a technical design. Such amount should be treated as "business profits" and in the absence of a PE of the assessee in India, it cannot be brought to tax. Similar conclusion applies in respect of cross-charge of HO expense which is in the nature of FTS.

(ii) The Tribunal observed as follows:

a) A careful reading of the FTS Article of the DTAA clarifies that the words "development and transfer of a technical plan or technical design" is to be read in conjunction with "make available technical knowledge, experience, skill, knowhow or processes".

b) As per the rule of *ejusdem generis*, the words "or consists of the development and transfer of a technical plan or technical design" will take colour from "make available technical knowledge, experience, skill, knowhow or processes".

c) Technology is considered to have been made available when the recipient of such technology is competent and authorised to apply the technology contained therein independently as an owner, without recourse to the service provider in the future.

d) The technical designs/drawings/plans supplied by the assessee are project-specific and cannot be used by BHEI in any other project in the future. Thus, the assessee has not made available any technical knowledge, experience, skill, knowhow or processes while developing and supplying the technical drawings/designs/plans to BHEI.

(iii) Reliance was placed on the Pune Tribunal decision in the case of *Gera Developments Pvt. Ltd. [(2016) 160 ITD 439 (Pune)]* in the context of the FTS Article under the India-US DTAA, wherein it was held that mere passing of project-specific architectural, drawings and designs with measurements does not amount to making available technical knowledge, experience, skill, knowhow or processes. Unless there is transfer of technical expertise skill or knowledge along with drawings and designs and if the assessee cannot independently use the drawings and designs in any manner whatsoever for commercial purpose, the payment received cannot be treated as FTS.

7. Section 56(2)(viia) – Rule 11UA – Section 28(iv) – Levy of MAT – Decision on taxability of composite scheme of arrangement which includes demerger and amalgamation in favour of the assessee

M/s. Aamby Valley Ltd. vs. ACIT [TS-80-ITAT-2019 (Del.)] Assessment Year 2012-13

Facts

(i) The assessee belongs to Sahara Group of companies. The assessee is engaged in the business of construction as developers, colonisers and contractors in the field of residential and commercial complexes, townships together with all allied infrastructure. The assessee is also engaged in the business of running of resorts and other hospitality services, etc.

(ii) The assessee had a 100 per cent subsidiary which in turn had eight subsidiaries and three step-down subsidiaries. The assessee along with wholly owned subsidiary and the Special Purpose Vehicles (SPVs) and step-down subsidiaries filed a composite scheme of arrangement before the Bombay High Court for demerger of various business undertakings from the assessee (along with all related assets, liabilities, employees, development rights, licenses, permits and registration etc.) to the SPVs and the step-down subsidiaries and amalgamation of the WOS with the assessee with effect from 31st March, 2011 (appointed date) on a going concern basis. The scheme was sanctioned by the High Court *vide* its order dated 20th January, 2012.

(iii) Pursuant to the amalgamation, the assessee received the shares of SPVs which were recorded in the books of the assessee at fair value. The excess credit arising out of the recording of assets and liabilities at fair values was credited to a general reserve. The assessee did not offer any income in its return of income since according to the assessee there was no income or gain arising out of the said composite scheme of arrangement and amalgamation.

(iv) The Assessing Officer (AO) observed that the assessee had received the shares of SPV's without consideration or inadequate consideration. The AO made the addition for the same under the provisions of Section 56(2)(viia) of the Act. The value of the shares was determined in accordance with Rule 11UA of the Income-tax Rules, 1962 (the Rules) by taking the FMV as on 31st March, 2012 ignoring the fact that the scheme was operative from 31st March, 2011.

(v) The Dispute Resolution Panel (DRP) upheld the order of the AO. Further, the DRP held that increase in general reserve on account of fair valuation of shares received on amalgamation, represent business profits and was taxable under Section 28(iv) of the Act. The DRP held that the amount carried to any reserve is required to be added back to the book profit since the creation of reserve was not routed through P&L account. Merely because it was not passed through the P&L account, it should not escape the requirement of Minimum Alternate Tax (MAT).

Decision

On assessee's appeal, the Tribunal held in its favour as follows:

(i) Re: Year of taxability

a) The Tribunal held that all the assets of the amalgamating company would vest in the assessee amalgamated company with effect from the appointed date which is 31st March, 2011. The transferor-company carrying on business and holding the assets on behalf of the transferee-company from the appointed date and the scheme would be effective from the appointed date.

b) The determination of the FMV of the assets of the demerged undertaking as well as recording of the entries in respect of the transfer and vesting of the assets in the SPVs will not change the appointed date as well as date of transfer and vesting of the properties for all the intending purposes because the transfer would be valid from the appointed date only.

c) Accordingly, transaction of the composite scheme of arrangement and amalgamation takes place in the previous year relevant to the AY 2011-12 and no transaction took place in the previous year relevant to assessment year under appeal, i.e. AY 2012-13. Therefore, no addition could be made in assessment year under appeal under any of the provisions of law.

(ii) Re: Taxability of amount credited to general reserve as business profits.

a) For taxability of net increase in general reserve within the provisions of Section 28(iv) of the Act, it is necessary that benefit or perquisite must arise from carrying on the business or profession. If any benefit or perquisite does not arise from the business or profession carried on by the assessee, the provisions of Section 28(iv) of the Act cannot be applied. The intention of the Legislature is not to apply the provisions of Section 28(iv) to a case where there is an increase in the general reserve arising due to the recording of the shares in the balance sheet of the assessee at their market

value. When a company is amalgamated with the other company, the activity cannot be regarded as a business transaction.

b) Relying on the decision of the Supreme Court in the case of *Godhra Electricity Co. Ltd. vs. CIT [1997] 225 ITR 746 (SC)* it was observed that an increase in general reserve did not give rise to any real income to the assessee. It is capital in nature. The general reserve arisen was due to the recording of investments held by the amalgamating company at its FMV. It did not give rise to any real income to the assessee.

(iii) Taxability under the provisions of Section 56(2)(viia) of the Act

a) The provisions of Section 56(2)(viia) of the Act were brought into the statute to curb bogus capital building and money laundering to prevent the practice of transferring unlisted shares at prices much below their market value. For the transfer of shares, there must be a transferor and transferee and transferred assets, i.e., shares. In the case of amalgamation, it cannot be said that there is a transfer of shares as there is only statutory vesting of the assets by virtue of the amalgamation scheme.

b) In the instant case, due to the composite scheme of arrangement and amalgamation, it cannot be said that there was no consideration or inadequate consideration. In fact, due to the arrangement, the assessee transferred the assets of various undertakings to SPVs and in consideration thereof, acquired the shares of SPVs through a subsidiary and through this process, the shares of subsidiary held by the assessee got substituted with the shares of various SPVs which were being earlier held by the subsidiary.

c) The market value of the shares received by the assessee is not higher than the market value of the undertaking (which was transferred by the assessee to various SPVs) to qualify for the provisions of Section 56(2)(viia) of the Act.

d) Section 56(2)(viia) of the Act excludes the transaction of business reorganisation and amalgamation which are not regarded as a transfer under the provisions of Section 47 of the Act. The exemption to the shareholder was available only if the consideration for amalgamation was received in the form of shares of the amalgamated company. However, this condition of allotment of shares could not be complied with in a scenario where the amalgamated company itself is a 100 per cent shareholder of the amalgamating company, thereby leading to ambiguity on the applicability of the amalgamation exemption provision.

e) To remove this ambiguity, the exemption provisions were amended by the Finance Act 2012, by specifically inserting the clause that issuance of shares by the amalgamated company is not required to fall within the amalgamation exemption provision where the amalgamated company itself is a 100 per cent shareholder of the amalgamating company. The Tribunal observed that the amendment to remove defect was retrospective in nature and it was clarificatory in nature and it is applicable from AY 2011-12, even though the amendment was made with effect from AY 2013-14.

f) The Tribunal held that provisions of Section 56(2)(viia) of the Act could not be applied in respect of the transaction undertaken by the assessee as it was covered under Section 47(vii) of the Act.

g) Without prejudice to the above, the Tribunal held that if an addition was made under Section 56(2)(viia) of the Act, the balance sheet as on 31st March, 2011 has to be considered for the purpose of determining the value of the property under Rule 11UA of the Rules.

(iv) Taxability for the purpose of MAT

Relying on the decision of the Supreme Court in the case of *Apollo Tyres Ltd. vs. CIT [2002] 255 ITR 373 (SC)*, it was held that the net reserve in the general reserve for which the addition was made was not debited to the profit and loss account and it was directly credited to general reserve, such amount cannot be added to the profits while computing book profits under the provisions of MAT.

8. Mumbai Tribunal – Territorial nexus must for Section 9 taxability; Restores profit attribution of agency-commission

Fox International Channel Asia Pacific Ltd. vs DCIT [TS-84-ITAT-2019(Mum)] Assessment Year : 2010–11

Facts

(i) The assessee, a foreign company (tax resident of Hong Kong) was engaged in distribution of satellite television channels and sale of advertisement air time for the channel companies at global level. Assessee was not a channel owner but is a service provider to group companies like Star Movies, Star World, etc. The channel companies had appointed the assessee as an agent to sell the advertisement air time on the channels, to distribute the channels in the territories where the channels were being broadcast and to procure syndication revenues in respect of the contents of the channels.

(ii) In the relevant year the assessee earned revenue from management fee, advertising fee, agency commission and other income in the nature of royalty and being a non-resident company, it was not required to maintain India Specific Financial Statement.

(iii) In course of assessment proceedings, the Assessing Officer (AO), noticing that the assessee earned revenue from international transaction with its Associated Enterprise (AE) in India made a reference to the Transfer Pricing Officer (TPO) for determining the arm's length price (ALP) of the international transactions. The consolidated profit computed as a percentage of total revenue earned by the channel companies from India during the 12 months period from April 2009 to March 2010, resulted in an overall profit rate of 28.17%. After verification, the TPO accepted PSM as the most appropriate method. He also noted that though under PSM there is no need to further benchmark the profitability against the comparables, however, with a view to demonstrate its *bona fide* and clear all doubts, the assessee had compared its profitability with nine external comparables, whose average margin worked out to 7.28%. Out of the 9 comparables, TPO shortlisted 5 and arrived at a mean margin of 23.81%. Noting assessee's margin to be higher, TPO concluded that no adjustment is required to be made to the value of the international transaction entered into by the assessee.

(iv) TPO accepted assessee's determination of ALP at ₹ 252.59 crore under PSM as per TP-analysis, however found that in the computation of income, it offered to tax in India an amount of ₹ 227.80 crore. Accordingly, he held that the differential amount of ₹ 24.79 cr, should be treated as adjustment to the ALP. In pursuance of TPOs order, AO passed draft assessment order making an upward TP-adjustment of the differential amount of ₹ 24.79 crore.

(v) Assessee filed its objections with DRP submitting that the amount of ₹ 24.79 crore

represents agency commission fee towards services provided outside India and received outside India and hence, cannot be treated as income u/s. 7 or 9 and is not chargeable to tax in India. It was submitted, since the agency commission fee is not an income chargeable to tax under the provisions of the Act, it cannot be considered as an international transaction u/s. 92B(1) and therefore, the TPO had no jurisdiction to take cognizance of such transactions and carry out adjustment. DRP observed that in view of *Explanation* below section 9(2), income of a non-resident shall be deemed to accrue or arise in India whether or not the non-resident has a residence or place of business or business connection in India or has rendered services in India. Thus, DRP upheld TPO's adjustments.

(vi) Before ITAT, assessee submitted that ALP of an international transaction has to be determined purely on the basis of income sourced from India. Assessee further submitted that TPO found the consolidated profit of 28.17% of the specified AEs in respect of India / Global Revenue to be at ALP and hence, has not proposed any adjustment to the arm's length price. He submitted that latching on to a mistake committed in Annexure-1 to the transfer pricing study report while mentioning "arm's length profit attributable to India", the Transfer Pricing Officer has actually considered the global profit of the assessee amounting to ₹ 252 crore. Assessee submitted that the income of ₹ 227.80 crore offered by the assessee represents the arm's length price profit attributable to India. Assessee submitted that the observations of the DRP that the assessee has admitted the amount of ₹ 252.59 crore as the profit attributable to India is a total misconception of fact and on a wholly wrong reading of the transfer pricing study report and that assessee has at no stage admitted that the profit attributable to India is ₹ 252.59 crore.

(vii) Assessee submitted, it is not the duty of the TPO to see what income is deemed to accrue or arise in to India, which is the job of the AO. It was further submitted that, under PSM, profit attributable to the income sourced from India has to be split and once the TPO has concluded that the margin shown by the assessee @ 28.17% is at arm's length and no adjustment to the arm's length price is required, he should not have recommended any further adjustment on the basis of global income.

viii) Assessee relied on a host of rulings in support of its contention that the agency fee commission of ₹ 24.79 crore being received outside India on services rendered outside India is not taxable in India and that the duty of the TPO is to determine the arm's length price only. Assessee further relied on Co-ordinate Bench decision in assessee's own case for AY 2007-08 wherein it was held that PSM will apply to India sourced income and thus, income earned / received for services rendered outside India cannot be brought to tax in India.

Decision

On Appeal, the Tribunal held in favour of the assessee as under:

(i) ITAT observed that in coming to his conclusion that the profit attributable to the Indian operations of the assessee is ₹ 252.59 crore and not ₹ 227.80 crore as offered by the assessee in the ROI, TPO has solely relied on Annexure - I to the TP study report wherein revised computation of consolidated net profit compared to the total India / Global Revenues earned by the channel companies and the overall profitability for the period FY 2009-10 has been reflected and an amount of ₹ 252.59 crore has been shown as the ALP attributable to India in case of the assessee.

(ii) ITAT rejected DRP's observation that section 9 can even bring to tax net income which does not accrue or arise in India but accrues or arises outside India as *Explanation* to

section 9(2) of the Act, inserted by Finance Act 2010, with retrospective effect from 1st June 1976, has widened the scope of section 9 to the extent that the income of non-resident shall be deemed to accrue or arise in India whether or not the non-resident has a residence or place of business or business connection in India or the non-resident has carried on business operation in India.

(iii) ITAT observed that if the provisions of section 9 was read as a whole, it would be clear that as per *Explanation* 1 to section 9(1)(i), in case of an assessee whose business operations were not exclusively carried out in India, the amount of income which will be deemed to accrue or arise in India shall be only such part of the income as is reasonably attributable to the operations carried out in India. Therefore, the income which is deemed to accrue or arise in India must have a territorial nexus.

(iv) ITAT noted that agency / marketing commission paid to non-residents agent outside India and for services rendered outside India is not taxable in India. Moreover, on careful reading of the provision contained in *Explanation* below section 9(2), it would be clear that it will not be applicable to the agency commission earned by the assessee.

(v) ITAT noted Revenue's claim that assessee itself has admitted that the profit attributable to India is ₹ 252.59 cr while assessees claimed that the profit attributable to India is ₹ 227.80 cr and placed reliance on its transfer pricing study report. ITAT observed that the actual profit attributable to India is a purely factual issue which has to be demonstrated by the assessee through proper documentary evidences / books of account, and hence, for the limited purpose of verifying this fact, ITAT restored the issue to the AO to examine assessee's claim. ITAT clarified that in the event, the claim of the assessee that actual profit attributable to India is ₹ 227.80 crore is found to be correct, no further adjustment can be made to the arm's length price since the TPO himself has concluded that the profit margin of the international transaction shown by the assessee is higher than the average margin of the comparables.

(vi) Finally, ITAT stated that since, there is no dispute between the parties with regard to the most appropriate method selected by the assessee as well as profit margin shown and the dispute is only with regard to the factual issue relating to the actual profit attributable to India under PSM, it is not necessary to deal with assessee's contention regarding powers of the TPO to determine the profit attributable to India.

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Rahul C. Thakar, *Advocate*

INDIRECT TAXES
GST Gyan

TDS under GST

TDS, as a concept is known to all since a long time under Income-tax laws and to some extent even for the intra-state works contracts. TDS is a mechanism by which the Government seeks to collect the tax at the source of income itself so as to enhance tax collection and ensure tax compliance of deductees. The concept of TDS has also been incorporated into the GST regime in Section 51 of the CGST Act, 2017. Though the Section 51 was enacted from 1st July 2017, the provisions of Section 51 were made effective only with effect from 1st October 2018 *vide* Notification No. 50/2018-Central Taxes dated 13th September 2018. In the present writeup we shall be dealing with the various aspects of TDS under GST with regards to its applicability, compliance, issues, etc.

Who is liable for deducting TDS under GST?

The most important and relevant question which we have been facing is who is liable to deduct TDS under GST. Whether all registered persons are liable to deduct TDS or only specified persons are liable to deduct TDS. Section 51 (1) of the CGST Act, 2017 itself makes it clear that the TDS shall be deducted only by persons mentioned in the said sub-section (1) of Section 51 and such other persons as may be notified by the Government on the recommendations of GST Council. On reading of the Notification No. 50/2018-Central Taxes dated 13th September 2018, the TDS shall be deductible by following persons:

a) A department or establishment of the Central Government or State Government

b) Local authority

c) Governmental agencies

d) An authority or a board or any other body, -

   (i) set up by an Act of Parliament or a State Legislature; or

   (ii) established by any Government,

   with 51% or more participation by way of equity or control, to carry out any function.

e) Society established by the Central Government or the State Government or a Local Authority under the Societies Registration Act, 1860 (21 of 1860)

f) Public sector undertakings

Thus, TDS shall be deductible only by the above specified persons on supplies received by it.

Further the TDS shall be applicable on all supplies made to the above entities except in two cases specified below:

I. Where the value of supply is less than the threshold limit of ₹ 2.5 lakh under a contract.

II. Supplier (deductee) and the place of supply are located in one State and the Recipient (deductor) is registered in another State.

The second exclusion can be explained as under:

Where in a case Supplier as well as place of supply are in State A and recipient is located in State B, the supply would be intra-State supply and Central tax and State tax would be levied. In such case, transfer of TDS (Central tax + State tax of State B) deducted in State B to the cash ledger of the supplier (Central tax + State tax of State A) is not possible. So in such cases, TDS would not be deductible.

Registration of person liable to deduct TDS

Next question which arises is whether a registration is required for complying with TDS provisions. As per Section 24 of the CGST Act, 2017 which provides for compulsory registration, Clause (vi) provides that a person who is required to deduct tax under Section 51 shall be required to get registration whether or not such person is separately registered under CGST Act, 2017.

Thus, a person liable to deduct TDS is required to obtain mandatory registration for that purpose with the GST Authorities. It is important to note that registration for TDS compliance is different from the registration discharging GST on outward supplies. Even though a person is already having GSTIN for discharging GST on its outward supplies, it is still liable to get another GSTIN for complying with the TDS provisions. For example, even if a PSU is registered with the GST authorities for discharging GST on its outward supplies, it is still required to obtain GSTIN for complying with TDS provisions. The GST registration for TDS is based on the TAN number issued under the Income-tax Laws.

Value on which TDS is applicable and Rate of TDS

The TDS shall be liable to be deducted when the total value of supply of goods or services or both exceeds ₹ 2,50,000/- under a particular contract. It is important to note that the threshold value is not linked to individual supplies or for a particular financial year. The threshold value is linked to each contract of supply. Thus, if the contract value is more than ₹ 2.5 lakh, TDS shall liable to be deducted irrespective of whether the individual supplies of goods or services under such contract are less than ₹ 2.5 lakh or such contract is spread across different financial years in such a way that the value of supplies in any financial year does not exceed ₹ 2.5 lakh. The TDS shall be liable to be deducted the moment the contract value is exceed ₹ 2.5 lakh.

In calculating the value of contract, the amounts of CGST, SGST, UTGST or IGST which are to be shown separately in the invoice shall be excluded.

The rate of TDS shall be 1% CGST + 1% SGST / UTGST or 2% IGST applicable on the taxable value after excluding the CGST, SGST, UTGST or IGST amount shown separately in the invoice.

TDS compliance

From TDS compliance point of view, the deductor shall have to comply with below explained compliances.

Depositing TDS amount deducted with Government

As per Section 51(2), the deductor shall be deposit the amount of TDS to the Government account by 10th of the succeeding month. The deductor would be liable to pay interest under Section 51 (6) r/w Section 50(1) if the tax deducted is not deposited within the prescribed time limit.

TDS Certificate

As per Section 51(3) the deductor shall be liable to issue a TDS certificate in Form GSTR-7A to the deductee (the supplier from whose payment TDS is deducted), within 5 days of crediting the amount to the Government.

As per Section 51(5), the TDS so deposited into the Government account by the Deductor can be claimed by the deductee (supplier) in Electronic Cash Ledger only to the extent of the amount reflected in the TDS return filed by the deductor.

As per Section 51(4), the deductor shall be liable to pay a late fee of ₹ 100/- per day from the expiry of the 5th day till the certificate is issued in case of failure to issue the TDS certificate within the prescribed time limit of 5 days. This late fee would be subject to a maximum of ₹ 5,000/- per failure.

TDS Return

Section 39 (3) r/w Rule 66 of the CGST Rules requires the deductor to file a return in Form GSTR-7 within 10 days from the end of the month in which the TDS amount is deducted. The details of tax deducted at source furnished by the deductor in FORM GSTR-7 shall be made available to each of the suppliers in Part C of FORM GSTR-2A electronically through the common portal.

If the supplier (deductee) is an unregistered person, then the name of the supplier rather than GSTIN shall be mentioned in the return.

For clarification, the option to file TDS return in GSTR-7 shall appear on the common portal only in case of TDS GSTIN. The said option is not appearing in case of a normal GSTIN.

Refund of excess amount of TDS deducted and deposited

As per section 51(8), in case of an excess amount or erroneous amount of TDS deducted and deposited into the Government account, the refund may be granted to the deductor or the deductee in accordance with the provisions of section 54.

No refund shall be granted to the deductor, if the amount deducted has been credited to the electronic cash ledger of the deductee.

Currently, many deductors have been facing the issues on common portal for claiming refund in case of excess deduction or erroneous deduction of the TDS. For example, where the deductor has wrongly deducted CGST + IGST instead of CGST + SGST. This leads to a lot of blockage of funds, both for the deductor as well as dedcutee.

There have also been cases where the deductor has deposited the amount in cash ledger of the normal GSTIN and not being able to use the same for payment of TDS amount under the TDS GSTIN. This also has led to blockage of fund for the deductor. Further, since the deductors are mostly Government Departments and PSU, the processing of the payments and refunds also takes time as due procedures have to be followed for various approvals. This results in financial burden on the deductees too.

In my view, the refund procedures for TDS need to be simplified for faster processing of refund. A separate cell for processing TDS returns and refunds is the need of the hour. The Government has already implemented such kind of cells under Income-tax due to the problems faced by the taxpayers. Similar approach is required even under the GST regime.

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CA Ashit Shah and CA Kush Vora

INDIRECT TAXES
GST – Legal Update

The authors have tried to cover GST updates pertaining to law points in particular. The notifications, circulars, orders relating to extension of various statutory due dates are not covered herewith.

A. CGST Notifications

1. **Extension of filing of Form GSTR-1** *(Notification No. 17/2019 – Central Tax – Dated 10-4-2019)*

   The CBIC had extended time limit for filing of Form GSTR 1 for the month of March 2019 from 11th April 2019 to 13th April 2019.

2. **Extension of filing of Form GSTR-7** *(Notification No. 18/2019 – Central Tax – Dated 10-4-2019)*

   The CBIC had extended time limit for filing of GSTR 7 (return by a registered person required to deduct tax at source) for the month of March 2019 from 10th April 2019 to 12th April 2019.

3. **Extension of filing of Form GSTR-3B** *(Notification No. 19/2019 – Central Tax – Dated 22-4-2019)*

   The CBIC had extended time limit for filing of GSTR-3B for the month of March 2019 from 20th April 2019 to 23rd April 2019.

4. **Time limit for filing return of taxpayers whose registration is cancelled and applied for revocation of registration** *(Notification No. 20/2019 – Central Tax – Dated 23-4-2019)*

   No time limit was prescribed for filing returns of taxpayers whose registration is cancelled. Now, time limit is provided as under –

   1. Returns due for the period from the date of the order of cancellation of registration till the date of the order of revocation of cancellation of registration shall be furnished by the said person within a period of thirty days from the date of order of revocation of cancellation of registration;

   2. Where the registration has been cancelled with retrospective effect, the registered person shall furnish all returns relating to period from the effective date of cancellation of

registration till the date of order of revocation of cancellation of registration within a period of thirty days from the date of order of revocation of cancellation of registration.

5. **Relief to small taxpayers in filing returns** *(Notification No. 21/2019 – Central Tax – Dated 23-4-2019)*

Composition taxpayers and persons who are discharging tax liability pursuant to Notification No. 2/2019 – Central Tax (Rate), dated 7-3-2019 have to file one page quarterly return and annual return as under –

Return / Statement	Periodicity	Form No.	Due Date
Statement of Self assessed tax	Quarterly	GST CMP – 08	18th day of the month succeeding such quarter.
Return	Yearly	GSTR – 04	30th April following end of such financial year

6. **Movement of goods for return defaulters** *(Notification No. 22/2019 – Central Tax – Dated 23-4-2019)*

Every registered person who causes movement of goods from one place to another, has to furnish details in Form GST EWB-01 (e-way bill) electronically. [Rule 138].

It is now provided that w.e.f. 21st June 2019, taxpayers who have not filed their periodic returns for two consecutive tax periods (Composition taxpayers) or consecutive period of two months (other taxpayers) will not be allowed to upload / furnish details in Part A of Form GST EWB-01 [Rule 138E] and hence movement of goods would not be possible for such non-compliant taxpayers.

B. Circulars

1. **Clarification regarding exercise of composition option in case of services** *(Circular No. 97/16/2019 – GST – Dated 5-4-2019)*

CBIC has clarified the following points with respect to composition scheme in case of services:

- a registered person will have to file intimation in the manner specified in sub-rule 3 of Rule 3 of the said rules in FORM GST CMP-02 by selecting the category of registered person as "Any other supplier eligible for composition levy" as listed at Sl. No. 5(iii) of the said form, latest by 30th April, 2019. Such person shall also furnish a statement in FORM GST ITC 03;
- Person who applies for fresh registration and wants to opt for payment of Central tax @ 3% may avail the benefit by filing Form GST REG-01.
- the option of payment of tax in respect of any place of business in any State or Union territory shall be deemed to be applicable in respect of all other places of business registered on the same Permanent Account Number.
- the option to pay tax by availing the benefit would be effective from the beginning of the financial year or from the date of registration in cases where new registration has been obtained during the financial year.

2. **Clarification regarding utilisation of Input Tax Credit pursuant to Rule 88A in CGST Rules, 2017** *(Circular No. 98/17/2019 – GST – Dated 23-4-2019)*

The newly inserted Rule 88A in the CGST Rules allows utilisation of input tax credit of IGST towards the payment of CGST and SGST, or as the case may be, UTGST, in any order subject to the condition that the entire input tax credit on account of IGST is completely exhausted first before the input tax credit on account of CGST or SGST / UTGST can be utilised.

It was further clarified that presently, the common portal supports the order of utilisation of input tax credit in accordance with the provisions before implementation of the provisions of the CGST (Amendment) Act i.e., pre-insertion of Section 49A and Section 49B of the CGST Act. Therefore, till the new order of utilisation as per newly inserted Rule 88A of the CGST Rules is implemented on the common portal, taxpayers may continue to utilise their input tax credit as per the functionality available on the common portal.

3. **Clarification regarding filing of application for revocation of cancellation of registration** *(Circular No. 99/18/2019 – GST – 23-4-2019)*

Extension in time under section 30(1) of the Act to provide a one time opportunity to apply for revocation of cancellation of registration on or before the 22nd July, 2019 for the specified class of persons for whom cancellation order has been passed up to 31st March, 2019.

4. **Clarification on applicability of GST on Seed Certification / Testing** *(Circular No. 100/19/2019 – GST – Dated 30-4-2019)*

It is clarified that testing and certification charges by the Seed Certification Agencies to the seed producing organization/ companies are collected for the composite supply of seed testing and certification, which is exempt under Notification No. 12/2017-Central Tax (Rate) Sl. No. 47 (services by Central/State Governments by way of testing/certification relating to safety of consumers and public at large, required under any law).

5. **Clarification on GST exemption on the upfront amount payable in installments for long lease of plots**. *(Circular No. 101/20/2019 – GST – Dated 30-4-2019)*

It is hereby clarified that GST exemption on the upfront amount (called as premium, salami, cost, price, development charges or by any other name) payable for long term lease (of thirty years, or more) of industrial plots or plots for development of infrastructure for financial business under Entry No. 41 of Exemption Notification 12/2017 – Central Tax (R) dated 28-6-2017 is admissible irrespective of whether such upfront amount is payable or paid in one or more installments, provided the amount is determined upfront.

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Learn obedience first. Always first learn to be a servant; and then you will be fit to be a master

— *Swami Vivekananda*

CA Naresh Sheth & CA Jinesh Shah

INDIRECT TAXES
GST – Recent Judgments and Advance Rulings

A. Rulings by National Anti-Profiteering Authority

1. Kerala Screening Committee, Director General Anti-Profiteering Board vs. M/s. Saint Gobain India Pvt. Ltd. – NAPA Kerala (2019-TIOL-23-NAA-GST)

Facts, Issue involved and Contention of the Applicant

Kerala State Screening Committee on Anti-Profiteering *vide* its minutes of meeting held on 8-5-2018 had referred the case to the Standing Committee on Anti-Profiteering, alleging profiteering by the Respondent on Supply of 'Gypsum Board' (hereinafter referred as product). Applicant has alleged that the respondent has failed to pass on the benefit of tax rate reduction in GST regime w.e.f. 1-7-2017. The Standing Committee on Anti-Profiteering further referred the case to the Director General of Anti-Profiteering.

DGAP in his report dated 26-9-2018 observed that in the Pre-GST regime the tax rates were CST @2% and Central Excise Duty @12.5% and Post GST the tax rate of the product was 28%. The DGAP further furnished the pre-GST and post-GST sale invoice wise details of the applicable tax rates. The details of the invoice is as follows:

	Particulars		Pre-GST	Post-GST
1	Product Description	A	Gypsum Board HSN Code 69091100	
2	Invoice No.	B	1300002553	GY9114061424
3	Invoice Date	C	29.05.2017	20-9-2017
4	Gross Price per unit	D	139.44	139.50
5	Discount per UOM	E	22.60	22.70
6	Discounted base price	F = D-E	116.84	116.80
7	Central Excise Duty (%)	G	12.5%	-
8	Central Excise Duty (in ₹)	H = F*G	14.61	-

	Particulars		Pre-GST	Post-GST
9	Central Sales Tax (CST) (%)	I	2%	-
10	Central Sales Tax (CST) (in ₹)	J = (F+H)*I	2.63	-
11	GST (%)	K	-	28%
12	GST on base price (In ₹)	L = F*K	-	32.70
13	Total Tax (in ₹)	M = H+J or L	17.24	32.70
14	Total tax as % of base price	N = M/F*100	14.75%	28%

Discussions and observations

DGAP submitted that the rate of tax on the product was 2% (CST) and 12.5% (Central Excise Duty) in the pre-GST era and 28% (GST) in the post-GST era. DGAP observed that the rate of tax has increased from 14.75% to 28%. Therefore, the rate of tax applicable to the product was increased from 14.75% as can be seen from the table above, in the pre-GST era to 28% in the post-GST era.

Section 171 of the CGST Act, 2017 reads as under:

(1). *"Any reduction in rate of tax on any supply of goods or services or the benefit of input tax credit shall be passed on to the recipient by way of commensurate reduction in prices."*

Provisions of Section 171 of the CGST Act comes into play when there is a reduction in the rate of tax or if there is net benefit of input tax credit. Consequently, the DGAP stated that there was no reduction in the rate of tax on the said product and the respondent had reduced the price from ₹ 116.84 (pre-GST) to ₹ 116.80 (post-GST). Provisions of Section 171 of the CGST Act, 2017 were not contravened.

Ruling of NAPA

It is apparent from the perusal of the facts of the case and the invoices placed on record that there was no reduction in the rate of tax on the above product w.e.f. 1-7-2017. Instead, rate of tax in the pre-GST era, which was 14.75%, has increased to GST @ 28% in the post-GST era. Therefore, the allegation of profiteering is not sustainable in terms of Section 171 of the CGST Act, 2017.

B. Rulings by Appellate Authority of Advance Ruling

2. M/s. Nash Industries – AAAR Karnataka (2019-TIOL-07-AAAR-GST)

Facts, Issue involved and Query of the Appellant

Appellant is in the business of manufacturing sheet metal pressed components and caters to various industries, ATM, printers etc., and is having multi-locational facilities in and around Bengaluru. Such components are manufactured by the appellant based on drawings provided by customers.

To manufacture such components, appellant had designed and manufactured certain tools. Such manufactured tools were billed to the customer and were retained by the appellant for manufacturing the sheet metal pressed components.

Appellant had filed an application for Advance Ruling on the following questions –

- *Whether the amortised cost of the tools is to be added to arrive at the value of the goods supplied for the purpose of GST under section 15 of the CGST Act read with Rule 27 of CGST Rules.*

Discussions by and Observations of AAR
AAR observed that there were two supplies involved in the entire activity.

Appellant, once he gets the order for the specialised components, manufactures the tools specifically required for the job and invoices it to the recipients. The appellant needs to collect the applicable tax on the tools and the recipient becomes the owner of such tools.

Later the recipient gives the tools free of cost to the appellant and he uses the same for the manufacture of the components. Section 7(1) of the CGST Act 2017 stipulates that 'Supply' shall be made for a consideration. Therefore, consideration is an essential element in supply. However, Section 7(1)(c) specifies that the activities described in Schedule I shall be considered as 'Supply' even if there is no consideration involved. One such activity covered in Schedule I is permanent disposal of business assets. As the tools are supplied by the recipient to the appellant for the limited purpose of manufacture / supply of components, the activity does not amount to permanent transfer of business asset of the recipient. Therefore, the activity of free supply of tools by the recipient to the appellant does not amount to supply as defined in Section 7 of the CSGT Act 2017.

Section 15(2) (b) of the CGST Act 2017 reads as follows:

"Any amount that the supplier is liable to pay in relation to such supply but which has been incurred by the recipient of the supply and not included in the price actually paid or payable for the goods or services or both."

Either the appellant himself could manufacture the tools or get it manufactured by someone else or the recipient could supply them free of cost. In case the appellant procures the tools from the third party, then they would incur the cost and such cost would be included in the value of taxable supply to the recipient.

However, when the first or third situation prevails, then the appellant has not spent any amount in respect of the tools. Here the cost of the tool is borne by the recipient of the supply whereas the same should have been borne by the appellant, as evident from the situation discussed above.

Therefore the facts and circumstances of the transaction as put forth by the appellant attract Section 15(2)(b) of the CGST Act 2017.

Ruling of AAR
The Karnataka Authority for Advance Ruling gave the following order:

"The amortized cost of tools which are re-supplied back to appellant free of cost shall be added to the value of the components while calculation the value of the components supplied as per Section 15 of the CGST /KGST Act, 2017".

Appeal to AAAR and observations of AAAR
Aggrieved by the said ruling of the Authority, the appellant filed an appeal to the Advance Appellate Authority seeking answer to the same query.

Appellant submitted the purchase order for the manufacture of components out of tools supplied by the recipient at free of cost provided by the customers. Appellate Authority observed that the appellant and their customers are not related party and the price paid by the customer is the sole consideration for the supply made by the appellant. To understand the scope of the transaction, the contractual agreement between the appellant and their customers was to be verified.

Appellate Authority took note of CBIC Circular No. 47/21/2018-GST dated 8-6-2018 which clarified that goods owned by the OEM (Original Equipment Manufacturer) and provided to the component manufacturer on FOC (Free of Cost) basis do not constitute a supply as there is no consideration involved.

In such cases, the value of goods provided on FOC basis shall not be added to the value of supply of components.

In this case, the terms and conditions of the contract between the OEM and the appellant clearly indicate that no such obligation is cast on them. The OEM has taken the responsibility to provide the tools. The tools are developed and manufactured by the appellant as per the requirements of customer. The tools (along with the title thereon) is then sold to customer. Appellant is allowed to retain the tools in his premises for undertaking the manufacture and supply of components to the customer.

In this instance, the value of the tools, which has already suffered tax and supplied FOC to the appellant, is not required to be added to the value of the components supplied by the appellant.

Order of AAAR

Appellate Authority set aside the ruling of the AAR and observed that the cost of the tools supplied by the OEM customer on FOC basis to the appellant is not required to be added to the value of the components supplied by the appellant.

C. Rulings by advance ruling Authority

3. M/s. Biostadt India Limited – AAR Maharashtra (2019-TIOL-59-AAR-GST)

Facts, Issue involved and Contention of Applicant

Applicant is engaged in the business of developing, manufacturing and distributing crop protection chemicals and hybrid seeds. Applicant has extensive network which includes three mother depots, 22 stock points & a network of more than 2000 distributors & above 25,000 retailers across the country.

Applicant launched one **Kharif Gold Scheme 2018** (target based – sales incentive scheme) for their distributors and retailers in order to maximise their sales and minimise their outstanding collections.

The terms and conditions of the scheme are as under:

a. The said scheme was in force for the period June 2018 to August 2018.

b. The scheme was divided into two parts:

Lifting of products

Customers who purchase certain specific products on or above their specific quantity shall be entitled to one 10 grams gold coin

Collections:

If the customers after lifting the products from the applicant and make payment in the prescribed staggered manner, then the customers shall be entitled to one 8 grams gold coin.

c. A meeting will be called at the end of the scheme period and customers who have satisfied either of the lifting or collection criteria shall be entitled to attend such meeting. They shall be rewarded with the 8 gms or 10 gms gold coin depending upon the criteria fulfilled by him.

Applicant has procured gold coins from jewellers which are to be distributed at the end of the scheme. As per Notification 1/2018 – CGST (Rate) dtd. 28-6-2017, gold is leviable to GST at the rate of 3 per cent.

Applicant has sought advance ruling in respect of the following questions.

1. *Whether Input Tax credit ("ITC") can be claimed by the applicant on procurement of gold coins which are to be distributed to the customers at the end of scheme period for achieving the stipulated lifting or payment criteria.*

2. *The Applicant notifies schemes with similar conditions periodically, so whether the ITC can be claimed in all such similar schemes?*

Applicant's submissions

Applicant submitted that it has satisfied all the criteria's w.r.t. registered person, input tax, in course of business as laid down u/s. 16(1) of CGST Act. It has also complied with the conditions laid down u/s. 16(2) of the Act. The only criteria that needs to be evaluated is the restriction laid down u/s. 17(5) of the Act.

Section 17(5)(h) of CGST Act disallows ITC in respect of goods lost, stolen, destroyed, written off or disposed of by way of gift or free samples. Term gift is not defined under CGST Act.

Gift-tax Act (18 of 1858) had defined the word gift to mean transfer by one person to another of any existing movable or immovable property voluntarily and without consideration in money or money's worth.

Gift is a gratuity and does not require any consideration. If a consideration is attached to a transaction, then it cannot be termed as a gift. Gift cannot arise out of a contractual obligation.

Applicant has launched a sales promotion scheme. It is a known principle that "nothing comes free in business". Each and every act done for business comes with a consideration. Applying same analogy, gold coins are not given away freely to the customers. Applicant has a contractual arrangement with the customer wherein if he purchases certain amount of company's product or makes payment in a prescribed manner then he shall be entitled to a gold coin of specific weight.

Applicant strongly contends that the gold coins distributed to customers at the end of scheme period cannot be qualified as "gift". Since they cannot be qualified as gift, disallowance under Section 17(5) will not be attracted.

Contentions of the Concerned Officer

Departmental officer has opined that the "Gold Coins" to be distributed are not inputs and hence, GST paid on such a purchase does not qualify to be an input tax for the purpose of section 16(1) read with section 2(62) of the CGST Act 2017. What is important in definition of input is the use of phrase "in course or furtherance of business". An activity is undertaken in course or furtherance of business on the basis of few principles:

- Was the activity undertaken in line with basic business model?
- Is the activity needed for continuity in supply?
- Is the activity mainly concerned for making taxable supply?

From above it is clear that applicant wants to avail ITC on gold coins which is not exclusively used in assessee's business related to manufacture and distribution of crop protection chemicals. They are not in line with basic business model and are not needed for continuity in supply. They are not used for making and further taxable supplies and hence cannot be termed as inputs.

Basic intention behind section 17(5)(h) is to restrict people from giving benefit in garb of gifts to avoid valuation and thus avoid levy of tax. If consideration for these goods (gold coins) is not charged directly, they shall qualify as gifts and ITC shall not be eligible.

Discussions by and Observations of AAR

Applicant has floated the subject scheme for the period June, 2018 to August, 2018 only, by way of which gold coins of different denominations would be given to those customers who lifted a certain quality of product or made a certain amount of payment. It is only those specific customers who fulfil the conditions would be able to avail the benefit to subject scheme.

The provisions of ITC are governed by sections 16 and 17 of the CGST Act 2017. In order to avail ITC, two basic provision need to be complied with i.e., Section 16 and Section 17.

As per section 16, a taxpayer is entitled to take credit of input tax charged on any supply of goods or services to him which are used in the course or furtherance of his business. Section 17(5) of the CGST Act deals with blocked credit and being with a *non obstante* clause, which means even if section 16(1) allows ITC, Section 17(5) shall block the same in respect of certain cases.

As per section 17(5)(h), "Notwithstanding anything contained in sub-section (1) of section 16 and sub-section (1) of section 18, input tax credit shall not be available in respect of goods lost, stolen, destroyed, written off or disposed of by way of gist or free samples.

As per the definition of gift under Gift-tax Act, transfer should be made voluntary. Applicant states that they have a contractual arrangement with customer for lifting products and for making payments. A contractual arrangement implies that it should be agreed upon by the customer in writing that such scheme has been floated by applicant. Applicant has submitted only brochure / write-up and has not submitted any concrete contract / agreement. Hence gold coins are not given under a contractual obligation but are given voluntary.

There are several schemes advertised in the market by business house which promise to give 'assured gifts' to their customers. Similarly malls offer various gifts to customers. Gift has an enlarged scope and has its own colour. In the present case, the statement that gold coins will be given to customers who satisfy certain conditions is nothing but assurance of giving away gifts on conditions being achieved by customers.

Under GST, non-granting / denial of ITC is envisaged in situations where there is no tax on output liability. In case where goods are procured with levy of input tax and are supplied without output tax levy, scheme of GST Act does not provide for ITC except for exports.

As a corollary if it is assumed that gifts have some commercial consideration, then GST should be paid at time of giving away of disposal of same and in such cases only ITC shall be available. Also applicant has assigned fixed price of Rs. 3,200/- per gram to gold coin. They have not explained as to how they have arrived at it because value of good changes everyday.

To sum up, ITC shall not be available when no GST is being paid on their disposal.

Ruling of AAR

Distribution of gold coins by the applicant is nothing but gifts hence applicant cannot avail ITC on procurement of gold coins for distribution to customers.

4. E-Square Leisure Pvt. Ltd. – AAR Maharashtra (2019-TIOL-121-AAR-GST)

Facts, Issue involved and Query of Applicant

Applicant is engaged in various services including renting of immovable property to business entities for commercial purpose. The applicant discharges GST on the rent received from the lessees. They also receive **interest free security deposit** (hereinafter to be referred as "security deposit") from the lessees.

The security deposit received is taken on account of security against the damages, if any, caused to the interiors or the property as a whole. Further, the security deposit shall be returned on the completion of tenure of lease.

Applicant has sought advance ruling in respect of following questions:

1. *Whether GST would be applicable on interest free security deposit and notional interest if any?*

2. *In case GST is applicable, what would be the value of notional interest for levy of GST?*

Applicant's submissions

Applicant, referring to Section 7(1)(a) read with 2(31) of the CGST Act, 2017, contends that the deposits received shall not be considered as a payment made for such supply unless the supplier applies such deposit towards consideration for the said supply.

Further, it is submitted that the security deposit has not been given as any additional consideration and it needs to be refunded to the tenant on completion of lease term. Therefore, it cannot form part of the consideration received towards rendition of renting services.

The applicant further contends that the concept of notional interest has nowhere been prescribed in the GST Rules. It existed only under the Excise Valuation rules where notional interest on advance received was includible in assessable value of the goods.

Discussions by and Observations of AAR

Definition of consideration u/s. 2(31) of CGST Act is inclusive and the consideration may be in cash or kind. The payment received will not be treated as consideration, if there is no direct link between the payment and supply. From the close scrutiny of definition, it is clear that there should be a close nexus between the payment and supply.

By referring to Section 2(31), a conclusion is hereby drawn stating that a deposit given in respect of supply shall not be considered as payment made for such supply unless the supplier appropriates such deposit as consideration for the said supply.

In the absence of definition of 'Deposit' in the GST Act, the payment to be considered as security deposit should have following attributes namely:

For performance of an obligation

a) Security against return of the hired goods.

b) Security against damage to properties rented.

c) Must be reasonable

Applying the above test to the facts of the case we find that, the security deposit taken by the applicant is to secure or to act as a guarantee as per the terms of agreement against damages to the properties. Further, admittedly applicant has taken security deposit against the damages caused to the furniture, equipments, fittings supplied along with the premises or damage done to the properties. Applicant will not apply the deposit received, as consideration for the said supply and therefore will not be liable to pay GST on the deposit received.

However at the time of completion of the lease tenure, if the entire deposit or a part of it is withheld and not paid back, as a charge against damages, etc., then at that stage such amounts not returned back will be liable to GST as per the present GST laws.

Ruling of AAR

It was held that GST shall not be applicable on interest free security deposit and notional interest thereon.

5. M/s. Arihant Enterprises – AAR Maharashtra (2019-TIOL-120-AAR-GST)

Facts, Issue involved and Query of the Applicant

Applicant is a partnership Firm engaged in the business of reselling ice cream in wholesale as well as retail sale packages. Applicant

purchases ice-cream from its sole manufacturer, M/s. Kamaths Ourtimes Ice-creams Pvt. Ltd. (the franchisor). The applicant sells the ice cream **"as it is"** without any further processing/alteration/structural or chemical change. Applicant supplies ice cream from its retail stores and selling of ice-cream in below mentioned manner is its only source of revenue:

i. **Sale of ice-cream in retail packs –**

Ice creams are sold in retail packs / plastic containers (popularly called tubs).

ii. **Sale of ice-cream by way of scoops –**

Ice-cream scoops are sold in cones, cups or waffle cones to customers who wish to consume ice-cream on a take away basis. The customer walks to the counter, goes through the menu, selects the flavours, places the order and makes payment to the cashier. Once the ice-cream is handed to the customer, he either waits within or outside the store or takes it away. There are a few tables/chairs/benches for customers to sit while having their ice cream.

Applicant purchases ice-cream in retail and whole sale pack from the franchisor under a tax invoice who collects GST @ 18%. Due to the inherent nature of the product, the packages received from the manufacturer/franchisor are stored in a refrigerator located inside the retail store.

Applicant has sought advance ruling on the following questions -

1. *Whether supply of ice-cream by the applicant from its retail outlets would be treated as supply of 'goods' or supply of 'services' or a 'composite supply' and subject to GST accordingly?*

2. *Whether the supply not being a composite supply, would be treated as supply of service in terms of Entry 6(b) of Schedule II of the CGST Act, 2017 and leviable to CGST @2.5% in terms of Notification No. 11/2017 as amended by Notification No. 46/2017 – Central Tax (Rate) (Serial No. (i) Entry No.7).*

3. *In case the supply is held to be 'composite supply', whether the taxability of the same should be treated as supply of service in terms of Entry 6(b) of Schedule II of the CGST Act, 2017 or should be taxable on the basis of nature of principal supply in accordance with Section 8 of the Act?*

4. *In case the supply is held to be a supply of service in terms of entry 6(b) of Schedule II of the CGST Act, 2017, would it be mandatory for the applicant to collect and pay CGST @ 2.5% in terms of Notification No. 11/2017.*

Applicant's submission

Section 2(52) of the CGST Act, 2017 defines goods as "every kind of movable property other than money and securities …. "

Definition of service u/s. 2(101) of the Act is residuary in nature. In other words what are not goods are services.

Section 2(30) of Act defines Composite Supply to *mean a supply made by a taxable person consisting of two or more taxable supplies of goods or services or both, which are naturally bundled and supplied in conjunction with each other in the ordinary course of business, one of which is a principal supply.*

Most prominent question to be answered in this regard is whether the supply of ice cream in retail package and in scoops by the applicant at the outlets would be termed as supply of goods or supply of service or a composite supply.

There is no objection to the fact that the transaction under consideration involves transfer of property in movable goods. The

intention of the parties and the understanding of the parties is that the same is a sale. The customer intends and accordingly, agrees to purchase the abovementioned final products from the applicant. There is no contract for provision of any service. The customers of the applicant are free to consume the ice-cream inside and outside the outlet. There are no restrictions as regards to the place of consumption. This contention is supported by the fact that none of the outlet provides the facility of serving/dining to the customer. Every customer, irrespective of age or sex is required to collect the same from the delivery counter. Applicant relied on various case laws in support of its contention that the transaction is that of sale of goods and not provision of services.

It is clear that there is only one activity which has taken place predominantly i.e., buying and selling of ice-cream. Applicant does not intend to provide any sort of service to their consumers. Selling the scoop of ice-cream into the cups and cones, as desired by the consumer, is merely an ancillary or incidental supply. The same could not be treated as a predominant nature of the transaction. Thus, apparently, the predominant nature of the transaction is that of supply of goods.

Applicant further submits that prior to the introduction of GST the company was registered under the Maharashtra Value Added Tax Act, 2002 (MVAT Act) as resellers and were discharging VAT @ 13.5%. It is mandatory for resellers of food and food service providers to obtain a licence under the Food Safety and Standards Act, 2006. Applicant is registered under the said Act as a "Retailer". Further, each of the stores are registered under the Maharashtra Shops and Establishment Act, 1948 and holds a registration certificate issued by the Municipal Corporation. The registration certificate describes the nature of business of the store as "Sale of ice-cream".

Discussions by and observations of AAR

The main issue before us is whether the supply of ice-cream by the applicant from its retail outlets would be treated as supply of "goods" or supply of "service" or a "composite supply".

Applicant has submitted that they purchase ice creams from their franchisor and resell the same in wholesale as well as retail sale packages as it is without any further processing/alteration/structural or chemical change.

Applicant has further submitted that their business transaction involves transfer of property in movable goods wherein the customer places the order and the same is delivered to him. It does not provide any separate facility of serving/ dining.

The Space (chair-tables) for consuming the ice-cream is made for the convenience of the customers and the dominant object involved is sale of ice-cream. The decision of Rajasthan High Court in case of *Govind Ram and Ors. vs. State of Rajasthan* is squarely applicable to this case. Applicant's outlet differ from the conventional restaurants. Generally, in restaurants the customers go with the intention of ordering articles of food for consuming the same at the restaurant.

Even if we consider the said transaction as a composite supply as per Section 2(30) of the CGST Act, we find that the principal supply in the subject case is a sale of goods i.e., ice-cream, being the predominant element of the transaction.

AAR observed that there is a transfer of title in ice-creams from the applicant to their customers and therefore as per Entry No. 1(a) of the Schedule II of the CGST Act, the subject transaction is nothing but a supply of goods.

Ruling of AAR

In respect of question (1), it held that supply of ice-cream by applicant from its retail outlets would be `treated as *'Supply of Goods'*.

Questions (2), (3) and (4) were answered in negative on the basis of first question answered.

6. M/s. E-Square Leisure Pvt. Ltd. – AAR Maharashtra (2019-TIOL-116-AAR-GST)

Facts, Issue involved and Query of the Applicant

Applicant is engaged in the business of leasing of immovable property for rent and is discharging the GST on the same in accordance with the provisions of the GST law. Applicant intends to enter into a contractual agreement of for leasing of immovable property with the lessee. It further intends to collect expenses for electricity, water charges, property tax and cooking fuel from the lessee.

Hence, it has approached the AAR seeking an advance ruling in respect of the following:

1. *Whether GST is levied on reimbursement of expenses from the lessee at actuals?*
2. *In case GST is levied, what is the rate of GST applicable to said reimbursement of expenses?*

Applicant's contention

Reimbursement is nothing but to repay for certain expenses incurred by the person on behalf of other. It can be construed that lessor has not supplied any goods or services but incurred certain expenses in relation to property which lessee is liable to pay.

Moreover, what the lessor recovers from the lessee by way of reimbursement of water charges, electricity charges, taxes etc, do not have the character of revenue or value addition in the hands of the lessor. They have co-relation with the exact quantity of water or electricity consumed, hence, it is variable based on usage whereas component of rent is always fixed by way of contractual agreement. Given this, it can be construed that there is no supply of goods or services from the lessor to lessee.

Applicant further submits that as per Rule 33 of CGST Rules, 'Determination of Value of Supply Rules', reimbursements are not liable to GST if the same are incurred in the capacity of 'Pure Agent' and will not be considered in the value for levy of GST.

Also further, what the lessor recovers from the lessee by way of reimbursements of water charges, taxes, etc., is purely in the nature of Pure Agent and does not have the character of revenue or value addition in the hands of the lessor.

Another school of thought is that reimbursement of expenses by the lessor from the lessee forms the part of consideration received towards rented property. It is important to analyse the other conditions of the supply:

1) Transaction should be for a consideration;

2) Two or more persons should be involved;

3) In course or furtherance of supply.

Definition of supply is inclusive and includes all supply other than supply specified in Schedule III of the CGST Act. Hence, it could be construed that reimbursement of expenses is also covered under Supply as defined under Section 7 of the CGST Act.

In case of reimbursement of expenses at actual by the lessor from lessee it could be construed that GST should be levied at the rate applicable at the time of procurement of said expenses. The rationale behind it is that reimbursement of expenses is nothing but original supply.

One may even consider it as a composite supply wherein GST rate applicable to reimbursement of expenses is the rate as applicable to principal supply i.e., renting of immovable property.

Discussions by and observations of AAR

Applicant is of the view that reimbursement of water charges, electricity charges, is nothing but repayment of expenses incurred by them on behalf of other and it does not take the character of supply. Alternatively, applicant is of the view that the reimbursement of expenses by them can qualify as an expenses incurred as a 'Pure Agent' and would not be considered in the value of supply for the levy of tax.

As per Entry no. 5 (a) of Schedule II ("Activities of Transaction to be treated as supply of Goods or supply of Services"), renting of immovable property is a supply of services and liable to tax under the provisions of GST Act. AAR was of the view that running a theatre will not be organic unless it is accompanied with supply of power and water. The utilities such as electricity supply and water supply are basic amenities subject to which competent authority will not issue' No objection Certificate' to conduct business of running a theatre. As such applicant is providing more than two services such as renting of immovable property, supply of power through DG set and water through RO besides cooking fuel.

Renting of immovable property is the main supply and provision of other utilities such as electricity, and water supply, fuel etc. is in nature of ancillary supply. Such ancillary supplies help in better enjoyment of the main supply. It is a matter of fact that all provision of services as envisaged in the contract are interdependent and if one or more is removed the nature of supply would be affected. Hence renting of theatre along with recovery of electricity, water and fuel charges forms part of a composite supply.

The issue before AAR was to decide that based on the facts of the transaction, whether the applicant can be treated as a Pure Agent?

For the purpose of Rule 33 of CGST Rules, the expression 'Pure Agent' means a person who –

(a) Enters into a contractual agreement with the recipient of supply to act as his Pure Agent to incur expenditure or costs in the course of supply of goods or services or both;

(b) Neither intends to hold nor holds any title to the goods or services or both so procured or supplied as Pure Agent of the recipient of supply;

(c) Does not use for his own interest such goods or services so procured; and

(d) Receives only the actual amount incurred to procure such goods or services in addition to the amount received for supply he provides on his own account.

With respect to the above definition, contention of applicant that reimbursement of expenses of electricity, water charges can be qualified as expenses incurred by lessor E-Square Leisure Pvt. Ltd., as Pure Agent, is not acceptable. Applicant has installed the main electric connection and has different sub-connections at each location for reading actual consumption of electricity. Applicant has also installed the DG sets for generation of electricity in case of power failure. The water required is also provided through RO system. All this goes to show that these supplies are on their own account and is for effective enjoyment of activities related to the theatre. Further, from the terms of the agreement and the transaction, there is no authorisation obtained by the applicant from the recipient to act as their Pure Agent and to make payment to third parties on their behalf.

Ruling of AAR

In respect of question (i), AAR held that reimbursement of charges by lessor from lessee is liable to GST.

In respect of question (ii), AAR held that renting of property along with reimbursement of expenses constitutes a composite supply and

GST would be payable at the rate as applicable to principal supply.

7. M/s. Famous Studios Ltd. – AAR Maharashtra (2019-TIOL-115-AAR-GST)

Facts, Issue involved and Query of the Applicant

Applicant Company is a registered taxable person under the GST Act carrying on the business of Studio services such as Production of advertisement films and Post Production services as Video Editing. Sound recording. Animation, VFX, etc. and also renting out some of the premises to his tenants.

One of the tenants has surrendered his "Tenancy Rights" in favour of the applicant *vide* agreement dated 31-8-2017 for a consideration of ₹ 54,00,000/-. The instant transaction relating to transfer of tenancy rights is from an unregistered person.

Applicant has sought an advance ruling on the following questions:

1. *Whether the exemption from payment of GST on reverse charge basis under section 9(4) of the CGST/SGST Acts for receipt of supply of goods and / or services by applicant from an unregistered person is applicable irrespective of any threshold limit right from 1-7-2017 vide Notification No.8/2017 dated 28-6-2017 read with Notification No. 38/2017 dated 13-10-2017?*

2. *Whether any action for recovery of tax under Section 9(4) of CGST Act or corresponding provision of SGST Act can be initiated if such tax is not paid for a period from 1-7-2017 to 12-10-2017 within the respective due dates?*

3. *Whether interest on the delayed payment of CGST/ SGST under section 9 (4) of the Act is applicable, when such tax on the relevant transaction/s has been kept on hold till 30-9-2019 by virtue of Notification No. 22/2018 - Central Tax (Rate) dated 6-8-2018?*

4. *Whether the circular dated 2nd May 2018 (cited supra) will have any effect of taxation including interest on the transaction dated 31 st August 2017?*

Applicant's submissions

Government of India issued Notification 8/2017 - CT(R) dated 28-6-2017 granting exemption from tax payable under reverse charge basis on goods and /or services procured from unregistered person provided such supplies is within the limit of ₹ 5,000 per day.

The said proviso in the aforesaid notification dated 28-6-2017 has been omitted *vide* Notification 38/2017 - CT(R) dated 13-10-2017. This results into a situation that all supplies from unregistered person are exempted without any threshold limit. The subsequent notification has extended the exemption from tax payable under RCM u/s. 9(4) up to 30-9-2019.

The effect of the above notification dated 13-10-2017 may therefore be misunderstood that GST under RCM on procurement from unregistered person is applicable from 1-7-2017 to 12-10-2017 if the aggregate amount of supplies from unregistered persons exceeds ₹ 5,000/- per day. On or after 13-10-2017, GST liability under RCM on procurement from unregistered persons is exempted without any threshold limit.

Notification No. 38/2017 dated 13-10-2017 has omitted the proviso in Notification No. 8/2017 dated 28-6-2017 without having any saving clause specifying its effective date. In other words, effective date for the omission of the proviso in the aforesaid Notification dated 28-6-2017 is to be considered *ab initio* from the mother notification dated 28-6-2017 effective from 1-7-2017

In absence of any such specific clause mentioning effective date, support of General Clauses Act, 1897 is to be taken. Accordingly, section 6 of the said Act is applicable in case of repeals and not omission. Hence, unless a date is specified in the amendment notification, an omission of any clause is considered to be made effective from the date of issue of mother notification, (i.e., No. 8/2017 CT (Rate) dated 28-6-2017 effective from 1-7-2017).

Government of India issued Circular No. 44/18/2018 stating that the transfer of tenancy rights is a taxable service under the GST law. An unregistered tenant has surrendered his tenancy rights in favour of the applicant. Hence, the liability to pay tax stands on the applicant under section 9(4) of the Act.

Discussions by and observations of AAR

The issue put before us is in respect of a applicability of notification to the transactions effected during the course of business.

Applicant submits that the omission of the above said exemption, mentioned in the original notification, has been deleted by the amending Notification No. 38/2017 dated 13-10-2017 and is therefore effective from the date of original notification dated 28-6-2017 i.e., RCM provisions are inapplicable for the period from 1-7-2017 to 12-10-2017.

Applicant has received the tenancy rights from an unregistered person. The agreement was made between the parties on 31-8-2017 and the transaction amount was ₹ 54 lakh. Transfer of tenancy rights in goods or of undivided share in goods without the transfer of titles thereof is treated as supply of services under clause (b) of para I of Schedule II of CGST Act 2017. As per Section 9(4) of CGST Act, registered person is liable to pay GST under RCM on procurement of goods / services from an unregistered person.

From the reading of provisions of RCM and the relevant notification (pertaining to exemption and omission), AAR observed that there was no clear stipulation that the amendment is retrospective or prospective.

In *Garikapatti Veeraya vs. N. Subbiah Choudhury, [1957] SCR 488,* the Court observed as follows:

"The golden rule of construction is that, in the absence of anything in the enactment to show that it is to have retrospective operation, it cannot be so construed as to have the effect of altering the law applicable to a claim in litigation at the time when the Act was passed."

Applying the above golden rule of construction, there is no difficulty in arriving at the conclusion that there is nothing to show that the amendment Notification No.38/2017 would have retrospective effect.

Therefore, the provisions of RCM u/s. 9(4) of the CGST Act are applicable, irrespective of any threshold limit, right from 1-7-2017. Thus, the benefit of exemption from payment of tax on RCM as provided u/s. 9(4) of the GST Act is not applicable from 1-7-2017 as claimed by the applicant.

Ruling of AAR

It is held that registered person is liable to discharge GST under RCM on transaction effected with unregistered person for the period 1-7-2017 to 12-10-2017.

❍□❍

The greater a man has become, the fiercer ordeal he has had to pass through.

— Swami Vivekananda


CA Rajiv Luthia & CA Keval Shah

INDIRECT TAXES
Service Tax – Case Law Update

Citation: 2019-TIOL-1047-CESTAT-Madras

Case: M/s. Castrol India Ltd. vs. CGST & C. Ex., Chennai South Commissionerate

Facts of the Case

The appellants are manufacturer of lubricating oils. They availed CENVAT credit of the differential duty amounting to ₹ 32,36,467/- on account of price increase of goods transferred in the period April 2008 to June 2008. However, the unit closed down in August, 2008 and the credit remained unutilized, which is claimed as refund to the tune of ₹ 28,65,823/-. SCN was issued to the appellant rejecting the cash refund claim of the unutilised CENVAT credit on the ground that the claim was not filed in order as per Section 11B of the Central Excise Act, 1944. The appeal was rejected by the original authority as well as by the Commissioner (Appeals) and came before the Hon'ble Tribunal.

Arguments put forth

The appellant made the following submissions:

a) The matter is no longer *res integra* as the Hon'ble Karnataka HC in the case of *UOI vs. M/s. Slovak Trading India Co. Ltd.* has upheld the decision of the Tribunal that there is no express prohibition in terms of Rule 5 of the CCR, 2004. Thus, the refund claim for unutilised CENVAT credit is eligible when the assessee opts out of the CENVAT/MODVAT scheme or when the unit is closed.

b) The Hon'ble SC has upheld the decision of Karnataka HC by dismissing the SLP filed by revenue.

c) Above case was relied upon in the case of Welcure Drugs & Pharmaceuticals Ltd. and in the case of *CCE Pune vs. Dai Ichi Karkaria.*

The Respondent made the following submissions:

a) The Ld. AR draws the attention to the judgment of the Hon'ble SC in the case of *State vs. Parmeshwaran Subramani 2009 (242) E.L.T 162 (SC)* to contend that the courts should go into interpretation only when the language of the law is not clear.

b) Section 11B is very clear in its provisions as to who can file a refund claim.

Decision of the Tribunal

a) In the case of Parmeshwaran Subramani (supra), the Hon'ble SC has laid down the

guiding principles on the scope of courts. But these principles have been stated in the area of jurisprudence, concerning interpretation of statutes.

b) The ground for rejecting the refund of unutilised credit claimed by the appellant as there is no express provision for granting such a refund in the books of account is not correct. CENVAT is accumulated over the years by availing the same on inputs, capital goods and eligible input services. In the normal course, this credit is used against the output tax liability of the manufacturer. The closure of the factory should not be the reason for snatching such a credit from the manufacturer.

c) Availment and utilisation is akin to a fundamental right in Indirect Taxation. Closure of the manufacturing unit, does not deny the credit accumulated by them over a period.

d) The lower authorities have not considered the decision of Slovak Trading seriously which expressly does not prohibit such refunds. Hence, the dispute is no longer *res integra* and is conclusively settled that such refund is allowable to the appellant.

Note: There are several decisions in contradiction to the above case wherein it is stated that a refund from CENVAT can arise only when there is an express provision for granting the same. Thus both the views may be taken based on the facts of the case. Following are two decisions citing the above principle:

(1) *CCE, Ahmedabad–II vs. Rangdhara Polymers by Gujarat High Court. 2013 TMI (1) 96.*

(2) *Steel Strips vs. CCE. Ludhiana by New Delhi CESTAT 2011(5) TMI 111.*

Citation: 2019-VIL-250-CESTAT-KOL-ST

Case: Maithan Alloys Limited vs. CCE & ST, Bolpur

Background facts of the case

The appellant assessee is a manufacturer of Ferro Alloys on which central excise duty is being paid. In the course of business, the assessee company pays remuneration to its whole-time directors which has fixed as well as variable components. The said variable component comprised of commission payable on the basis of percentage of profit in conformity with the provisions of the Companies Act. The Department has raised demand of service tax under reverse charge mechanism on the said remuneration paid to the whole-time directors, in terms of Notification No. 30/2012-ST, dated 20-6-2012, as amended. It is the case of the department that the said remuneration paid to the directors would constitute 'service' liable to service tax in the hands of assessee under reverse charge mechanism.

Arguments put forth

The appellants submitted as under:

a) The whole time directors are actually salaried employees and whatever remuneration has been paid to the said directors, on which the impugned demand has been raised, has been made exigible to deduction of tax (TDS) under Section 192 of the Income-tax Act, 1961, the provision as applicable to deduction of income tax on employees.

b) There is no dispute with regard to the payment of remuneration to other directors, who are not whole-time directors, in as much as service tax is being duly paid under reverse charge

c) It was further submitted that the definition of 'service' under Section 65B(44) of the Finance Act, 1994, excludes the services rendered by employee to the employer, from the levy of service tax.

d) The decision of the Tribunal in the case of *PCM Cement Concrete Pvt Ltd. vs. CCE, Siliguri 2018 (9) GSTL 391 (Tri-Kol.)* wherein

the Tribunal observed that consideration paid to whole time directors would be treated as payment of salaries inasmuch as there would be employer-employee relationships and in such cases, there cannot be any levy of service tax. The appellants further relied on the CBEC Circular No. 115/9/2009-ST dated 31-7-2009, wherein it has been clarified that no service tax is leviable on commission paid to managing directors/ whole time directors, even if the remuneration is termed as 'commission', inasmuch as the said managing directors/whole-time directors do not perform consultancy or advisory function.

The respondents submitted as under:

a) It was argued that since the directors are paid a variable amount based on the percentage of profit though approved by the Company's Board, it cannot be said to have constituted the employer-employee relationship, despite the fact that they are wholetime directors.

Decision

a) A whole-time director refers to a director who has been in employment of the company on a full time basis and is also entitled to receive remuneration. We further find that the position of a whole-time director is a position of significance under the Companies Act. Moreover, a whole-time director is considered and recognised as a 'key managerial personnel' under Section 2(51) of the Companies Act. Further, he is an officer in default [as defined in clause (60) of section 2] for any violation or non-compliance of the provisions of Companies Act. Thus, in our view, the whole time director is essentially an employee of the Company and accordingly, whatever remuneration is being paid in conformity with the provisions of the Companies Act, is pursuant to employer-employee relationship and the mere fact that the wholetime director is compensated by way of variable pay will not in any manner alter or dilute the position of employer – employee status between the company assessee and the wholetime director.

b) The appellant has duly deducted tax under section 192 of the Income-tax which is the applicable provision for TDS on payments to employees. This factual and legal position also fortifies the submission made by the appellant that the whole time directors who are entitled to variable pay in the form of commission are 'employees' and payments actually made to them are in the nature of salaries.

Accordingly, the appeal filed by the assessee was allowed and the demand along with interest and penalties were dropped.

Note: There is contradictory decision in case of *M/s. Brahm Alloy Ltd. vs. Commissioner of CGST & C Ex., Durgapur 2019 (4) TMI 1537 – CESTAT Kolkata* wherein it is held that service tax is payable on director remuneration under RCM , inspite of fact that the said director remuneration is offered to income tax under head of salary income & TDS is also deducted thereon u/s. 192.

Citation: 2019-VIL-238-CESTAT-DEL- ST

Case: Entertainment World Developers Private Limited vs. CCE & ST Indore

Background facts of the case

The appellants are in the business of setting up and managing shopping centres, family entertainment centres, malls etc. The appellants in all these cases got the shopping malls constructed by using the services of contractors and subsequently spaces in the malls had been given by them to their various customers on lease and licence basis. Some spaces in the mall have also been given to advertisement companies for putting up their hoardings etc., for advertisement.

A common point of dispute in all these cases is whether appellants would be eligible for CENVAT credit of Central Excise duty paid on various inputs like steel, cement, glass etc. and various capital goods like lifts etc. and of service tax paid on various input services used in or in relation of the construction of malls

Arguments put forth

The assessee as appellant submitted as under:

a) The Appellant has incurred various costs for construction of mall on which service tax was duly paid to the contractors/ various other agencies. Further, the appellants entered into authorisation agreement as per licence agreement and charged certain sum for that on monthly basis. In addition to above, the appellants have collected the amount for maintenance of common area (CAM) and discharged service tax on the amount so collected under the category of management, maintenance and repair service. Thus, it is undisputed fact that input credit on construction and input credit on services has been used for providing taxable output service and there were no exempted services. The entire CENVAT credit was thus availed against the taxable input service rendered through the mall so constructed without which no output service could have been provided.

b) The amendment was carried out in the definition of input with effect from 1-4-2011 whereby the goods used in the construction of building or civil structure were specifically excluded. Further various decisions were relied upon on which the credit was allowed for construction of mall.

The respondent submitted as under:

a) They have not provided any construction service as output service and hence there is no nexus between the input, input services and CENVAT credit on capital goods vis-a-vis the provisions of output service. The reliance was placed on the judgment of *Maruti Suzuki vs. CCE – 2009 (240) ELT 641 (SC) - 2009-VIL-01-SC-CE* wherein it is held that the principle of nexus between the input and input services to output services is *sine-qua-non* is most for CENVAT ability of input and input services which is not nexus is not directly provided as the services have been provided by the contractor of the appellant.

b) Item on which CENVAT credit is being claimed goes into creation of immovable property and the same is work contract service and there was a restriction imposed on work contract service provider for availment of CENVAT credit. Reliance was also placed on the decision of Larger Bench of CESTAT in the case of *Tower Vision India Pvt. Ltd. vs. CCE, Delhi – 2016 (42) STR 249 (Tri.-LB) - 2016-VIL-176-CESTAT-DEL-ST-LB* regarding nexus theory for availment of CENVAT Credit Rules

Decision

a) The demand in question is prior to the amendment of the provisions of input services under the Credit Rules i.e., prior to 2011. The issue is no longer *res integra* in view of the decision of Hon'ble Andhra Pradesh High Court in the case of *Sai Samhita Storages (P) Ltd. [2012] 17 taxmann.com 107 (AP) - 2011-VIL-70-AP-ST* which was subsequently followed by the various other decisions. In all these cases, the issue was identical and it was held by various Tribunals/High Court that in such a situation, the appellant would be entitled for the benefit of CENVAT credit prior to amendment.

b) The reliance placed by AR on various decisions of immovability is misplaced as the same is not directly related to the issue at hand. In all these the issue was

regarding the immovability/movability of transmission towers which was in different context all together. Hence the appeal filed by the appellants was allowed.

Citation: 2019-TIOL-1028-CESTAT-MUMBAI

Case: M/s. Graphite India Ltd. vs. Commissioner of Central Excise and Service Tax, Nashik

Facts of the case

The appellant is a public limited company manufacturing GRP pipes & fittings and clears final products on payment of excise duty. It avails exemption under Notification No. 6/2006-CE dated 1-3-2006 for such supplies made up for setting up of water treatment plants for animal and human consumption. It also undertakes turnkey contracts for municipal corporation for laying down the pipelines for which the service tax is exempted. In the course of CERA Audit, it was observed that the appellant had not maintained separate accounts for both taxable as well as exempted goods as per Rule 6(3) of the CCR, 2004. The appellant accepted the contention and paid the amount of tax as well as interest on the same for delayed payment. Subsequently, a SCN was issued to the appellants for equivalent amount of penalty. The Adjudicating Authority confirmed the amount along with interest and 50% penalty and further this order was challenged before Commissioner (Appeals), who upheld the adjudication order.

Arguments put forth

The appellants made the following submissions:

a) The SCN was issued on 17th October, 2014 which is nearly a year after the information of payment of duty u/s. 11A(3) of the CE Act, 1944 i.e., on 29th July, 2013. Also, they were under *bona fide* belief that they had to reverse the credit under Rule 6 of the CCR, 2004.

b) The demand is based on audit objection, and imposing penalty on such demand is not sustainable when the issue is relating to interpretation of law. Further, there is no suppression of facts on the part of the appellant as the duty is paid voluntarily under Section 11A(2), the proceeding by issuance of show cause notice is erroneous and the order should be set aside.

The respondents made the following submissions:

a) The Ld. AR argued that in the ST-3 returns, there are categorical fields for exemptions where the appellant has marked "NO" and therefore not showing the details in ST-3 returns is clear suppression of facts and there should be no interference by the Tribunal in this case.

Decision of the Tribunal

a) The appellant has not mentioned in their ST-3 returns about the details of exemptions availed. Similarly, at entry 5AA they are required to provide the details of amount payable under Rule 6(3) of the CCR,2004 wherein they have declared "zero". It indicates that such mis-statement was done to suppress facts.

b) But the appellant has paid the service tax for the services provided to municipal corporation for the later period when the department issued the SCN for reversal of CENVAT credit u/r. 6(3) of CCR, 2004. Thus, filing of erroneous ST-3 returns coupled with payment of service tax clearly indicates that the appellant has misconceived the provisions of law due to erroneous interpretation and paid tax on services provided to municipal corporation, which is actually exempted as well as took CENVAT for the same. By no stretch of imagination, suppression can be invoked in such a situation.

c) Under CERA, the objective is that no amount which is chargeable to duty must escape taxation. Further, it is a participative audit procedure wherein any irregularity is discussed with the assessee and they are advised to follow correct procedure in future. The audit is carried out by the CEO with the help of records provided by the assessee himself. Therefore, it cannot be said that assessee has supressed the facts only because the irregularities have been discovered by the audit party. The appeal was allowed in favour of the assessee.

Citation: 2019 – TIOL – 1157 – CESTAT – ALL

Case: M/s. Triveni Engineering & Industries Ltd. vs. Commissioner of CGST, Noida

Facts of the case

The appellant filed a refund claim of ₹ 23,36,577/- on the ground that project for setting up of sewage treatment plant under contract for Haryana Development Authority was exempt from service tax under Notification No. 25/2012-ST dated 20th June, 2012 but on account of oversight, they kept paying service tax. The refund pertained to the period 2013 whereas the claim was filed by the appellant in 2015.

The revenue stated that the refund claim stands barred by limitation and cannot be sanctioned. They rejected the refund claim.

Arguments put forth

a) During the course of adjudication, the appellant did not contest the payment of service tax or the date of filing the refund claim.

b) Their contention was that since the payment was not required to be made at all, the claim is required to be refunded. The original Adjudicating Authority as well as Commissioner (Appeals) did not accept the plea of the assessee.

c) The Ld. AR reiterated the views of the lower authorities.

Decision of the Tribunal

a) The only issue to be decided in this appeal is whether the limitation of one year would be applicable as per the provisions stated in 11B of the CE Act, 1944.

b) The Commissioner (Appeals) referred to various decisions of Hon'ble Supreme Court that the lower authorities are bound by the Act and cannot go beyond the same. The CCE (Appeals) gave reference of case of *CCE, Chandigarh vs. Doaba Co-operative Sugar Mills Ltd.* decided by the Hon'ble Supreme Court and the Hon'ble CESTAT judgment in the case of *Benzy Tours & Travels (P) Ltd. vs. Commissioner of ST.*

c) From the above explanations, it is clear that the issue is well–settled. Each and every refund claim of tax/duty is granted only within four corners of the law. In fact, every refund claim arises on account of the fact that tax was not required to be paid at all. If the refunds are sanctioned on the ground, that the tax was not required to be paid without adhering to the limitation provisions, then each and every refund claim would be payable and the provisions of Section 11B of the CE Act, 1944 would be redundant and infructuous.

d) Reference is taken of the Hon'ble SC decision in the case of *Porcelain Electric Mfg. Co. vs. CCE, New Delhi* wherein it is stated that the authorities working under the Act are bound by the provisions of the Act, and are require to scrutinise the refund claims accordingly.

e) The constitutional jurisdiction exercised by the HC for granting refund beyond the limitation period cannot be exercised by the Tribunal as it cannot go beyond the provisions of the Act. Thus, the claim stands barred by limitation as it is filed beyond the period of one year and it is rightly rejected by the lower authorities.

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Janak C. Pandya, *Company Secretary*

CORPORATE LAWS
Company Law Update

[2019] 213 Comp Cas 337 (NCLAT)

[Before the National Company Law Appellate Tribunal – New Delhi]

Rachakonda Siva Kumar vs. Zetatek Engineering Systems P. Ltd. ('Company') and others.

If the shares are not issued under Section 62(1)(a) of the Companies Act, 2013 ("Act"), the law envisaged that the special resolution is must, when the shares are issued under Section 62(1)(b) or 62(1)(c) of the Act.

Brief

The applicant has filed the appeal under Section 421 of the Act challenging the order passed by the National Company Law Tribunal ("NCLT"), Hyderabad Bench.

The facts are as follows:

1. The applicant was a first director and shareholder of the Company, but he resigned as director in 2014. However, continued holding 50% of the share capital.

2. The applicant along with the respondent had incorporated the Company with equal shareholding of 50% each.

3. After one of the board meetings held in 2014, the Company had filed e-form MGT-14 by which it disclosed that 500 equity shares of the Company were transferred to a third party. This was not a part of agenda for a board meeting and that same was against the provisions of Articles 17 to 22 of the Articles of Association.

4. After the completion of another board meeting, Company uploaded the forms on MCA website, whereby it revealed that 90,000 equity shares of the Company were allotted to the respondent. However, this was not the part of agenda of the said board meeting.

5. The respondent had failed to convene and conduct the annual general meetings.

6. The respondent is indulging in anti-company activities and resorted to acts of mismanagement by creation of fake documents and uploading fake resolutions on MCA website.

The applicant had filed the Company petition before the NCLT and claimed the following reliefs.

1. To declare the board resolution attached with the uploaded e-form MGT-14 for transfer of 500 shares to a third party as against the provisions of Articles 17 to 21 of the Articles of Association of the Company and thus null and void.

2. To declare the allotment of 90,000 shares to the respondent as void and illegal and also declare the form PAS-3 filed as null and void.

3. To order the respondents to conduct the annual general meeting.

Respondent submitted as follows.

1. Applicant has another company called Gagan Aerospace Ltd.

2. Applicant had sent a different balance sheet which provides for payment of ₹ 1.70 crore to the applicant company for technical services.

3. The applicant refused to sign the correct balance sheet and due to his non-cooperation, it was difficult for the Company to function.

4. Applicant was present in the board meeting, where another director was appointed and 500 shares were transferred to him.

5. The minutes submitted by the applicant does not have the signature of the Chairman. It is false, fake and bogus.

6. During the period 2007 to 2014, the respondent had contributed ₹ 1,64,55,000 towards the share application money. The said amount was converted into an unsecured loan in 2013-14. Thus, the applicant was aware of share application money from the respondent pending allotment and that applicant was aware of it.

The NCLT has rejected the petition with the following reasons.

1. Petitioner had resigned as a director and was holding only 5% of shares and thus the alleged acts of oppression and mismanagement also cease to exist. The judgment of Hon'ble Kerala High Court in *Palghat Exports P. Ltd vs. T.V Chandran [1994] 79 Comp Cas 213 (Ker.)* was referred.

2. Petitioner was present at the board meeting, when transfer of shares was approved, he had not objected to it and further, it does not change its shareholdings.

3. There is no absolute bar on transfer of shares but it is only a condition to offer the shares to existing shareholders.

4. The Company has followed all extant rules related to new provisions of section 42 of the Act and issue of shares within 60 days from the date of receipt of the application money.

5. The ratio held in various judgments as relied upon by the petitioner would not be applicable to the facts and circumstances of the present case.

In the present application, the following submissions are made.

1. The board meeting for appointment of additional director had only 5 agenda items. The transfer of shares was not part of agenda. However the minutes prepared and signed by the applicant and respondent had an additional agenda of transfer of shares.

2. The second board meeting for which minutes were prepared and signed by applicant and respondent had only 9 agenda items and there was no agenda item for the issue of further shares.

3. Applicant *vide* its email of December 2014 had disputed the fraudulent actions of respondent in tampering the minutes of two board meetings, which has not been objected by the respondent.

4. The Board had approved the accounts and notice for convening the annual general meeting of 2014, but respondent failed to conduct the same.

5. The NCLT has erred in passing order without considering the following:

   a. Oversighted the provisions of Articles 17 to 22 which prohibits transfer of shares until the rights of pre-emption have been exhausted.

   b. In holding that upon applicant ceased to be a director, acts of oppression and mismanagement also ceased without considering the fraudulent transfer of shares.

   c. That the change in shareholding of the applicant was not at all considered. Upon the transfer of shares and issue of further shares by respondent the appellant has been reduced into a minority shareholder.

   d. The appellant being a director and having participated in board meetings challenging that the minutes of the meeting do not actually reflect any agenda of transfer of shares and allotment of shares.

Judgment

NCLAT has set aside the NCLT order and allowed the application in part. The following are the main observations.

1. On setting aside the transfer of shares, and upon pursuing the minutes, attendance sheet etc., it has set aside the objection raised by the appellant. It was further observed that having consented to transfer of shares while attending the board meeting, it is not fair to raise issue now. Further, if the said transfer is set aside, the shares will be transferred back to the respondent, even then, no benefit would be accrued to the appellant.

2. On question as to whether allotment is the act of oppression and mismanagement, it has set aside the NCLT observation. It has further observed that if, in case the allotment is held to be oppressive, appellant share will be reduced from 50% to 5% and thus it will be continuous oppressive act.

3. The issue of further shares was set aside. It has observed that Section 62 is applicable to both public and private company. It has analysed the provisions of Section 62 as to further issue of shares and issue of shares on rights basis and also issue of shares to an employee and other persons by passing a special resolution. It has further observed that since shares were issued to only one person, it must have complied with provisions of section 62(1)(c) as to passing a special resolution etc. Thus, if shares are not issued under Section 62(1)(a) the law envisaged that special resolution is must, when shares issued under Section 62(1)(b) or 62(1)(c). No material was present before the NCLAT on compliance of said provisions. It also observed that the Company has completely ignored the legal provisions applicable on the date of issue. Thus, exercise is not only illegal but oppressive to the appellant.

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Makrand Joshi, Kumudini Bhalerao *Company Secretaries*

CORPORATE LAWS
Recent Developments

Payment to Micro and Small Enterprises

The Central Government *vide* Notification Number S.O. 5622(E), dated 2nd November 2018 has directed that all companies, who get supplies of goods or services from micro and small enterprises whose payments to micro and small enterprise suppliers exceed forty five days from the date of acceptance or deemed date of acceptance of the goods or services as per the provisions of section 9 of the Micro, Small and Medium Enterprises Development Act, 2006, (MSMED Act, 2006) shall submit a half yearly return to the Ministry of Corporate Affairs.

We need to understand in detail about brief history and the provisions of MSMED Act, 2006.

A. Brief Background of MSMED Act, 2006

The Interest on Delayed Payments to Small Scale and Ancillary Industrial Undertakings Act, 1993 was in force before enactment of MSMED Act 2006. The Interest on Delayed… Act, 1993 was enacted to regulate delayed interest payments.

Salient features of Interest on Delayed… Act, 1993

a) It was not covering any services other than those mentioned in clause (j) of section 3 of the Industries (Development and Regulation) Act, 1951 (65 of 1951)

b) It was referring to IRDA 1951 for meaning of small scale and ancillary industrial undertaking.

c) Payment to any supplier within 120 days from the day of acceptance.

d) Interest on delayed payments – One and half times of Prime Lending Rate charged by SBI.

e) Interest not allowed as deduction from income.

f) The provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force.

The MSMED Act was notified on 16th June 2006. The objective of the MSMED Act is to provide following :

(a) facilitating the promotion and development of Micro Small and medium enterprises

(b) enhancing the competitiveness of micro, small and medium enterprises and for matters connected therewith or incidental thereto.

On 9th May 2007, subsequent to an amendment of the Government of India (Allocation of Business) Rules, 1961, erstwhile Ministry of Small Scale Industries and the Ministry of Agro and Rural Industries were merged to form the Ministry of Micro, Small and Medium Enterprises (M/o MSME). This Ministry now designs policies and promotes/ facilitates programmes, projects and schemes and monitors their implementation with a view to assisting MSMEs and help them to scale up.

The major benefit of MSMED Act, 2006 is time period given for payments to micro small and medium enterprises for supply of goods or rendering of services. It has overriding effect on any contract or agreement etc.

B. Key Provision under MSMED Act, 2006

Section Number	Heading	Key Points	
15	Liability of buyer to make payment	•	Buyer shall make payment to supplier on or before the date agreed in writing
		•	If there is no agreement deciding payment date then, payment shall be made before the appointed day
		•	In no case, period agreed between the supplier and buyer in writing shall exceed 45 days from the day of acceptance or the day of deemed acceptance.
16	Date from which and rate at which interest is payable	•	Buyer fails to make payment as per section 15, then he shall be liable for interest payment from the appointed day
		•	Compound interest with monthly rest at three times of at bank rate notified by RBI.
		•	The interest shall be charged notwithstanding anything contained in any agreement or any law for the time being in force.
17	Recovery of amount due	•	Buyer shall be liable to pay the amount with interest thereon as provided under section 16.
18	Reference to Micro and Small Enterprises Facilitation Council	•	Any party to dispute for amount due under section 17 can refer it to the Micro and Small Enterprises Facilitation Council.
22	Requirement to specify unpaid amount with interest in the annual statement of accounts	•	Buyer is required to disclose unpaid amount with interest in the annual statement of accounts as per section 22.
23	Interest not to be allowed as deduction from income	•	Notwithstanding anything contained in the Income -tax Act, 1961, the amount of interest payable or paid shall not be allowed as deduction for the purpose of computation of Income.
24	Overriding effect	•	The provisions of sections 15 to 23 shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force.

C. Important terms in MSMED Act, 2006

1. Enterprise:- The MSMED Act, 2006 is applicable to Micro-Small and Medium Enterprises. We need to understand the term "Enterprise" which is defined in section 2(e) :

   - Enterprise means an industrial undertaking or a business concern or any other establishment, by whatever name called, engaged in the manufacture or production of goods, in any manner, pertaining to any industry specified in the First Schedule to the Industries (Development and Regulation) Act, 1951 or engaged in providing or rendering of any service or services.
   - We understand following from definition of "Enterprise":
     - o It is covering all types of entities
     - o Engaged in manufacture or production of goods specified in First Schedule of IDRA, 1951 or
     - o Engaged in providing or rendering of any service(s)

2. Micro-Small and Medium Enterprises

   - Definitions of Micro, Small & Medium Enterprises in accordance with the provision of Section 7 of MSMED Act, 2006. The Micro, Small and Medium Enterprises (MSME) are classified in two classes:
     - o Manufacturing Enterprises- The enterprises engaged in the manufacture or production of goods pertaining to any industry specified in the First Schedule to the Industries (Development and Regulation) Act, 1951) or employing Plant and Machinery in the process of value addition to the final product having a distinct name or character or use. The Manufacturing Enterprises is defined in terms of investment in Plant & Machinery.
     - o Service Enterprises: The enterprises engaged in providing or rendering of services and are defined in terms of investment in equipment.

The limit for investment in plant and machinery / equipment for manufacturing / service enterprises, as notified, *vide* S.O. 1642(E) dtd. 29-9-2006 are as under:

	Manufacturing Sector	**Service Sector**
Enterprises	**Investment in Plant & Machinery**	**Investment in Plant & Machinery**
Micro Enterprises	Does not exceed twenty five lakh rupees	Does not exceed ten lakh rupees
Small Enterprises	More than twenty five lakh rupees but does not exceed five crore rupees	More than ten lakh rupees but does not exceed two crore rupees
Medium Enterprises	More than five crore rupees but does not exceed ten crore rupees	More than two crore rupees but does not exceed five crore rupees

3. Appointed day is defined under section 2(b) of the MSMED Act, 2006:

   It means the day following immediately after the expiry of the period of fifteen days from the day of acceptance or the day of deemed acceptance of any goods or any services by a buyer from a supplier.

4. Date of Acceptance means

   (i) the day of the actual delivery of goods or the rendering of services or;

   (ii) where any objection is made in writing by the buyer regarding acceptance of goods or services within fifteen days from the day of the delivery of goods or the rendering of services, the day on which such objection is removed by the supplier.

5. Deemed date of acceptance means, where no objection is made in writing by the buyer regarding acceptance of goods or services within fifteen days from the date of the delivery of goods or the rendering of services, the day of the actual delivery of goods or the rendering of services.

   e) Supplier: means a micro or small enterprise, which has filed a memorandum with the authority referred to in sub-section (1) of section 8, and includes –

   i) the National Small Industries Corporation being a company, registered under the Companies Act, 1956.

   ii) the Small Industries Development Corporation of a State or a Union Territory, by whatever name called, being a company registered under the Companies Act, 1956.

   iii) any company, co-operative society, trust or body, by whatever name called, registered or constituted under any law for the time being in force and engaged in selling goods produced by micro or small enterprises and rendering of services which are provided by such enterprises.

In case of supplier, it covers following:

i) Any micro or small enterprise which has filed a memorandum with the authority referred to in sub-section (1) of section 8

ii) Any entity registered or constituted under any law for the time being in force and engaged in selling goods produced by micro or Small Enterprises and rendering of services which are provided by such enterprises. It means any entity which is trading goods manufactured by micro or small enterprises or getting the services delivered provided by micro or small enterprises.

D. Benefit or Protection under MSMED Act

1. Payment to supplier as mentioned in para B.1 within 45 days irrespective of any contract or agreement for longer period.

2. Compound interest of three times of Bank Rate on delayed payments.

3. Coverage of "any services" for determining micro, small and medium enterprise.

4. Ministry of MSME has launched a portal samadhaan.msme.gov.in on 30th October, 2017 to address delayed payment.

5. Interest on delayed payment is not allowed as deduction from income.

6. Section 24 stated that sections 15 to 23 of the MSMED Act has overriding effect.

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CA Mayur Nayak, CA Natwar Thakrar & CA Pankaj Bhuta

OTHER LAWS
FEMA – Update and Analysis

In this article, we have discussed recent amendments to FEMA through Circulars, Notifications and FAQs issued by RBI. In addition to it we have discussed few recent compounding orders issued by RBI:

A. Amendment to FEMA through A.P. Dir. Circular issued by RBI

I) Foreign Currency Accounts by a person resident in India – Amendments

RBI, *vide* Notification No. FEMA 10(R)(2)/2019-RB dated February 27, 2019, by amending Regulation 4 and substitution of para G(2) allowed re-insurance / insurance brokers registered with IRDA to open no interest bearing foreign currency accounts for the purpose of undertaking transaction under their ordinary course of business.

The Master Direction No. 14 on Deposits and Accounts, dated January 1, 2016, updated on April 12, 2019 inserted para 3.12 under Regulation 3 as follows:-

"3.12 Re-insurance and Composite Insurance brokers registered with Insurance Regulatory and Development Authority of India (IRDA) may open and maintain non-interest bearing foreign currency accounts with an AD bank in India for the purpose of undertaking transactions in the ordinary course of their business."

Source: A.P. Dir. Series Circular No. 29 dated April 11, 2019.

(Comment: This is a welcome move in the direction of ease of doing business in India)

II) Investment by Foreign Portfolio Investors (FPI) in Debt – Review

In terms of Schedule–5 to Notification No. 20(R) "Foreign Exchange Management (Transfer or Issue of Security by a Person Resident outside India) Regulations, 2017" Foreign Portfolio Investors (FPI) are allowed to purchase debt instruments on repatriation basis subject to the terms and conditions specified by the Securities and Exchange Board of India and the RBI.

As a measure to broaden access of non–resident investors to debt instruments in India, Foreign Portfolio Investors (FPI) are now permitted to invest in municipal bonds within the existing limits set for FPIs for investment in State Development Loans (SDLs).

Source: A.P. Dir. Series Circular No. 33 dated April 25, 2019.

(Comment: This is a welcome move as it will allow municipal authorities to tap funds from FPI while providing wider choice of debt instruments to FPIs.)

B. Updated through Notifications

Amendment in Notification No. 20(R) "Foreign Exchange Management (Transfer or Issue of Security by a Person Resident outside India) Regulations, 2017"

1) After the clause (xlvi) of Regulation 2 (Definitions), the following clause shall be inserted:

"xlvii) 'Muncipal Bonds' mean debt instruments issued by municipalities constituted under Article 243Q of the Constitution of India.

2) The existing clause (xlvii) of Regulation 2 shall now become (xlviii).

3) Para 1 sub-section A of Schedule 5 the following shall be added

"(m) Municipal Bonds."

(Source: Foreign Exchange Management (Transfer or Issue of Security by a Person Resident Outside India) (Third Amendment) Regulations, 2019 vide GSR No. 312(E) dated 18-4-2019)

C. Updated through FAQs

I) Accounts in India by Non-Residents

RBI update on FAQs on Accounts in India by Non-Residents as on April 25, 2019 contains the following changes:

1) Answer to Questions 3, 4 and 6 have been amended. Amendments are in bold italics.

Q.3 What are the major accounts that can be opened in India by a non-resident?

Ans.

Particulars	Non-Resident (External) Rupee Account Scheme	Foreign Currency (Non Resident) Account (Banks) Scheme [FCNR(B) Account]	Non-Resident Ordinary Rupee Account Scheme [NRO Account]
Who can open an account	NRIs and PIOs Individual/entities of Pakistan and Bangladesh shall require prior approval of the Reserve Bank of India		Any person resident outside India for putting through *bona fide* transactions in rupees. Individuals/ entities of Pakistan nationality/ origin and entities of Bangladesh origin require the prior approval of the Reserve Bank of India. ***A citizen of Bangladesh/Pakistan belonging to minority communities in those countries i.e., Hindus, Sikhs,***

Particulars	Non-Resident (External) Rupee Account Scheme	Foreign Currency (Non Resident) Account (Banks) Scheme [FCNR(B) Account]	Non-Resident Ordinary Rupee Account Scheme [NRO Account]
			Buddhists, Jains, Parsis and Christians residing in India and who have been granted LTV or whose application for LTV is under consideration, can open only one NRO account with an AD bank subject to the conditions mentioned in Notification No. FEMA 5(R)/2016-RB dated April 1, 2016, as updated from time-to-time. Post Offices in India may maintain savings bank accounts in the names of persons resident outside India and allow operations on these accounts subject to the same terms and conditions as are applicable to NRO accounts maintained with an authorised dealer/authorised bank.

Q.4 Can a Bangladeshi/Pakistani national or an entity owned/controlled from Bangladesh/Pakistan have an account in India?

Ans. Opening of accounts by individuals/entities of Pakistan nationality/ownership and entities of Bangladesh ownership requires prior approval of the Reserve Bank. However, individuals of Bangladesh nationality can open an NRO account subject to the individual(s) holding a valid visa and valid residential permit issued by Foreigner Registration Office (FRO)/Foreigner Regional Registration Office (FRRO) concerned.

Further, citizens of Bangladesh/Pakistan belonging to minority communities in those countries, namely, Hindus, Sikhs, Buddhists, Jains, Parsis and Christians residing in India and who have been granted Long Term Visa (LTV) or whose application for LTV is under consideration, are permitted to open only one NRO account with an AD bank in India subject to the conditions mentioned in Notification No. FEMA 5(R)/2016-RB dated April 1, 2016, as updated from time-to-time. The opening of such NRO accounts will be subject to reporting of the details of the accounts opened by the concerned authorised bank, to the Ministry of Home Affairs (MHA) on a quarterly basis as instructed vide AP (DIR Series) Circular No.28 dated March 28, 2019.

Q.6 What is an SNRR account? How is it different from a NRO account?

Ans. Any person resident outside India, having a business interest in India, can open a Special Non-Resident Rupee Account (SNRR account) with an authorised dealer for the purpose of

putting through *bona fide* transactions in rupees which are in conformity with the provisions of the Act, rules and regulations made thereunder. The features of the SNRR account are:

a. The SNRR account will carry the nomenclature of the specific business for which it is opened and not earn any interest.

b. The debits/credits and the balances in the account should be incidental and commensurate with the business operations of the account holder.

c. Authorised dealers are required to ensure that all the operations in the SNRR account are in accordance with the provisions of the Act, rules and regulations made thereunder.

d. The tenure of the SNRR account should be concurrent to the tenure of the contract/ period of operation/the business of the account holder and in no case should exceed seven years. ***Approval of the Reserve Bank shall be obtained in cases requiring renewal. However, the restriction of seven years shall not be applicable to SNRR accounts opened by a person resident outside India for the purpose of making investment in India in accordance with Foreign Exchange Management (Transfer or issue of security by a person resident outside India) Regulations, 2017, as amended from time-to-time.***

e. No operations are permissible in the account after seven years from the date of opening of the account.

f. The operations in the SNRR account should not result in the account holder making available foreign exchange to any person resident in India against reimbursement in rupees or in any other manner.

g. The balances in the SNRR account can be repatriated outside India.

h. Transfers from any NRO account to the SNRR account are not permitted.

i. All transactions in the SNRR account will be subject to payment of applicable taxes in India.

j. SNRR account may be designated as resident rupee account on the account holder becoming a resident.

k. The amount due/ payable to non-resident nominee from the account of a deceased account holder, will be credited to NRO account of the nominee with an authorized dealer/ authorised bank in India.

l. Opening of SNRR accounts by Pakistan and Bangladesh nationals and entities incorporated in Pakistan and Bangladesh require prior approval of Reserve Bank.

The SNRR can be held only as a non-interest earning account, while an NRO account can earn interest. While the balances in a NRO account are non-repatriable (except for current income and to the extent permissible for NRIs/ PIOs under FEMA 13(R)), SNRR is a repatriable account.

2) Q11 and Q12 have been newly inserted.

Q.11 Can a Foreign Portfolio Investor or a Foreign Venture Capital Investor open a foreign currency account in India?

Ans. Yes, a Foreign Portfolio Investor or a Foreign Venture Capital Investor, both registered with the Securities and Exchange Board of India (SEBI) under the relevant SEBI regulations can open and maintain a non-interest bearing foreign currency account for the purpose of making investment in accordance with Foreign Exchange Management (Transfer or issue of security by a person resident outside India) Regulations, 2017, as amended from time-to-time.

Q.12 Who can open an Escrow Account in India and for what purpose?

Ans. Resident and non-resident acquirers can open Escrow Account in INR with an AD bank in India as the Escrow Agent, for acquisition/transfer of capital instruments/convertible notes in accordance with Foreign Exchange Management (Transfer or issue of security by a person resident outside India) Regulations, 2017, as amended from time-to-time and subject to the terms and conditions specified under Schedule 5 of Foreign Exchange Management (Deposit) Regulations, 2016, as amended from time-to-time.

D. We have discussed below few recent compounding orders issued by RBI:

1) Transfer or Issue of Security by a Person Resident Outside India (Inbound Investment) (FEMA 20/2000-RB)

Purchase of equity shares of an Indian Company by the Non-Resident Indian (NRI) through a resident saving bank account.

Applicant	Shri Naveen Trehan
Compounding Application Number	C.A. 4859/2019
Compounding Authority Name	Foreign Exchange Department, Mumbai
Amount imposed under Compounding Order	₹ 75,350/-
Date of order	1st March, 2019
Facts of the case	The applicant is a 'Non-Resident Indian' as defined under Regulation 2(vi) of Foreign Exchange Management (Deposit) Regulations, 2000 dated 3rd May, 2000. The applicant had acquired certain equity shares of Pacific BPO Private Limited, an Indian company. The applicant issued a cheque drawn on HDFC Bank in favour of seller towards the payment of the sale consideration. The said account from which the applicant made the payment was the resident saving Bank account. However, the applicant converted his ordinary resident savings account into NRO account. Foreign Investment Division (FID) of FED *vide* its letter had advised the AD Bank of the applicant to advise the applicant that his investment is being treated as non-repatriable.
Contravention	Purchase of equity shares of an Indian Company by the Non Resident Indian (NRI) through a resident saving bank account: Regulation 5(3)(ii) of Notification No. FEMA 20/2000-RB states that "A Non-Resident Indian or an overseas corporate body may purchase shares or convertible debentures of an Indian company on non-repatriation basis other than under Portfolio Investment Scheme, subject to the terms and conditions specified in Schedule 4."

	Further, Paragraph 3 of Schedule 4 of Notification No. FEMA 20/2000-RB states that "The amount of consideration for purchase of shares or convertible debentures of an Indian company on non-repatriation basis, shall be paid by way of inward remittance through normal banking channels from abroad or out of funds held in NRE/FCNR /NRO/ NRSR/NRNR account maintained with an authorised dealer or as the case may be with an authorised bank in India."
Comments	Though Foreign Exchange Management (Transfer or Issue of Security by a Person Resident Outside India) Regulations, 2000 has been replaced by revised regulations; Regulation 5(3) of extant FEMA 20(R)/2017-RB dated 7-11-2017 corresponds to Regulation 5(3)(ii) of erstwhile FEMA 20/2000- RB dated May 3, 2000.' Though Foreign Exchange Management (Transfer or Issue of Security By a Person Resident Outside India) Regulations, 2000 has been replaced by revised regulations; Para 3 of Schedule 4 of extant FEMA 20(R)/2017-RB dated 07/11/2017 corresponds to Para 3 of Schedule 4 of erstwhile FEMA 20/2000- RB dated May 3, 2000. It is pertinent to note that the remittance for investment on non-repatriation basis can be made only by modes prescribed in para 3 of Regulation 4 of FEMA 20/FEMA 20(R). Remittance for investment on non-repatriation basis from Resident Saving Bank Account is not the permitted mode of payment.

2) Transfer or Issue of any Foreign Security (Outbound Investment) (FEMA 120/2004-RB)
Non-receipt of share certificates or any other proof of investment within the stipulated time period.

Applicant	Apposite Trading Private Limited
Compounding Application Number	C.A. 4806/2018
Compounding Authority Name	Foreign Exchange Department, Mumbai
Amount imposed under Compounding Order	₹ 10,000/-
Date of order	5th March, 2019
Facts of the case	The applicant is engaged in the business of financing industrial enterprises and to carry on the business of a finance company. The applicant had remitted a sum of USD 12,48,000/- on 3rd February, 2017 for purchase of 3,08,60,534 shares of Piramal Glass Ceylon PLC, a company incorporated in Sri Lanka. The shares were to be acquired on the Colombo Stock Exchange.

	However, the applicant could acquire only 69,59,677 shares within the stipulated period of six months due to low volume of trades on the Colombo Stock Exchange. The share certificate or any other proof of investment for the remaining amount could not be furnished by the applicant within the stipulated time period of six months.
Contravention	Purchase of equity shares of an Indian Company by the non-resident Indian (NRI) through a resident saving bank account: Regulation 15(i) of Notification No. FEMA 120/2004-RB states that "An Indian Party which has acquired foreign security in terms of the Regulation in Part I, shall receive share certificates or any other document as an evidence of investment in the foreign entity to the satisfaction of the Reserve Bank within six months from the date of effecting remittance". Since in this case, applicant was unable to produce share certificate or any other proof of investment within the six months of effecting remittance. Thus, applicant contravened the Regulation 15(i) of FEMA notification *ibid*.

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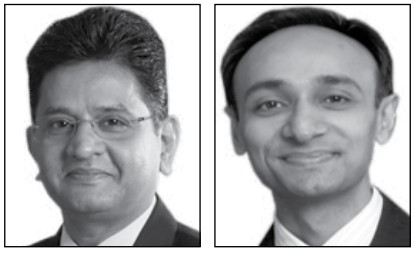

CA Sandeep Shah & CA Bhavin Kapadia

In Focus – Accounting and Auditing

Insight on Standard on Auditing (SA) 701 – Communicating Key Audit Matters in the Independent Auditor's Report

*The Institute of Chartered Accountants of India (ICAI) has issued a new auditing standard "**Audit Standard 701 – Communicating Key Audit Matters in the Independent Auditor's Report**". The inclusion of Key Audit Matters (abbreviated as KAMs) adds a new dimension to the Auditor's Report – which this article seeks to analyse.*

Background and need for communicating KAMs

It is generally understood that good quality synopsis of any document is the best way for a reader to get a quick insight into the document. This holds true in case of an executive summary of internal audit report presented to management which describes the significant observations and risks involved along with magnitude of observation. However unlike internal audits, there was no such reporting requirement on audit of general purpose financial statements. Rather it is criticised that the statutory auditor's report is 'boiler plate language' with standardised contents.

Universally, there is an upscale in awareness amongst the investors to focus on a company's reported earnings and critically evaluate the quality of such reported earnings. Whilst the Earnings Press conference post announcement of financial results gave investors/analysts an additional insight into performance and opportunity to speak to the management, no similar opportunity was there where they could find out the key matters which were discussed by the auditors with the management and what process they followed to arrive at audit opinion. Apart from the auditor's opinion on financial statement, the risks identified by them during the course of audit and other matters reported in the audit report is gaining attention of investors, regulatory bodies and other stakeholders.

Introduction of new auditing standard on KAMs is a step in this direction. KAMs is like a KAMERA (camera) a lens (peek) into the audit work. It focuses on the **process of reaching audit conclusion** rather than focusing on audit conclusion.

The discussions on key issues between an auditor and a company's management (including its audit committee and independent directors) happen behind closed doors. Currently, the auditor is not required to report issues wherein he receives satisfactory explanation from the company management,

despite the fact that these explanations may be material to the understanding of the financial statements and the audit report. The SA 701 on communicating KAMs seeks to change all this. Post its implementation, auditors will be required to provide details of management response to material risks and issues identified during the course of audit, which, so far, were only documented in the audit working papers. *The purpose of communicating KAMs is to enhance the communicative value of the auditor's report by providing greater transparency about the audit that was performed.*

The ICAI has made this SA 701 mandatory for audit of general purpose financial statement for period beginning on or after 1st April 2018 for entities whose shares and securities are listed on stock exchanges whether in India or overseas and will equally apply to all components which are consolidated with the listed entities irrespective of whether it is listed or unlisted. Reporting on KAMs is applicable for standalone and consolidated financial statements of the listed entities.

KAMs in other countries: International Standard on Auditing (ISA) ISA 701 was adopted by some of the countries since year 2015 and there was overall a good feedback.

USA has termed it as "critical audit matters" and it is being implemented in phases. Large accelerated filers will report for fiscal year ending on or after 30th June 2019 and rest of companies will report for fiscal years ending on or after December 15, 2020. Also exemptions have been given to audits of emerging growth companies; brokers and dealers; investment companies other than business development companies; and employee stock purchase, savings, and similar plans.

This article covers the main aspects of newly introduced Standard on KAMs (SA 701).

New Section in the audit report

The SA 701 mandates a new section in the audit report for communicating KAMs which raises a few questions, such as:

- Are KAMs critical enough to warrant a separate section in the audit report?
- What are the additional insights a user of audited statements will need?
- Will this new section empower the auditor or increase onus of compliance?
- Will it mitigate or heighten the risk of litigations against the auditors?

The answers to the first two questions are relatively straight forward. Reporting of KAMs is pertaining to accounts or disclosures that are material to the financial statements and which involved challenging, subjective, or complex auditor judgment and also provides insights into the quality of the audit process. Hence, it is critical that it is reported as a separate section in the audit report. Additionally, a careful study of KAMs reported would bring out management philosophy of being conservative or prudent in selection of its accounting policies.

From an auditor's perspective, the introduction of the SA 701 encompasses additional compliance and reporting requirements. However what it does not change is the auditor's underlying responsibilities in accordance with Standards of Auditing to conduct a thorough risk assessment, and design and perform procedures that are appropriate to respond to those risks, and to form an opinion based on the audit evidence obtained. Nor does it change the responsibilities of management and those charged with governance for the preparation and presentation of the financial statements, including appropriate disclosures in accordance with the applicable financial reporting framework. KAM however provides a platform for the auditor to share the insights through its eyes and highlight critical areas in a

company's financial reporting which hopefully will give increased confidence to users.

One cannot have a one-size fits all mind-set while determining KAMs. Each industry will have different items which can be considered significant, within each industry each company will have different key audit matters and for each company there will be different aspects which may be critical in each reporting period. These critical areas also include, significant accounting estimates where auditors need to rely on the management representation apart from test of control and other audit procedures for example:

- Useful life of Property, Plant & Equipment as also intangible assets
- Impairment test for assets mainly goodwill
- Matters relating to tax litigation & impacts arising out of tax reforms
- Policy choice in regard to expected credit loss model & assessment relating to changes in credit quality
- Inventory obsolescence
- Provision for disputed legal matters
- Assessment of customer claims including class action suit for faulty products
- Right of return of goods
- Fair value of unquoted financial instruments
- Valuation of actuarial assumptions say salary growth etc.

Broad overview of SA-701

- KAMs are those matters that in the auditor's professional judgment:
  - Were of most significance in the audit of financial statements of the current period
  - Had most significant assessed risk of material misstatement whether or not due to fraud
- KAMs are selected from matters communicated with those charged with governance i.e., audit committee/ management/board of directors.
- Identification of KAMs may consider aspects like:
  - Areas which have high risk of material misstatement or which had significant risk involved or which had great effect on the overall audit strategy including resource allocation & directing efforts of audit team
  - Areas involving significant management judgment, effect of significant events or transactions that occurred during the period.
- The descriptions of the matter/s should supplement, and not reiterate or disagree, what has been disclosed in the financials.
- In case of unlisted entities, KAMs reporting is not required unless it is considered for the purpose of consolidated financial statement of listed entity. However, the auditors may decide to report KAMs on voluntary basis for unlisted entities if it promotes consistency or comparability in auditor's reporting & assists intended users of the financial statements in understanding those matters that, in the auditor's professional judgment, were of most significance in the audit of the financial statements of the current period.

Identifying and Communicating KAMs

The SA 701 clearly provides for the manner in which KAMs need to be identified and communicated. As mentioned in Implementation guide on SA 701 issued by

the ICAI, the joint auditors should identify key audit matters for their respective area of responsibility since in respect of audit work divided among the joint auditors, each joint auditor is responsible only for the work allocated to them.

To ensure compliance with this standard the auditor would need to focus on the following aspects:

- Step I: Identifying KAMs
  a. Pre-audit – based on discussions with management identify significant areas that need attention of the auditor & based on which audit plan has been drawn up
  b. During the course of the audit, review whether identified areas, for the current period, fall under the following areas:
     - Areas of high risk of material misstatement
     - Areas with significant risks involved
     - Areas involving significant management judgment
- Step II: Communicating KAMs
  a. Auditor has to report why the matter was considered as significant and determined to be part of KAMs
  b. Auditor has to report how the matter was addressed during the course of the audit

The SA 701 on KAMs has laid down guidelines about reporting of KAMs in different scenarios, which has been summarised below.

Scenario	**Guidelines given in SA 701 for KAMs**
Emphasis of Matter [EOM] paragraph	EOM paragraphs are not a substitute for a description of individual key audit matters. Further, EOM paragraph may be presented either before or after the KAMs section based on the auditor's judgment as to the relative significance of the information included in the EOM paragraph.
Qualified or Adverse Opinion	Reference of the qualified or adverse opinion to be given under KAMs
Disclaimer of Opinion	Key Audit Matters section is prohibited from being included in the auditor's report when the auditor disclaims an opinion on the financial statements, unless the auditor is otherwise required by law or regulation to communicate key audit matters.
If there is no KAMs other than those given under qualified or adverse opinion	To explicitly mention that there are no other KAMs to be reported.

Illustrations

Identification of KAMs is subjective and predominantly based on auditor's judgment. Tabulated below is the summary of reportable KAMs based on the nature of industry. The list is only illustrative in nature.

Industry	**Areas of significance which may be reported under KAMs**
FMCG & Lifestyle products	• Inventory provision based on ageing/stock turn, fast changing consumer preference in relation to fashion products, impact due to negative margins, discounting strategy
	• Store outlet rationalisation & impairment of assets at store level
	• Sales return assumption
Retail & Tourism/ leisure	• Management estimates for giving rebates, chargebacks, etc. to distributors
	• Identification and measurement at fair value of acquired intangibles (including customer relationship/contracts) & resultant recognition of bargain purchase gain
	• Principal or agent relationship and consequent appropriate accounting treatment under revenue
	• Loyalty programmes [management estimates for redemption of loyalty and bonus points]
	• Customer claim arising out of illness, deficiency in service & whether counter claim exists
	• Customer data breach & claims arising therefrom
Real Estate	• Revenue recognition based on percentage of work completed and estimation of cost of construction
Departmental Store	• Breakages and pilferages of inventory
	• Customer claims including due to privacy breach
	• Space rationalisation programme including reduction / relocation/ closure & consequent impact on contracts with outlet owners/ tenants/employees/restoration cost etc. arising out of market conditions (current & future outlook including due to changes in business model)/loss making stores
	• Gift cards and vouchers redemption/ expiry assumptions
IT & Software & telecom	• Tax disputes with uncertain tax positions taken by the company involving multiple jurisdiction in which the group operates
	• Timing of revenue recognition including cut-offs & deferral
	• Attribution of revenue to products and services
	• Accounting of discounts/incentives/commissions & new/dynamic pricing models
	• Allocation of goodwill on acquisition of business to CGU & other CGU based on synergies of contribution
	• Intellectual property rights violation & claims arising therefrom
	• Capitalisation or expensing out costs and timing of transfer of assets in the course of construction

Industry	Areas of significance which may be reported under KAMs	
Pharmaceuticals	•	Product recall & product expiry with its impact on financial position
	•	Regulatory action on account of lapses/ deficiency in manufacturing practices
E-commerce or digital app	•	Recognition of deferred tax & recoverability
	•	Useful life of intangible assets
	•	Regulatory environment including uncertainty whether business breaches the law or not
Oil & Gas	•	Estimate of oil and gas reserves & resources which will impact impairment testing and amortization charges
	•	Determination of the liabilities, contingent liabilities and disclosures relating to claims arising from spillage including environmental damage / economic loss and property damage

Note – It is possible that there are more than one KAMs in audit report.

There will be diverse nature of KAMs across various industries having varying sizes & complexities. Additional KAMs have been bifurcated in broad categories for ease of reading only:

Accounting standard related points including implementation & interpretation related

- Impact of new standard on financial statements being adopted in subsequent year example IND AS 116 on leases
- Appropriateness of separate disclosure under Income statement due to size, nature, non-recurring feature etc.
- Going concern assessment
- Re-measurement of interest already owned at fair value in case of step up acquisition resulting in control
- Classification of post balance sheet item as adjusting or non-adjusting events
- Impairment of assets including testing of goodwill & in case of new acquisition allocation of goodwill to cash generating units
- Estimation of maintenance obligation & model used for determining usage, future maintenance cost, discount rate etc. in case of aircraft or other machineries taken on operating lease
- Fair value of financial instruments
- Significant events or transactions that occurred during the year
- Accounting estimates that have been identified as having high estimation uncertainty
- Estimation of inputs for fair value of share based payment instrument
- Risk relating to changes in presentation currency

Legal matters / litigations / disputed matters and its impact

- Disputed taxes [especially where there are different jurisdiction involved]
- Liability assessment arising from (threatened or actual cases) by customer/ competitors / regulators/ suppliers/ shareholders of subsidiaries

- Anti-bribery and corruption processes & claims by Governments

Changes in business and processes affecting financial statements

- Implementation of new Enterprise Resource Planning (ERP) and risk associated with integration testing, data conversion, cut-over, and retiring legacy systems. Additionally there could be issues with payment control, data security, some of the functionality not activated, management override in certain areas in initial year of implementation etc.
- Significant restructuring of businesses including exiting certain line of business & estimation around such restructure

Is reporting under KAMs broader than Emphasis of Matter (EOM)?

Currently there is no requirement to report key audit matters in the audit report unless the same is reported under 'Emphasis of Matter' (EOM) based on their judgment or 'Other Matters' if it does not relate to a matter not disclosed in financial statement.

Table below summarises why KAMs is considered to be much broader in coverage as compared to EOM:

EOM	KAMs
Auditors only draw attention of members to the matter given in financial statement.	Under KAMs the auditor is required to address (a) why the matter was considered to be one of most significance in the audit of financial statement and therefore determined to be KAM and (b) how the matter was addressed in the audit.

Audit documentation related to KAMs

It is said that audit work executed but not adequately documented is equal to work not done. Documentation of audit working papers is critically reviewed by the regulators like Peer Review Board and Quality Review Board and by ICAI disciplinary committee. The SA 701 on KAMs lays down additional documentation requirements like determination of KAMs, as to whether or not each of these matters is a key audit matter, rational for no key matters reported, rational for not reporting KAMs. On a lighter note, auditor going forward may be required to video record the discussion with management about the key risks involved.

Concerns in implementation of KAMs

1. Identification of KAMs is subjective and predominantly based on auditor's judgment. The standard does not specify any standardized KAMs related to industry or products or services. In the initial phase of implementation of KAMs, audit planning will have to be more robust since it would require substantial time of core members of audit team.
2. Stakeholders would critically look and question the authenticity of auditors if KAMs was not identified and reported in the audit report. Going ahead the auditor's report may highlight the KAMs which are deleted / added as compared to previous year.
3. Sensitive matters identified under KAMs would be known to company's peers and hence may have adverse consequences. To safeguard the auditor's interest it may be advisable to obtain legal advice before concluding that KAMs is not required to be disclosed.

Will KAMs meet expectations of users of financial statements?

Certainly new reporting requirement will give additional information to users in regard to the key risks involved in the audit of standalone and consolidated financial statements of listed companies and how these matters were addressed during the course of audit. However it doesn't eliminate the risk of any fraud on or by the company which remains unearthed

The value of KAMs to users will be served if the language is kept simple as opposed to too technical or generic and it no way suggests that matter reported has not been adequately resolved while forming audit opinion. Adequate care on this aspect should be taken.

Investors expect frequent updates about the company's key financial issues which will assist them in their investment life cycle. However such KAMs reported will generally be available in public domain when the annual report of the listed company is published and circulated to the members of the company. Quarterly limited review reports issued by the auditors as per SEBI requirement will not contain such KAMs. However it would be mandatory to disclose KAMs on shorter intervals if complete set of financial statements are published.

Further, one year post implementation, investor would expect from auditors to highlight the changes in the KAMs as compared to those reported in past and also comments on KAMs removed like due to limited level of judgment involved in current period.

Other changes in the format of auditor's report which are made effective along with SA 701

Additionally, to emphasise on relevant contents of the auditor's report, changes are made in format of audit report as given below:

- Placement of "Auditor's opinion paragraph" is at the beginning of the Auditor's Report
- Separate paragraph for going concern assumptions
- Auditor's report to include separate para on 'Materiality levels' adopted by the auditor. It could be either in narrative form or specify the quantum in terms of threshold % or amount.
- Separate paragraph in audit report for 'other information' like board of director's report, management discussion and analysis which are prepared by the management and auditor has to comment if there is any variation in comments / figures as compared to those stated in the financial statement.
- Reference can be made to a website of an appropriate authority (say the ICAI or the NFRA as may be prescribed) that contains the description of the auditor's responsibilities [which are generally standard paragraphs], rather than including it in the auditor's report.

Conclusion

The dimension of KAMs will enable more dialogue to take place between the auditors and the Management/ Board of Directors/ Audit Committee and members of the company. It is quite likely that recommendation to improve/strengthen the internal control review mechanism in respect of KAMs reported will garner necessary attention from those charged with governance. Implementation of KAMs in true spirit will make the auditor's report certainly more informative and also add value to the organisation having strong foundation of transparency and corporate governance. The change in sequencing of 'opinion paragraph' at the beginning of the report will also be relevant for the users of financial statement for bird's eye view. As mentioned in the *Implementation Guide* to SA 701 issued by the ICAI, members will have to adopt a funnel approach to determine the KAMs for the period audited. Certainly this additional reporting responsibilities will involve more time & efforts of the auditors. Users of auditor's report can expect freshness in the report in the initial years of implementation of KAMs. The true value will also be generated if the management of unlisted entities requests the auditors to report on KAM. We believe that this new quill have a lot of sharpness and utility.

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Rahul Sarda, *Advocate*

Best of the Rest

Whether a mere financial assistance to purchase immovable property amounts to Benami Transaction?

The Appellant had filed suit seeking declaration of 1/4th right in the suit property, which was purchased by her brothers i.e. the Respondents with financial assistance of their late father. The Trial Court held that the properties were self-acquired by the Respondents and that the Appellant had no right in respect to suit property but was entitled to 1/4th share in the movable property. Being aggrieved by the said order, the Appellant approached High Court. The High Court held that the suit property was not self-acquired as the transaction related to the suit property was benami in nature.

Being aggrieved by the said order, the Respondents challenged the said order before the Apex Court. The Apex Court after observing various facts of the matter remitted it back to the High Court for reconsideration. Accordingly, the High Court decided the matter by confirming the order of the Trial Court and observed that the transaction for purchasing the suit property was not benami in nature and that they were self-acquired property and that the Appellant had no right in the suit property. Being aggrieved by the order, the Appellant moved to the Apex Court.

The question/challenge before the Court was to ascertain whether financial assistance by the father for purchase of suit property was benami in nature or not.

The Court held that there were certain factors to be considered before a transaction could be coloured as benami. The intention of the person who contributed the purchase money was determinative of the nature of transaction which was to be decided on the basis of the surrounding circumstances, relationship of the parties, the motives governing their action in bringing about the transaction and their subsequent conduct etc. Further, the burden of proving that a particular transaction was benami or not always rests on the person asserting it to be so. Also, the source of money was not the only sole consideration; it was merely one of the relevant considerations.

Smt. P. Leelavathi(D)by LRs v. V. Shankarnarayana Rao(D)by LRs, Civil Appeal No.1099 of 2008 dated 9-4-2019 – Supreme Court.

Whether provisions under Prevention of Money Laundering Act, 2002 (PMLA) prevails over other Acts i.e. SARFESI Act, RDBA Act and Insolvency and Bankruptcy Code, 2016?

The appeals were filed before the High Court challenging the order of the Appellate Tribunal under PMLA which has taken the view that the relevant statutory provisions of PMLA take a back seat, the enactments under which the third parties (the banks) lay a superior claim over the properties in question having primacy. The Appellants have assailed the said view questioning the correctness thereof by which the Appellate Tribunal has so concluded arguing that if its decision were to prevail, it would not only be prone to misuse but also render PMLA toothless.

Under the PMLA, the empowered Enforcement Officer has the authority of law to attach a "tainted

property" - acquired directly or indirectly, from proceeds of criminal activity along with any other asset or property of equivalent value of the offender of money laundering. The latter not bearing any taint but being alternative attachable property on account of its link or nexus with the offence of money-laundering.

The order of confiscation is restricted to take over by the government of illicit gains of crime. The burden of proof is on the person who contends so that the property attached was not acquired or obtained from criminal activity. The burden of proving facts in support of such claim is to be discharged by such a person.

Pursuant to the rights of third party in the properties attached under PMLA, the Court held that if the property of a person other than the one accused of the offence of money-laundering, i.e. a third party, is sought to be attached and there is evidence available to show that such property before its acquisition was held by the person accused of money-laundering, or it was involved in a transaction which had relations with transactions concerning money-laundering, the burden of proving facts to the contrary for release of such property from attachment is on the person who so contends.

Unless and until the unless material is available to show that the charge or encumbrance of a third party was created to defeat the said law, the property attached under PMLA cannot be treated or declared as "void". Further, in order a party to be considered as a bonafide third party claimant for its claim in a property being subjected to attachment under PMLA must be proved, by cogent evidence, that it had acquired interest in such property lawfully and for adequate consideration, the party itself not being privy to, or complicit in, the offence of money-laundering, and that it has made all compliances with the existing law including registering the said security interest.

An order of attachment under PMLA is not illegal only because a secured creditor has a prior secured interest (charge) in the property in RDBA and SARFAESI Act. Similarly, mere issuance of an order of attachment under PMLA does not render illegal a prior charge or encumbrance of a secured creditor, the claim of the latter for release (or restoration) from PMLA attachment being dependent on its bonafides.

The objective of PMLA being distinct from the purpose of RDBA, SARFAESI Act and Insolvency Code, these latter three legislations do not prevail over the PMLA. The PMLA, by virtue of section 71, has an overriding effect over other existing laws in the matter of dealing with "money-laundering" and "proceeds of crime" relating thereto. The PMLA, RDBA, SARFAESI Act and Insolvency Code (or such other laws) must co-exist, each to be construed and enforced in harmony, without one being in derogation of the other with regard to the assets respecting which there is material available to show the same to have been "derived or obtained" as a result of "criminal activity relating to a scheduled offence" and consequently being "proceeds of crime", within the mischief of PMLA.

If it is shown by cogent evidence by the bonafide third party claimant, staking interest in an alternative attachable property (or deemed tainted property), claiming that it had acquired the same at a time around or after the commission of the proscribed criminal activity, in order to establish a legitimate claim for its release from attachment it must additionally prove that it had taken "due diligence" to ensure that it was not a tainted asset and the transactions indulged in were legitimate at the time of acquisition of such interest.

The property to the extent of such interest of the third party will not be subjected to confiscation so long as the charge or encumbrance of such third party subsists, the attachment under PMLA being valid or operative subject to satisfaction of the charge or encumbrance of such third party and restricted to such part of the value of the property as is in excess of the claim of the said third party.

If the *bona fide* third party claimant is a "secured creditor", pursuing enforcement of "security interest" in the property sought to be attached, it being an alternative attachable property, it having acquired such interest from person accused of the offence of money-laundering, or from any other person through such transaction as involve(s) criminal activity relating to a scheduled offence, such third party having initiated action in accordance with law for enforcement of such interest prior to the order of attachment under PMLA, the directions of such attachment under PMLA shall be valid and operative subject to satisfaction of the charge or encumbrance of such third party and restricted to such part of the value

of the property as is in excess of the claim of the said third party.

The bonafide third party claimant shall be accountable to the enforcement authorities for the "excess" value of the property subjected to PMLA attachment. If the order confirming the attachment has attained finality, or if the order of confiscation has been passed, or if the trial of a case under Section 4 PMLA has commenced, the claim of a party asserting to have acted bonafide or having legitimate interest in the nature mentioned above will be inquired into and adjudicated upon only by the special court. The impugned orders were set aside by the High Court.

The Deputy Director, Directorate of Enforcement, Delhi v. Axis Bank & Ors – CRL.A.143/2018 dated 2-4-2019

RBI Circular dated 12-2-2018 – constitutional validity

Petitions were filed before the Supreme Court challenging the validity of section 35AA and 35AB of the Banking Regulation Act, 1949. The real challenge in question was the circular issued on 12-2-2018, by which the RBI promulgated a revised framework for resolution of stressed assets.

The salient features of this circular was that restructuring in respect of borrower entities de hors the Insolvency and Bankruptcy Code, 2016 could now only occur if the resolution plan that involves restructuring is agreed to by all lenders, i.e., 100 per cent concurrence. Secondly, what has been chosen to be the subject matter of the circular is debts with an aggregate exposure of INR 2000 crore and over on or after 1-3-2018. With respect to such debts, if default persists for 180 days from 1-3-2018, or if the date of first default is after 1-3-2018, then 180 days calculated with effect from that date, lenders shall file applications singly or jointly under the Insolvency Code within 15 days from the expiry of the aforesaid 180 days. the sources of power for issuance of the aforesaid circular have been stated to be Section 35A of the Banking Regulation Act read with the Central Government's circular dated 5-5-2017, Sections 35AA and 35AB of the said Act, and Section 45L of the Reserve Bank of India Act, 1934.

The existing guidelines pertaining to resolution of stressed asset which included early identification of stressed asset into sub categories based on period of overdue of the principal or interest payment, reporting credit information by the lender to Central Repository of Information on Large Credits within stipulated time period as set out by the RBI, implementation of Resolution plan, conditions pertaining to implementation of resolution plan and the timelines for implementation of resolution plan were revised by RBI and the other debt restructuring circulars such as CDR, SDR, S4A and JLF were repealed by the RBI by this impugned circular.

It is a particular default of a particular debtor that is the subject matter of Section 35AA of the RBI Act. It was in specific cases of default that the RBI was to intervene for resolution of NPAs. The Statement of Objects and Reasons for introducing Section 35AA also emphasises that directions are in respect of "a default". Thus, the directions that could be issued under Section 35AA could only be in respect of specific defaults by specific debtors. This was also the understanding of the Central Government when it issued the notification dated 5-5-2017, which authorised the RBI to issue such directions only in respect of "a default" under the Code. Thus, any directions which were in respect of debtors generally, would be ultra vires Section 35AA. The argument that "specific cases" would include specification by category or class was rejected.

On *inter alia* the above grounds, the impugned circular was declared as ultra vires as a whole, and be declared to be of no effect in law and all actions taken under the said circular, including actions by which the Insolvency Code has been triggered were to fall along with the said circular. As a result, all cases in which debtors have been proceeded against by financial creditors under Section 7 of the Insolvency Code, only because of the operation of the impugned circular will be proceedings which, being faulted at the very inception, are declared to be non-est. the Court held that the impugned circular is ultra vires Section 35AA of the Banking Regulation Act.

Dharani Sugars and Chemicals Ltd. v. Union of India & Ors. – Transferred Case (Civil) No.66 of 2018 in Transfer Petition (Civil) No.1399 of 2018 dated 2-4-2019 – Supreme Court.

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CA Anish Thacker & CA Parag Ved, *Hon. Jt. Secretaries*

The Chamber News

Important events and happenings that took place between 7th April, 2019 and 7th May, 2019 are being reported as under:

I. Admission of New Members

1) The following new members were admitted in the Managing Council Meeting held on 22nd April, 2019.

Type of Membership	No. of Members
Life Membership	16
Ordinary Membership	19
Student Membership	2
Associate Membership	2

II. Past Programmes

1. DELHI CHAPTER

An "Income Tax Litigation – Workshop on Skill Development" was held on 19th & 20th April, 2019 at India International Centre, Lecture Room, Delhi. Hon'ble Mr. G. S. Pannu, Vice-President ITAT Mumbai inaugurated the Workshop and delivered keynote address. The workshop was addressed by Mr. Ved Jain, ITAT Member, Mr. K. Sampath, Advocate, CA Gautam Jain, CA Sanjay Agarwal, Mr. P. R. Tolani, Mr. Kapil Goel, Mr. Prashant Maharishi and Mr. Himanshu Sinha.

2. IT CONNECT COMMITTEE

A visit to CTRL's Data Centre was held on 13th April, 2019 at CTRLs Data Centre, TTC Industrial Area, Mahape, Navi Mumbai.

3. INTERNATIONAL TAXATION COMMITTEE

- A Half Day Seminar on "Recent Developments in Compounding of Offences under FEMA" was held on 24th April, 2019 at Babubhai Chinai Hall, IMC, Churchgate. The

seminar was addressed by CA Dilip Thakkar, Shri Kamlesh Sharma, Dy. General Manager RBI, Mr Himanshu Mohanty, Ex-GM RBI and Mr. Ganesh Chandak.

- A Two Day Conference on FEMA was held on 3rd & 4th May, 2019 at India International Centre, Lecture Room, Delhi. The conference was addressed by CA Manoj Shah, CA Rajesh P. Shah, CA Vijay Gupta, CA Anup Shah, CA Paresh P. Shah, CA Deependra Kumar Agrawal and Mr. R. K. Handoo, Senior Advocate

4. MEMBERSHIP & PR COMMITTEE

- A Panel Discussion on "Right to Information Act and Public Interest Litigation" was held on 23rd April 2019 at Walchand Hirachand Hall, IMC, Churchgate. The panel was addressed by Justice (Retd.) Shri B. N. Srikrishna.

- A Full Day Seminar on Direct Taxes at Amravati was held on 4th May, 2019 at Diamond Hall, Hotel Grand Mehfil, Amravati. The seminar was addressed by Mr. Kishor Dewani, Senior Advocate, CA Jagdish Punjabi, Mr. Dharan Gandhi, Advocate, CA Abhitan Mehta and CA Jagdish Punjabi.

5. MEMBERSHIP & PR COMMITTEE & COMMERCIAL & ALLIED LAWS COMMITTEE

A Lecture Meeting on Right to Information Act – A must learn for professionals was held on 30th April, 2019 at Babubhai Chinai Hall, IMC, Churchgate. The meeting was addressed by Mr. Shailesh Gandhi.

III. Future Programmes

1. ACCOUNTING & AUDITING COMMITTEE & CORPORATE CONNECT COMMITTEE

A "Study Course on Valuation" is scheduled to be held on 8th June, 2019 at Babubhai Chinai Hall, IMC, Churchgate.

2. COMMERCIAL & ALLIED LAWS AND CORPORATE CONNECT COMMITTEE

Seminar on issues related to IBC and Resolutions of Distressed Assets is scheduled to be held on 15th June, 2019 at IMC, Churchgate.

3. COMMERCIAL & ALLIED LAWS AND DIRECT TAXES COMMITTEE

Workshop on the New Benami Law and Prevention of Money Laundering Act is scheduled to be held on 29th June, 2019 at Hotel West End, Churchgate, Mumbai.

4. DIRECT TAXES COMMITTEE

- Half Day Seminar on Recent Controversies and Issues under Income-tax Act is scheduled to be held on 14th June, 2019 at IMC, Churchgate.

- Half Day Workshop on Return Filing provisions under the Income-tax Act is scheduled to be held on 28th June, 2019 at IMC, Churchgate.

5. INTERNATIONAL TAXATION COMMITTEE

- The "13th Residential Refresher Course on International Taxation", 2019 is scheduled to be held from 20th June, 2019 to 23rd June, 2019 at The Grand Bhagwati, Surat.

- The "5th International Study Tour" is scheduled to be held from 25th May, 2019 to 5th June, 2019 at Central Europe.
- Seminar on TDS u/s. 195 of Foreign Remittances & Expatriate Taxation including procedural aspects is scheduled to be held on 8th June, 2019 at Hotel West End, Churchgate, Mumbai.

6. IT CONNECT COMMITTEE

Technology Clinic is scheduled to be held on 29th May, 2019 at CTC Conference Room.

7. MEMBERSHIP & PR COMMITTEE

Full Day Seminar on Direct Taxes at Nagpur is scheduled to be held on 29th June, 2019 at Hotel Centre Point, 24, Central Bazar Road, Ramdaspeth, Nagpur – 440 010.

8. STUDENT COMMITTEE

Student Orientation Course is scheduled to be held from 13th June to 15th June, 2019 at Juhu Jagruti Hall, Mithibhai College, Vile Parle, Mumbai.

(For details of the future programmes, kindly visit www.ctconline.org or refer The CTC News of May, 2019)

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Notice of
The Ninety Second Annual General Meeting

Notice is hereby given that the **Ninety Second Annual General Meeting** of **THE CHAMBER OF TAX CONSULTANTS** will be held at Garware Club House, Wankhede Stadium, D Road, Churchgate, Mumbai- 400 020 on Thursday, 4th July, 2019 at 4.30 p.m. to transact the following business:

1. To read and adopt the minutes of the previous (91st) annual general meeting.
2. To consider the Annual Report of the Managing Council for the year 2018-19.
3. To consider and adopt the annual audited accounts for the year ended 31st March, 2019.
4. To appoint auditors and fix their honorarium for the year 2019-20.
5. To announce the results of the elections of President and fourteen Members of the Managing Council.

FOR AND ON BEHALF OF THE MANAGING COUNCIL

Sd/-
Anish M. Thacker / Parag S.Ved
Hon. Jt Secretaries

Place : Mumbai
Dated : 22nd April, 2019

Office
3, Rewa Chambers,
31, New Marine Lines,
Mumbai – 400 020.

Notes:

1. As per the decision taken at 86th Annual General Meeting, Annual Report would be circulated in electronic form. It shall also be available on the Chamber's website after ``**6th June, 2019**. Any member desiring physical copy can send written request and get it collected from Chamber's office after **6th June, 2019**. Alternatively, a member can also send a written request for dispatch to him/her by post or courier.
2. If there is no quorum by **4.30 p.m.** the meeting will be adjourned for half an hour and the members present at such adjourned meeting shall form the quorum.
3. The members desiring to raise queries are requested to send their queries, in writing, if any, on the Statement of Accounts and Annual Report for the year 2018-19 to the Hon. Jt. Secretaries at least **four working days** before the day of the Annual General Meeting.
4. The AGM will be followed by the release of the CTC's publications and the felicitation of the winners of the Dastur Essay Competition.

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Indirect Taxes Committee

Panel discussion on "Recent GST Amendments for Real Estate Sector – Implications & Fall Out" was held on 4th April, 2019 at Walchand Hirachand Hall, 4th Floor, IMC Churchgate

CA Hinesh Doshi (President) giving his opening remarks

CA Sumit Jhunjhunwala (Convenor) welcoming the panellists.

Dignitaries on the dais. Seen from L to R: CA Sumit Jhunjhunwala (Convenor), CA Vikram Mehta (Past Chairman), CA S. S. Gupta (Panellist), CA Hinesh Doshi (President), CA Pranav Kapadia (Panellist), CA Naresh Sheth (Panellist), Mr. Harsh Shah, Advocate (Panellist and CA Kush Vora (Convenor)

IDT Study Circle on "Issues under Mixed and Composite Supply" was held on 23rd April, 2019 at Jai Hind College, A. V. Room, Churchgate

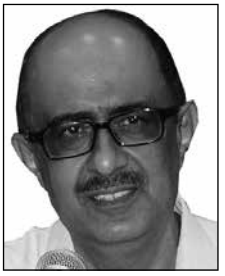
Mr. Aditya Surte (Group Leader) addressing the delegates

CA Rajiv Luthia (Chairman) addressing the delegates

IT Connect Committee

Seminar on Business Intelligence (BI) and Microsoft Power BI was held on 5th April, 2019 at Kilachand Hall, 2nd Floor, IMC, Churchgate

CA Hinesh Doshi (President) giving his opening remarks. Seen from L to R: CA Amit Salla (Convenor), Mr. Ramaswamy Krishnan (Speaker), CA Dinesh Tejwani (Chairman) and CA Mitesh Katira



CA Dinesh Tejwani (Chairman) welcoming the speakers.

Mr. Ramaswamy Krishnan addressing the delegates

Industrial visit to CLTRs Data Centre was held on 13th April, 2019 at CLTRs Data Centre, TTC Industrial Area, Mahape, Navi Mumbai

International Taxation Committee

Half Day Seminar on Recent Developments in Compounding of Offences under FEMA was held on 24th April, 2019 at Babubhai Chinai Hall, 2nd Floor, IMC, Churchgate

CA Hinesh Doshi giving his opening remarks. Seen from L to R: CA Rajesh L. Shah (Co-Chairman), Shri Kamlesh Sharma, Deputy General Manager, RBI (Panellist), CA Rajesh P. Shah (Chairman), CA Dilip Thacker (Moderator) Shri Himanshu Mohanty ex-GM, RBI (Speaker), CA Kartik Badiani (Vice-Chairman) and CA Harshal Bhuta (Convenor)

CA Rajesh Shah (Chairman) welcoming the speakers

Shri Himanshu Mohanty ex-GM, RBI addressing the delegates

Mr. Ganesh Chandak, ICICI Bank Official addressing the delegates

Shri Kamlesh Sharma, Deputy General Manager, RBI (Panellist) addressing the queries at Panel Discussion

CA Dilip Thacker (Moderator) addressing the queries at Panel Discussion

FEMA Study Circle on "Revised ECB Regulations" was held on 11th April, 2019 at CTC Conference Room

CA Niki Shah addressing the participants

Membership & Public Relations Committee

SAS Meeting on "Dynamic Memory (Part II)" was held on 25th April, 2019 at Babubhai Chinai Hall, 2nd Floor, IMC, Churchgate

Mr. Srinivas Vakati addressing the delegates

Direct Taxes Committee

ISG on Direct Taxes on "Recent Important Decisions under Direct Tax" was held on 24th April, 2019 at CTC Conference Room

Mr. Ajay Singh, Advocate addressing the delegates

Bengaluru Study Group

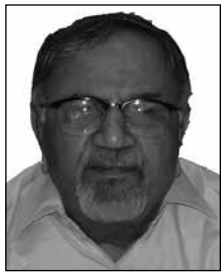
Bengaluru Study Group Meeting was held on 26th April, 2019 at FKCCI, 3rd Floor, Hall No. 4, Bengaluru

Mr. V. Raghuraman addressing the delegates on the topic "Constitutional validity of recent amendments in Real Estate Sector & Implications on JDA"

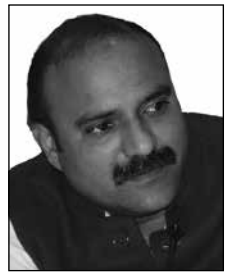
Membership & Public Relations Committee and Commercial & Allied Laws Committee

Lecture Meeting on "Understanding the RTI Act for an effective Democracy in India" was held on 30th April, 2019 at Babubhai Chinai Hall, 2nd Floor, IMC, Churchgate

CA Hinesh Doshi giving his opening remarks. Seen from L to R: Mr. Rahul Hakani, (Chairman), Mr. Rahul Wadke (Speaker), Mr. Shailesh Gandhi (Speaker), CA Sanjeev Lalan (Chairman) and Ms. Ashita Shah (Member)



Mr. Shailesh Gandhi addressing the delegates



Mr. Rahul Wadke addressing the delegates

Study Circle & Study Group Committee

Study Circle on "Issues in Connection with Transactions in Immovable Property" was held on 15th April, 2019 at Babubhai Chinai Hall, 2nd Floor, IMC, Churchgate

CA Jagdish Punjabi addressing the participants

Study Group on "Recent Judgments under Direct Taxes" was held on 26th April, 2019 at Babubhai Chinai Hall, 2nd Floor, IMC, Churchgate

CA Sanjay Parikh addressing the delegates

Study Circle on "Issues on Deemed Income – Section 56(2) (X) etc." was held on 18th April, 2019 at Babubhai Chinai Hall, 2nd Floor, IMC, Churchgate

CA Devendra Jain (Group Leader) addressing the delegates

Me. Vipul Joshi, Advocate (Chairman) addressing the delegates

Membership & PR Committe

Panel discussion on "Right to Information & Public Interest Litigation" was held jointly with Rotary International District 3141 and Indian Merchants' Chamber on 23rd April, 2019 at Walchand Hirachand Hall, 4th Floor, IMC, Churchgate

CA Hinesh Doshi (President) giving his opening remarks

Hon'ble Mr. Justice B. N. Srikrishna (Retd.), Supreme Court of India addressing queries at the Panel Discussion. Seen from L to R: Mr. Jimmy Pochkhanawalla, Senior Advocate, Bombay High Court (Moderator), Mr. Shailesh Gandhi, Dr. Milind Sathe, Mr. Rahul Wadke and Mr. Jamshed Sukhadwalla

CA Hinesh Doshi (President) receiving appreciation Certificate from Hon'ble Mr. Justice B. N. Srikrishna (Retd.), Supreme Court of India

Group photo of Dignitaries

President's Meeting with Mr. P. K. Das, Member, CBDT in North Block, New Delhi on Tax Litigation Management representation made by CTC

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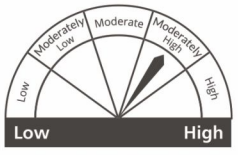

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