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THE CHAMBER'S JOURNAL

Your Monthly Companion on Tax & Allied Subjects

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The Chamber of Tax Consultants

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The Chamber of Tax Consultants (The Chamber) shall be a powerhouse of knowledge in the field of fiscal laws in the global economy.

The Chamber shall contribute to the development of law and the profession through research, analysis and dissemination of knowledge.

The Chamber shall be a voice which is heard and recognised by all Government and Regulatory agencies through effective representations.

The Chamber shall be pre-eminent in laying down and upholding, among the professionals, the tradition of excellence in service, principled conduct and social responsibility.

Unveiled by **Shri S. E. Dastur,** Senior Advocate on 30th January, 2008.

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3, Rewa Chambers, Ground Floor, 31, New Marine Lines, Mumbai – 400 020
Phone : 2200 1787/2209 0423/2200 2455
E-Mail: office@ctconline.org • Website : http://www.ctconline.org.

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Editorial

Dear Readers,

As anticipated, this year, Diwali was celebrated with increased festivity and fervour and as expected, after two muted years, colourful lights lit up homes and streets across the country. Our Hon'ble Prime Minister, celebrating Diwali every year with the soldiers stationed at the border is something we all are proud of. There is all around positivity in the air and the new S.Y. 2079 seems to have begun on a positive note and hope that gaiety continues throughout the year.

This year the Noble Prize for Economic Science category has been awarded to three economists from the USA, Ben Bernanke, Douglas Diamond and Philip Dybvig for their research in the banking field. They developed theoretical models that explain why banks exist, how their role in society makes them vulnerable to rumours about their impending collapse, and how society can lessen this vulnerability. Their work is hailed across the globe and is most relevant in the context of the situation of the banking industry in India.

It's a known fact that the prestigious Nobel Prize awards were started in 1901 by the Nobel Foundation and it is given in memory of Swedish scientist Alfred Nobel who made 355 inventions including, ironically, the invention of dynamite. The celebrated Indian poet, musician, and painter, Rabindranath Tagore was the first Indian to win the Nobel Prize in 1913. The second Indian to win the award was Sir Chandrasekhara Venkata Raman, or CV Raman. In all, 12 Indians have won the coveted award. Generally, there is not much discussion about the Nobel Prize winners in the media unless the prize is won by an Indian. With the present pool of talent in the country ,we can hope that many more Indians will win this coveted award in future.

Coming back to banking, one praiseworthy initiative by the Reserve Bank of India worth a mention is launch of the Central Bank Digital Currency (CBDC) and pilot projects in this direction have already been launched from 1st November. Launch of CBDC has evoked immense interest world over, and has been hailed as a step in the right direction. The CBDC is expected to boost the digital economy and will be based on blockchain technology.

Many professionals of Indian origin are occupying position of CEO in various corporates and political leadership worldwide. Its indeed a matter of pride that latest addition to this list is the newly elected British Prime Minister, Shri Rishi Sunak, the youngest ever Prime Minister, in 200 years British History.

One recent positive development on the income tax front is proposed simplification of Income tax returns. Presently, taxpayers are required to furnish their Income-tax returns in ITR-1 to ITR-7 depending upon the type of person and nature of income. The proposed draft ITR takes a relook at the return filing system in tandem with international best practices. It proposes to introduce a common ITR by merging all the existing returns of income except ITR-7. However, the current ITR-1 and ITR-4 will continue. This will give an option to taxpayers to file the return either in the existing form (ITR-1 or ITR-4) or the proposed common ITR, as per their convenience.

The draft ITR aims to bring ease of filing returns and reduce the time for filing the ITR by individuals and non-business-type taxpayers considerably. The taxpayers will not be required to see the schedules that do not apply to them. It intends the smart design of schedules in a user-friendly manner with a better arrangement, logical flow, and increased scope of pre-filling. It will also facilitate the proper reconciliation of third-party data available with the Income-tax Department vis a vis the data to be reported in the ITR to reduce the compliance burden on the taxpayers. For tax professionals also, hopefully some of the issues in uploading the returns will get resolved as changes may now not need to be replicated across different return forms, and release of the utility will hopefully be faster.

The Ministry of Finance has invited suggestions from all the stakeholders by 15th December 2022. This is indeed a praiseworthy initiative and a step in the right direction.

The current month's issue of the Journal is on very important topic of GST and Income Tax implications on Joint development and redevelopment. This subject is of significant importance for the professionals as there are numerous direct and indirect tax issues when it comes to joint development and redevelopment. Considering the vastness of the subject the issue is divided in two parts and this issue covers indirect tax aspects. Appreciation for the Journal Committee for thinking of this subject and making a design which covers all the aspects of the subject. Sincere gratitude to the authors for sharing their expert knowledge and sparing their valuable time.

I end my communication with a very thoughtful quote:

"One of the greatest pains to human nature is the pain of new idea".

VIPUL K. CHOKSI
Editor

From the President

Dear Members,

I trust all members have had wonderful Deepavali Celebrations with their family and friends and I extend all of you best wishes for Samvat 2079. I am sure members had relaxed atmosphere in Deepavali as government extended return filing due date to 7th November 2022.

Indian economy is better placed than rest of the world. While inflation has reached double digit in many of the developed countries, in India we are still around 7%. We must thank our Government and Reserve Bank of India for taking proactive measures. RBI has recently increased benchmark rates and have also submitted report to the Government on the current state of affairs of the economy and its recommendation on bringing back inflation rate to acceptable range. Results of 2nd quarter of current financial year are out and are mixed bag. While revenue has increased for most of the Companies, there is pressure on margin as costs have also gone up. Early trends of 3rd quarter performance is encouraging with festive demand and we hope that we wlll be able to grow at 7% to 8%.

At CTC, we just concluded 2 day course on PMLA and Black money. Participation from members was encouraging. We have announced full day workshop on NBFC on 10th December, 2022. It is well designed program keeping in mind various changes brought in by Reserve Bank of India. Our 1st RRC on FEMA has received very good response and enrollment is closed since we have reached full capacity. For GST RRC in January 2023 at Pune and Direct Tax RRC in March 2023 at Indore, period for Early Bird registration is over and very few seats are available for enrollment. Those members who are interested in this subject are requested to enroll at the earliest. Papers at all the RRCs are meticulously planned keeping in mind CTCs tradition of giving papers on contemporary topics and best speakers. You all are requested to visit website of Chamber to get updated program list.

Recently, we have made representation to Government on issues faced by Producer Companies. We have also made representation to CBDT on issues in Capital Gains Tax. We are also in the process of preparing pre-budget memorandum wherein we will cover issues faced by tax payers and suggestions for simplification and removal of hardship faced by taxpayers. If any one of you have suggestions for the pre-budget memorandum, do send it to CTC office in couple of days. Recently CBDT has released draft of new Income Tax return form wherein they are proposing to merge all the ITR forms into 1 form. Our L&R Committee is examining the same and will surely give our feedback to the Government.

This months issue focuses on Property Redevelopment by society through another builder / developer or self-redevelopment model or joint development agreements. The issue covers implications under GST, Income Tax Act, Accounting Standards, ICDS, etc. I thank all the contributors for their timely articles and I am sure members at large will benefit from their knowledge.

I conclude with best wishes to all the readers.

Jai Hind.

PARAG S. VED
President

Sudipta Bhattacharjee
Advocate

Rishabh Prasad
Advocate

Applicability of GST on Redevelopment Rights/FSI/TDR

The concept of 'development right' is rooted in a very fundamental principle - that ownership of land carries with it a "bundle of rights". One amongst that "bundle of rights" is the right to develop the land. Over the course of the last century, transfer of 'development rights' has been utilized as a tool for city planning and de-congestion purposes. One of the earliest examples of implementation of transferring development rights, can be traced to a zoning ordinance in New York City of 1916[1]. In general, Indian municipal laws, define 'development right' to mean the right to carry out development or to develop the land or building or both[2].

Against this backdrop, we have attempted to detail the levy of GST on transfer of development rights, transferable development rights/floor space index and redevelopment rights. In Part I of this article, we have detailed the scheme or the modalities pertaining to the transfer of development right whereafter we have addressed the constitutional issues pertaining to taxation of transfer of development rights in Part II. In Parts III, IV and V, we have dealt with the legislative framework under GST laws pertaining to chargeability, applicable rate, time of supply and valuation qua the transfer of development rights.

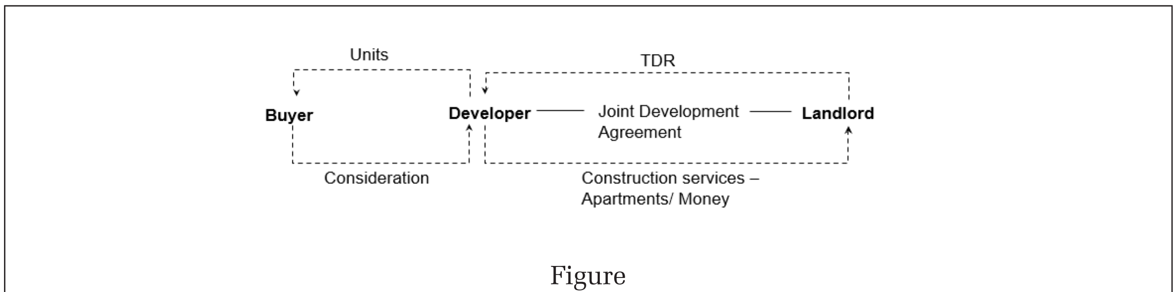
I. Modalities of transfer of development right

The transfer of development rights may happen to Government or to private parties. Where the Government is desirous of creating public amenities, building roads, etc., for public procurement activities, the Government issues transferable development right certificates (also known as floor space index) to the landlord in lieu of the privately owned land supplied by the landlord. This TDR certificate issued by the Government can

1. Transferable Development Rights, Guidelines for Implementation of TDR Tool for achieving Urban Infrastructure Transition in India, NITI Aayog.
2. See for instance, the Maharashtra Regional and Town Planning Act, 1966 and the Development Control Regulations for Greater Bombay, 1991 (the Regulations) which define `development right' as follows:
   "9A. "Development Right" means right to carry out development or to develop the land or building or both and shall include the transferable development right in the form of right to utilise the Floor Space Index of land utilizable either on the remainder of the land partially reserved for a public purpose or elsewhere, as the final Development Control Regulations

be sold or transferred for value to any other person.

For private procurement of development right, the modus operandi generally involves entering into a joint development agreement between the landlord and the developer. In lieu of the transfer of development rights, the landlord may be entitled to either a share of the apartments (area sharing) or a proportion of the consideration (revenue sharing). Under area sharing models, the developer furnishes a proportionate area of the built-up unit to the landlord whereas in a revenue sharing model, the developer compensates the landlord in cash. For ease of reference, a graphical representation of a joint development agreement involving the developer, the landlord and the buyers is detailed below:



Figure

On a perusal of the above diagram, the following transactions can be identified:

- Transfer of development rights from landowner to the developer.
- Construction service provided by developer to landowner in the form of construction of area or flats in lieu of land development rights given.
- Sale of under construction area or flats to buyers by the developer.
- Sale of under construction area or flats by the landowner to other buyers out of his own share.

In subsequent paragraphs, we have discussed the taxability, valuation, time of supply, etc. for TDR transfer by the landlord to the developer; but before that, it may be pertinent to understand the constitutional perspective in this context.

II. Constitutionality of tax on TDRs

The Constitution of Indian, 1950 (Constitution) empowers only the State Governments to impose 'taxes on land' by virtue of Entry 49 of List II of the Seventh Schedule of the Constitution. As such, the Central Government cannot impose taxes on lands. Any legislation imposing taxes by the Central Government on land would suffer from the vice of legislative incompetence to enact such laws and necessarily struck down.

The above constitutional precept was incorporated under the erstwhile service tax laws, by way of a specific exclusion for the activity of transfer of title in immovable property, from the definition of 'service' under the Finance Act, 1994[3]. However, the term

3. Section 65B (44) of the Finance Act, 1994.

'immovable property' was not specifically defined. The taxability of TDRs was the subject matter of dispute, in this background. In ***Chheda Housing Development Corporation vs. Bibijan Shaikh Farid [2007 (3) MhLJ 402]***, the Bombay High Court held that development rights being a benefit arising from the land must be held to be immovable property. This was followed in Sadoday Builders Private Limited v Joint Charity Commissioner [Writ Petition Number 4543/2010] where the Bombay High Court observed that development rights being a benefit arising from the land, must be held to be immovable property. Further, the Chandigarh bench of the Customs Excise and Service Tax Appellate Tribunal in ***DLF Commercial Projects case [2019-TIOL-1514-CESTAT-CHD]*** reiterated the aspect that TDR constitutes immovable property and is therefore not exigible to service tax.

Despite the above rulings, the Central Board of Indirect Taxes and Customs attempted to justify and continue levying service tax on TDRs, vide Circular No. 151/2/2012-ST dated 10 February 2012 (Circular). The Circular inter alia discussed various models for undertaking construction. Under the model 'tri-partite agreement', the Circular provided that in the area sharing model, the developer is providing construction services to prospective buyers as well as to the landowner. The Circular also provided that the value of construction services provided to the landlord, would the value at which the developer sells apartment to prospective buyer closest to the date of execution of the development agreement. For valuing the TDR, the authorities relied upon this Circular.

Under the goods and services tax regime, 'goods' have been defined to mean every kind of movable property, while 'services' has been expansively defined to mean anything other than goods. Further, the 'sale of land' and the 'sale of building' (other than under-construction buildings) have been specifically excluded from the ambit of GST[4]. Thus, the wider exclusion for 'immovable property' under the erstwhile service tax regime has been replaced with a more specific exclusion for 'sale of land' (and buildings, other than under-construction buildings). Hence, a conscious departure was made in the GST regime from the language used under the earlier law. Nonetheless, levy of tax on TDR has been challenged under GST too and is presently pending challenge before some High Courts on the ground that TDR being a benefit arising out of land, is akin to sale of land and thus outside the GST ambit.

III. Chargeability to tax on TDR under GST

Under the GST law, no specific provisions qua TDR taxability existed prior to 25 January 2018. For the first time, with effect from 25 January 2018, the Central Government notified that the liability to pay tax on transfer of development rights in exchange of constructed space shall be the date of transfer of possession or development right, at the time of executing a conveyance deed or a similar instrument. The notification clearly suggests the liability to pay tax on transfer of development rights. This notification was challenged before the Hon'ble Bombay High Court in a writ petition in ***Nirman Estate Developers Private Limited [2018-TIOL-2935-HC-MUMGST]***, as being ultra vires the GST laws since the same purported to levy GST on TDRs which are in the nature of land. However, the said writ petition was subsequently withdrawn. On the other hand,

4. Entry 5, Schedule III of the Central Goods and Services Tax Act, 2017.

several rulings of the Authorities for Advance Ruling in various states under GST have held that GST is applicable on the transfer of development rights[5].

However, it is noteworthy that the machinery provisions for ascertaining the value of transfer of development rights, were introduced only with effect from 1 April 2019[6]. This fact assumes significance since the transfer of development right usually envisages two separate supplies i.e.:-

a. A (Landowner) supplies Development Rights to B (Developer) – Tranche 1;

b. B (Developer) supplies 'construction services' to B (Landowner) in consideration of the above supply of Development rights – Tranche 2.

The levy of GST is attracted on both the above-mentioned tranches. So, for a singular transaction of TDR, dual GST consequences apply – once on the transfer from the landlord to the developer; and second, on the construction services rendered by the developer to landlord.

In other words, both the transfer of development rights and construction services are a 'supply' as well as a 'consideration'. From the landlord's perspective, the transfer of development rights, is a supply of service. On the other hand, for the developer it is a 'consideration' for the supply of construction services by the developer to the landlord.

This can be problematic, conceptually. Even if both tranches of this transaction are treated as two legs of a barter transaction, both legs cannot simultaneously qualify as 'supply' as well as 'consideration'. Levy of GST can only be on a supply for a consideration (with some exceptions which do not apply vis a vis the present transaction) – thus, arguably, this levy may be vulnerable to a legal/constitutional challenge on this ground of vagueness too. The problem is compounded since, for the transfer of development right in the period before 1 April 2019 even the machinery/valuation provisions were not in place. In the absence of machinery provisions identifying a 'consideration' for the two-way supplies of the present nature, it may be possible to contend that the levy of GST on TDR fails[7].

IV. Rate of tax and time of supply

As noted supra, with effect from 1 April 2019, GST is liable to be paid on the transfer of development rights by the developer under reverse charge[8]. Thus, with effect from 1 April 2019 GST at 18% is leviable on transfer of development rights in respect of – (a) commercial apartments; and (b) unbooked residential apartments as on date of issue of completion certificate/occupancy certificate or first occupation of the project.

Prior to 1 April 2019, the landlord was liable to pay GST at 18% on TDR (both commercial and residential) to the developers.

5. *Vilas Chandanmal Gandhi, In re [2020] 114 taxmann.com 239 (AAR) – affirmed in Vilas Chandanmal Gandhi, In re [2020] 120 taxmann.com 83 (AAAR – Maharashtra); Maarq Spaces P Ltd., In re (2020) 78 GST 25 = 111 taxmann.com 368 (AAR – Karnataka).* – confirmed in appeal in *Maarq Spaces P Ltd. In re (2020) 81 GST 192 = 116 taxmann.com 702 (AAAR-Karnataka).*

6. See Part III of the present Article.

7. It is a well settled position in law that no tax can be levied in the absence of machinery provisions effectuating the levy. (See, for instance - *CIT vs. B.C. Srinivasa Setty — (1981) 2 SCC 460; CCE Kerala vs. Larsen & Toubro Ltd.*

8. Notification No. 4/2019-Central Tax (Rate), dated 29th March 2019 amending Notification No. 12/2017-Central Tax (Rate)

If development rights were transferred prior to 1 April 2019, reverse charge does not apply even if consideration for the same, in cash or kind, is received after 1 April 2019[9]. In case the landlord was unregistered, there was no requirement to pay GST.

The developer is entitled to input tax credit of GST paid on TDR for commercial units in real estate project (REP). But no input tax credit is available to the developer for GST levy on TDR used in commercial units in residential real estate project (RREP). It is worthwhile to note that commercial units in RREP are treated at par with residential units for output tax purpose – i. e. the rate of GST is 5% without ITC.

Exemption from levy of GST on transfer of development rights for residential apartments

With effect from 1 April 2019 an exemption has been carved out for levy of GST on TDR in cases of residential apartments. As per Entry No. 41A inserted by Notification No. 4/2019- CT (Rate) dated 29 March 2019 where TDR is supplied for construction of residential apartment, then levy of GST on TDR is exempt. The same has been reproduced here under:

"Service by way of transfer of development rights (herein refer TDR) on or after 1st April, 2019 for construction of residential apartments by a promoter in a project, intended for sale to a buyer, wholly or partly, except where the entire consideration has been received after issuance of completion certificate, where required, by the competent authority or after its first occupation, whichever is earlier.

The amount of GST exemption available for construction of residential apartments in the project under this notification shall be calculated as under:

[GST payable on TDR for construction of the project]x (carpet area of the residential apartments in the project ÷ Total carpet area of the residential and commercial apartments in the project)"

Therefore, in case of residential apartments, GST on TDR, is leviable where the consideration is received after issuance of completion certificate or after its first occupation.

As the next step, GST payable by promoter is to be computed on un-booked residential apartments in the following manner:

GST payable on TDR for construction of the residential apartments in the project but for the exemption contained herein] x (carpet area of the residential apartments in the project which remain un-booked on the date of issuance of completion certificate or first occupation ÷ Total carpet area of the residential apartments in the project

Further, a cap on the upper limit of tax on transfer of development rights has also been imposed - tax payable by the developer under reverse charge mechanism shall not exceed: 1% of the value, in case of affordable residential apartments; and 5% of the value, in case of residential apartments other than affordable residential apartments remaining un-booked on issuance of completion certificate/first occupation.

9. FAQ (Part I) No. 38 issued by CBI&C vide circular F No. 354/32/2019-TRU dated 7-5-2019.

Time of supply

In cases where the joint development agreement entered on or after 1 April 2019, the point of payment of tax would arise as on the date of obtaining the completion certificate or on the first occupation[10]. Where the joint development agreements are entered before 31 March 2019, the time of supply shall be at the time when the said developer transfers possession or the right in the constructed complex by entering into a conveyance deed or similar instrument (for example allotment letter)[11].

V. Value of development rights

Our analysis in this segment is confined to the valuation of TDR supplied by the landlord to the developer. The methodology for valuation of development rights for area sharing agreements, was introduced with effect from 1 April 2019, vide notification number 4/2019-Central Tax (rate) dated 29 March 2019. As per Para 1A inserted by the said notification, the value of TDR services is to be computed in the following terms:

1A. Value of supply of service by way of transfer of development rights or 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.

On a reading of the above provision, the following points can be gleaned:

a. The valuation methodology has been prescribed for both residential and commercial apartments;

b. The deemed value is not restricted to the value of similar apartment in the project charged by the promoter. Thereby, sale value of similar apartments in any other project can also be considered;

c. No express deduction given for the land value included in such first sale value;

A sample illustration demonstrating the levy of GST on transfer of development right in an affordable housing project is exposited below, for ease of understanding[12]:

1	Total Flats (“I”)	20
2	Flats given to landlord - (“II”)	9
3	Flats retained by Developer - (“III”)	11
4	Market Value of apartments on date of Transfer of Dev. Right – (“IV”)	1.25 Crore
5	Carpet-area of 1 flat (25,000sq.ft/ 20) – (“ V”)	1250 sq. ft.

10. Notification No.06/2019 dated 29.03.2019
11. Notification No.04/2018 dated 25.01.2018
12. Chapter 24 – Works Contract & Implications on Real Estate, Taxmann’s GST on Works Contract & Other Construction Contract, Sudipta Bhattacharjee & Others.

6	Apartments unbooked on date of issuance of CC – ("VI")	5
7	Market Value of unsold apartment on date of issuance of CC – ("VII")	1.50 crores
8	Value of TDR – "VIII" (II * IV)	11.25 crores
9	Total Carpet Area of Unbooked apartments – "IX" (VI * V)	6250 sq. ft.
10	GST on TDR – "X (18%*VIII*IX/25000)	0.50625 crore
11	Alternate GST threshold – "XI" (5%*VII)	0.375 crore
12	GST to be paid on TDR (Lower of X or XI)	0.375 crores

The valuation methodology raises significant questions. In so far as it allows sale value from any project to be referred for ascertaining the value of TDR, it appears unreasonable. Where no two projects are similar, as each project would have significant differences vis a vis location, size, amenities, etc. Thus, to this extent, the notification may be susceptible to challenge before writ courts as being unreasonable and arbitrary.

That apart, the notification does not prescribe a specific deduction for land from the sale value of similar apartments. In other words, the notification tantamounts to imposing GST on the value of land. Support can be drawn from the Gujarat High Court decision in ***Munjaal Manishbhai Bhatt vs. Union of India [R/Special Civil Application Number 1350 of 2021***] where mandatory deeming fiction of 1/3rd deduction for value of land in under-construction real estate transactions under GST as ultra vires and unconstitutional and the said provision was read down as optional. Under these circumstances, the legislative competence to levy GST on land provides a further ground of challenge to the aforesaid notification.

Thirdly, the notification is completely silent in cases where the developer is intending to only lease and not sell even a single apartment. In such scenarios, no valuation methodology has even been prescribed where there is no sale of the apartments made by the Developer.

Conclusion

On a detailed review of the legislative scheme under GST pertaining to taxation of transfer of development rights, it is apparent that the same is highly technical and complex – the framework is nuanced, and a patchwork of difficult legislative drafting has complicated the field.

Further, issues pertaining to transfer of development rights being akin to land and thus not the subject matter of GST, dual supplies, and the absence of consideration as also vague valuation provisions for ascertaining the value of transfer of development rights, continue to remain open and are likely to witness long drawn battles before the courts.

Nishant Shah
Advocate

Varun Parmar
Advocate

Rushil Shah
Advocate

Redevelopment of Co-operative Housing Societies - GST Implications

After the two years slow down due to COVID-19 pandemic, there is again growth in the real estate sector in India. Redevelopment projects are highly prevalent especially in metros and other large cities during this growth phase.

Post the introduction of Goods and Services Tax (**"GST"**) in 2017, the implications for the real estate sector have been dynamic and have continuously undergone change with the evolution of understanding of the nature of transactions including sub-transactions of certain large real estate projects. The tax authorities have been proactive in coming out with clarifications, notifications and amendments where required in a prompt and effective manner. The taxation of real estate sector has undergone significant change from a GST perspective effective from 1 April 2019. As GST is not applicable on transactions relating to sale of immovable property and input tax credit is also restricted in case of real estate development projects, the need to effectively analyse the impact of GST on transactions of redevelopment of co-operative housing societies (**"Redevelopment Project"**) gains further significance as optimisation of GST facilitates the overall cost of the Redevelopment Project. This article attempts to evaluate GST implications on execution of Redevelopment Project for a co-operative housing society.

It is important at the first instance to understand the key stakeholders in case of a Redevelopment Project:

a. Society members (**"Existing Members"**): These are the existing members of the co-operative housing societies who own the flats in the existing building premises.

b. Housing society: This is the statutorily formed co-operative housing society of which the Existing Members are shareholders. Such societies are formed under the laws applicable in the respective State in which the premises/ building is located. In certain states, the society is replaced by a condominium in which ownership of individual units is considered as owning of proportionate share in the overall premises including land thereof.

c. **Promoter Developer ("Promoter")**: The real estate developer with whom the society or members contractually agree to redevelop the existing premises/ building.

d. New Buyers: These are the persons who would be purchasing "additional saleable flats/units" that become

available in the hands of the developer upon redevelopment of the premises.

A. Redevelopment of Housing Society - Transaction Structure

As we proceed to analyse the GST implications of transaction relating to Redevelopment Project it is important to understand the transaction structure and the role of each stakeholder in this structure.

From the society's perspective the redevelopment results in coming into existence of a new premise for the existing members and in certain cases some additional area for the members. From the Promoter's perspective, the redevelopment would result in additional space becoming available for outright sale to new flat buyers.

Nature of Sub-Transactions in a Redevelopment Project

i. The initiation of the entire transaction is through the execution of a redevelopment agreement which results in the transfer of development rights by the society (on behalf of its members) to the Promoter. Alternatively, in case of a condominium such agreement would be an agreement between the members and Promoter.

ii. The other aspect of the development agreement is the supply by the Promoter to the existing members with one or more of the following:

   a. Newly constructed flats of the same area or higher area.

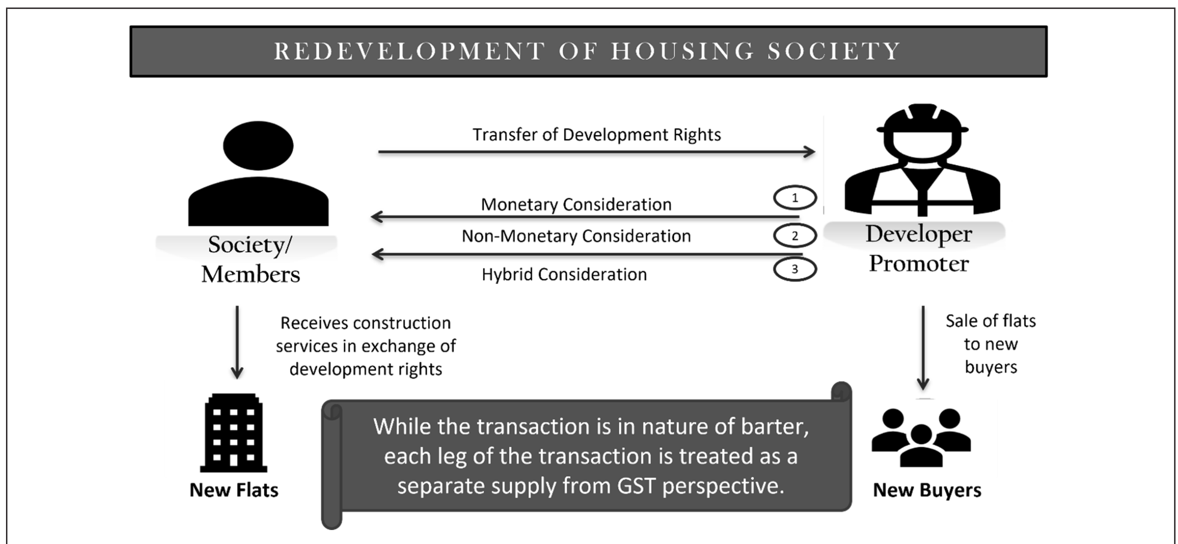
   b. Car parking space in the building.

   c. Rental charges/Hardship allowance for the period of displacement when the old premises is demolished till the new premises is handed over to the society/its members.

   d. Corpus of funds to the society/ members.

iii. The third aspect of the redevelopment agreement is the sale of additional space available with the developer on out-right basis to New Buyers.

The above transaction is depicted in the form of a diagram hereunder:



B. Legal Framework

As we proceed to analyse the GST implications on a Redevelopment Project, it is important that we understand the legislative framework applicable to such transactions.

1. Co-operative Societies Act/Law relating to Condominiums

States which have a legislative framework regulating housing societies, generally contain provisions dealing with redevelopment of such societies. For instance, Section 79A of The Maharashtra Co-operative Societies Act, 1960 ("**MCSA**") empowers the authority to come out with regulations for determining the manner in which the Redevelopment Project should be carried out. In this regard the Government Resolution dated 4th July 2019 has been issued by the relevant authority in Maharashtra.

2. GST Law

Various provisions under the GST Legislations relating (i) to supply, (ii) time of supply, (iii) value thereof, etc. get triggered in case of a Redevelopment Project. Considering that a contract for redevelopment to a certain extent is in the nature of a barter transaction, the determination of these aspects for the purpose of levying GST become even further complicated. Keeping in mind these complications and to avoid ambiguity in determination of GST liability, the CBIC has issued a series of notifications dealing with transactions that entail transfer of development rights to the Promoter and provision of built-up area to the transferor of such development rights. A list of these notifications is set out as under:

Notification No.	Description
03/2019-Central Tax (Rate) [Amends the rate notification 11/2017-Central Tax (Rate)]	The notification prescribes the rate of GST in respect of construction of residential/commercial apartments and also provides for mechanism to value construction service, when provided against transfer of development rights.
04/2019-Central Tax (Rate) [Amends the exemption notification 12/2017-Central Tax (Rate)]	This notification exempts supply of service provided by way of transfer of development rights for construction of residential apartments in respect of which entire/part consideration has been received before the issuance of completion certificate or first occupancy. The notification also provides for the mechanism to value development rights in certain situations.
05/2019-Central Tax (Rate) [Amends the Reverse Charge Notification 13/2017-Central Tax (Rate)].	This notification provides for taxability in respect of service provided by way of transfer of development rights on reverse charge basis, in terms of which liability to pay tax has been cast upon the Promoter.
06/2019-Central Tax (Rate)	This Notification inter alia provides for: i) The Promoter to be the registered person to pay tax on supply of development rights and on the construction services against such development rights, ii) time when tax is to be paid in respect of services mentioned in i) above.

Each of the above notifications and other relevant provisions as applicable to the transaction of redevelopment have been referred to and dealt with in the analysis carried out hereunder for ease of reference.

Legal controversies surrounding deemed valuation

Divergent from the normal process of valuation as set out under Section 15 of CGST Act, the valuation in relation to various aspects in case of Redevelopment Project is governed by specific valuation methodology provided by notifications issued in this regard *viz*. 11/2017-Central Tax (Rate) and 12/2017-Central Tax (Rate).

One may argue the GST Council's free handedness in prescribing different valuation methodology that are quite divergent from the legislative mandate contained in Section 15. This in turn brings into question the GST Council's powers to recommend and the Central Government's power to legislate such valuation methodologies under the GST law.

Section 15(5) of CGST Act, however, provides that notwithstanding the general valuation provisions, value of certain notified supplies shall have to be determined in the manner prescribed by the Government on the recommendation of GST Council. The above Notifications have inter alia been issued under the said Section 15(5) to provide for deemed valuation provisions for the transactions of the nature as described above.

It is however pertinent to note that the word 'prescribed' is defined under Section 2(87) of CGST Act to mean "prescribed by rules". Accordingly, it may be argued that the Notifications insofar as they prescribed deemed values for certain supplies are ultra vires the CGST Act. This aspect has been dealt with in a recent decision of the Hon'ble Gujarat High Court[1].

Implications under GST

Having understood the nature of transaction and the legal framework applicable to such transactions, we now proceed to evaluate the implications under GST law on the various sub-transactions (as discussed in Para A above) of a Redevelopment Project.

C. Implications on Transfer of Development Rights

The subject of "development rights" has been a matter of controversy over last few years and therefore for a better understanding of the concept of development rights it is important that we track the evolution of the understanding of this concept through the Service Tax regime before proceeding to analyse its implication under GST.

Transfer of Development Rights Pre-GST

The term 'development rights' had not been defined under the Finance Act, 1994 ("Finance Act"). The development rights are nothing but rights arising out of land which is per se an immovable property.

In a plethora of decision[2], a view has been upheld that right associated with an immovable property partakes the nature of an immovable property.

1. *Munjaal Manishbhai Bhatt vs. UOI [2022 (5) TMI 397 – Gujarat High Court]*
2. *Chheda Housing Development Corporation vs. Bibijan Shaikh Farid [MANU/MH/0070/2007]; State of Orissa vs. Titaghur Paper Mills Co. Ltd [MANU/SC/0325/1985]; Sadoday Builders Private Limited vs. Joint Charity Commissioner [WP No 4543/2010]*

In light of the judicial precedents (relating to the service tax regime), it could be said that the development rights being rights arising out of land, are akin to an immovable property and hence were outside the scope of the definition of 'Service' under Service Tax.

Transfer of Development Rights - Impact under GST

The definition of 'services' as given in the Central Goods and Services Tax Act (**"CGST Act"**) is very wide and covers all things which do not classify as 'goods', unless specifically excluded. 'Goods' have been defined to mean every kind of movable property. Therefore, development rights being rights associated with land would not qualify as 'goods' and would qualify instead as a 'service'. Further, in terms of Schedule III of the CGST Act , sale of land is neither treated as goods nor services. However, since the development rights are rights arising out of land and not per se land, the transfer of the same is not within the ambit of Schedule III under 'sale of land' and therefore liable to GST, unless specifically exempt. Consequently, transfer of development rights by society would qualify as a supply of service which would be liable to GST unless specifically exempt.

Levy of GST

Having concluded that transfer of development rights is liable to GST, let us now analyze how this levy operates. Notification No. 04/2019 Central Tax (Rate) dated 29.03.2019 (**'Notification No. 04/2019'**) notified that the services by way of transfer of development rights on or after 1 April 2019 will be exempt from levy of GST, subject to fulfilment of all the following conditions –

i Development rights should have been transferred on or after 1 April 2019

ii Such development rights should be used for the construction of residential units by a Promoter

iii Units in the project should be intended for sale to a buyer whether wholly or partly and

iv Such units should be sold prior to receipt of completion certificate/first occupation in the project.

Let us examine the GST implications in the following scenarios.

Scenario I – Residential Project

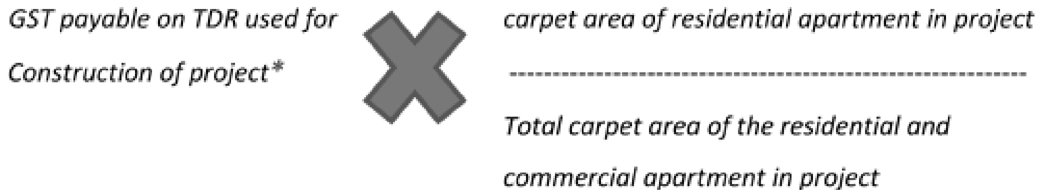
Where development rights are being transferred by the society after 1 April 2019 and where the project is a residential real estate project wherein all the units (including additional units) are residential units which, apart from being provided to existing members of the society, will also be marketed and sold to independent buyer, the transfer of development rights will be exempt from levy of GST in terms of Notification 04/2019, subject to the said residential units being sold prior to receipt of completion certificate/first occupation.

Scenario II – Mix Development (Residential + Commercial Units)

The exemption from levy of GST on transfer of development rights does not mandatorily require a project to be a 100% residential project. The exemption will not be available to the extent development rights are used for construction of commercial units. Therefore, in a mixed development project, proportionate exemption will be available to the extent the development rights are used for construction of residential units.

The manner of determination of the amount which would be exempt from the levy of GST on transfer of development rights prescribed under Notification No. 04/2019 is set out below.

The amount of GST exemption available for the construction of residential apartments in the project shall be calculated as under:



Payment of GST under reverse charge [Notification No. 05/2019 Central Tax (Rate) dated 29.03.2019 ('Notification No.05/2019')

The exemption from levy of GST on transfer of development rights is not absolute but conditional upon the fulfilment of the conditions prescribed under Notification No.04/2019. The scenario in which development rights will be liable to GST are set out below –

i Development rights used for construction of commercial units in a project;

ii Development rights attributable towards residential units that remain unsold on the date of receipt of completion certificate/first occupation.

The Government also amended the Notification No. 13/2017 – Central Tax (Rate) dated 28.06.2017 (**"Reverse Charge Notification"**) to include the transfer of development rights under reverse charge mechanism. Therefore, in a scenario where the transaction becomes liable to GST, the recipient (i.e. the Promoter) will be liable to pay GST.

Applicable Rate of GST

Notification No. 11/2017-Central Tax (Rate) dated 28.06.2017 (as amended) [**'Rate Notification'**] specifies the SAC Code for different services and the applicable rate qua each SAC Code. The Government has issued a compilation of FAQs on Real Estate Sector (**FAQs**) vide F.No.354/32/2019- TRU dated 07.05.2019 wherein in the reply to Q 7 it is clarified that GST on transfer of development rights gets covered under HSN Code 9972 for Real Estate services [Sr. No. 16(iii) of the Rate Notification] on which the applicable rate of GST is 18%. Even if it is considered that transfer of development rights does not get covered under the said entry of the Rate Notification, since the transaction is not specifically covered under any other entries, it will fall under the residuary category liable to 18% GST. Hence, the applicable GST rate on supply of service of transfer of development rights will be 18%. It is however important to note that while the rate of GST is 18%, in terms of Notification no. 04/2019, the liability in case development rights used for construction of residential units has been capped at 5% of the value of a similar flat at the time of receipt of completion certificate/ first occupation. GST is capped at the applicable rate of 1% (instead of 5%) of the value in case of affordable residential units.

Time of Supply [Notification No 06/2019 - Central Tax (Rate) dated 29.03.2019] ('Notification No. 06/2019')

Since the service of granting of development rights may be held liable to GST and therefore it becomes imperative to evaluate the time of supply for payment of tax by the Promoter under reverse charge.

1. For transfer in lieu of constructed area

The time of supply where the development rights have been transferred in lieu of constructed area to Existing Members, is required to be determined independently for the following –

i. Development rights used for construction of residential units which remain unsold at the time of receipt of completion certificate/first occupation:

Notification No. 06/2019 prescribes that the liability to pay tax in respect of the amount attributable towards the development rights used for construction of residential units remaining unsold, shall be in a tax period not later than the tax period in which the completion certificate is issued or the date first occupation falls, whichever is earlier.

ii. Development rights used for commercial units

Similar to the residential unit, the liability to pay tax on the development rights used for construction of commercial units, has been prescribed to be in a tax period not later than the tax period in which the completion certificate is issued or the date first occupation falls, whichever is earlier.

2. For transfer in lieu of monetary consideration

In case of monetary consideration paid for transfer of development rights, following is the time of supply applicable in both scenarios:

i. Residential units which remain unsold at the time of receipt of completion certificate/first occupation

In terms of Notification No. 06/2019 wherein the liability to pay tax arises in respect of the amount attributable towards the development rights used for construction of units remaining unsold, has been prescribed to be in a tax period not later than the tax period in which the completion certificate is issued or the date first occupation falls, whichever is earlier.

ii. Commercial Units

Where the development rights have been transferred in lieu of revenue share or monetary consideration where tax invoice has not been issued, the liability to pay tax in respect of the amount attributable towards the development rights used for construction of commercial units, shall be the date of provision of services i.e. date of transfer of the development rights. This is substantiated by Question 14 of FAQ [F.No. 354/32/2019-TRU], dated 07.05.2019.

In case of supplies in respect of which tax is paid or liable to be paid on reverse charge basis, the time of supply is provided under Section 13(3) of the CGST Act. In terms of Section 13(3) of the CGST Act, where the development rights have been transferred in lieu of monetary consideration and invoice is issued, the time of supply of service shall be the date immediately following sixty days from the date of issue of invoice or the date of payment, whichever is earlier.

Valuation

Another important aspect while determining GST levy in case of a Redevelopment Project is the determination of value

1. ***For transfer of development rights in lieu of constructed area***

Section 15 of the CGST Act provides that the value of the service will be the transaction value i.e. the price paid or payable for the said supply. In order to determine the value of supplies where the consideration is not solely in money terms, the value will be arrived based on the method prescribed under Chapter IV of CGST Rules titled "Determination of Value of Supply" (**"Valuation Rules"**). Rule 27 of CGST Rules provides for the methodologies to arrive at the value of the service in case the consideration is not wholly in money.

However, in terms of power given under Section 15(5) of the CGST Act, the Government has, vide Notification No. 04/2019, notified the methodology to be adopted for determining the value of development rights, more particularly described in the scenarios set out hereinafter:

i. *Residential units which remain unsold at the time of receipt of completion certificate/first occupation*

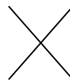
Where the transfer of development rights is for consideration in the form of constructed area, the value of development rights has been deemed to be equal to the value of similar units in the Project charged by the Promoter to the independent buyers nearest to the date on which the development rights is transferred to the Promoter.

It may be pertinent to note that the above-mentioned methodology will compute the value of the entire development rights transferred to the Promoter and used in the Project. However, the GST liability shall be restricted to the extent of development rights attributable towards residential units remaining unsold at the time of receipt of completion certificate/first occupation.

The Entry 41A of the Exemption Notification prescribes the method for computation of GST liability to be paid by the Promoter under reverse charge mechanism on development rights attributable towards residential units remaining unsold on the date of receipt of completion certificate/first occupation shall be calculated in the following manner:

The amount of GST which the promoter would be liable to pay under reverse charge mechanism

Amount of GST payable on TDR for construction of the residential apartments in project



carpet area of residential apartment in project which remain un-booked on the date of issuance of completion certificate

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Total carpet area of residential apartments In the Project

As mentioned earlier, the Government has capped the maximum lability to be discharged by the Promoter in respect of residential units remaining unsold in the Project on the date of receipt of completion certificate/first occupation. In terms of the second proviso of Entry 41A of the Exemption Notification, the amount of tax payable shall not exceed 5%/1%[3] of the value in case of residential units remaining un-booked on the date of issuance of the completion certificate.

ii. *Commercial units in the Project*

The exemption benefit is not available for development rights used in the construction of the commercial units in a project. Accordingly, the entire value of development rights attributable towards commercial area shall be the value on which GST is payable.

iii. *Mix Development*

The total value on which GST will be payable will be the combined value as computed in (i) and (ii) above. However, it may be pertinent to note that the capping on GST liability will be applicable only for residential units remaining unsold in the mixed development project and not for commercial project.

2. *For transfer in lieu of monetary consideration*

In terms of Section 15(1) of the CGST Act, the value of supply of development rights shall be the transaction value, which is the price actually paid or payable for the said supply.

Other monetary consideration such as hardship allowance, corpus fund, rent etc.

Other consideration such as Hardship allowance, Corpus Fund, Rent etc. may be paid by the Promoter to the Society/Landowner as part of consideration towards the development rights transferred in favour of the Promoter.

Where the transfer of development rights is considered as a supply, then, other monetary consideration should also be added to the valuation for the purpose of computing the GST liability. The reason to add other monetary consideration for calculation as part of overall consideration is that notwithstanding the terminology used to explain such payments, the nature of transaction is akin to a mix consideration which involves consideration in the form of constructed units as well as other monetary consideration.

Thus, against the transfer of development rights, the consideration is paid by the Promoter in two-fold i.e. constructed units and other monetary consideration. This being the case, the value of both these elements must be considered for determining the value of development rights.

3. The concessional rate of 1.5% GST [Effective tax rate of 1%] has been extended in respect of residential units in a RREP as well as REP other than RREP, subject to fulfillment of the following conditions:
   (i) Carpet area of the affordable residential unit should be upto 60 sq. m. in metropolitan cities or 90 sq. m. otherwise; and
   (ii) The gross amount charged for the unit should not be more than Rs. 45 lakhs.

It may however be pertinent to note that the valuation mechanism specified in Notification 04/2019 provides that value of service by way of transfer of development rights against consideration in the form of residential or commercial units shall be deemed to be equal to the value of similar units sold to independent buyers. Therefore, one may argue that the GST Law has already prescribed a deemed value for development rights and therefore other monetary consideration are not required to be added to such deemed value.

D. Construction Services in Relation to Units Handed Over to Existing Members

Since the transaction of Redevelopment Project is a barter transaction it is also important to decipher the GST implications in relation to the construction services provided by the Promoter. Typically, GST payable on such construction services is factored by the Promoter in the total cost of executing the Redevelopment Project and discharged, whether such GST is separately collected or not from the existing members.

Applicable Rate of GST

As per Notification No.03/2019- Central Tax (Rate), Dated 29.03.2019 ('Notification 3/2019'), the effective applicable rate of GST in respect of constructed units handed over post 1 April 2019, will be as follows –

a) Residential Real Estate Project ('RREP') – A project wherein the commercial area is not more than 15 per cent of the total carpet area is being defined as RREP. In such project the applicable GST Rate for the units handed over to Society/ Landowner will be 5%/1% for residential units and 5% for commercial units.

b) Real Estate Project ('REP') other than RREP - A project in which the commercial area is more than 15% of the total carpet area is a REP other than RREP. The applicable rate of GST will be 5%/1%[4] for residential unit and 12% for commercial unit.

Time of Supply

In this regard, it may be pertinent to refer to Notification No. 06/2019 wherein the liability to pay tax in respect of the construction service provided to the Society has been prescribed to be any time upto the date of issuance of the completion certificate for the project, or the date of its first occupation, whichever is earlier.

Valuation

Vide Notification No.03/2019, paragraph 2A has been inserted in the Rate Notification which provides the valuation mechanism of the construction services being provided to the registered person transferring the development rights to the Promoter. In terms of Paragraph 2A, the value of construction service in respect of the units to be handed over to the Society shall be deemed to be equal to the value of the similar units in the project sold nearest to the date of transfer of development rights after deducting 1/3rd of the total amount charged for the unit towards land.

4. Refer Foot Note 3 above.

Input Tax Credit

In terms of Notification 03/2019, the Promoter will not be eligible to avail the input tax credit of GST paid in respect of goods and services procured for the construction of a RREP Project. However, it may be pertinent to note that in case the project qualifies as a REP other than RREP then the Promoter shall be allowed to avail proportionate credit to the extent of commercial area in such project.

E. Constructed Units Sold to New Buyers

1. Where consideration is received by Promoter prior to receipt of completion certificate or first occupation whichever is earlier

In terms of entry 5(b) of Schedule II to CGST Act, construction of building intended for sale to a buyer except where the entire consideration has been received after issuance of completion certificate or after its first occupation whichever is earlier is treated as supply of services under the GST. Therefore, sale of unit to New Buyer before receipt of completion certificate or first occupation shall be chargeable to GST.

Applicable Rate of GST

As stated in Para D above.

Time of Supply

As per provision of Section 13 of CGST Act i.e. at the time receipt of consideration or issuance of invoice whichever is earlier

Valuation

Section 15 of the CGST Act provides that the value of service will be the transaction value i.e. the price paid or payable for the said supply. Further, as per Notification 11/2017, the value of transfer of land or undivided share of land, in such construction services shall be deemed to be one third of the total amount charged for such supply. Therefore, GST shall be applicable on 1/3rd value of total consideration charged for sale of units to New Buyers.

Input Tax Credit

As stated in Para D above.

2. Where consideration is received by Promoter after the receipt of completion certificate or first occupation whichever is earlier

In terms of Schedule III entry 5 sale of building is neither supply of goods nor supply of services (subject to entry 5(b) of Schedule II). Therefore, sale of units/flats post completion certificate or first occupation shall not be subjected to GST.

Conclusion

Each real estate project would have its own nuances and therefore requires in depth analysis of the facts on hand to derive the applicability of GST provisions. The taxation of real estate under GST is a complex issue, however the authorities have tried to iron out the complexities by issuing clarification and amendment from time to time. The trick in determining the GST liability in case of Redevelopment Project lies in properly analysing the various aspects thereof and thereafter one also needs to be diligent while applying the rate of tax, payment of tax, valuation, availment of ITC in order to be in compliance with the law. This also gives avenue to the taxpayers to structure and optimise the input tax credit wherever applicable.

CA Sushil Solanki CA Abhishek Deodhar

GST implications on Self-Redevelopment by Housing Society & Redevelopment by Land Owner for Tenanted Buildings

Major cities in India face the problem of redeveloping old and dilapidated buildings. Mumbai, along with other big cities, has a large number of residential buildings wherein multiple units are given on rent and neither the land owner nor the tenants are able to repair these old buildings. One of the categories of these structures are known as "**cessed**" buildings in Maharashtra. A building is categorised as "cessed" where cess was paid by the tenants to the Maharashtra Housing and Area Development Authority ('**MHADA**') under the provisions of the Maharashtra Housing and Area Development Authority Act, 1976 ('**MHADA Act**'). Under the said Maharashtra Act, it is MHADA's responsibility to repair and maintain the cessed premises as they are the authority that collects cess from tenants. Considering the large number of cessed properties requiring major repair and renovation in Mumbai, MHADA was unable to undertake such activities as it involved substantial investment. Therefore, the Government of Maharashtra came up with a scheme, under which land owners and housing societies were given incentive in the form of extra Floor Space Index or FSI (hereinafter referred to as '**incentive FSI**') which could be expoited by constructing and selling the flats to new buyers. In lieu of this incentive, the land owner was obligated to construct a new building in place of the deteriorating structure and hand over the new flats/shops to tenants. This incentive scheme is contained in Regulation 33(7) read with Appendix III of the Development Control Regulations ("**DCR**") issued by the Urban Development Department of the Government of Maharashtra (hereinafter referred to as '**Regulation 33(7)**').

In practice, the land owner may appoint a developer or assign him the development rights for redeveloping the structures. In this model, the developer becomes eligible for incentive FSI and is obligated to give new flats to the old tenants. In this article, the term land owner has been used for the sake of convenience.

Provisions of Rent Control Acts

For the purposes of this article, the provisions of the rent control legislations across the country are particularly important. The tenancy arrangement in Mumbai was governed by the erstwhile Bombay Rent Control Act, 1947, which was replaced by Maharashtra Rent Control Act, 1999. As per the said enactments, the tenants enjoyed right of continued tenancy on payment of regular rent. In other words, they were protected against unfair eviction. As per such rent control legislations, a tenant has the right of continuous possession and even after renovation or reconstruction of old/dilapidated building, a tenant was required to be given

a flat in the new building. The effect of this provision was that a tenant had perpetual possessory rights in the tenement. One of the reasons for bringing out the incentive scheme under Regulation 33(7) of the DCR was that in a congested city like Mumbai, a house on ownership basis could be provided to tenants free of cost, which he will be responsible for further maintenance without any burden on the owner or the Government. At the same time, land owner or societies were induced to undertake redevelopment as they were offered incentive in the form of extra FSI rights which they could avail by constructing and selling flats to buyers. Accordingly, all parties were incentivised in one form or another to go ahead with redevelopment schemes.

Nature of consideration received by the land owner for free supply of flats to tenants

As per the redevelopment scheme discussed above, a land owner is obligated to construct and handover the new flat to the old tenants free of charge. In most cases, there is an obligation to convey undivided land rights along with the said flat also. On the face of it, it appears that there is no monetary consideration being received by the land owner. However, upon going through the redevelopment scheme under Regulation 33(7) of the DCR, it is abundantly clear that the land owner receives non-monetary consideration in the form of additional FSI or incentive FSI. It is interesting to note that the said non-monetary consideration is converted into a monetary consideration by the land owner on sale of new flats constructed using incentive FSI out of free sale area to the new buyers. Therefore, the land owner is receiving the consideration in the form of incentive FSI for free supply of flats to tenants.

Chargeability of GST for flats given free of cost to tenants

As discussed above, the developer is receiving non-monetary consideration in the form of incentive FSI and therefore, the activity of construction and giving the flats free of cost to tenants falls within the ambit of "supply" as defined under the CGST Act. This is because there is supply of construction service against the consideration of incentive FSI. As far as the point of taxation for the supply of free flats is concerned, the same is governed by provisions of Notification No. 6/2019-Central Tax (Rate) dated 29.03.2019, as amended, which provides that liability to pay tax in such cases shall arise in a tax period **not later** than the tax period in which the date of issuance of the Completion Certificate for the project or the date of its first occupation, whichever is earlier, falls. It is relevant to note that in the erstwhile Service Tax regime, there was no clarity about the time of payment of Service Tax for such cases as the circulars issued by the CBIC and even the Education Guide were ambiguous and vague on this issue. It is important to note that GST can be paid even prior to issue of Completion Certificate because under the same Notification, the same developer is also required to pay GST on reverse charge basis for the development rights or additional FSI supplied by land owner. Therefore, by using the tax credit of the GST paid on reverse charge basis, he can use the same for payment of his output liability for the construction services provided by him to the tenants.

Nature of service – Works Contract or Construction service

At this stage, it is necessary to examine the exact nature of services provided by the land owner to the tenants. Prima facie, it may appear that the developer is providing construction services relating to construction of residential apartments. Notification No.11/2017-Central Tax (Rate) provides rate for services relating to the construction of residential apartments. Paragraph 2 of the said Notification provides that where such services involve transfer of land or undivided share of land, in that case the value of such

services should include the value of the land or undivided share of land, as the case may be and value of land shall be deemed to be one third of the total amount charged for the said flat.

In this regard, it is also necessary to understand the provisions of the Maharashtra Rent Control Act (as discussed above) which provides that a tenant cannot be evicted as long as he is paying the rent and therefore, tenancy rights are perpetually vested with him. The tenancy rights are valuable rights because as per the provisions of the Maharashtra Rent Control Act, on transfer of tenancy rights, the outgoing tenant is legally eligible to receive the value for transfer of tenancy rights. Therefore, effectively the tenancy rights are in the nature of land rights which are already vested with the tenants. By giving new flats to the tenant, the land owner is not providing construction services involving transfer of land rights as these rights are already with tenant, hence, the land owner is providing only **Works Contract Service** on the land in possession of the tenants which could not have been taken possession by the landlord in view of provisions of Maharashtra Rent Control Act. Therefore, in the views of author, the land owner is providing only the Works Contract Service to the tenants. This difference in treatment is very important since for construction services, no ITC is available, whereas for other works contract services, ITC can be availed and rate of tax is also different.

Further, Para 2A of the said notification stipulates that value of construction is deemed to be the total value charged for similar flats in the same project from independent buyers. This leads to a question as to whether such similar value is only required to be adopted. It can be argued that in the present case supply of works contract service is happening, which is not being a typical sale of flat transaction where undivided share of land is part of sale consideration, Para 2A shall also not apply in case of flats given to old tenants.

The next connected issue would be the manner of determination of value of the Works Contract Service. It would be governed by the provisions of Rules 27 to 31 of the CGST Rules. As the open market value or value of like services is not available, the value based upon 110% of the cost of construction can be considered for payment of GST. The rate of tax applicable to Works Contract would be 18% along with eligibility of input tax credit as per the provisions of the GST law.

Double taxation argument

It can also be argued that for the value of flats given free to the tenants, the developer is already paying GST when he discharges GST on the flats sold to the new buyers out of free sale area. The entire scheme of Regulation 33(7) of the DCR has two parts. Firstly, there is an obligation on the part of developer to construct and handover the new flats to the existing tenants without any charge. The second part of the scheme is that the developer is entitled for extra FSI which he can exploit by constructing and selling the flats.

If one examines this scheme from the costing perspective, it would be seen that the cost incurred for rehabilitation of the existing tenants (cost of construction of new building, cost of accommodation during construction period, etc.) would be included in the cost of flats sold in open market while determining the sale price thereof. The developer would be paying GST on the entire price charged by him to the new buyers. It means that the developer is paying GST on costs incurred for construction of flats given free to the tenants and other related costs while paying tax on flats sold to independent buyers. Therefore, demanding GST again on the value of flats given free to tenants would amount to double taxation. This view has been upheld in the context of service tax by the CESTAT in the case of ***Vasantha Greens Project [2019 (20) GSTL 568 (Tri. Hyd).*** This view was further

upheld in another decision of the CESTAT in the case of ***Aswini Apartments [2019 (31) GSTL 476 (Tri. Chennai)***]. In view of the said Tribunal orders on a case having similar facts, it could be said that GST is not payable on supply of service in the form of free flats to tenants.

Even if a view is taken that the nature of services provided for free supply of flats is a service for construction of residential apartments and in view of a specific provision in the notification providing for inclusion of land value, it is necessary to mention a recent Gujarat High Court judgment in the case of ***Munjaal Manishbhai Bhatt [Special Civil Application No. 1350 of 2021]***. In brief, the Gujarat High Court read down the deeming fiction which stipulated 1/3rd of the price of a flat to be the value of land in terms of Para 2 of the Notification No. 11/2017 and held that the actual value of land can be adopted for determining the actual value of construction services. In the present case, same argument will hold good and following the said High Court judgment, GST can be paid considering actual cost of land.

No Consideration argument

It can also be argued that the transaction of giving flats free to the tenant by the landlord is not taxable because there is no consideration being passed on to the builder. Here, consideration means as defined under Section 2(31) of the CGST Act because the said definition excludes any subsidy given by the State Government. In the present case additional FSI sanctioned by Govt under Regulation 33(7) of DPCR can be claimed to be in the nature of subsidy for the purpose of encouragement of development of houses for needy section of society.

GST liability for area sold in the open market would be governed by normal provisions relating to construction sector. real estate. In case of residential buildings, presently, GST of 5% without ITC is applicable on the gross value of the flat (for specified flats classified as “affordable”, the rate is 1%).

Regarding GST on unsold area, it is also governed by regular GST provisions. If the flats are sold after a receipt of Occupation Certificate or Completion Certificate, the same is not required to suffer any GST.

Implication for tenants

It can be argued by tax officials that the tenancy rights surrendered/transferred by tenants to the land owners allowing them to construct new building with additional FSI would be chargeable to GST because they are supplying tenancy rights for which consideration is being received in non-monetary form by way of receipt of new flats free of charge. However, in the view of the authors, the said transaction does not satisfy the ingredients of the definition of “supply” inasmuch as one of the requirement is that the said transaction must be carried out in the course or furtherance of business and the tenants do not surrender/transfer tenancy rights in the course or furtherance of business. Even though the definition “business” in Section 2(17) of the CGST Act is very wide, every transaction involving consideration cannot be treated as a business activity. The CBIC in one of the GST flyers on the scope of “Supply” has clarified that GST is essentially tax only on commercial transactions. Hence, only those supplies that are in the course or furtherance of business qualify as “supply” under GST. Therefore, any supply made by an individual in his personal capacity and not in the course of business do not come under the ambit of GST levy. CBIC, vide press release dated 13.07.2017, has clarified that sale of old gold jewellery by an individual to a jeweller will not constitute “supply” as the same cannot be said to be in the course or furtherance of business. Following same reasoning, it is viewed that the tenants would not be liable for payment of GST for transfer or surrender of tenancy rights.

Self-development by the Housing Society

The Government of Maharashtra has provided lot of incentives for self-redevelopment of the old buildings by the housing society itself because it was noticed that many redevelopment projects were held up for many years due to reasons like financial problems of developer. In such cases, the society, with approval of its members, can undertake redevelopment of the existing buildings itself. In such cases, the existing members are given new flats for same or higher areas and the balance FSI as per the scheme of the Government is used to construct new flats which are sold by the society to outside third parties. The cost incurred by the society for constructing flats to be given free to the existing members is recovered by way of sale of flats to the new customers. In this regard, all the provisions regarding chargeability tax value for supply of constructed flats to the existing members free of cost, nature of services, the valuation thereof and rate of tax would be similar as discussed above where the development of the old buildings is undertaken by the land owners or development for tenants. Further, in this regard the concept of "mutuality of interest" needs to be discussed.

It has been consistently held by the courts that there cannot be a taxable supply when a transaction is undertaken between a society or club and their members because both the society/club and its members are not distinct persons and one cannot make a supply or render a service or sell a good to himself. The recent decision of the Supreme Court in the case of Calcutta Club [AIR-2019-SC 5310] may be referred to in this regard. However, in the said case, it was inter alia held that in terms of the Indian Contract Act, consideration must flow from one person to another and in the absence of two persons, clause (29A) of Article 366 of the Constitution, which provides for tax on sale of goods, has no application. Further, that expression 'valuable consideration' used in the said clause necessarily requires two persons, viz., the promisor and promise. Hence, there cannot be a sale to oneself. In the views of author, the argument of mutuality and reasoning given in Calcutta Club case (supra), may not hold good after insertion of clause (aa) in Section 7(1) of the CGST Act. The said clause was inserted to nullify the effect of said judgement only. In view of the fact that levy of GST is governed by Articles 246A, 269A and definition of GST under Article 366 (12A) which have been introduced subsequent to said judgement, and as these are completely different from Article 366 (29A), the reasoning used in said judgment may not be applicable.

Accordingly, in view of a specific provision made in the GST law, society would be deemed to be making supply of the Works Contract Service to its members and it would be liable to payment of GST. The provision regarding valuation, nature of service and rate of tax, as discussed above in the case of transaction between Developer and the tenant would be equally applicable for this case also.

Conclusion

The GST treatment on redevelopment activities is ambiguous, especially with regard to the taxability and value of the flats given free to the existing tenants. This confusion has been created because of a specific para added in the rate Notification providing that value of such flats should be equivalent to the value of similar flat sold in the same project. Perhaps, the true nature of services provided in such cases have not been appreciated by the law makers and this has laid to unwarranted litigation which has continued from Service Tax Regime. However, there is a strong case to argue that the value of such service should be only the cost of construction. If this aspect is accepted by the policy makers, unnecessary litigation can be avoided and the government would also be getting the revenue which is involved in the said redevelopment transactions.

Vinay Jain
Advocate

Jay Chheda
Advocate

GST Implication on Development of Slum Rehabilitation Projects (SRP)

Introduction

This article deals with GST implication on development of Slum Rehabilitation Projects (SRP). The GST implication on below has been discussed along with other relevant connected issues:

a) Area given to Slum-dwellers/ SRA free of cost under the SRA Scheme;

b) Area given to landowner;

c) Area sold in the open market and

d) Unsold area

Brief Background of Slum Rehabilitation Authority

Slum Rehabilitation Projects envision slum-free cities to ensure and enhance standard of living for all. A Slum Rehabilitation Authority ('SRA') is appointed by a State Government which is entrusted with the responsibility to develop slum areas. SRA conducts review and formulates a scheme known as Slum Rehabilitation Scheme ('SRS'), which is implemented after SRA declares the said area as 'Slum Area'. The aim is to clear the slum area and provide buildings/tenements on such land to the Slum-dwellers.

History of Slum Rehabilitation Authority

There are various SRAs created under special Acts of various states. Mumbai being the financial capital of India witnessed large scale migration on account of employment. The housing authorities could not match the pace of migration and this resulted in creation of slum areas. As a response to this the Government passed the Maharashtra Slum Areas (Improvement, Clearance and Redevelopment) Act, 1971 which provided for improvement of slums by providing civic amenities to Slum-dwellers. Accordingly, Slum Rehabilitation Authority, Mumbai was constituted under Maharashtra Slum Areas (Improvement, Clearance and Redevelopment) Act, 1971. In 1995 the government introduced Slum Rehabilitation Scheme (SRS) wherein land which has been encroached by the Slum-dwellers would be used as a resource and incentive floor space index (FSI) would be granted to developers to construct permanent tenements. SRA is designated as a local planning authority to provide all the requisite approvals for SRS under one roof.

Features of Slum Rehabilitation Scheme

SRAs floats various schemes. For present discussion, the scheme as prevalent in Mumbai is discussed as follows:

- Every slum structure existing prior to 1.1.1995 is covered within the scheme.
- Every slum-dweller whose name appears in electoral rolls as on 1.1.1995 and continues to stay in the slum is eligible for rehabilitation.
- Minimum 70% of eligible Slum-dwellers come together to form a Co-operative housing society for implementation of SRS.
- The society appoints a developer for execution of the scheme.
- The underlying land covered by slums is used as a resource for the SRS.
- Every eligible slum structure is provided with an alternative tenement or rent.
- The developer constructs tenements for Slum-dwellers and saleable area for other buyers in the open market in a pre-defined area ratio.
- The developers sell the balance FSI, if any in the form of Transferable Development Right (TDR) in the open market.
- Slum-dwellers are not permitted to sell allotted flats for 10 years

SRA Development Model

The key participants in a SRA Development Project are as follows:

i. Slum-dweller: Any person who lives in an area designated as 'slum-area'.

ii. SRA: State body set up under Maharashtra Slum Areas (Improvement, Clearance and Redevelopment) Act, 1971, to achieve the goal of Slum free Mumbai.

iii. Developer: Private Entity which is tasked with executing the Slum rehabilitation project as mandated by SRA. Developer

receives consideration in the form of Transferable Development Rights.

iv. Landowner: Person or entity who owns the land which has been encroached by Slum-dwellers.

v. New Buyer: Person who buys the saleable flats built by the Developer based on TDR provided.

The most common model of development of slum area is the In-situ Model. In this model, the SRA issues tenders to build rehabilitation flats for Slum-dwellers on one portion of the land, and saleable flats for sale on other portion of the land. There is no outright transfer of land to the Developer, but only granting of development rights over land i.e., by way of issuance of Transferable Development Rights certificates ('TDR') or grant of Floor Space Index (FSI) is done. FSI can be granted only by the landowner and TDR is issued by a local authority (like SRA) as per prevailing town planning norms. The TDR Certificates obtained by the developers can be used in the very same construction project or can be sold in the open market.

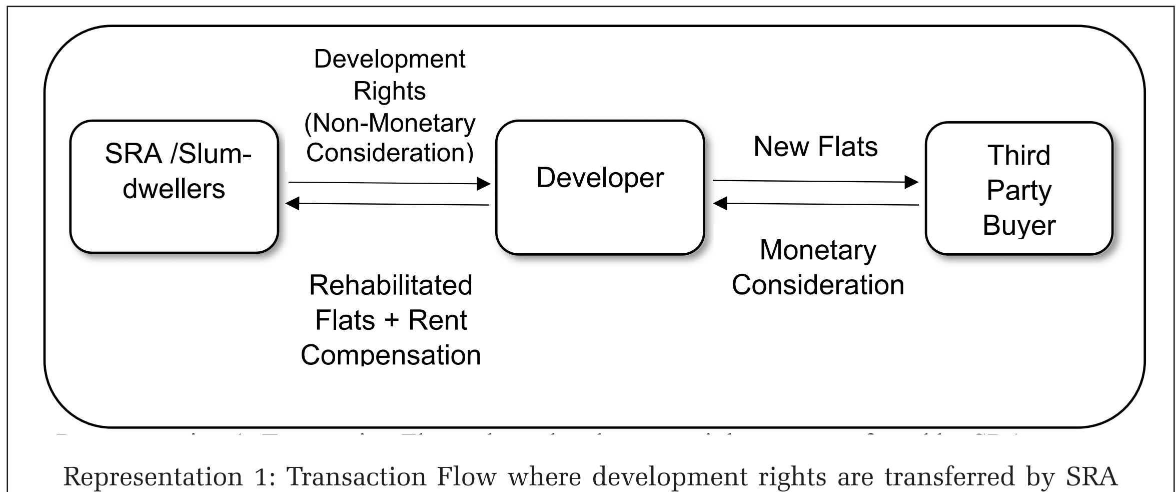
The construction of the free sale area is in accordance with the SRS approved by SRA and the additional development rights obtained by developer are subject to construction of rehabilitation building.

SRA will float a Re-development Scheme under two circumstances:

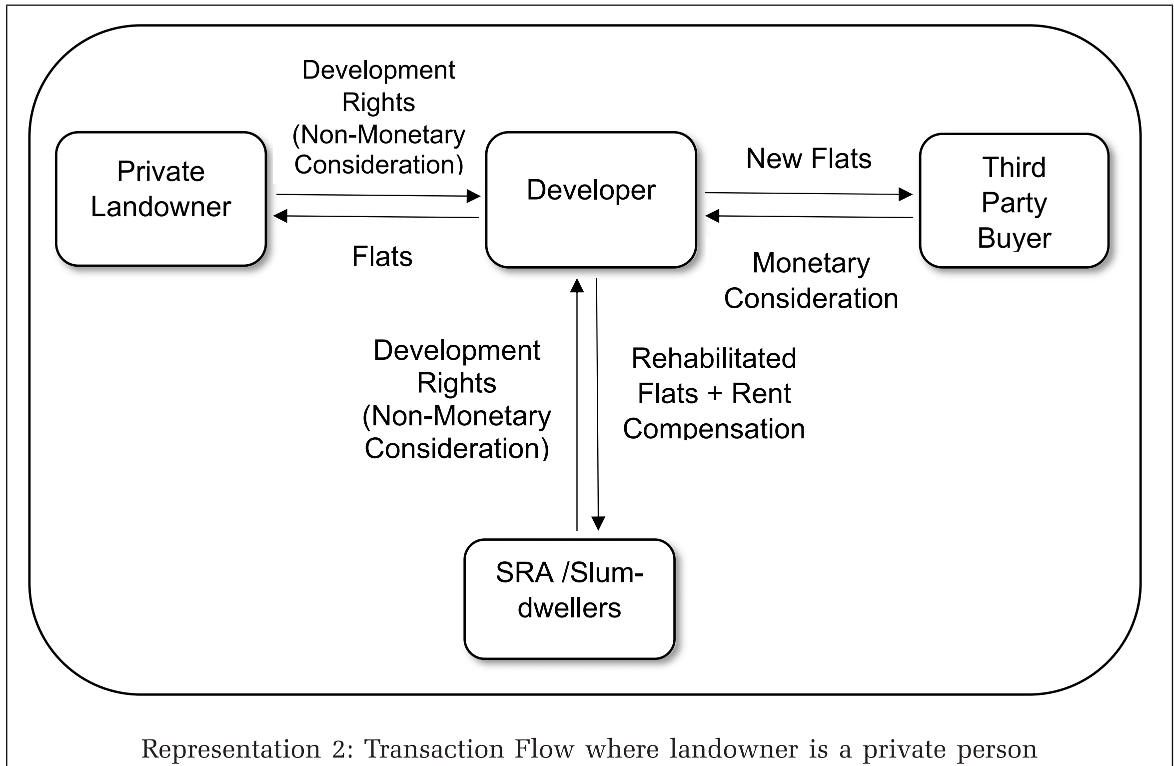
i. Upon request received from a private landowner or

ii. Upon recommendation of the Competent Authority constituted under the SRA Act.

The flow of services and consideration can be understood by way of below two representations:



Representation 1: Transaction Flow where development rights are transferred by SRA



Representation 2: Transaction Flow where landowner is a private person

Now, we go on to discuss the GST implication on various supplies made under SRA development project. In a typical SRA project following supplies can be envisaged:

A. Supply of Development Rights

 i. Supply of Development rights by Government as Landowner

 ii. Supply of Development rights by SRA

 iii. Supply of Development rights by Private Landowner

B. Supply of Construction Services

 i. Construction Services rendered by Developer to SRA / Slum-dweller

 ii. Construction Services rendered by Developer to Private Landowners

 iii. Construction Services rendered by Developer to third party new buyers

Supply of Development Rights by Government

In cases where the land encroached upon by the Slum-dwellers belongs to the government, then the government grants Development rights to the Developer in accordance with the Development Control Regulations. The Development rights granted to the Developer will enable him to construct rehabilitation building as well as the free saleable area in open market.

In such a scenario, one supply is from government to the developer by way of grant of development rights, for which consideration is received by way of constructed flats for rehabilitation.

IS TRANSFER OF DEVELOPMENT RIGHTS BY GOVERNMENT TO DEVELOPER SUBJECT TO GST?

The development rights in respect of a particular piece of land are nothing but a right to construct, own and sell the superstructure over the land. This development potential of the land is separated from the land and is transferred to a third party i.e. Developer for exploitation, called as transfer of development rights.

Schedule III to CGST Act covers transactions which are neither supply of goods nor supply of services. Serial No. 5 of Schedule III is extracted below:

SCHEDULE III
[See Section 7]
Activities or Transactions which shall be treated neither as a supply of goods nor a supply of services

....

5. ***Sale of land*** *and, subject to clause (b) of paragraph 5 of Schedule II, sale of building*

As per Schedule III, sale of land is excluded from scope of 'supply'. The term 'sale' has not been defined in the GST Act. As per Section 54 of Transfer of Property Act, 1882, sale is a transfer of ownership in exchange for a price paid or promised or part-paid and part-promised. Sale means transfer of ownership in property from one person to another. The transfer by way of sale is permanent and irrevocable.

One possible interpretation is that every owner of a piece of land is vested with a bundle of rights and only when the entire bundle of rights are transferred to another person, it can be said that there is a 'sale of land'. In case of transfer of development rights, only the development rights in land are transferred to the Developer. The Developer cannot dispose or sell the land since the ownership and title over land still vests with the Landowner. Therefore, one may opine that transfer of Development Rights does not tantamount to 'sale of land' and thus not excluded from the scope of supply under Schedule III.

Another possible interpretation is that Development rights is an immovable property, and it cannot be subject matter of GST. Section 3(26) of the General Clauses Act, 1897 defines 'immovable property' to include land, benefits to arise out of land, and things attached to the earth. In ***Sadoday Builders Private Limited vs. Joint Charity Commissioner,*** the Bombay High Court held that Transferable Development Rights are benefits arising out of land and qualify as immovable property. Further, the Bombay High Court in the case of ***Chheda Housing Development Corporation vs. Bibijan Shaikh Farid (2007 (3) MhLJ 402)***, observed that Transferable Development Rights (TDR) being a benefit arising from land must be held immovable property.

As per GST Act, 'goods' means every kind of movable property other than money and securities. Thus, land being an immovable property is not 'goods'. As per GST Act, 'services' means anything other than goods, money and securities. However, even though service is defined widely, whether it can cover immovable property within its ambit is highly contentious.

However, it has to be noted that the judgments dealing with TDR are in different context and also the word used is 'immovable property' and not land per se. The exclusion clause in Service Tax Regime under section 65B(44) of Finance Act, 1994 was wider which excluded transfer of title in immovable property also. However, the exclusion in GST is restricted to

sale of land alone. Ultimately, the Courts will have to resolve this controversy.

However, the government vide Notification No. 14/2017-Central Tax (Rate) as amended by Notification No. 16/2018-Central Tax (Rate) dated 26-07-2018 has notified the transactions undertaken by the Central or State Government or local authority in relation to a function entrusted to Municipality under Article 243W of Constitution as neither supply of goods nor a supply of service.

The activities entrusted to a Municipality under Article 243W including the Twelfth Schedule of the Constitution are as follows:

TWELFTH SHEDULE (Article 243-W)

1. *Urban planning including town planning.*
2. *Regulation of land-use and construction of buildings.*
3. *Planning for economic and social development.*

…………….

10. Slum improvement and upgradation.

Therefore, it can be contended that, the activity of grant of Development rights by government shall neither tantamount to supply of goods nor as supply of services in view of the aforesaid highlighted entry in the Twelfth Schedule to Article 243W of the Constitution.

Supply of Development Rights by SRA

In addition to the development rights granted by a landowner, the SRA also grants Development rights by way of issuance of TDR Certificates to the Developers to incentivise them.

SRA is constituted by the State Government under the Act passed by the State Legislature. In the GST framework, services provided by Governmental Authority by way of any activity in relation to any function entrusted to a municipality under article 243W of the Constitution are exempt under Serial No. 4 of Notification No. 12/2017- C.T. (Rate) dated 28.6.2017. Governmental authority has been defined as follows under GST Law:

(zf) "Governmental Authority" means 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 90 percent or more participation by way of equity or control, to carry out any function entrusted to a Municipality under article 243W of the Constitution or to a Panchayat under article 243G of the Constitution.

Since SRA is constituted under a special state legislature, it qualifies as Governmental Authority. Further, as discussed above, the activity of Slum improvement and upgradation is part of Twelfth Schedule to Article 243W. Therefore, the activity of grant of Development rights by SRA also is exempt under Twelfth Schedule to Article 243W of the Constitution.

Supply of Development Rights by Private landowner

Prima facie, the supply of Development rights by Private landowner is taxable. The FAQ's issued by CBIC on Real Estate Sector has also clarified as under:

Ss. No.	*Question*	*Answer*
39.	*Land Owner being an individual is not engaged in the business of land relating activities and thus whether the transfer of development rights by an individual to a promoter is liable for GST and whether the same will fall within the scope of 'Supply' as defined in Section 7 of CGST/SGST Act, 2017? Position of such a transaction may be clarified in light of amendments recently made.*	*The term business has been assigned a very wide meaning in the CGST Act and it includes any trade, commerce, manufacture, profession, vacation, adventure, or any other similar activity whether or not it is for a pecuniary benefit irrespective of the volume, frequency, continuity or regularity of such activity or transaction. Therefore, the activity of transfer of development rights by a land owner, whether an individual or not, to a promoter is a supply of service subject to GST.*

However, the possible arguments against the levy of GST is: (i) Transfer of development rights amount to transfer of immovable property and immovable property cannot be included within the scope of 'service' and (ii) Transfer of development rights by a Private Landowner (individual / co-operative housing society) is not a 'supply' under Section 7(a) of the CGST Act since the same is not in the course or furtherance of business. Therefore, the transaction is outside the purview of 'supply' and thus not taxable.

However, the arguments against the levy of GST are yet to face judicial scrutiny.

Value of Service, Time of Supply & Rate of GST on transfer of Development Rights

The legal position relating to value of service, time of supply, person liable to discharge GST and rate of GST on transfer of development rights has been discussed earlier by various learned authors. Therefore, it is not repeated here for the sake of brevity.

Now, we discuss the various GST implications on the services provided by the Developer.

Supply of Development service by Developer

The Developer makes the following supplies in a SRA Project:

i. Construction of flats for the SRA / Slum-dwellers without any monetary consideration. The consideration for the construction of flats for Slum-dwellers is received in kind by way of grant of Development Rights.

ii. Construction and sale of flats to private landowner for non-monetary consideration received in kind by way of grant of Development Rights.

iii. Construction and sale of flats to third party buyers for monetary consideration.

GST Implication on services provided by Developer to SRA/ Slum-dwellers

Rate of Tax, Value of Supply and Time of Supply for Construction Services Provided by Developer to Slum-dwellers

Rate of Tax

The services rendered by Developer to Slum-dwellers are eligible for reduced rate of tax

under the Heading 9954 Serial Number 3(i)/(ia)/(ib)/(ic)/(id).

The services rendered by the Developer by way of construction of flats which are intended for sale to buyer is a 'Works Contract' in view of the decision of the Supreme Court in the case of ***Larsen & Toubro Ltd - 2014 (34) S.T.R. 481 (S.C.)***. It is undisputed that such services rendered by Developer to third party buyers falls under Serial Number 3(i)/(ia)/(ib)/(ic)/(id) of Notification No. 11/2017 CT Rate. Thus to classify services under Serial No. 3 of the Notification No. 11/2017 CT Rate, it is irrelevant to determine whether the services are in the nature of 'Works Contract' or not and the only thing that one needs to determine is whether the activity undertaken falls under the specified description as mentioned in Serial No. 3(i)/(ia)/(ib)/(ic)/(id).

The services rendered by Developer to Slum-dwellers is undoubtedly of Construction of Residential apartments. Further, a portion of the apartments constructed by the Developer is certainly intended for sale to new buyers.

Therefore, the reduced rate of GST can be applied for flats constructed for Slum-dwellers as well. This view is in consonance with para 2A of Notification No. 11/2017 C.T. Rate, wherein it has been stated that the value of construction service for apartments provided in lieu of Development rights shall be equal to the amount charged for similar apartments from third party independent buyers. Therefore, once the value of flats is taken as what is sold to third party independent buyers, then rate of GST as well would be the rate applicable to third party independent buyers only.

The above view is also supported by answer to Question no. 9 of Real Estate FAQs II issued by CBIC wherein the CBIC has clarified that the apartments being constructed for Slum-dwellers would be eligible for reduced rate of GST if the apartments meet the definition of affordable residential apartment. In view of the above, the benefit of reduced rate of GST would be available in case of flats given to SRA/Slum-dwellers as well.

The GST rate for construction of affordable housing unit is 1.5% and for non-affordable housing unit is 7.5% subject to further reduction of one-third in value of supply if transfer of land or undivided share of land is also involved. However, the law does not provide any guidance as to how to determine whether the threshold limit of ₹ 45 lakhs (applicable to affordable residential unit) is exceeded in case of rehabilitation flats constructed for Slum-dwellers. In such case, the Developer may take the market value of similar flats in any other Slum rehabilitation project in the same area for the purpose of determining whether the condition regarding threshold price of ₹ 45 lakhs is satisfied or not. If the market rate of similar rehabilitation flats in the same area does not exceed ₹ 45 lakhs, then the benefit of reduced rate of GST can be adopted. Reference can be made to FAQ No. 9 of Real Estate FAQ's.

However, one may contend that 'intended for sale to buyer' as mentioned in Serial No. 3 of Notification No. 11/2017 will not cover cases where the buyer is identified prior to the commencement of construction and therefore the benefit of reduced rate shall not be applicable for flats given to SRA/Slum-dwellers. In such a case, it can be argued on first principles that the notification uses the phrase 'intended for sale to a buyer, wholly or partly' and therefore, once part of the project is intended for sale to third party independent buyers, the entire project shall be eligible for reduced rates of GST. It can be also argued that the superstructure constructed above the land is intended to be sold to SRA/Slum-

dwellers and therefore the eligibility under the Notification has been satisfied.

Value of Supply

The value of construction services provided by Developer to the Slum-dwellers shall be in accordance with Para 2A of Notification No. 11/2017 CT Rate i.e. equivalent to the total amount charged for similar apartments in the project from independent buyers, nearest to the date on which development right is transferred. Further, since the value of construction services provided to Slum-dwellers will be the value of similar flats sold to third party customers in terms of the artificial valuation mechanism prescribed in para 2A, the Developer would not be required to include the value of shifting allowance or monthly rental payments to the Slum-dwellers in the value of supply.

One may contend that such artificial measure of tax i.e. the value of similar flat provided to third party independent buyers is incorrect since the flats and benefits given to third party buyers may differ significantly from the flats and benefits given to the Slum-dwellers. Therefore, one can take a view that such valuation mechanism is arbitrary and contrary to the object sought to be achieved by the deeming fiction. Thus, in such a case one may resort to valuation of Construction Service as per Rule 27 to Rule 30 of CGST Rules, 2017.

Time of Supply

As per Notification No. 6/2019 – C.T. (Rate) dated 29.3.2019 as amended by Notification No. 3/2021-C.T. (Rate), dated 2-6-2021, the Developer would be required to discharge GST on supply of construction service to Slum-dwellers in a tax period not later than the tax period in which the date of issuance of the completion certificate or first occupation falls.

GST Implication on services provided by Developer to Landowner

The taxability, valuation, rate of tax and time of supply of the construction services provided by Developer to landowner would be same as that of Slum-dwellers as discussed above.

GST Implication on services provided by Developer to Third party independent buyers

The definition of 'Supply' under Section 7(1) of CGST Act is wide enough to cover all supplies made by a person in course or furtherance of his business for a consideration. The services provided by Developers to third party independent buyers is subject to GST if the flats are sold to such buyers prior to receipt of Occupation Certificate / Completion Certificate.

Rate of Tax

W.e.f. 1.4.2019, as mentioned above, construction and sale of residential flats prior to receipt of OC, involving transfer of land or undivided share in land, would be subject to effective GST rate of 1% / 5%. The entries (ia), (ib), (ic) and (id) are not discussed again in detail for the sake of brevity since the same has already been discussed in earlier articles.

Value of Supply

The value of construction service provided to third party independent buyers shall be the Transaction value as per Section 15 of CGST Act, 2017 i.e. price actually paid or payable for the supply of construction services since the Developer and buyers are unrelated persons.

Time of Supply

The construction services provided to third party independent buyers is a continuous supply of service and accordingly, the time of supply in such case shall be in accordance

with Section 13(2) read with Section 31(5) of CGST Act.

GST Implication on unsold flats

As per Schedule II of CGST Act, 2017 the activity of construction of complex service shall be deemed to be "supply of service" except where the entire consideration has been received after OC/CC. Therefore, any sale of flat by a Developer after the receipt of OC/CC shall not amount to supply of 'service'. Further the definition of the term 'goods' means any movable property only and therefore the sale of flat after OC/CC shall neither qualify as 'service' nor as 'goods'. By virtue of section 7(1) of the CGST Act read with section 9(1), transactions which are neither supply of goods nor supply of service, would not be exigible to GST. Therefore, GST is not payable on supply of flats after receiving OC / CC.

However, the developer shall be liable to pay GST under reverse charge on the Development rights attributable to the residential apartments unsold, in accordance with Serial No. 41A of Notification No. 12 of 2017 – C.T. Rate. The GST payable on such development rights shall be computed as follows and be payable as a supply of service at the rate of 18%:

> *GST payable on Development rights x Carpet area of residential apartments unsold ÷ Total carpet area of the residential apartments*

Further the value on Development rights shall be computed in accordance with Para 1A to Notification No. 12/2017 – C.T. (Rate). As per the said Notification, the value of development rights shall be deemed to be equal to the value of similar apartments charged by the Developer from independent buyers nearest to the date on which Development rights is transferred to Developer.

However, the GST payable in terms of the above formula shall not exceed 1%/ 5% of the value of residential apartments remaining unsold. The value of residential apartments remaining unsold shall be deemed to be equal to the value of similar apartments charged by the Developer nearest to the date of issuance of OC / CC.

The Time of Supply of payment of GST under reverse charge on the Developer on the above shall arise on the date of completion or first occupation of the project.

Conclusion

The tax position on Construction contracts has always been complex and unsettled. There is still not much clarity on the classification of service and rate of tax applicable on various transactions. Further, one will have to wait for the Courts to decide as to whether Development rights can be subject to GST at all. It is hoped that the government lays down clear guidelines on classification of service for effective implementation of GST both for the Developers and the Government. In the end, most often we end up concluding that *"GST is really good and simple tax only if you are the tax collector"*. The views and opinions expressed above are those of the authors only and does not represent the view of any organisation they are associated with.

Uchit N Sheth
Advocate

Applicability of GST on Joint Venture Development Agreement

A development agreement is ordinarily entered into between two parties i.e. the developer and land owner whereby the developer agrees to develop the land for consideration. While the taxability of such development agreement under the Central/State Goods and Services Tax Act, 2017 (herein after referred to as "the GST Acts") in itself raises interesting issues, an additional element to be considered is the effect of the development being undertaken by more than one person i.e. by a "Joint Venture".

Legislative History of Indirect Tax on Development Agreements

Before adverting to the legal consequences under the GST Acts of a development agreement entered into by a Joint Venture, chargeability of tax of any development agreement needs to be considered. For such purpose, the legislative history of imposition of indirect taxes on development agreements may be charted as under:

(a) Entry 54 of List II to the Constitution of India empowered the State legislatures to impose tax on sale or purchase of goods. Under such entry, many state legislatures imposed tax on goods used in the course of execution of works contracts such as works contracts. The legislative competence of the State legislatures to impose tax on goods used in the course of execution of indivisible works contracts came up for scrutiny before Hon. Supreme Court of India in the case of ***State of Madras vs. Gannon Dunkerley and Co. (Madras) Ltd. (1958) 9 STC 353***. Hon. Supreme Court observed that in case of building construction contract the property in goods passes to the buyer by the theory of accretion as and when the goods are embedded into the earth. The property in goods does not pass as chattel pursuant to agreement of sale and therefore it is not sale as per Sale of Goods Act, 1930. Thus it was held that State legislatures did not have competence to impose sales tax on goods element of a construction contract.

(b) The 46th Constitutional Amendment was made to overcome the judgement of Hon. Supreme Court in the case of ***Gannon Dunkerley and Co. (supra).*** Article 366(29A) of the Constitution was introduced whereby transfer of property in goods (whether as goods or in some other form) involved in the course of execution of works contract was deemed to be sales. Thus the State legislatures were given power to impose tax on goods element of a works contract.

(c) Thereafter question arose as to on what amount such tax could be imposed as a works contract would even

contain labour element. This issue was addressed by Hon. Supreme Court in the case of ***Gannon Dunkerley and Co. vs. State of Rajasthan (1993) 1 SCC 364***. It was held that tax could be imposed only on the value of goods incorporated in the works contract and that labour expenses and profit thereon was to be excluded. It was observed that the value of goods was to be ascertained from the books of accounts of the assessee. Only in the event where it was not possible to ascertain the actual value, it was held that the State could prescribe a formula on the basis of fixed percentage of value of contract. It was however clarified that such prescribed value should not appreciably differ from the actual value.

(d) The States formulated valuation procedure for works contract in line with the decision of Hon. Supreme Court in the 2nd Gannon Dunkerley's case supra.

(e) Various States also provided an option of paying lumpsum tax on total value of works contract. However since such mechanism was at the option of the dealer, its validity was upheld by Hon. Supreme Court in the case of ***State of Kerala vs. Builders Association of India (1997) 2 SCC 183*** as well as ***Mycon Construction Ltd. vs. State of Karnataka and Another (2003) 9 SCC 583***.

(f) Thereafter the question arose as to whether even a tripartite agreement between landowner, developer and prospective buyer would constitute a works contract even though property in such agreement would subsequently pass by way of registered sale deed. Hon. Supreme Court held in the case of ***K. Raheja Development Corporation vs. State of Karnataka (2005) 5 SCC 162*** that even tripartite agreement involving construction of flats for prospective buyer would constitute sale in the course of execution of works contract.

(g) The correctness of the decision of Hon. Supreme Court in the case of K. Raheja Development Corporation (supra) was doubted and referred to a larger bench. The larger bench in the case of ***Larsen and Toubro Ltd. vs. State of Karnataka (2014) 1 SCC 708*** affirmed the view taken in the case of ***K. Raheja Development Corporation (supra).*** It was however clarified in para 110 of the judgement that the activity of construction undertaken by the developer would be works contract only from the stage the developer enters into a contract with the flat purchaser and that the value addition made to the goods transferred after the agreement is entered into with the flat purchaser can only be made chargeable to tax by the Government. It was further observed in para 112 of the judgement that if at the time of construction and until the construction was completed, there was no contract for construction of building with the flat purchaser, the goods used in construction could not be deemed to have been sold by the builder since at that time there was no purchaser. It was held that the fact that the building was intended for sale ultimately after construction did not make any difference. Further, the Rule 58(1A) of the Maharashtra Value Added Tax Rules which provided a cap of 70% of the agreement value for deduction towards land was read down and it was held that taxing the sale of goods element in a works contract was permissible provided that the tax was directed to the value of goods at the time of incorporation and it did not purport to tax transfer of immovable property.

(h) The decisions with respect to taxability of development agreements and tri-partite agreements were taken in the 14th GST Council meeting keeping the aforementioned perspective in mind which is noted in the minutes of the meeting.

Changeability

Thus, what is taxable under the GST Acts is the development activity undertaken by the developer on behalf of the recipient of service. There is no intention to impose tax on sale of land or undivided share in land which may flow along with supply of construction service. Sale of land is neither supply of goods nor supply of services as per Entry No. 5 of Schedule III to the GST Acts.

The simplest variation of a development agreement would be a land owner entering into development agreement with a developer for construction of building for use by the land owner. In such a case, the land owner would give development rights to the developer. The developer would construct building by using such development rights and charge consideration from the land owner. Since the developer would be undertaking construction pursuant to agreement with land owner in lieu of consideration, this would constitute supply by the developer to the land owner and therefore taxable under the GST Acts.

Another popular variant of a development agreement is where developer develops land pursuant to agreement with land owner but the consideration is agreed to be taken from third parties who agree to buy the building or units thereof which is constructed by the developer. In such circumstances as well, it is now well settled after the decision of Hon. Supreme Court in the case of ***Larsen and Toubro Ltd. (supra)*** that such transaction would constitute supply of service by the developer to the buyers of building units and this would be taxable under the GST Acts.

Quantification of Deduction for Land

A dispute arose under the GST Acts with regard to quantification of deduction of sale of land. Explanation to the rate notifications provide that if consideration is charged for construction as well as sale of land then the sale of land or undivided share in land will be presumed to be 1/3rd of total consideration. In other words no deduction in excess of 1/3rd of total consideration will be granted even though the actual consideration towards sale of land is higher.

The validity of such adhoc mandatory deduction was recently tested by Hon. Gujarat High Court in the case of ***Munjaal Manishbhai Bhatt vs. Union of India Special Civil Application No. 1350 of 2021 decided on 6.5.2022***. Hon. Gujarat High Court read down the mandatory deduction to be applicable only at the option of the taxable person. The concluding portion of the judgement reads thus:

"122. In the result, the impugned Paragragh 2 of the Notification No. 11/2017-Central Tax (Rate) dated 28.6.2017 and identical notification under the Gujarat Goods and Services Tax Act, 2017, which provide for a mandatory fixed rate of deduction of 1/3rd of total consideration towards the value of land is ultra-vires the provisions as well as the scheme of the GST Acts. Application of such mandatory uniform rate of deduction is discriminatory, arbitrary and violative of Article 14 of the Constitution of India.

123. While we so conclude, the question is whether the impugned paragraph 2 needs to be struck down or the same can be saved by reading it down. In our considered view, while maintaining the mandatory deduction of 1/3rd for value of land is not sustainable in cases where the value of `land is clearly ascertainable or where the value of construction service can be derived with the aid of valuation rules, such deduction can be permitted at the option of a taxable person particularly in cases

where the value of land or undivided share of land is not ascertainable.

124. The impugned paragraph 2 of Notification No. 11/2017- Central Tax (Rate) dated 28th June 2017 and the parallel State tax Notification is read down to the effect that the deeming fiction of 1/3rd will not be mandatory in nature. It will only be available at the option of the taxable person in cases where the actual value of land or undivided share in land is not ascertainable."

Taxability of Transferable Development Rights

Another issue which has raked controversy from time to time is the taxability of transfer of development rights in the hands of the land owner. Reference may be made to the judgement of Hon. Customs Excise and Service Tax Tribunal in the case of ***DLF Commercial Projects Corporations vs. Commissioner of Service Tax Appeal No. ST/60493/2018 decided on 22.5.2019*** wherein it was held that transfer of development rights was not a taxable service since it was a transaction of immovable property. However since the exclusion under the GST Acts is only for sale of land and building and not for sale of immovable property in its entirety, such judgement will not be directly applicable. In fact from 1.4.2019, the Government has altered the scheme with respect to taxability of Transferable Development Rights whereby if the rights are supplied to a promoter of residential flats then they are exempt in the hands of the land owner and they are taxable in the hands of the promoter on reverse charge basis to the extent of flats remaining unsold at the time of issuance of completion certificate. However, in remaining cases, the transfer of development rights will be taxable in the hands of the land owner.

Implications if Development Agreement is to be Executed Jointly by Different Persons

Section 9(1) of the GST Acts, which is the charging section imposing tax, requires payment of tax by a "taxable person". Section 2(107) of the GST Acts defines the phrase "taxable person" as under:

"2(107) "taxable person" means a person who is registered or liable to be registered under section 22 or section 24;"

The term "person" is defined under Section 2(84) of the GST Acts as under:

"2(84) "person" includes—

(a) an individual;

(b) a Hindu Undivided Family;

(c) a company;

(d) a firm;

(e) a Limited Liability Partnership;

(f) an association of persons or a body of individuals, whether incorporated or not, in India or outside India;

(g) any corporation established by or under any Central Act, State Act or Provincial Act or a Government company as defined in clause (45) of section 2 of the Companies Act, 2013;

(h) any body corporate incorporated by or under the laws of a country outside India;

(i) a co-operative society registered under any law relating to co-operative societies;

(j) a local authority;

(k) Central Government or a State Government;

(l) society as defined under the Societies Registration Act, 1860;

(m) trust; and

(n) every artificial juridical person, not falling within any of the above;"

Clause (f) of the aforementioned definition specifically includes an association of persons

or body of individuals, whether incorporated or not, as a "person" for the purpose of the GST Acts.

Historical Background of "Association of Persons" and "Body of Individuals" under Tax Laws in India

It may be noted that the phrases of "association of persons" and "body of individuals" have their roots in the Indian Income tax law. Prior to the year 1924, income tax was leviable only on "individual, company, firm and Hindu Undivided Family". By the Indian Income Tax Amendment Act of 1924 the phrase "association of individuals" was introduced in the Income Tax Act, 1922 which was replaced by "association of persons" by the Income Tax Amendment Act of 1939. The current Income Tax Act, 1961 uses the phrases "association of persons" and "body of individuals" which have been replicated under the GST Acts.

What would constitute an "association of persons" has been judicially analyzed by Hon. Supreme Court in the context of Income tax law in number of decisions. Reference may be made to the first significant judgement of Hon. Supreme Court in this regard in the case of ***Commissioner of Income Tax, Bombay vs. Indira Balkrishna (1960) 39 ITR 546 (SC)*** wherein the following pertinent observations were made:

"8…..In the absence of any definition as to what constitutes an association of persons, we must construe the words in their plain ordinary meaning and we must also bear in mind that the words occur in a section which imposes a tax on the total income of each one of the units of assessment mentioned therein including an association of persons. The meaning to be assigned to the words must take colour from the context in which they occur. A number of decisions have been cited at the Bar bearing on the question, and our attention has been drawn to the controversy as to whether the words "association of individuals" which occurred previously in the section should be read ejusdem generis with the word immediately preceding viz. firm or with all the other groups of persons mentioned in the section. Into that controversy it is unnecessary to enter in the present case. Nor do we pause to consider the widely differing characteristics of the three other associations mentioned in the section viz. Hindu undivided family, a company and a firm, and whether in view of the amendments made in 1939 the words in question can be read ejusdem generis with Hindu undivided family or company.

9. It is enough for our purpose to refer to three decisions: ***In re, B.N. Elias[(1935) III ITR 408]*** *;* ***CIT vs. Laxmidas Devidas [(1937) V ITR 584]*** *; and* ***In re. Dwaraknath Harishchandra Pitale [(1937) V ITR 716]****. In* ***B.N. Elias [(1935) III ITR 408]*** *Derbyshire, C.J. rightly pointed out that the word "associate" means, according to the Oxford dictionary, "to join in common purpose, or to join in an action". Therefore, an association of persons must be one in which two or more persons join in a common purpose or common action, and as the words occur in a section which imposes a tax on income, the association must be one the object of which is to produce income profits or gains. This was the view expressed by Beaumont, C.J. in* ***CIT vs. Laxmidas Devidas [(1937) V ITR 584]*** *at p. 589 and also in* ***Re. Dwaraknath Harishchandra Pitale [(1937) V ITR 716]*** *. In re. B.N. Elias [(1935) III ITR 408] Costello, J. put the test in more forceful language. He said: "It may well be that the intention of the legislature was to hit combinations of individuals who were engaged together in some joint enterprise but did not in law constitute partnership…. When we find …. that there is a combination of persons formed for the promotion of a joint enterprise …. then I think no difficulty arise in the way of saying that these persons did constitute an association…."*

Similar observations as under were made by Hon. Supreme Court in the case of ***G. Murugesan and Brothers vs. Commissioner of Income Tax (1973) 4 SCC 211*** with the addition that there should be some management or enterprise required for earning the income. It was held by Hon. Supreme Court that *"for forming an 'Association of Persons', the members of the association must join together for the purpose of producing an income. An 'Association of Persons' can be formed only when two or more individuals voluntarily combine together for a certain purpose. Hence volition on the part of the member of the association is an essential ingredient. It is true that even a minor can join an 'Association of Persons' if his lawful guardian gives his consent. In the case of receiving dividends from shares, where there is no question of any management, it is difficult to draw an inference that two more shareholders functioned as an 'Association of Persons' from the mere fact that they jointly own one or more shares, and jointly receive the dividends declared. Those circumstances do not by themselves go to show that they acted as an 'Association of Persons'.""*

In a nutshell, according to Hon. Supreme Court, if two or more persons combine for a common purpose or action, such enterprise requires some management or positive effort and such enterprise does not in law constitute a partnership, then it will be an "association of persons".

While the meaning ascribed to "association of persons" is somewhat narrow and with caveats, introduction of the phrase "body of individuals" in the Income Tax law was interpreted by Hon. Supreme Court as further widening the ambit of an assessable unit. Following observations were made by Hon. Supreme Court in the case of ***Meera and Company vs. Commissioner of Income Tax, Punjab (1997) 4 SCC 677***:

"37. In the background of these definitions, when several individuals are found to have joined together for the purpose of making profit, the group of individuals may be conveniently described as "a body of individuals". We have seen how the controversy arose under the Indian Income Tax Act as to the meaning of "association of individuals". There was a conflict of opinion on whether "individuals" include artificial or non-juridical persons. But there can be no scope of any controversy now. "An association of persons" or "a body of individuals", whether incorporated or not, has been brought within the net of taxation. The intention of the legislature is clearly to hit combination of individuals or other persons who were engaged together in some joint enterprise. The combinations may or may not be incorporated. A profit-yielding joint venture has to be taxed as a single unit.

38. In the case before us, we have a widow and her minor sons who are engaged in the business activity which generates income. It does not make any difference that the widow and the minor sons did not start the business. The business was inherited. But the fact that the business has been continued by the widow on her own behalf as well as on behalf of the minor sons after buying the interest of the mother goes to show that there is an organised activity jointly carried on to produce income. It is a clear case of a joint business venture of a few individuals. The income of this business has been rightly assessed in the status of a "body of individuals"."

Separate Registration Required

Considering the scope and ambit of the phrases "association of persons" and "body of individuals" as judicially interpreted, a joint venture development agreement whereby different persons enter into a joint enterprise for conducting development activity will result in forming of an association of persons/body of individuals and considering the fact that the GST Acts includes them within the definition of "taxable person", the joint venture, whether incorporated or not, will have to be separately registered under the GST Acts.

Invoicing and Maintenance of Books of Accounts

Once separately recognized and registered, all the procedures will have to be followed by the joint venture as an entity different from the co-venturers. Tax invoice will have to be issued in the name of the joint venture. The joint venture will also have to maintain separate books of accounts for the activities undertaken by the joint venture.

Inter-Se Transactions between Co-Venturers

An issue would also arise as regards the taxability of inter-se transactions between co-venturers or between a co-venturer and the joint venture. For example if one of the parties purchases goods and they are used in the course of execution of the joint venture development agreement, question would arise as to whether such transaction would constitute supply by the co-venturer to the joint venture and therefore taxable under the GST Acts?

The Central Board of Indirect Taxes has issued Circular No. 35/9/2018-GST dated 5.3.2018 clarifying this issue. The concluding portion of the circular reads thus:

"4. Therefore, the law with regard to levy of GST on service supplied by member of an unincorporated joint venture (JV) to the JV or to other members of the JV, or by JV to the members, essentially remains the same as it was under service tax law. Thus, it is clarified that the clarification given vide Board cash calls are taxable or not will entirely depend on the facts and circumstances of each case. 'Cash calls' are raised by an operating member of the joint venture on other members in proportion to their participating interests in the joint venture(unincorporated) to meet the expenditure on the operations to be carried out as per the approved work programme and budget. Taxability of cash calls can be further explained by the following illustrations:

Illustration A: There are 4 members in the JV including the operating member and each one contributes Rs 100 as part of their share. A total amount of Rs 400 is collected. The operating member purchases machinery for Rs 400 for the JV to be used in oil production.

Illustration B: There are 4 members in the JV including the operating member and each one contributes Rs 100 as part of their share. A total amount of Rs 400 is collected. The operating member thereafter uses its own machine and performs exploration and production activities on behalf of the JV.

4.1 Illustration A will not be the subject matter of 'ST/GST' for the reason that the operating member is not carrying out an activity for another for consideration. In Illustration A, the money paid for purchase of machinery is merely in the nature of capital contribution and is therefore a transaction in money.

4.2 On the other hand, in Illustration B, the operating member uses its own machinery and is therefore providing 'service' within the scope of supply of CGST Act, 2017. This is because in this scenario, the operating member is recovering the cost appropriated towards machinery and services from the other JV members in their participating interest ratio."

Thus the taxability of inter-se transactions between joint venture and co-venturers is not straight-jacketed. While mere flow of money is not taxable, if the transaction involves supply of goods or services then it would be taxable under the GST Acts.

Conclusion

Taxability of development agreements under the GST Acts has many technical nuances and the additional factor of more than one developer adds another flavour to the issue. A proper understanding is necessary before determining effective tax liability.

CA T. S. Ajai

Accrual and taxability of income in the hands of various stakeholders involved in a re-development of property under the Income Tax Act, 1961 (Revenue recognition, PCM v/s CCM, ICAI Guidance Note, ICDS III

1.0 Introduction

1. Re-development of property as per the Cambridge Dictionary is," **the act or process of changing an area of a town by replacing old buildings, roads, etc. with new ones".** Re-development of an old property takes myriad forms and depends upon the availability of land and the emerging requirements of the area or town. In India, Re-development is highly regulated by local regulations and is a complex process. These Regulations have an impact not only on the rights and entitlements of the parties to the "Redevelopment Agreement" but also on the consequent implication under the Income Tax Act, 1961.

1.2 Broadly speaking there are three stakeholders viz i) the Flat owner ii) the collective body representing the owners that is a Cooperative Housing Society (CHS) etc and iii) the Developer who carries out the redevelopment of the property by deploying resources. Typically in a redevelopment agreement, the Flat owner hands over possession of the flat for redevelopment and in consideration thereof gets a new flat with a higher carpet area, and also additional monetary compensation in some cases. Further, the flat owner may also receive from the developer various types of compensation such as displacement compensation, reimbursement of rent etc. The CHS transfers the Base Transferable Development Rights (TDR)/Floor Space Index (FSI) and/or the additional TDR/ FSI to which it becomes entitled pursuant to the re-development under the Development Regulations and in consideration thereof receive a corpus or lumpsum amount. The Developer incurs the entire cost of re-development and becomes entitled to certain agreed share of the additional area or flats constructed under the redevelopment agreement, which can be sold by the Developer and profits realised.

1.3 This paper attempts to delineate the concepts/principles of taxation of redevelopment and issues faced by each of the above category of stakeholder, with a caveat that the tax implication of any particular transaction has to be arrived after due consideration of the

facts and circumstances specific and unique to that transaction.

2.0 Tax Issues in the Hands of Flat Owner

Year of Taxability

2.1.1 It is axiomatic that the action of the flat owner in handing over possession of the flat to the developer in exchange of a new flat is a " transfer" u/s 2(47) of the Income Tax Act (the Act) and accordingly attracts capital gains tax u/s 45(1) of the Act. In those cases where possession of the old flat is handed over/deemed to be handed over by the flat owner in part performance, Clause (v)or (vi) of Section 2(47) is attracted at the time of entering into re-development agreement, resulting in liability to capital gains in the year in which the possession of immovable property is handed over to the developer for development of a project, that is on completion of construction of the project by the developer.

There are also difficulties in arriving at the value of the new flat which is the " full value of consideration" for the purpose of computing the capital gains and there are divergent views as to whether the cost of construction in the hands of the developer or the re sale value/market value of the new flat is to considered.

Deferment of Year of Taxability u/s 45(5A)

2.1.2 In order to minimise the difficulties, in the case of any Individual or HUF, the Finance Act, 2017 has introduced a new scheme of taxation of capital gains vide Section 45(5A) w.e.f. 1.04.2018, with the following features as explained in Para Nos 25.2 to 25.5 of the CBDT Circular No 2/2018 dated 18th February 2018 :

"25.2 With a view to minimise the genuine hardship which the owner of land may face in paying capital gains tax in the year of transfer, a new sub-section (5A) has been inserted in section 45 of the Income-tax Act to provide that in case of an assessee, being an individual or a Hindu undivided family, who enters into a specified agreement for development of a project, the capital gains shall be chargeable to income-tax as income of the previous year in which the certificate of completion for the whole or part of the project is issued by the competent authority.

25.3 It has also been provided that the stamp duty value of his share, being land or building or both, in the project on the date of issuing of said certificate of completion as increased by any monetary consideration received, if any, shall be deemed to be the full value of the consideration received or accruing as a result of the transfer of the capital asset.

25.4 It is also provided that benefit of this regime shall not apply to an assessee who transfers his share in the project to any other person on or before the date of issue of said certificate of completion. It has also been provided that in such a situation, the capital gains as determined under general provisions of the Income-tax Act shall be deemed to be the income of the previous year in which such transfer took place and shall be computed as per provisions of the Income-tax Act without taking into account these provisions.

25.5 Consequential amendment to section 49 of the Income-tax Act has also been made to provide that the cost of acquisition of the share in the project being land or building or both, in the hands of the land owner shall be the amount which is deemed as full value of consideration under section 45(5A) of the Income-tax Act."

2.1.3 While Section 45(5A) sets at rest the issue of valuation of the consideration received and the date of liability to tax, it must be noted that the section defers only the chargeability to tax, from the date of "transfer" to the date of " completion of the project", and does not defer the date of " transfer" itself, which would remain to be the date of re-development agreement. Consequently, the Indexation benefit u/s 48 would be available only up to the date of " transfer" and would not be available for the period from the date of " transfer" to the date of chargeability, i.e. year in which completion certificate is issued.

2.1.4 Another issue in the context of Section 45(5A) is that the Stamp Duty Value is found to be higher than the market value of properties due to the steep increase in the Stamp Duty values, in recent times, by some State Governments, resulting in notional capital gains. In such cases a right to dispute the stamp duty value for the purpose of computing the Capital gains is not available to the flat owner u/s 45(5A). It would be welcome if a provision similar to similar to Section 50C(2) is added to Section 45(5A).

Availability of Exemption u/s 54 for LTCG on Redevelopment

2.2 It is also settled law that the acquisition of the new flat under the redevelopment agreement would be treated as construction of a new house and subject to compliance of the provisions of section 54, the resultant LTCG on transfer of the old flat will be eligible for the exemption u/s 54. One of the condition u/s 54 is that the new house is to be constructed within 3 years from the date of transfer. However, there may be cases where the construction is not completed within the stipulated period of 3 years and the question that arises is whether the flat owner can still claim the benefit of the deduction u/s 54.

In this regard the following may be useful to contend that the re development agreement shall be treated as compliance of the requirements of Section 54 and the benefit should not be denied even if the construction is delayed beyond the prescribed time limit, due to factors beyond the control of the flat owner (assessee):

a) The CBDT vide circular No 672 dated 16-12-1993 *decided that if the terms of the schemes of allotment and construction of flats/houses by the co-operative societies or other institutions are similar to those mentioned in para 2 of Board's Circular No. 471, dated 15-10-1986 (Sl. No. 428), such cases may also be treated as cases of construction for the purposes of sections 54 and 54F of the Income-tax Act.*

b) The above Circular no 471 dated 15.10.1986 was followed by the MP High Court in the case of ***Sashi Varma vs. CIT (1997) 224 ITR 106 (MP),*** and relief was granted to the assessee.

c) The same circular was followed by the Delhi High Court in ***CIT***

vs. R.L. SOOD [2000; 245 ITR 727 (Del)].

Taxability of Various Allowances/ Compensation Received from the Developer by the Flat Owner During Construction

Allowance/Compensation is Capital Receipt not Liable to Tax

2.3.1 As part of the redevelopment agreement or by way of separate agreement(s), the flat owner could receive from the Developer various amounts while the construction is in progress such as rent for alternate accommodation, shifting expenses, inconvenience allowance, hardship allowance etc. In such cases, the contention raised by the flat owner is that these are capital receipts not liable to tax, which has been upheld by the ITAT in several cases.

2.3.2 Reliance can be made to ***Smt. Delilah Raj Mansukhani vs. ITO (ITAT Mumbai), ITA No. 3526/Mum/2017,*** order dated 29/01/2021 holding that,

"5. After hearing the rival submissions and perusing the material on record, we find that compensation received by the assessee towards displacement in terms of Development Agreement is not a revenue receipt and constitute capital receipt as the property has gone into redevelopment. In such scenario, the compensation is normally paid by the builder on account of hardship faced by owner of the flat due to displacement of the occupants of the flat. The said payment is in the nature of hardship allowance/rehabilitation allowance and is not liable to tax."

2.3.3. Reliance can also be made to ***Kushal K. Bangia vs. ITO in ITA No.2349/ Mum/2011***, wherein the ITAT held that,

"In view of these discussion, in our considered view, the receipt of Rs. 11,75,000 by the assessee cannot be said to be of revenue nature, and, accordingly, the same is outside the ambit of income u/s 2(24) of the Act*. However, in our considered opinion and as the learned counsel for the assessee fairly agrees, the impugned receipt ends up reducing the cost of acquisition of the asset, i.e. the flat, and, therefore, the same will be taken into account as such, as and when occasion arises for computing capital gains in respect of the said asset. .."*

Similar views were expressed by other coordinate benches of the ITAT. Reference may be made to ***Shri Devshi LakhamshiDedhia vs. ACIT in ITA No.5350/Mum/2012,*** and ***Lawrence Rebello vs. ITO (ITAT Indore) Appeal Number: ITA No. 132/Ind/2020.***

Allowance/Compensation is Part of Capital Gains

2.3.4 : There is also an alternative view, that such compensation by whatever name called is received in connection with the transfer of property and therefore it is part and parcel of the total consideration for transfer of property. See ***ITO vs. Harsha Jitendra Sanghvi [ITA No 6732/Mum/2012*** and ***MA No 15/ Mum/2017***]. Also refer ***Pradyot Borkar vs. ACIT: ITA No 4070/Mum/2016***.

Allowance/Compensation is "Income from Other Sources"

2.3.5 There is also a view that such compensation is to be charged to tax

as " Income from Other sources" after deducting the amount actually spent by the assessee. See ***Jatinder Kumar vs ITO: 21 taxmann.com 316 (Mum-Trib).*** However, everything exempt from capital gains cannot be taxed as income from other sources as held by the Apex court in the case of ***CIT vs. D. P. Sandhu Bros. Chembur (P.) Ltd. (2005) 273 ITR 1***,

"Furthermore, it would be illogical and against the language of section 56 to hold that everything that is exempted from capital gains by the statute could be taxed as a casual or non-recurring receipt under section 10(3) read with section 56. We are fortified in our view by a similar argument being rejected in Nalinikant Ambalal Mody v. S.A.L. Narayan Row, CIT [1966] 61 ITR 428 (SC). "

3.0 Tax Issues in the Hands of The Society

Taxability of Corpus or Lumpsump Amount Received by Society

3.1 Any TDR/FSI (Development rights), whether acquired along with land or on account Development Regulations, is a Capital Asset. If the Society is in possession of development rights already embedded in the land acquired and owned by it, be it Base FSI/Unconsumed FSI etc.) then a proportionate cost of the land can be ascribed to such development rights as cost of acquisition. Therefore transfer of such development rights would result in capital gains liable to tax in the hands of the Society.

Corpus/Lumpsum not Taxable as Capital Gains in the Absence of Cost of Acquisition

3.2 However, if the Society has acquired the TDR/FSI due to change of law, that is the Development Regulations which confer additional development rights for re-development, then there is no cost of acquisition for such rights and consequently the computation mechanism will fail. In such cases, since there is no cost of acquisition there can be no capital gains following the ratio laid down by the Honourable Supreme Court in the case of ***B C Srinivas Setty [128 ITR 294***].

It is to be noted that development rights as above are not covered by any of the specific capital assets for which the cost of acquisition is deemed to be NIL u/s 55(2). Hence any corpus or lump sum or any benefit received by the Society is not liable to capital gains tax.

3.3 There are a line of decisions of the ITAT starting from ***Jethala D. Mehta vs. DCIT [2005] [2 SOT 422 Mum]*** in support of the above view expressed. Suffice it to say that this issue is squarely covered in favour of the assessee by the decision of the Honourable Bombay High Court in the case of ***CIT vs. Shambhaji Nagar Coop Housing Society Ltd 370 ITR 325*** wherein it has been held as Under:

*"**6.** We have heard both sides at great length and with their assistance, we have perused the order passed by the Tribunal and that of the Commissioner and the Assessing Officer. The Assessing Officer has noted the basic facts and about which there is no dispute. What has been argued before the Assessing Officer is that with the promulgation of the Development Control Rules, 1991 (DCR), the Assessee Society acquired right of putting up additional construction through TDR. Instead of utilising*

this right itself, the Society decided to transfer the same to a Developer for a consideration. The Society transferred a valuable right, which is capital asset under section 2(14) of the Income Tax Act. The right created by the DCR attaches to the land owned by the Society which was acquired for a value. Its title or ownership of the plot enables the Society to consume this FSI/TDR. In such circumstances, this is a transfer of capital asset held by the Society, which is chargeable to tax.

……….

11. *Thus, the conclusion of the Hon'ble Supreme Court is that an asset which is capable of acquisition at a cost would be included within the provisions pertaining to the head "Capital gains" as opposed to assets in the acquisition of which no cost at all can be conceived.* ***In the present case as well, the situation was that the FSI/TDR was generated by the plot itself. There was no cost of acquisition, which has been determined and on the basis of which the Assessing Officer could have proceeded to levy and assess the gains derived as capital gains. ….In the present case, additional FSI/TDR is generated by change in the D. C. Rules. A specific insertion would therefore be necessary so as to ascertain its cost for computing the capital gains. Therefore, the Tribunal was in no error in concluding that the TDR which was generated by the plot/property/land and came to be transferred under a document in favour of the purchaser would not result in the gains being assessed to capital gains.*** *……… The Tribunal concluded that the Assessee had not incurred any cost of acquisition in respect of the right which emanated from 1991 Rules, making the Assessee eligible to additional FSI.* ***The land and building earlier in the possession of the Assessee continued to remain with it. Even after the transfer of the right or the additional FSI, the position did not undergo any change. The Revenue could not point out any particular asset as specified in sub-section (2) of section 55. The conclusion of the Tribunal is imminently possible and in the given facts. That is also possible in the light of the legal position as noted by language of section 55(2) and the Judgment of the Hon'ble Supreme Court, which is in the field."***

No Taxability if Cost of Improvement Cannot be ascertained

3.4 : The same principle that there will be no capital gains when there is no cost of acquisition was also followed with reference to cost of improvement by the ITAT in the case of ***Ishverlal Manmohandas Kanakia vs. ACIT [ITA No 3053/Mum/2010]***. In that case the assessee had made a composite transfer that is i) FSI for which there was cost of acquisition as part of the cost of the land and ii) transfer of right to load TDR which did not have a cost of acquisition. The Tribunal held that the right to load TDR was cost of improvement which is not ascertainable and hence no capital gains is chargeable on the entire consideration including the

portion relating to FSI, in the following words:

"As per the law laid down by the Hon'ble Supreme Court in the case of B. C. Srinivasa Shetty (supra) both cost of acquisition and cost of improvement should be capable being ascertained and only then the machinery provisions of Sec. 48 can be applied. Therefore if cost of improvement cannot be ascertained the principle laid down in the case of B. C. Srinivasa Shetty would equally apply. The decisions rendered by the Tribunal in the case of Jethalal D. Mehtha (supra) and Maheshwar Prasad-2 CHS Ltd. (supra) clearly lay down that right as owner of a receiving plot to load additional FSI in terms of Regulation 14 of the Regulations is a right for which there is no cost of acquisition. If that be so, then the computation of capital gain in the case of the Assessee is not possible and therefore the receipt by the Assessee is a capital receipt which cannot be brought to tax as laid down by the Hon'ble Supreme Court in the case of B. C. Srinivasa Shetty (supra).

In that view of the matter we are of the view that the receipts on assignment of FSI including originating from the plot of land and/or married to it and right to load consume and use FSI credit by way of TDR which was the subject matter of transfer by the Assessee was a capital asset in respect of which the cost of improvement could not be ascertained and therefore the receipts of consideration for transfer of the said rights cannot be brought tax as the said receipts will be capital receipts and not capital gain."

Applicability of Section 50C To Transfer of Development Rights

3.5 The transfer of development rights do not attract the provisions of Section 50C as they are neither land nor building as held by the ITAT in the case of ***Smt. Sowmya Sathyan vs. The Income Tax Officer, Ward-1 (4), MYSURU. I.T.A. No. 1224/Bang/2019*** holding that,

"7. ….. A perusal of section 50C shows that section 50C shall be applicable where the consideration received as a result of transfer by an assessee of a capital asset, being land or building or both, is less than the value adopted or assessed or assessable by any authority of State Government. ***Thus, it is noted that the term 'capital asset' mentioned in the section specifically refers and confines its meaning to 'land or building or both'. Thus, scope of section 50C is restricted by the legislature itself to these two types of capital assets only****.*

7.1 In the present case before us, ***the capital asset transferred by the assessee was 'Development Rights in the land' and not the 'Land' itself.*** *If we go through similar provisions of the Act, we find that the legislature has used this expression consciously and carefully and keeping in view its need and objective of legislating section 50C. ……*

In these cases, 'rights' in 'land & building' have been specifically included as per requirement of these sections. ***In other words, term 'land & building' and 'rights therein' have been clearly understood and treated as***

independent from each other. *Thus, the perusal of the definitions given in these sections when compared with section 50C shows that legislature was conscious about the proper expression to be used as per its intention, scope, object and purpose of the section 50C, wherein it has been expressly mentioned that capital asset should be 'land or building or both'.* ***It has not been mentioned that any type of 'rights' shall also be included in the definition of capital assets to be transferred by an assessee.***

7.3 The provisions of section 50C are deeming provisions. It is settled law and well accepted rule of interpretation that deeming provisions are to be construed strictly. Thus, while interpreting deeming provisions neither any words can be added nor deleted from language used expressly. We should apply the 'Rule of strict Interpretation' as well as 'Rule of Literal Construction' while understanding the meaning and scope of deeming provisions. In our opinion, under the given facts and circumstances, Ld. Counsel has rightly contended that since the impugned capital asset transferred by the assessee upon which long term capital gain has been computed by the AO is on account of transfer of Development Rights in the land of the assessee. ***The land itself has not been transferred by the assessee. Thus, in our opinion provisions of section 50C have been wrongly applied upon the impugned transaction.*** *Thus, we reverse the action of lower authorities in applying the provisions of section 50C and in substituting any value other than the amount of actual sales consideration received by the assessee. ….."*

3.5.1 Similar view was taken by the ITAT in ***ITO vs. State Bank of India Staff Vaibhav Co-op Hsg Ltd: ITA No.5324/Mum/2016***.

Applicability of Section 56(2)(X)

3.6 This discussion cannot be complete without considering the applicability of Section 56(2)(x) to the transfer of development rights. While there are no precedents on this issue, it can be contended that the transfer of development rights in a re-development agreement includes both monetary components and non-monetary components such as the inconvenience caused to the society and its members which cannot be evaluated and therefore Section 56(2)(x) is incapable of being applied. Interestingly in the case of ***Smt. Sowmya Sathyan v. ITO*** above, the addition was initially made by the AO u/s 56(2)(x) in respect of the consideration received on transfer of development rights. However, the CIT (Appeals) confirmed the addition u/s 50C which however was later deleted by the ITAT. In the absence of factual details in the ITAT order it can, perhaps, be presumed that the CIT appeals deleted the addition u/s 56(2)(x) and the department did not deem it fit to pursue it before the ITAT.

4.0 Tax Issues in the Hands of The Developer

4.1 As far as the Developer is concerned the activity of development is a business and hence the income therefrom is

assessable under the head Income from Business. Typically each development agreement would constitute a " project" and hence a separate source of income. The income received from the sale of flats under the development agreement would constitute the "Revenue" and the entire development expenditure incurred for the Project as a whole would be allowable as a deduction. The moot question that needs to be answered is the method of Revenue recognition that needs to be followed from the accounting and tax point of view since the Project may carry on for many years.

Percentage of Completion Method (POCM) vs Project Completion Method/ Completed Contract Method (CCM)

4.2 : Broadly, there are two methods of Revenue recognition in vogue viz Percentage of Completion Method (POCM) or Project Completion Method/ Completed Contract Method (CCM). CCM allows the assessee to defer the actual ascertainment of profits/losses till the completion of the project, whereas, POCM recognises revenues and consequently profits/losses based on the progress of the project over the period of the Project.

Accounting Standard (AS) - 7, AS9 AND POCM

4.3.1 AS 7 (Constructions Contracts) and AS 9 (Revenue Recognition) are relevant for determining whether POCM/CCM is to be followed by the Developer. Para 21 of the AS 7 deals with the Recognition of Contract Revenue and requires recognition of revenue under POCM in the case of construction contracts. The relevant paras 21 and 24 are extracted below:

"21. When the outcome of a construction contract can be estimated reliably, contract revenue and contract costs associated with the construction contract should be recognised as revenue and expenses respectively by reference to the stage of completion of the contract activity at the reporting date. An expected loss on the construction contract should be recognised as an expense immediately in accordance with paragraph 35. "

*"24. **The recognition of revenue and expenses by reference to the stage of completion of a contract is often referred to as the percentage of completion method.** Under this method, contract revenue is matched with the contract costs incurred in reaching the stage of completion, resulting in the reporting of revenue, expenses and profit which can be attributed to the proportion of work completed. This method provides useful information on the extent of contract activity and performance during a period. "*

4.3.2 Para 12 of AS 9 deals with the Main Principles of Revenue Recognition and permits both POCM and CCM in the case of service contracts as below :

"12. In a transaction involving the rendering of services, performance should be measured either under the completed service contract method or under the proportionate completion method, whichever relates the revenue to the work accomplished. Such performance should be regarded as being achieved when no significant uncertainty exists regarding the amount of the consideration that

will be derived from rendering the service. "

ICAI Guidance Note on Real Estate Transactions (2012)

4.4.1 The ICAI has issued a Guidance on Real Estate Transactions in 2012, in which it laid down the principles for the application of AS 7 and AS 9 to Real Estate Transactions, relevant portions of para 5 are extracted as below:

"**5.0 Application of Percentage Completion Method**

5.1: The percentage completion method should be applied in the accounting of all real estate transactions/activities in the situations described in paragraph **3.3 above, i.e., where the economic substance is similar to construction contracts.**

Some further indicators of such transactions/activities are:

The duration of such projects is beyond 12 months and the project commencement date and project completion date fall into different accounting periods.

Most features of the project are common to construction contracts, viz., land development, structural engineering, architectural design, construction, etc.

While individual units of the project are contracted to be delivered to different buyers these are interdependent upon or interrelated to completion of a number of common activities and/or provision of common amenities.

The construction or development activities form a significant proportion of the project activity."

Indian Accounting Standards (IND AS) vs. POCM

4.5 Para 31 of the Ind AS – Revenue from contracts with customers, provides for revenue recognition on completion of performance obligations, that is ,

"An entity shall recognise revenue when (or as) the entity satisfies a performance obligation by transferring a promised good or service (ie an asset) to a customer. An asset is transferred when (or as) the customer obtains control of that asset. "

A question arises whether the above para of 31 recognises only CCM method and does not permit POCM . This has been clarified by the ICAI , vide press release dated 20-07-2018, as below :

"Implementation of Ind AS 115, Revenue from Contracts with Customers in context of Real Estate Sector

It has come to ICAI's attention that there have been misleading and confusing media reports that Ind AS 115, Revenue from Contracts with Customers, (issued by MCA vide notification dated March 28, 2018) permits only Completed Contract Method of accounting for real estate companies. We have come across statements like,"revenue in case of real estate transactions can be booked only after the project is completed and the customer has taken possession of the unit (house/flat)". These kind of reports may lead to misinterpretation of the principles laid down in the Standard.

In view of the above, the ICAI would like to clarify that the Ind AS 115 does allow recognition of revenue using Percentage of Completion Method (POCM) and has explicit and specific requirements to recognise revenue,

where performance obligation is satisfied over a period of time. It may be noted that paragraphs 35-37 of Ind AS 115 explicitly permit recognition of revenue using POCM, where the performance obligation is satisfied over time.

It may be noted that Paragraph 35(b) & (c) of Ind AS 115 are intended to address situations of real estate sector. In view of the above, recognition of revenue as the construction progresses is possible considering the prevalent long established legal system/ jurisprudence in India, and facts and circumstances of individual case/ contract."

Income Computation and Disclosure Standards (ICDS) AND POCM

4.6 ICDS III deals with Construction Contracts and ICDS IV deals with Revenue Recognition and are relevant for determining the method of taxation of revenue of Real Estate Transactions, including in the case of a developer engaged in redevelopment.

4.7 Para of ICDS III mandate that Revenue from constructions contracts shall be recognised under the POCM, as extracted below:

*"**Recognition of Contract Revenue and Expenses***

16. Contract revenue and contract costs associated with the construction contract should be recognised as revenue and expenses respectively by reference to the stage of completion of the contract activity at the reporting date.

*17. **The recognition of revenue and expenses by reference to the stage of completion of a contract is referred to as the percentage of completion method.** Under this method, contract revenue is matched with the contract costs incurred in reaching the stage of completion, resulting in the reporting of revenue, expenses and profit which can be attributed to the proportion of work completed. "*

4.8 Para 6 of ICDS IV requires revenue recognition from services under POCM and makes the requirements of ICDS III on POCM applicable to service contracts under ICDS IV, as extracted below :

*"6. Subject to Para 7, **revenue from service transactions shall be recognised by the percentage completion method**. Under this method, revenue from service transactions is matched with the service transaction costs incurred in reaching the stage of completion, resulting in the determination of revenue, expenses and profit which can be attributed to the proportion of work completed. **Income Computation and Disclosure Standard on construction contract also requires the recognition of revenue on this basis. The requirements of that Standard shall mutatis mutandis apply to the recognition of revenue and the associated expenses for a service transaction.** However, when services are provided by an indeterminate number of acts over a specific period of time, revenue may be recognised on a straight line basis over the specific period. "*

No ICDS for Real Estate Transactions

4.9 There is no separate ICDS for Real Estate Transactions, and the draft ICDS

for Real Estate Transactions released by the CBDT in 2012 is yet to be notified. It is noted that the said Draft is on the same lines as the ICAI Guidance note on Real Estate Transactions (2012) and requires POCM to be followed in case of Constructions Contracts and " transfer of risks and reward method" (i.e. CCM) in the case of a project where the economic substance is not similar to the construction contract.

Section 43CB of the Act qnd POCM

4.10 An important statutory development is the introduction of Section 43CB by the Finance Act, 2018 with retrospective effect from 1.04.2017 , to the effect that,"

Computation of income from construction and service contracts.

43CB. *(1) The profits and gains arising from a construction contract or a contract for providing services shall be determined on the basis of percentage of completion method in accordance with the income computation and disclosure standards notified under sub-section (2) of section 145: "*

Redevelopment Contracts – POCM is Applicable

4.11 Thus the AS 7, AS 9, ICAI Guidance Note on Real Estate Transactions (2012), Ind AS 115, ICDS III, ICDS IV, Draft ICDS on Real Estate Transactions and Section 43CB of the Act are all aligned to the effect that in respect of Construction Contracts and Service Contracts the economic substance of which is similar to Construction Contracts, the method for Revenue Recognition is the POCM, that is recognition of revenue and expenses by reference to the stage of completion of a contract, by which method the contract revenue is matched with the contract costs incurred in reaching the stage of completion, resulting in the reporting of revenue, expenses, and profit which can be attributed to the proportion of work completed.

4.12 The economic substance of a re development contract is similar to construction contract. Hence, applying the above principles to the case of Developer under a re development contract, it is clear that POCM method is to be followed for revenue recognition by the Developer for recognising revenue arising from re-development contracts/projects.

5.0 Conclusion

Having discussed the principles as above, it must be said and reiterated that each re-development contract is unique by itself, there is no one precedent that can be applied universally. The interplay of Development Regulations and Laws relating to Property with the principles of income tax law as discussed above create complex situations, the nuances of differences between Accounting Standards and ICDS have a significant impact and hence the facts and circumstances of each case must be carefully analysed to arrive at the tax implications and to avoid litigation.

CA Suhas P. Bora

Analysis of Section 45(5A) of the Income Tax Act, 1961 in case of a Joint Development Agreement

Taxing the land owner at the stage of entering into the JDA was causing undue financial hardship to them. With a view to alleviate the hardship, an amendment was brought in by the Finance Act, 2017 by inserting a new sub-Section (5A) to Section 45 w.e.f. 1 April 2018. The new provision states that capital gains would arise in the hands of the landowner once the completion certificate is issued by the authority on completion of the project or part of the project, as the case may be.

In this article I have attempted to analyse the provisions of Section 45(5A) of the Income-tax Act, 1961 (**'IT Act'**) in the context of applicability of the said provision on the following various issues.

Issues

1. Issues in period of holding to determine long term or short term

The taxability of capital gains depends upon a number of factors, out of which one of the most important is the period of holding. In very general terms the time lag between the acquisition and transfer of asset is taken as the period of holding and that period predicts whether the capital gain arising is short term or long term.

Section 45(5A) deals with two aspects (a) year of tax liability and (b)full value of consideration. It does not deal with year of transfer.

Therefore **'Notwithstanding clause'** under Section 45(5A) would apply only to aforesaid two aspects. Which means, year of transfer remains same i.e. the year in which the transfer takes place under Section 2(47) of the Act. However, Sec. 45(5A) provides for chargeability of Capital gain in the year in which certificate of completion is issued for the developed real estate project.

From the minute reading of the provision of Sec. 45(5A), it reveals that there is no mandate regarding determination of date of transfer of Land/Asset. In fact, this provision has been inserted to set right the controversy regarding the determination of date of transfer of asset. In other words, making the provision for chargeability of tax on Capital Gain in the year in which certificate of completion is issued for the real estate project, **the date of transfer of Asset** is sought to be substituted by such date. Therefore, in my opinion, according to provisions of Sec. 45(5A), actual date of transfer of asset as per Sec. 2(47) of the Act is not relevant for the purpose of computing capital gain.

This interpretation is based upon the analogy from the decision of Hon'ble Bombay High Court in the case of ***CIT vs. Manjula J. Shah 68 DTR 269***, wherein Hon'ble Court has held that in case of an Assessee, covered under 49(1) of the Act, the capital gain liability has to be computed by considering that the assessee held the said asset from the date it was held by previous owner and the same analogy has also to be applied in determining the indexed cost of acquisition. Even in the **Circular No. 636 dated 31.08.1992 [198 ITR 1 (St)**], it is clarified that a fair method of allowing relief by way of indexation is to link it to the period of holding of the asset.

Therefore, in my opinion, the period of holding under Sec. 45(5A) should also be computed with reference to the date on which capital gain is chargeable to tax as no mandate regarding determination of date of transfer of the land/asset has been provided under Sec. 45(5A) of the Act.

2. Whether indexation is only up to the date of transfer or up to the date of issue of completion certificate

As per *Explanation* (iv) to Section 48, cost of inflation index (CII) is calculated from the year in which the long-term capital asset was held by the assessee to the year of 'transfer of such asset'

This issue also arises in case of conversion of capital asset in to stock in trade and it that context Chennai ITAT in the case of ***Best & Crompton Engineering Ltd. vs. Asst. CIT [2014] 30 ITR (T) 688*** **has held that Cost Inflation Index of year of conversion of asset into stock-in-trade has to be applied and not the Cost Inflation Index of year of taxation.**

If the aforesaid ratio is applied, Cost Inflation Index of year of transfer should be applied and not the Cost Inflation Index of year of taxability.

With due respect, the aforesaid decision cannot be applied for the following reasons

a. In the aforesaid decision, the consideration is frozen on the date of conversion. Under Section45(5A), consideration is frozen on the date of issue of completion certificate.

b. Object behind giving benefit of indexation is to enhance the value of the asset by taking estimated rise in the cost of asset year-by-year as a result of inflation.

c. If indexation is restricted up to the year of transfer as against year of taxability, the effect of inflation during the period between the year of transfer and year of taxability will be ignored.

This results in defeating the objective in granting the benefit of indexation. Further, while the indexation during the aforesaid period is ignored, the stamp duty value applied will be as on the date of issue of completion certificate [year of taxability].

Therefore, in my opinion in the context of working of taxability of capital gain U/Sec, 45(5A) cost inflation index of the year of taxability should be applied and not up the date of execution of the specified agreement. In this context reliance can be placed on following decisions, which are in the context of Sec. 45(2) of the Income tax Act.

a. ***Karnataka High Court, in the case of CIT vs. Rudra Industrial Commercial Corporation. [(2012) 20 taxmann.com 611.]***

b. ***Sakthi Sugars Ltd. vs. DCIT, IT.A.Nos. 866/Mds/2016, IT.A.Nos. 1107/Mds/2016, Dt.23.06.2017 (Chennai Trib)***

c. ***Mather & Platt Pumps Ltd. vs. Addl. CIT, ITA No. 351/PN/2009, ITA No. 368/ PN/2009, ITA No. 302/PN/2010, ITA No.***

1000/PN/2012, dt. 28.10.2013 (Pune-Trib)

In these cases, the court has provided the benefit of indexation till the year of taxability of capital gain, even if the capital gain arose in earlier year.

It is also relevant to mention that in the context of section 45(2), where an investment is converted into stock and the transferred, the CBDT had issued a circular no. 791, dated 02.06.2000, which came out in the context specifically of exemptions provided in section 54EA/54EB/54EC wherein it was provided that for the purposes of these exemptions, date of transfer has to be taken as the sale of transfer of stock in trade only.

3. Non availability of liquidity to discharge tax liability

The expression 'transfer' is defined in Section 2(47) of the IT Act. The provisions of clause (v) and (vi) to Section 2(47) of the IT Act, inserted by the Finance Act, 1987, w.e.f. 1 April 1988 provides a wide meaning to the expression 'transfer', bringing within its ambit even to include those transactions which would have otherwise not been considered as 'transfer' under the general law. These clauses cover the following transactions:

a. any transaction allowing possession of any immovable property to be taken or retained in part performance of a contract under Section 53A of Transfer of Property Act [Section 2(47)(v)]

b. any transaction which has the effect of transferring or enabling enjoyment of any immovable property [Section 2(47)(vi)]

The law regarding the point of transfer under JDA has evolved through following decisions:

a. ***CIT vs. Ramgopal [2015] 55 taxmann.com 536 (Del);***

b. ***CIT vs. Tata Teleservices Ltd [1980] 122 ITR 594;***

c. ***Vinoj Kumar Jain [2012] 395.***

In all these decisions courts have held that there is a 'transfer' by the land owner to the extent of the developer's share in the land, on the date of entering the JDA itself and that capital gains are triggered in the hands of the landowner at that point in time.

The Bombay High Court in the case of ***Charturbuj Dwarakadas Kapadia*** held that the 'transfer' as far as the landowner is concerned takes place on the date of entering into the JDA on the ground that possession given to a developer would also fall within the ambit of the 'transfer' under Section 53A of the Transfer of Property Act, 1882 read with Section 2(47)(v) of the IT Act.

This legal position that transfer happens on the date of entering into the JDA itself, necessitated the land owners to discharge tax liability even in the absence of receipt of any consideration in their hands, thereby causing grave hardship to them.

The above method of taxability of capital gains was posing challenges to many land owners who were constrained to discharge tax liability even before completion of project and receipt of consideration.

The provision of Sec. 45(5A) which states that capital gains would arise in the hands of the landowner once the completion certificate is issued by the authority on completion of the project or part of the project, as the case may be is welcome provision to mitigate the hardships faced by the landowners.

Now at least the Individual and HUF, who fulfils the all-other conditions of Sec. 45(5A) of the Act, now will not have to pay capital gain tax on the date of entering in to Joint Development Agreement and therefore will not

be in a situation of non-availability of liquid funds to discharged the liability.

4. Capital Assets vs. Business Assets

Section 45(5A) starts with the non-obstante clause stating that 'notwithstanding anything contained in sub section (1) of section 45' which implies that the provision of sub section (5A) shall supersede the provision of sub section (1).

Section 45(1) provides that the capital gains arising in the case of transfer of capital asset is taxable in the year in which transfer of asset takes place.

Therefore, in the case of transfer of land etc. under joint development agreement being in the nature of 'specified agreement' as defined therein, capital gain arising on transfer of land or building or both etc. by Individual or HUF shall be governed by the provision of sub section (5A) and not by the provision of sub section (1) of section 45.

As per Sec. 45(5A) the main condition is that the Capital Gains should arise from the transfer of a **Capital asset**, being land or building or both, under a specified agreement

The provisions of Section 45 do not apply to a case of stock-in-trade. Therefore, even if it is a case of JDA, the provisions of Section 45(5A) do not apply.

However, the provision of Section 45(2) would apply in case a capital asset is converted in to stock-in-trade. Income arising out of transfer of land or building or both held as stock-in-trade constitute business income chargeable to tax under Section 28 of the Act.

5. Conversion of land into business S. 45(2)

On conversion of capital asset into stock in trade, as per provisions of Sec, 2(47)(iv) r.w.s 45(2) capital gain will arise in the hands of the land owner in the year of conversion.

The same is to be worked out by considering the FMV of the land on the date of conversion and difference between the FMV and indexed cost of acquisition is the capital gain liable to be tax in the hands of land owners.

However, the tax on said gain shall be paid in the year when the stock in trade will be sold on a future date i.e. the constructed units in the project will be sold. Thus, the land owner will be liable to pay capital gain tax when he actually realizes the revenue by selling the constructed units in his project.

Here it is important to note that income from profits and gains of business and profession will also be liable to tax in the hands of the land owner for the sale of constructed units of the project. This is worked out by deducting the FMV of the land which is consider while calculating capital gain at the time of conversion, from the revenue which is generated from sale of constructed units. Thus tax will have to be paid under two heads of income tax i.e. capital gain and business income. The benefit on conversion is only the deferment of payment of capital gain tax on introducing the land into the Joint Venture Agreement.

In view of above as per provisions of Sec. 45(2) and Sec. 2(47)(iv) the capital gain will be worked out in the year in which capital asset is converted into stock in trade and liability will be paid in the year in which constructed units received by the land owners are sold.

Therefore, if land owner, who is Individual/HUF converts the land being Capital Asset into Stock in trade, he shall be covered by provisions of Sec. 45(2) and not by provisions of Sec. 45(5A) of the Act, since Sec. 45(5A) is applicable then land continues to remain as capital asset in the hands of the landowner, who is Individual/HUF.

6. Stamp duty value of developed structure higher than fair market value, impact of section 50C

Sec. 45(5A) provide a deeming fiction by prescribing the method of determination of the value of consideration to be received in kind. It provides that for the purpose of section 48, the stamp duty value on the date of issue of completion certificate of the project with respect to the share of the land owner as increased by the consideration received in cash, if any, shall be deemed to be the full value of the consideration received or accruing as a result of the transfer of the asset.

Under Sec. 45(5A) there is no provision which states to substitute fair market value as a sale consideration if the FMV is less than Stamp duty Value.

In such situation whether provisions of Sec. 50C(2) are applicable.

There are two school of thought to this issue. First one subscribes to thought that provisions of sec. 50C(2) are applicable on the ground of principle of parity and natural justice.

The other school of thought is provisions of sec. 50C are not applicable to the provisions of Sec. 45(5A) of the Act and I am also subscribing to this view on account of following reasons:

a. Section 45(3) and Section 50C both are deeming fiction with regards to the consideration.

b. It is a well-known rule of interpretation that in a case where a general as well as a specific section is applicable, the specific provision will overrule the general provision.

c. Section 45(5A) of the Income-tax Act, 1961 is a deeming provision and hence has to be interpreted strictly. The said provision does not invoke section 50C of the Act.

d. Supreme Court decision in the case of ***CIT vs. Moonmill Ltd. 59 ITR 574*** where in it held that one deeming section cannot be extended by importing another deeming section.

e. Section 50C reads as "Where the consideration received or accruing as a result of the transfer by an assessee of a capital asset, being land or building or both". In case of Section 45(5A) capital gain shall be chargeable to Income Tax as a income of a previous year in which certificate of completion for the whole or part of the project is issued by competent authority and for the purpose of section 48, the stamp duty value on the date of issue of said certificate, of his share, being a land or building or both in the project, as increased by consideration received in cash, if any, shall be deemed to be the full value of the consideration received or accruing as a result of transfer of capital asset.

f. The deemed 'full consideration' is an expression different from the word 'consideration' appearing in Section 50C. Hence the amount determined as consideration section 45(5A) is a deemed one which is received by or accrued to the individual/HUF.

g. If section 50C was to prevail over 45(5A), section 45(5A) would become redundant to that extent, which does not seem to be the intention of the legislature.

7. How capital gains to be calculated when part completion certificate received

7.1 As per mandate of Sec. 45(5A), in capital gain is chargeable to tax on entire land as per specified agreement even when the certificate of completion is issued by the competent authority.

7.2 If the development has been carried out in separate phases, then the proportionate capital gain shall be taxable in the year of issue of part completion certificate.

7.3 Otherwise, the whole of the capital gain shall be taxable in the year of the issue of part completion certificate.

7.4 The practical day to day life case, when part completion certificate received in my opinion the correct, logical and reasonable interpretation suggest that the capital gain should be attracted on proportionate basis in the ratio of land utilised for the part of the project for which certificate of completion has been received.

8. Applicability in case agricultural land is contributed for joint development

8.1 If an agricultural land is not covered as per definition of Capital Asset under Sec. 2(14) then there will not be any Capital Gain tax on transfer of such agricultural land. The status of agricultural land whether complying the conditions as provided in Sec. 2(14) is to be seen as on the date of transfer of agricultural land by the land owner to the developer.

8.2 As per Income Tax Act, there are two types of Agriculture Land in India that is 'Rural Agriculture Land' and 'Urban Agriculture Land'. Therefore, it is very important to understand the meaning of 'Rural Agriculture Land' and 'Urban Agriculture Land'. Agricultural Land in Rural Area in India is not considered a capital asset. Therefore, any gains from its sale are not taxable under the head Capital Gains

8.3 **Rural Agricultural land**

It means an agricultural land in India –

(a) If situated in any area which is comprised within the jurisdiction of a municipality and its population is less than 10,000, or

(b) If situated outside the limits of municipality, then situated at a distance measured-

(i) more than 2 kms, from local limits of municipality and which has a population of more than 10,000 but not exceeding 1,00,000; or

(ii) more than 6 kms, from local limits of municipality and which has a population of more than 1,00,000 but not exceeding 10,00,000; or

(iii) more than 8 kms, from local limits of municipality and which has a population of more than 10,00,000.

8.4 **Urban Agricultural Land**

Urban Agricultural Land is a land located in specified location i.e. not a Rural Agricultural Land and used for agricultural purposes.

Therefore, when urban agricultural land is contributed by Individual/HUF to the developer in terms of specified agreement as per Sec. 45(4A), capital gain is chargeable to tax in the year in which certificate of completion is issued for the developed real estate project.

In case the land owner who is Individual/HUF contributes rural agricultural land to the developer in

terms of specified agreement, there should not be any capital gain tax liability in the hands of the landowner on account of following reasons:

a. since the land contributed by him is a rural agricultural land in terms of Sec. 2(14) as on the date of transfer.

b. Provision of Sec. 45(5A) is applicable only when there is a transfer of Capital Asset.

9. How taxability is determined if ingredients of S. 45(5A) is not fulfilled

9.1 As per section 45(5A), capital gains to the land owner arise only after construction of the property is completed and the completion certificate is obtained from the competent authority by the builder/developer.

9.2 The benefit of special tax regime shall not apply to an assessee who transfers his share in the project to any other person on or before the date of issue of said certificate of completion. In such a situation, the capital gains (as determined under general provisions of the Act) shall be deemed to be the income of the previous year in which such transfer took place and shall be computed as per provisions of the Act without taking into account the above provisions.

9.3 As per Proviso, Section 45(5A) would not apply where the assessee i.e. Individual or HUF 'transfers his share' before the issue of completion certificate.

9.4 Whether expression **'Transfers his share'** would mean **'complete transfer'** of owner's share or it includes even **'part transfer'**?

Under Section 45(5A) the taxable event takes place, even when the competent authority issues completion certificate for the part of the project. Similarly, even transfer of part of owner's share would come under proviso to Section 45(5A) of the Act.

In case of **'part transfer'** of owner's share, whether Proviso would apply to entire land or Only to the extent of land proportionate to the transfer of part of owner's share.

Whether in case of 'part transfer' of owner's share, applicability of Section 45(5A) is barred wholly or only to the extent of part transfer?

9.5 There is no clarity in the section about this situation. Therefore, I am dealing with the implications of Proviso considering both the interpretations i.e. non-applicability of Section 45(5A) wholly as well as partially.

9.6 **Non-applicability of Section 45(5A) wholly**, would mean application of Proviso [i.e. Section 45(1)] to the entire land and the capital gains shall be deemed to be the income of the previous year in which such transfer takes place and the provisions of this Act, other than the provision of this sub section, shall apply for the purpose of determination of full value of consideration received or accruing as a result of such transfer.

9.7 **Non-applicability of Section 45(5A) partially would mean application of:**

a. Proviso [i.e. Section 45(1)] to the extent of land proportionate to the transfer of owner's share before the issue of completion of certificate.

b. Section 45(5A) to the extent of completion certificate issued by the Competent Authority

9.8 The Proviso to section 45(5A) has envisaged a situation **where the land owner transfers his share in the project on or before the date of issue of the certificate of completion**. In normal circumstances, it is not possible to transfer a property which has not still come into existence. The developed real estate comes into existence when certificate of completion is issued by the competent authority and the assessee is entitled to sell or transfer such property after getting its possession. Prior to the issue of certificate of completion land owner has rights in the developed real estate of the project and at the most he can transfer such rights.

In case ownership rights or interest in the project is transferred by the land owner before issue of certificate of completion by the competent authority, it may be possible that the proviso gets triggered and taxability of capital gains on transfer of land may be in accordance with the proviso. Therefore, in our humble opinion such situation may arise in rare cases and the proviso may be of very limited applicability.

9.9 The other situation may be that land owner enters into agreement for transfer of the developed real estate before the date of issue of certificate of completion. Such practice is very common and prevalent & for the purpose of creating liquidity, sale agreement is entered and part payment is received from the customers. As per the language of the proviso, it is applicable when the assessee transfers his share of the developed real estate before issue of certificate of completion. Such expression cannot be interpreted to cover the situation when sale agreement has been entered but property is yet to be transferred. Therefore, under such situation also, there is no applicability of this proviso. In such a situation, in case sale consideration of developed real estate agreed between the land owner and the customer is higher than the stamp duty value of the developed real estate as on the date of issue of certificate of completion, the excess amount of such sale consideration shall be chargeable to income tax in the year in which transfer of such real estate takes place.

In view of the above it can be said that there may be practically hardly any applicability of the above proviso.

10. Conclusion

It is relevant to mention at the end that there are conflicting opinions on the various issues arising out of interpretation of section 45(5A). We have expressed our opinion having regard to harmonious & schematic interpretation of the provision. Since there are no direct judicial precedents available on Sec. 45(5A) of the Act and in course of time, we hope that the courts would resolve above referred issues.

CA Abhay Pitale

Issues arising out of Section 56(2)(x)(b) of Income-tax Act in case of immovable property transactions

Gift Tax provisions were applicable in India and gifts received were taxable in the hands of recipients till 30.9.1998. However, provisions of Gift Tax were abolished with effect from 1.10.1998 citing reasons that such provisions neither yielded much revenue nor fulfilled objective of preventing tax evasion. However, post abolition of Gift Tax provisions, it was noticed that there was substantial increase in gift transactions which were not taxed as income in absence of any specific provisions. To curb such practices, deeming provisions such as clause (v), (vi), (vii), (viia) and (viib) were inserted over a period under section 56(2) of the Income-tax Act, 1961 ('the Act').

In addition to the above provisions, provisions of clause (x) in section 56(2) of the Act were introduced by the Finance Act, 2017 with effect from 1 April 2017. Under the then existing provisions of section 56(2)(vii) of the Act, any sum of money or any property, which was received without consideration or for inadequate consideration (in excess of the specified limit of ₹ 50,000), by an individual or Hindu undivided family was chargeable to income-tax in the hands of the recipient under the head "Income from other sources" subject to certain exceptions. Further, receipt of certain shares by a firm or a company in which the public are not substantially interested was also chargeable to income-tax under the provisions of section 56(2)(viia) of the Act in case such receipt was in excess of ₹ 50,000 and received without consideration or for inadequate consideration. The then definition of 'property' for the purpose of section 56 (2)(vii) of the Act included immovable property, jewellery, shares, paintings, etc. However, the anti-abuse provisions were applicable only in case of individual or HUF and firm or company in certain cases. Therefore, receipt of sum of money or property without consideration or for inadequate consideration did not attract these anti-abuse provisions in cases of other Assessees like companies.

In order to prevent the practice of receiving the sum of money or the property without consideration or for inadequate consideration by all class of assessees, a new clause (x) was inserted in sub-section (2) of section 56 of the Act so as to provide that receipt of the sum of money or the property by any person without consideration or for inadequate consideration in excess of ₹ 50,000 shall be chargeable to tax in the hands of the recipient under the head "Income from other sources". The scope of then existing exceptions was also widened by including certain transfers not regarded as transfer under section 47 of the Act. Consequential amendment was also done in section 49 of the Act for determination of cost of acquisition.

Provisions of Section 56(2)(x) of the Act

Provisions of clause (x) govern the taxability of deemed income on account of any sum of money or any other property received by any person. Broadly, the scope of the provisions is as under:

i. Apply to all the categories of Assessees;

ii. Money or property should be received during the previous year;

iii. Same should be received from any person or persons;

iv. Provisions are applicable when the person has received:-

- sum of money exceeding ₹ 50,000/- in aggregate; or
- any immovable property without consideration or for a consideration less than the stamp duty value, by ₹ 50,000 or by 10% of the consideration (whichever is higher); or
- any property, other than immovable property without consideration or for a consideration less than the fair market value exceeding ₹ 50,000/-.

v. In case of immovable property valuation is to be adopted as per the stamp duty value of the property as notified by the Central Government or the State Government for the payment of stamp duty, subject however, to the exemption up to ₹ 50,000/- or 10% of such value, whichever is higher. Further, value is to be adopted as on the date of the agreement in case a part of consideration has been paid before the date of agreement by way of account payee cheque or by using electronic clearance system. The assessee is also entitled to dispute the valuation in terms of provisions of section 50C(2) of the Act.

vi. Fair market value in case of any other property has to be determined as per Rules 11U and 11UA of Income-tax Rules, 1962.

vii. The property for purpose of section 56(2)(x) means assets as defined in Clause (vii) of section 56(2) of the Act, i.e., immovable property being land or building or both; shares and securities; jewellery; archaeological collections; drawings; paintings; sculptures; any work of art or bullion.

viii. Any sum of money or any property received from a relative or in the circumstances as are specified in the Clause are not covered by the scope of deemed income.

ix. Meaning of the term relative has been defined in Clause (e) of Explanation to Clause (vii) of section 56(2).

Let us discuss few important issues in case of immovable property transaction in context of the provisions of section 56(2)(x) of the Act.

Whether provisions of Section 56(2)(x) apply if the immovable property being land is purchased for business purpose and forms part of stock-in-trade of the recipient

There could be a situation where immovable property in nature of land is purchased by an assessee. Such purchase could be done for consideration which is lower than the stamp duty value of such property by ₹ 50,000 or by 10% of the consideration (whichever is higher) and the land so purchased is treated as stock-in-trade by the purchaser. It is worthwhile to analyse whether provisions of section 56(2)(x) of the Act will be applicable in such situation or not.

The term 'immovable property' or 'property' is not defined in section 56(2)(x). However, as per the Explanation to section 56(2)(x), the expression 'property' shall have the same meaning as assigned to it in clause (d) of the Explanation to clause (vii) of section 56(2).

As per the provisions of clause (d) of the Explanation to section 56(2)(vii), the expression 'property' is defined as under:

(d) "property" means the following capital asset of the assessee, namely:—

- i. immovable property being land or building or both;
- ii. shares and securities;
- iii. jewellery;
- iv. archaeological collections;
- v. drawings;
- vi. paintings;
- vii. sculptures;
- viii. any work of art; or
- ix. bullion.

Looking at the above definition of the property for the purpose of section 56(2)(vii) and (x), it can be inferred that it is common requirement of all the 9 sub-clauses of clause (d) above is that it should be a capital asset of the assessee.

Section 2(14) of the Act defines 'capital asset' to inter alia mean property of any kind held by assessee, whether or not connected with his business or profession, and any securities held by foreign institutional investor but it does not include any:

(i) stock in trade, consumable stores or raw materials held for the purpose of business;

(ii) personal effects i.e. movable property held for personal use; and

(iii) agricultural land in India.

Considering the definition of 'capital asset' under section 2(14) and the exceptions provided, one may argue that any kind of stock-in-trade should not be regarded as 'capital asset' and provisions of section 56(2)(x) should not be applicable to such assets not qualifying as 'capital asset'. As such, any land purchased for the purpose of business and forming part of stock-in-trade should not be treated as 'property' for the purpose of section 56(2)(x) of the Act. Considering this, it can be argued that provisions of section 56(2)(x) of the Act may not be applicable to land purchased for the purpose of business and treated as stock-in-trade. This view also find supports from the memorandum to Finance Bill, 2010 when the definition of 'property' was amended under clause (d) of Explanation to section 56(2)(vii). The memorandum, while discussing the intention behind amending such definition, states as under:

"The provisions of section 56(2)(vii) were introduced as a counter evasion mechanism to prevent laundering of unaccounted income under the garb of gifts, particularly after abolition of the Gift Tax Act. The provisions were intended to extend the tax net to such transactions in kind. The intent is not to tax the transactions entered into in the normal course of business or trade, the profits of which are taxable under specific head of income. It is, therefore, proposed to amend the definition of property so as to provide that section 56(2)(vii) will have application to the 'property' which is in the nature of a capital asset of the recipient and therefore would not apply to stock-in-trade, raw material and consumable stores of any business of such recipient".

One may also refer to Jaipur ITAT's decision in case of ***Shri Satendra Kaushik vs. ITO***

(ITA No. 392/JP/2019). In this case, the assessee was engaged in real estate business. In the year under consideration, the assessee purchased a piece of land by registered purchase deed of ₹ 15 lakhs. During the assessment proceedings, the AO observed that the assessee has shown the purchase of land in trading account. The assessee had also paid ₹ 3 lakh to the seller and shown the balance of ₹ 12 lakhs in the liability side of balance sheet. The AO invoked the provision of sec. 56(2)(vii)(b) of the Act adopting the full value of sale consideration as adopted by the stamp authority and added the difference amount ₹ 34,23,542/- in the hand of assessee as deemed income of the assessee u/s. 56(2)(vii)(b) of the Act. On appeal by the assessee, the ld. CIT(A) confirmed the action of the AO by observing that the property is defined in very specific way in the definition by mentioning 'property', which means both agricultural land and non-agricultural land. Accordingly, the order passed by the AO was confirmed by the ld. CIT(A). On further appeal by the assessee to the ITAT, the ITAT observed that the definition of property has been amended to provide that section 56(2)(vii) will have application to the 'property' which is in the nature of a capital asset of the recipient and therefore would not apply to stock-in-trade, raw material and consumable stores of any business of such recipient. The observations of the ITAT in this regard are as under:

"The provisions of section 56(2)(vii) were introduced as a counter evasion mechanism to prevent laundering of unaccounted income. The provisions were intended to extent the tax net to such transactions in kind. The intent is not to tax the transactions entered into in the normal course of business or trade, the profits of which are taxable under specific head of income. Therefore, the definition of property has been amended to provide that section 56(2)(vii) will have application to the 'property' which is in the nature of a capital asset of the recipient and therefore would not apply to stock-in-trade, raw material and consumable stores of any business of such recipient. However, a property is defined in a very specific way, which includes agricultural and non-agricultural land or both. It appears that the lower authorities have not properly appreciated the relevant provisions of the Act with regard to the land purchased by the assessee, which is part of stock-in-trade."

Similarly, Pune ITAT in its decision in the case ***Mubarak Gafur Korabu vs. ITO (2020) (117 taxmann.com 828)*** has upheld the principle that provisions of section 56(2)(vii)(b) are not applicable in case of assets held as stock-in-trade. This decision is discussed in detail in later part of the article.

Considering the above discussion and judicial precedents on the issue, it may be argued that provisions of section 56(2)(x) of the Act do not get attracted to transactions of purchase of land for the purpose of business and treated as stock-in-trade. However, considering the decision of Jaipur ITAT in case of ***Trilok Chand Sain (ITA No. 449/JP/2018)*** (discussed in detail in later part of the article), litigation on this issue may not be ruled out.

Whether provisions of Section 56(2)(x) apply if the immovable property purchased is agricultural land situated outside 8 KM of municipal area

Another issue to be considered is whether provisions of section 56(2)(x) of the Act apply to a transaction of purchase of agricultural land, situated outside 8 KM of municipal area, by an assessee. There could be a situation that such purchase is done for consideration which is lower than the stamp duty value of such property by ₹ 50,000 or by 10% of the consideration (whichever is higher).

As discussed above, for the purpose of applying provisions of section 56(2)(x) to any property transaction, it is critical to determine

whether such property is qualifying as a 'capital asset' under section 2(14) of the Act. Considering the definition of 'capital asset' as discussed earlier, an agricultural land, situated outside 8 KM of municipal area, does not qualify as a capital asset under section 2(14) of the Act. Once a property does not qualify as a capital asset, then provisions of section 56(2)(x) do not apply in case of transfer of such property for without consideration or lower consideration. As such, one may argue that provisions of section 56(2)(x) do not apply in case of purchase of an agricultural land, situated outside 8 KM of municipal area, by an assessee.

Reliance in this regard can be placed on Jaipur bench of ITAT's decision in case of ***Prem Chand Jain (2020) (82 ITR 522)***. In this case, the assessee had purchased 2 pieces of agricultural lands for a total consideration of ₹ 5,50,000. The stamp duty valuation of these lands was ₹ 8,53,636 and the AO made an addition of ₹ 3,03,363 in the hands of the assessee under provisions of section 56(2)(vii)(b) of the Act. On appeal by the assessee, the ld. CIT(A) confirmed the action of the AO. On further appeal by the assessee, the ITAT held that since the agricultural land purchased by the assessee is not a capital asset, provisions of section 56(2)(vii)(b) of the Act are not applicable. The observations of the ITAT are reproduced as under:

"On reading of provisions of 56(2)(vii)(b), we find that it refers to any immoveable property. Further, provisions of section 56(2)(vii)(c) refers to any property, other than an immovable property. The meaning of the term "property" has been provided in Explanation (d) to section 56(2)(vii) where the term "property" has been defined to mean capital asset of the assessee namely immoveable property being land or building or both. It has been contended by the ld AR that all immovable properties of any nature are not covered in the definition of property. Only those immovable properties which are held as capital assets and is in nature of land or building or both are only covered u/s 56(2)(vii). We agree with the contention of the ld AR that where the term "property" has been defined to mean a capital asset as so specified and where an immoveable property as so specified being land, building or both is not held as a capital asset, it will not be subject to the provisions of section 56(2)(vii)(b) of the Act. In the instant case, therefore, where the agricultural land does not qualify as falling in the definition of capital asset, provisions of section 56(2)(vii)(b) cannot be invoked."

However, it is worthwhile to note that Jaipur bench of ITAT only has taken a different view regarding applicability of definition of 'capital asset' under section 2(14) of the Act in context of provisions of section 56(2)(vii) of the Act. In case of ***ITO vs. Trilok Chand Sain (supra)***, the assessee had purchased three plots of land during the year under consideration and had claimed that these plots of land are agricultural land and does not fall in the definition of capital asset as per the provisions of Section 2(14) of the Act. The AO, however invoked the provisions of Section 56(2)(vii)(b) of the Act and made an addition of ₹ 1,51,06,224/- being difference between the sale consideration as per the sale deeds and the stamp valuation determined by the Stamp Valuation Authority. On appeal by the assessee, the ld. CIT(A) held that the land in question being an agricultural land is not a capital asset as per the provisions of Section 2(14) of the Act and therefore, not being a capital asset, the transaction does not attract the provisions of Section 56(2)(vii)(b) of the Act. On appeal by the Revenue to ITAT, the ITAT held that the definition of the term 'capital asset' in section 2(14) of the Act is not relevant for the purpose of section 56(2)(vii) of the Act. The observations of the ITAT are as under:

"On reading of provisions of 56(2)(vii)(b), we find that it refers to any immoveable property

and the same is not circumscribed or limited to any particular nature of immoveable property. It refers to any immoveable property which by its grammatical meaning would mean all and any property which is immoveable in nature, i.e, attached to or forming part of earth surface. In the instant case, the assessee has purchases three plots of agricultural land and such agricultural land is clearly an immoveable property. Whether such agriculture land falls in the definition of capital asset u/s 2(14) or whether such agriculture land is stock-in-trade of the assessee, in our considered view, are issues which cannot be read in the definition of "any immoveable property" used in context of section 56(2)(vii)(b) and are thus not relevant".

However, the Pune ITAT in its decision in the case ***Mubarak Gafur Korabu vs. ITO (supra)*** has distinguished the above decision of Jaipur ITAT in case of ***Trilok Chand Sain (supra)***. While deciding on the similar issue of applicability of provisions of section 56(2)(vii)(b) of the Act to agricultural lands, Pune ITAT held that agricultural land purchased by assessee is not governed by the provisions of section 56(2)(vii)(b) of the Act not being capital asset. Hence, it is outside the purview of said section and no addition has to be made in the hands of assessee. While distinguishing the decision of Jaipur ITAT in case of ***Trilok Chand Sain (supra)***, Pune ITAT observed as under:

"Now, coming to the decision of Jaipur Bench of Tribunal in Trilok Chand Sain (supra), wherein provisions of clause (b) of section 56(2)(vii) of the Act were considered. However, they have failed to take into cognizance the provisions of clause (c) of said section, which talks of property other than immovable property. The Tribunal in para 6 refers only to the definition of 'immovable property' and hold that it is not circumscribed or limited to any particular nature of property. However, clause (c) very clearly talks of property other than immovable property and the word 'property' has further been defined under clause (d) of Explanation thereunder. In the totality of the above said facts and circumstances, there is no merit in reliance placed upon by the learned Departmental Representative for the Revenue on the ratio laid down by Jaipur Bench of Tribunal in ***ITO vs. Trilok Chand Sain (supra)****."*

Reliance in this regard can further be placed on Jaipur ITAT decision in case of ***Yogesh Maheshwari (2021) (125 taxmann.com 273).*** In this case, the assessee had purchased agricultural lands, situated outside 8 KM of municipal area. The stamp duty valuation of these lands was higher than the purchase consideration and the AO made an addition in the hands of the assessee under provisions of section 56(2)(vii)(b) of the Act. On appeal by the assessee, the ld. CIT(A) confirmed the action of the AO. On further appeal by the assessee, the ITAT held that since the agricultural land purchased by the assessee is not a capital asset, provisions of Section 56(2)(vii)(b) of the Act are not applicable. The observations of the ITAT are reproduced as under:

"From the said explanation, it is abundantly clear that immovable property being land or building or both should be capital assets for applying section 56(2)(vii)(b) of the Act. However, the definition of capital asset is given in Section 2(14) of the Act. The clause (iii) of Section 2(14) specifically excludes agricultural land of the description given therein from capital asset which means that agricultural land which are outside 8 KM of the municipal limits are not held to be capital asset and as per the facts of the present case, the agricultural land purchased by the assessee falls in the definition of agricultural land as is given in Section 2(14)(iii) of the Act, so the same cannot be termed as capital asset. Since the agricultural land purchased by the assessee is not a capital asset, therefore, provisions of Section 56(2)(vii)(b) of the Act

are not applicable as the agricultural land which are not capital asset and are outside the ambit/purview of capital asset. In other words, provisions of Section 56(2)(vii)(b) of the Act applies only to those immovable properties being land or building or both if it falls within the definition of capital asset. While reaching to this conclusion, we draw strength from the decision of Coordinate Bench of Pune Benches, Pune in the case of ***Mubarak Gafur Korabu vs. ITO [2020] 117 taxmann.com 828 (Pune-Trib)*** *after considering the decision of Coordinate Bench of Jurisdictional ITAT, Jaipur Benches, Jaipur in case of* ***ITO vs. Trilok Chand Sain [2019] 101 taxmann.com 391/174 ITD 729 (JP. - Trib).****"*

Similar view has been taken by Jaipur ITAT in case of ***Smt. Kavita Maheshwari vs. DCIT (ITA No. 300/JP/2015)***. Jaipur ITAT has followed its decision in case of ***Yogesh Maheshwari (supra)*** while deciding the case o***f Smt. Kavita Maheshwari (supra)***.

Considering the above, one may infer that provisions of section 56(2)(x) of the Act may not apply to purchase of agricultural land which does not qualify as capital asset under section 2(14) of the Act.

Cost of acquisition to the buyer of property on further sale of property – Interplay between section 49(4) and section 56(2)(x) of the Act

Section 49 of the Act deals with deemed cost of acquisition in case of certain modes of acquisition of the assets. As per the provisions of section 49(4) of the Act, where the capital gain arises from the transfer of a property, the value of which has been subject to income-tax under clause (vii) or clause (viia) or clause (x) of sub-section (2) of section 56, the cost of acquisition of such property shall be deemed to be the value which has been taken into account for the purposes of the said clause (vii) or clause (viia) or clause (x).

As such, for the purpose of applying deeming provisions of section 49(4) to any immovable property, it is important that value of such immovable property has been subjected to income-tax under the provisions of section 56(2)(x) of the Act.

As we have discussed in this article, provisions of section 56(2)(x) of the Act may not be applicable in following nature of transactions of immovable property being land:

- Purchase of land for business purpose and treated as stock-in-trade; and
- Purchase of agricultural land qualifying as capital asset under section 2(14) of the Act.

Since above type of transaction in immovable properties do not get covered in the ambit of section 56(2)(x), deeming provisions of cost of acquisition under section 49(4) will also be not applicable to such transactions. The cost of acquisition in such cases would depend on other factors such as whether the property is treated as stock-in-trade, whether it is received as gift, mode of acquisition etc.

Conclusion

Considering the above discussion and judicial precedents (both favourable and against), one may take appropriate positions regarding applicability of provisions of section 56(2)(x) to receipt/ purchase of immovable property being land and relevant tax implications. Though the judicial precedents mentioned pertains to provisions of section 56(2)(vii), reference may be drawn from these judicial precedents as provisions of section 56(2)(x) are largely similar to provisions of section 56(2)(vii).

Keshav B. Bhujle
Advocate

DIRECT TAXES
Supreme Court

1 ***CIT vs. SBI Home Financer Ltd.; [2022] 447 ITR 659 (SC): Dated 13/09/2022***

Depreciation — Condition precedent — Ownership of property — Lease of property — Terms of lease giving third party option to purchase property — Option not exercised — Right to such option does not affect ownership — Terms of lease showing assessee owner of plant and machinery and lease rentals in entirety taxed as revenue receipts — Lessor assessee entitled to depreciation : S. 32 of ITA 1961: Decision of the Calcutta High Court in *S. B. I. Home Finance Ltd. vs. CIT [2006] 280 ITR 6 (Cal)* affirmed

The assessee carried on the business of finance and lease. A plant was being set up at the premises of M, a division of SIL. WPIL approached the assessee for leasing finance for the plant in the process of being set up at the premises of M of SIL. Pursuant to this, the assessee itself acquired the plant and leased it out to WPIL upon taking symbolic possession. According to the terms of the agreement between SIL and WPIL, SIL had a right to purchase the plant after the expiry of a stipulated period of time. The assessee's claim for depreciation was rejected by the Assessing Officer. The Tribunal held that this right to purchase by SIL hit the ownership claimed by the assessee and upheld the disallowance of the claim.

The Calcutta High Court allowed the assessee's appeal and held as under:

"i) Depreciation is available on the items mentioned in section 32 of the Income-tax Act,1961 on satisfaction of the conditions that the plant was owned wholly or partly by the assessee and such plant was used for the purpose of his business. The term "owned" occurring in section 32(1) must be assigned a wider meaning. Anyone in possession of a property in his own title exercising such dominion over the property as would enable others being excluded therefrom and having the right to use and occupy the property and/or to enjoy its usufruct in his own right would be the owner though he may not have formal documents recognized as documents of title under the provisions of the respective law governing the subject. A lease does not extinguish the right of ownership of the lessor;

nor does the lessee acquire any right of ownership thereon.

ii) The Tribunal had held that the agreement for leasing was genuine. The Department had not preferred any appeal or filed any cross-objection against such finding. The lessee could not dispute the title of the lessor and the alleged third-party interest did not affect the ownership of the lessor. In this case, the lessees had never claimed ownership of the plant. Thus, the right of SIL to purchase the plant would in no way affect the ownership of the assessee. The ownership of the assessee was not only absolute and perfect but was apparent and real until SIL established its rights. SIL had not claimed any title or possession over the plant or claimed depreciation in respect thereof. Nor had it exercised its option to purchase. Therefore, in respect of the period covered by the financial year under assessment the ownership of the assessee in respect of the plant could not be disputed for the purpose of section 32.

iii) The assessee was the owner of the plant for the purpose of section 32 and by leasing it out to WPIL the assessee had used the plant wholly for the purpose of its business, namely, for the purpose of carrying on the business of leasing and as such the income earned thereout by way of a rental of the plant was business income. Thus, the ingredients of ownership and user of the plant in business, as required u/s. 32 of the Act, having been fulfilled the assessee was entitled to depreciation available to it u/s. 32."

The Supreme Court dismissed the appeal filed by the Revenue and held as under:

"From the relevant clauses of the agreements dated December 8, 1993 and December 30, 1994, it was apparent that the assessee had become the owner of the plant and machinery. Further the lease rentals in entirety had been taxed as revenue receipts as income accrued and taxable. In view of this factual background, there was no good ground or reason to interfere with the final conclusion and decision of the High Court."

2 ***DIT(Exemption) vs. D. R. RANKA CHARITABLE TRUST; [2022] 447 ITR 766 (SC): Dated 26/08/2022***

Donation to Charitable Institution — Special deduction u/s. 80G(5)(ii) of ITA 1961 — Approval of institution — Renewal of approval — Conditions to be satisfied: A. Y. 2009-10

The assessee is a charitable trust. It was granted registration u/s. 12A of the Income-tax Act, 1961 on July 21, 1986. It was also granted recognition u/s. 80G(5)(vi) of the Act for the years 2005-06, 2006- 07, 2007-08. Returns were being filed regularly. On January 1, 2009 the assessee filed an application in form 80G of the Act, seeking renewal of the recognition. The Director of Income-tax (Exemptions) rejected the application.

On appeal, the Tribunal expressed a doubt whether the assessee is entitled even for the benefit u/s. 11A and therefore the matter was remanded. On remand, the Commissioner passed an order on August 31, 2009 rejecting the application for renewal of recognition u/s. 80G. Aggrieved by the same, the assessee preferred an appeal before the Tribunal. The

Tribunal dismissed the appeal filed by the assessee.

On appeal, the Karnataka High Court framed the following question of law:

"Whether on the facts and circumstances of the case, the Tribunal was right in law in holding that the appellant-trust is not eligible for renewal of approval u/s. 80G ?"

The High Court held as under:

"i) Be that as it may, we are of the considered view that the consideration of these factors when an application for renewal has been made cannot be the considerations before the authority. The only condition that requires to be fulfilled for the purposes of seeking renewal are as specified u/s. 80G(5)(ii) and the clauses narrated therein. That none of the clauses in section 80G(5)(ii) would be said to be applicable herein. It only postulates that any income derived from the charitable trust may be used for charitable purpose. Therefore, the rejection of the application is inappropriate.

ii) However, we are of the considered view that this consideration can only be made, during the assessment proceedings. The question whether renewal is justified or not, is not necessary to be considered at this stage. The applicability of the income of the assessee whether it is for charitable purposes or not are all questions of fact and necessarily can be gone into by the assessing authority at the time of assessing the income of the assessee. Therefore, it is needless to state that the assessing authority shall look into all the material placed in order to ensure that the income is used for a charitable purpose in accordance with law.

iii) Under these circumstances, the substantial question of law is answered by holding that the Tribunal was not right in law in holding that the appellant-trust was not eligible for renewal for approval u/s 80G. Consequently, the order of the Tribunal is set aside. The substantial question of law is accordingly answered. The appeal is disposed of accordingly."

The Supreme Court dismissed the appeal filed by the Revenue and held as under:

"The High Court's decision on the conditions to be considered for renewal of approval of the assessee-trust u/s. 80G of the Income-tax Act, 1961 was correct."

"Day when you do not come across any problems you can be sure that you are travelling on the wrong path"

— *Swami Vivekananda*

Neelam Jadhav
Advocate

Tanmay Phadke
Advocate

DIRECT TAXES

Tribunal

1 ***JCIT vs. Bhanu Chopra- (ITA No. 167/Del/2019)***

Section 56(2)(vii)(c)- Bonus shares are not governed by Section 56(2)(vii)(c)

Facts

The Assessee was in the receipt of the bonus shares of HCL Technologies Ltd in the financial year 2014-15. (Assessment Year 2015-16). The AO computed the FMV of the said bonus share in terms of Rule 11UA of the Rules to the tune of ₹ 47,21,93,975/- and consequently, added the said amount in the total income of the Assessee by applying the provisions of section 56(2)(vii)(c). The AO also observed that the taxable event was the receipt of property without consideration or for a consideration which is less than FMV and the receipt of the bonus shares fell within the category of "property received without consideration". Being aggrieved, the assessee filed an appeal before the CIT(A) and succeeded. It was held by the CIT(A) that in the case of bonus shares, there was neither increasing in value of existing property nor was any new property received as it was only split up of value of existing shares. No consideration was flown out from the holder of the shares (the Assessee), which is reflected in the decrease in the intrinsic value of the original shares held by him. The CIT(A) also relied upon certain judgement of the ITAT to support his observation. Being aggrieved, the Revenue filed an appeal before the ITAT:

Held

The ITAT considered the judgement of the Supreme Court in the case of ***CIT vs. Dalmia Investment Co. Ltd. [1964] 52 ITR 567*** wherein the Court made certain pertinent observations on bonus shares. The ITAT also noted that the decisions of coordinate benches in the cases of ***Dy. CIT vs. Dr. Rajan Pai [2017] 82 taxmann.com 347 (Bang. - Trib.)*** and ***Sudhir Menon HUF vs. Asstt. CIT [2014] 45 taxmann.com 176/148 ITD 260 (Mum.)*** wherein it was clearly held that allotment of bonus shares cannot be considered as received for an inadequate consideration and therefore, it is not taxable as income from other sources u/s 56(2)(vii)(c) of the Act. The ITAT also referred to Circular No. 06/2014 issued on dated 11.02.2014 and circular 717 dated 14.08.1995 and reached the conclusion that section 56(2)(vii)(c)

does not apply to bonus shares. The ITAT dismissed the appeal filed by the revenue and held in favour of the assessee.

2 *Dipakumar Ishwarlal Panchal vs. ITO- (ITA No: 490/Ahd/2020)*

Section 271(1)(c) and 56(2)(x)- When the addition is made under deeming section and the revenue cannot establish the receipt of money over and above consideration and does not find it necessary to verify the reason for the receipt of lower consideration as given by the assessee, the penalty is not maintainable

Facts

The assessee filed an appeal before the ITAT challenging the decision of the CIT(A) confirming the levy of penalty u/s 271(1)(c) on the addition made u/s 56(2)(x) of the Act. The assessee had purchased the property for the consideration lesser the stamp duty value. It was submitted before the AO as well as the CIT(A) that the land was compromised for several reasons being situated at the end of the village with the high-tension wire running over it and the area being of not much use. Further, it was submitted that the Stamp duty value was not challenged considering the litigation cost and further to buy peace of mind. The assessee made similar submissions before the ITAT. The Assessee also submitted that at no point of time, it was observed by the revenue that he had been paid over and above the consideration received as per the agreement. The revenue opposed the contentions and requested the ITAT to confirm the penalty. After hearing both the sides, the ITAT held as under:

Held

The ITAT observed that the revenue could not establish that the assessee had received over and above the sale consideration. It further observed that Section 56(2)(x) is a deeming fiction and the assessee had given the reasons for the property not being capital of getting the stamp duty value which was not enquired into by the revenue and was accepted as such. The ITAT held that the assessee could not be considered to have concealed particulars of income or furnished inaccurate particulars and the penalty u/s 271(1)(c) was not leviable. The ITAT allowed the appeal filed by the Assessee.

3 *Shri Jeen Mata Buildcon (P.) Ltd. vs. ITO, ITA No. 397/JP/2019*

Section 145: Method of accounting - Estimation of income (Discrepancy in receipts as shown in 26AS) – when AO had not found a single defect in books of account and enquiry made under section 133(6) had been properly explained, addition on difference between amount reflected in books of account and in 26AS was liable to be deleted.

Facts

The assesse company is engaged in the business of labour contractor supplier with machinery under affordable housing policy. The assesse company filed its return of income through e-filing portal and the same was processed u/s. 143(1) of the Income Tax Act, 1961. The case was assessee was selected for scrutiny due to difference in turnover between 26AS and books of accounts. The Assessing Officer has observed that turnover declared by the Assessee and the turnover reflected as per 26AS was

different hence is added to the income. The Commissioner of Income Tax Appeals has also confirmed the view of the assessing officer.

Held

The ITAT while deciding the issue observed that, AO has not found any single defect in the books of accounts, when Assessee has details produced before him. The assessment completed u/s. 143(3) of the Act, even, the inquiry made u/s 133(6) has properly been explained by the assessee in the assessment proceedings. Further observed that the contract receipt got reflected in the subsequent year as per regular method of accounting followed. An addition based on amount in Form 26AS and that shown in books indicated that additions were made by following a pick and choose method. Information as per data base of revenue could not, by itself, be a legally sustainable basis for making addition. Considering the details and submission of the assessee, the ITAT held that, addition merely based on difference between amount reflected in books of account and in 26AS is not justified.

4 *Satish Cold Storage vs. Dy. CIT, ITA No.76/Lkw/2021*

Section 80-IB : Deductions - Rectification of mistake - Claim for deduction under section 80-IB was rejected for want of filing of audit report, Assessing Officer was required to consider rectification application filed by assessee since a copy of said report in Form 10CCB was uploaded on receipt of intimation under section 143(1). Deduction under section 80IB allowed once the audit report uploaded on receipt of S. 143(1) intimation. (r.w.s. 154 and 143, CBDT Circular No. 689)

Facts

The Auditor of the assessee who was also dealing with tax matters omitted to upload the audit report in Form-10CCB and therefore, the CPC rejected the claim of the assessee u/s. 80IB. On receipt of intimation u/s. 143(1), assesse filed an application u/s. 154 of the Act after uploading the copy of audit report in Form-10CCB, which was rejected by CPC. The Commissioner of Income Tax (A) has also rejected the appeals by holding that there was no mistake apparent from record.

Held

The ITAT while deciding the issue observed that, on receipt of intimation assesses had filed an application under section 154 after uploading copy of auditor report in Form-10BBC. However, said application was rejected by CPC without appreciating that Circular No. 689 of 1994, dated 24-8-1994 which clearly directs officers to allow rectification under section 154 for non-filing of audit report or other evidences which could not be filed with return of income. The ITAT held that, Assessing Officer was not justified in rejecting the rectification application on the ground that the assessee had failed to furnish audit report along with its returns. The Hon'ble Tribunal directed that the Assessing Officer has to rectify his order and extend benefit of deductions under section 80-IB to assessee.

■●■

CA Chirag B. Mehta CA Hemant N. Regmi

INDIRECT TAXES

GST Gyaan — Recent Changes in GST

The Central Board of Indirect Taxes and Customs ('CBIC') appointed[1] **1st October, 2022** as the date from when flurry of legislative changes relating to the Goods and Services Tax come into effect as introduced by the Finance Act, 2022.

In this edition of GST Gyan, an attempt has been made to highlight and discuss these legislative changes brought through recent notifications. The important changes are enumerated hereunder:

- Eligibility conditions for claiming Input Tax Credit ('ITC') under section 16;
- Amendments to section 41;
- The new deadline of 30th November for effecting amendments to details furnished pertaining to the previous financial year;
- Rule 86B gets legal backing with the insertion of sub-section (12) to section 49
- No extension of IGST exemption on Ocean Freight;
- Amendments relating to cancellation of registration;
- E-Invoicing mandatory to all businesses whose aggregate turnover exceeded ₹ 10 Crores.

Eligibility conditions for claiming ITC under section 16

In any value added tax the concept of ITC plays a pivotal role in avoiding tax cascading. The provisions relating to ITC have evolved since the time GST has been introduced in our country. A number of restrictions have

1. Notification No. 18/2022, dated 28-09-2022.
2. Section 16(2)(aa) read with Rule 36(4).

been put in place to ensure that there is no loss of revenue due to ITC. At the time of its introduction section 16(2) contained four fundamental conditions for claiming ITC. Finance Act, 2021 added a 5th condition in section 16(2) by inserting clause (aa) which came into effect from 01-01-2022. This provision[2] restricted the ITC of the recipient to so much amount as is reflected in GSTR-2B.

The Finance Act, 2022[3] inserted[4] a 6th condition for claiming ITC. This was done by inserting a new clause (ba) in section 16(2) which reads as under:

> ***(ba) the details of input tax credit in respect of the said supply communicated to such registered person under section 38 has not been restricted.***

The above amendment appears very simple unless we read it along with the newly substituted[5] section 38(2) of the Act.

Let us quickly enumerate the fundamental conditions laid down under section 16(2) for claiming ITC as amended and effective from 01-10-2022. The conditions are as under:

a) He is in possession of Tax Invoice or debit note or other prescribed[6] documents;

b) Details of above Tax Invoice or debit note appear in GSTR-2B[7] of the recipient [**inserted by Finance Act, 2021**];

c) He has received the goods or services;

d) *The details of ITC in respect of the said supply are not restricted under section 38(2) of the Act* [**newly inserted clause (ba)**];

e) The tax charged in respect of such supply has been actually paid to the government, either in cash or through ITC admissible in respect of such supply;

f) He has furnished a return under section 39 of the Act.

Hence, the new clause (ba) states that where ever ITC has been restricted under section 38(2) the same cannot be claimed. Accordingly, it becomes important to examine the circumstances in which the ITC flowing to a recipient would get restricted as per the newly substituted section 38 of the Act.

The existing section 38 dealt with **"furnishing details of inward supplies"**. Finance Act, 2022 has substituted the existing section 38 with a new section 38 which reads as **"Communication of details of inward supplies and Input Tax Credit"**. The newly substituted section 38(2) is summarized hereunder:

3. Section 100 of the Finance Act, 2022.
4. Inserted clause (ba) in section 16(2).
5. Substituted vide section 104 of the Finance Act, 2022.
6. Refer Rule 36 of the CGST Rules, 2017.
7. Rule 36(4) of the CGST Rules, 2017.

ITC is unrestricted under section 38(2)(a)	ITC restricted under section 38(2)(b)
Details of inward supplies in respect of which credit of input tax may be available to the recipient	Supplies furnished by the supplier within an initial period of taking registration
	Supplier has defaulted in payment of tax continuously for prescribed period
	Difference between GSTR-1 and GSTR-3B of supplier for prescribed period
	Difference between GSTR-2B and GSTR-3B of supplier exceeding a limit
	Tax paid through ITC more than prescribed limit
	Falls under such other class of persons as may be prescribed

It is evident that this new provision makes the claim of ITC entirely dependent on how compliant the supplier is. There is plethora of decisions given by various judicial foras under the erstwhile and the GST laws where it has been repeatedly held by courts that the genuine purchaser cannot be punished for the misdeeds of his supplier.

In the erstwhile regime the Hon'ble Apex Court had held in the case of ***Arise India***[8] that disallowing the Input tax credit of the purchasing dealer due to default of selling dealer in depositing tax, is violation of Article 14 and 19(1)(g) of the Constitution of India.

Even under the GST laws we already have a few court rulings which have taken a pro-tax payer stand relating to ITC claims. In the case of ***D. Y. Beathel's*** case the Hon'ble Madras High Court held[9] if the tax had not reached the kitty of the Government, then the liability may have to be eventually borne by one party, either the seller or the buyer. In the case on hand, the respondent does not appear to have taken any recovery action against the seller, on the present transactions When it has come out that the seller has collected tax from the purchasing dealers, the omission on the part of the seller to remit the tax in question must have been viewed very seriously and strict action ought to have been initiated against him.

It is not very clear whether restriction of ITC in terms of section 38(2)(b) is temporary or permanent. Let's take an example of a supplier who has defaulted in payment of tax continuously for a prescribed period and hence the ITC in respect of invoices issued by him appear as restricted in GSTR-2B of his customers. If subsequently this default is made

8. *Commissioner Of Trade and Taxes Delhi vs. Arise India Limited [2018 (1) TMI 555 - SC].*
9. *M/s Dy Beathel Enterprises vs. State Tax Officer (Data Cell) [2021-TIOL-890-MAD-GST].*

good by the supplier whether the ITC can be claimed by his customers. Also, whether as a consequence whether the invoices issued by him would appear in subsequent GSTR-2B of his customers as available ITC.

In view of the authors the amount that appears as restricted in GSTR-2B shall not get auto populated in GSTR-3B Table 4A. This is in line with the clarification[10] issued by the Board regarding furnishing of information in GSTR-3B.

The changes in restriction on claiming ITC since the time GST was introduced is pictorially depicted hereunder:

1-7-2017 to 8-10-2019	9-10-2019 to 31-12-2021	1-1-2022 to 30-9-2022	From 1-10-2022
GSTR-2A/3B matching was not mandatory	GSTR-2A/3B matching was required up to extent of 120%/110% or 105% Matching could have been done on gross basis post-facto	GSTR-2B matching made mandator. Matching to be on invoice level but not on gross level	GSTR-2B non matching will cause damage to supplier's customer ITC should appear in GSTR-2B as eligible.

These restrictions that have been put in place for claiming ITC not only appear to be against the scheme of seamless flow of credit but also against the principles of natural justice.

Amendment to section 41 of the Act

The Finance Act, 2022 also substituted[11] the existing section 41 of the Act. Prior to its amendment the provision dealt with granting of ITC to the tax payer on provisional basis. However, the amendment has done away with the concept of provisional ITC and simply allows the tax payer to claim ITC on self-assessment basis in the return filed by him.

The existing and the amended provisions are reproduced hereunder for ready perusal:

10. Circular No. 170/02/2022-GST, dated 06-07-2022.

11. Section 106 of the Finance Act, 2022.

Current Provision	Substituted Provision
(1) Every registered person shall subject to such conditions and restrictions as may be prescribed, be entitled to take the credit of eligible input tax, as self assessed, in his return and such amount shall be credited on a provisional basis to his electronic credit ledger. (2) The credit referred to in sub-section (1) shall be utilised only for payment of self-assessed output tax as per the return referred to in the said sub-section.	**41.** (1) Every registered person shall, subject to such conditions and restrictions as may be prescribed, be entitled to avail the credit of eligible input tax, as self assessed, in his return and such amour:it shall be credited to his electronic credit ledger. (2) The credit of input tax availed by a registered person under sub-section (1) in respect of such supplies of goods or services or both, the tax payable whereon has not been paid by the supplier, shall be reversed along with applicable interest, by the said person in such manner as may be prescribed: **Provided** that where the said supplier makes payment of the tax payable in respect of the aforesaid supplies, the said registered person may re-avail the amount of credit reversed by him in such manner as may be prescribed.".

The substituted section 41 also states that in respect of the supplies, on which tax has not been paid by the supplier, ITC will be required to be reversed by the recipient along with the interest. Once the supplier makes payment of the tax, the recipient can re-avail the credit reversed earlier. A similar condition already exists in section 16(2)(c) which states that the subject to the provisions of section 41, the tax charged in respect of such supply has been actually paid to the Government, either in cash or through utilization of input tax credit admissible in respect of the said supply'.

On a conjoint reading of the two provisions [i.e. section 16(2)(c) and 41] it clearly brings out the intention of the legislature which is to not allow ITC in cases where the tax has not been deposited by the supplier.

The new deadline of 30th November for effecting amendments to details furnished pertaining to the previous financial year

The Finance Act, 2022 carried out certain legislative changes which provides extended time line to a registered person for carrying out amendments or availment of ITC in respect of the previous financial year. Earlier the outer time line for these actions was the due date for filing the GSTR-3B for the month of Sep of the following financial year (i.e. 20th, 22nd or 24th Oct, as the case may be).

The provisions which have undergone change as a result of the amendment are tabulated hereunder:

Section	Description	Current time limits	Amended time limits
16(4)[12]	Time limit for claiming ITC	GSTR-3B due date for Sep of the following year (i.e., 20th Oct)	30th Nov following end of the Financial Year
34(2)[13]	Time limit for reflection of Credit Notes in GST returns	GSTR-3B due date for Sep of the following year (i.e., 20th Oct)	30th Nov following end of the Financial Year
37(3)[14]	Time limit for correction to details furnished in GSTR-1	GSTR-3B due date for Sep of the following year (i.e., 20th Oct)	30th Nov following end of the Financial Year
39(1)[15]	Time limit for correction to details furnished in GSTR-3B	GSTR-3B due date for Sep of the following year (i.e., 20th Oct)	30th Nov following end of the Financial Year
52(6)[16]	Time Limit for correction in TCS Statement (GSTR-8)	GSTR-8 due date for Sep of the following year (i.e., 20th Oct)	30th Nov following end of the Financial Year

It may be relevant to note that all the relevant provisions have been amended by substituting the words "due date for furnishing return under section 39 for the month of September" with the words "30th day of November. The above legislative changes in the GST Act were brought about by the provisions of the Finance Act, 2022 which were made effective from 01-10-2022[17]. Due to the change in the expression in the amended provisions as compared to the existing provisions and since the above changes were brought into effect after 30th September following doubts were raised:

- Whether the extended time lines are applicable to financial year 2021-22;
- Whether the extended time lines are applicable for a return or statement for the month of Nov-2022 or the said corrections, amendments or claims can be made in any return or statement filed up to 30th Nov.

It has been clarified[18] by the Board that the extended timelines shall be applicable for financial year 2021-22 and can be carried out in any statement or return filed on or before 30th Nov of the following financial year.

Rule 86B gets legal backing with the insertion of sub-section (12) to section 49

Finance Act, 2022[19] has inserted sub-section (12) in section 49 of the CGST Act, 2017. The

12. Section 100 of the Finance Act, 2022.
13. Section 102 of the Finance Act, 2022.
14. Section 103 of the Finance Act, 2022.
15. Section 109 of the Finance Act, 2022.
16. Section 112 of the Finance Act, 2022.
17. Vide Notification No. 18/2022-Central Tax, dated 28-09-2022.
18. Press Release dated 04-10-2022.
19. Section 110(d) of the Finance Act, 2022.

same has been reproduced hereunder for ready reference:

> ***(12) Notwithstanding anything contained in this Act, the Government may, on the recommendations of the Council, subject to such conditions and restrictions, specify such maximum proportion of output tax liability under this Act or under the Integrated Goods and Services Tax Act, 2017 which may be discharged through the electronic credit ledger by a registered person or a class of registered persons, as may be prescribed.***

Rule 86B requires taxpayers with taxable supplies exceeding fifty lakhs to pay at least 1% of their tax liability by way of cash payment. The newly inserted sub section (12) empowers the government to notify such rules.

No extension of exemption on ocean freight from 1-10-2022

Recently, the Hon'ble Supreme Court held[20] that no GST is payable by an Indian importer under RCM on ocean freight (CIF contracts). However, a new issue has propped up with effect from 1st October, 2022.

Services by way of transportation of goods by an aircraft and vessel from customs station of clearance in India to a place outside India was exempted. However, the exemption had a sun-set clause which came to an end on 30-09-2022. Hence, there is a need to understand the GST implications consequent to the end of the exemption.

The GST implications of non-extension of the sun-set clause in the exemption notification would depend on the nature of contract between the Indian exporter and the overseas buyer. The implication would depend on whether the contract between the Indian supplier and the overseas buyer is a Free on Board ('FOB') or a Cost Insurance Freight ('CIF') contract.

Case 1: In case of a FOB Contract

Typically, under a FOB Contract, the supplier (the Indian exporter in this case) assumes responsibility until the goods are loaded onto a shipping vessel. The further, carriage of the goods may be made by the buyer himself or by the supplier on behalf of the overseas buyer. The GST implication in this case shall be as under:

Location of Supplier of Transport services	Location of Recipient	Place of Supply	GST Implications
India	Outside India	Outside India [S. 13(9) of the IGST Act]	For the transport service provider, the supply shall amount to export of service in terms of section 2(6) of the IGST Act since the POS is outside India.
Outside India	Outside India	Outside India [S. 13(9) of the IGST Act]	In this case the provider of the transportation service, the recipient and the place of supply of services are outside India and hence no GST shall be leviable on this transaction.

20. *Union of India vs. Mohit Minerals Pvt Ltd [TS-246-SC-2022-GST]*

Case 2: In case of a CIF Contract

'CIF' stands for Cost, Insurance and Freight. Typically, under a CIF Contract, the supplier (an Indian exporter in this case) will bear all transportation expenses and hazards until delivery, at which point the buyer will accept responsibility. In these cases, the transportation is arranged by the supplier (i.e. an Indian exporter). The GST implication in this case shall be as under:

Location of Supplier of transport services	Location of Recipient	Place of Supply	Implications
India	India	Outside India [S. 12(8) of the IGST Act]	For the transport service provider, the supply shall be liable for payment of GST since the location of recipient is in India. Accordingly, he shall levy 18% IGST for transport by air and 5% for transport by vessel.
			There is a controversy whether a transaction where place of supply is outside India should be taxed at all. In fact, the GST Council also published a draft proposal for amendments in GST law on 15.07.2018 inviting comments. As per the rationale, the government intended to bring the taxability of transportation services of export goods by a transporter located in India at par with a transporter located outside India. Hence, the intention was not to tax these transactions.
Outside India	Outside India	Outside India [S. 13(9) of the IGST Act]	Since the transport service provider is located outside India, there is no GST implication for him. From the point of view of the Indian Exporter, the transaction does not qualify as an "import of service" in terms of section 2(11) of the IGST Act, 2017 since the place of supply is not in India. Accordingly, no GST shall be payable by the Indian exporter as well.

Amendments relating to cancellation of registration

The Finance Act, 2022[21] has made amendments to section 29 of the CGST Act, 2017 that deals with cancellation and suspension of registration. Section 29(2) provides for *Suo moto* cancellation of registration of a tax payer by the tax officer. As per the amendments registration of a person can be cancelled if:

- In case of a Composition Tax payer – if they have not filed their GSTR-4 return beyond 3 months from the due date
- In other cases, if there is failure to file returns for a continuous period as prescribed.

The above prescription has been made by amendments in Rule 21[22] of the CGST Rules, 2017. Accordingly, in case of regular filer who files monthly returns the registration can be cancelled if there is a default of continuous period of 6 months[23]. On the other hand, in case of regular filer who files quarterly returns the registration can be cancelled if there is default of a continuous 2 tax periods[24].

E-Invoicing mandatory to all businesses whose aggregate turnover exceeded ₹ 10 Crores

Section 31 of the Act mandates the issuance of Tax Invoice in respect of every supply of goods or services. The form and manner of issuance of Tax invoice has been provided in the Rules. Rule 46 enumerates the contents of a Tax invoice. The Rule 46 interalia requires issuance of Tax Invoice (i.e. E-Invoice) along with QR code and IRN where ever applicable as per Rule 48(4). As per Notification No. 13/2020-Central Tax, dated 21-03-2020 every registered person whose aggregate turnover for any financial year from 2017-18 exceeds ₹ 20 crores is required to obtain QR code and IRN from the common portal.

The above threshold limit of ₹ 20 crores, has been lowered w.e.f. 01-10-2022 to ₹ 10 crores[25] in any of the financial years starting from 2017-18 to 2021-22.

As provided in the notification the threshold limit of ₹ 10 crores is to be computed in terms of definition of the term 'aggregate turnover" as per section 2(6) of the CGST Act. Further, as per E-Invoice FAQ the aggregate turnover for the year 2017-18 has to be reckoned from 1-7-2017.

21. Section 101 of the Finance Act, 2022.
22. Rule 21(h) and 21(i) inserted vide Notification No. 19/2022-Central Tax, dated 28-09-2022 w.e.f. 01-10-2022.
23. As per newly inserted Rule 21(h).
24. As per newly inserted Rule 21(i).
25. Notification No. 17/2022-Central Tax, dated 01-08-2022.

CA Naresh Sheth CA Jinesh Shah

INDIRECT TAXES
GST – Recent Judgments and Advance Rulings

A. DECISIONS BY HIGH COURT

1. *OASIS REALTY VS. UNION OF INDIA [WRIT PETITION NO.: 23507 OF 2022]*

Facts and issue involved

Petitioner had filed an appeal against the order restricting the utilization e-credit balance to pay the mandatory pre-deposit under Section 107(6) of the Maharashtra Goods and Services Tax Act, 2017 (MGST Act) required for filing the appeal before the Appellate Authority.

Respondent had passed an order stating that Petitioner has to pay pre-deposit through Electronic Cash Ledger (ECL) and not through the Electronic Credit Ledger (ECRL).

Section 49(4) restricts the usage of the amount available in the ECRL only for payment of output tax under GST and hence ECRL balance cannot be utilized for payment of pre-deposit stipulated in Section 107(6)(b).

Aggrieved by the order passed by Respondent, Petitioner filed a writ petition before the Honorable Bombay High Court.

Observations and Discussion by Court

Section 107(6) of the MGST Act requires payment of 10% of the disputed tax for admission of appeal.

Term used in Section 107(6) of MGST Act is 'paid' and not 'deposited'. Section 49(3) & (4) of MGST Act provide manner of utilizing the balance lying in the Electronic Cash Ledger and Electronic Credit Ledger, respectively for making payments. Hence payment of pre-deposit can be made either through ECL or ECRL.

Section 49(4) of the MGST Act allows payment of 'tax' through the ITC balance in the ECRL. Thus, the pre-deposit can also be paid through the ECRL as Section 107(6) requires paying 'tax in dispute', where the word 'tax' means Integrated Tax, Central Tax or State Tax and not only tax self-assessed in the returns.

Rule 86(2) of MGST Rules provides for debiting ECRL to the extent of discharge of any liability in accordance with the provisions of Section 49 of the MGST Act.

Further, output tax in relation to a taxable person is defined in Section 2(82) of the MGST Act as the tax chargeable on the taxable supply of goods or services or both but excludes tax payable on the reverse charge mechanism. Therefore, any payment towards output tax can be made by utilization of the amount available in the ECRL.

Decision of High Court

Taxpayer is, thus, entitled to utilize the balance in the ECRL to pay 10% of tax in dispute (pre-deposit of tax) as required by Section 107(6) of MGST Act.

2. *SHEETAL DILIP JAIN Vs. THE STATE OF MAHARASHTRA – BOMBAY HIGH COURT [2022-TIOL-1276-HC-MUM-GST]*

Facts and issue involved

Petitioners were served with show cause notice ('SCN') requiring them to file a reply within 7 days from the dates of issuance of such notice. On 8th day, in absence of any action from petitioner, respondent department passed the order.

Petitioner contends that minimum 15 days of time should be granted to taxpayer for replying to the SCN.

Present writ petition has been filed requesting High Court to set aside the order in passed without giving adequate time to petitioner to file a reply against impugned SCN.

Petitioner's submissions

Section 73(8) of CGST Act provides time of 30 days from the date of issue of notice to make payment of tax demanded under SCN. Hence,

Observations and Discussion by Court

Section 73(8) of CGST Act provided time limit of 30 days to make payment of tax demanded under SCN. If taxpayer does not wish to make payment of tax, he should be allowed time of 30 days to file reply to such SCN. This time period cannot be arbitrarily reduced to 7 days by the assessing officer.

Since of 8th day the impugned order was already passed, the question of not paying within 30 days of the issue of the notice will not arise. Hence, Impugned order is erroneous.

Hon'ble High Court has strongly condemned the act of respondent department's officer of passing the order without application of mind and contrary to the provisions of law. Hon'ble Court has also acknowledged unnecessary hardships and litigation costs borne by the taxpayers due to such acts of departmental officers.

Hon'ble Court directed respondent to donate ₹ 10,000/- to PM Cares Fund and has directed CBIC to impart training to its officers to appraise and educate its officers on prevailing law and rules and also explain them principles of natural justice.

Decision of High Court

Hon'ble High Court set aside the order passed by tax officer.

3. *C P RAVINDRANATH MENON – BOMBAY HIGH COURT [TS-64-HCBOM-2022-GST-CP]*

Facts and issue involved

Petitioner had entered into 'agreement for sale' with Godrej Re-developers (Mumbai) Pvt. Ltd. ('supplier'). Supplier had paid

GST of ₹ 18,26,412 on invoice issued to the petitioner. Since loan was not sanctioned to the petitioner, above 'agreement for sale' was terminated. Subsequently, petitioner filed application for refund of GST paid by the supplier. It is also admitted that supplier did not claim any refund of the said amount. The refund application filed by petitioner was rejected by the GST department on the grounds that the said application was not filed electronically and was not in compliance with Circular dated 18th November 2019. Present writ petition is filed for quashing and setting aside the said refund rejection order and to consider and process the refund application filed by petitioner.

Petitioner's submissions

Section 54(1) of CGST Act provides that any person claiming refund of any tax paid is entitled to make an application before the expiry of two years from the relevant date in such form and manner as may be prescribed.

Supplier has recovered the tax from petitioner and thus it shall be deemed that the incidence of tax has been passed on to the ultimate consumer i.e. Petitioner. Hence, by virtue of explanation (ii) to Rule 89 of CGST Rules, petitioner becomes eligible for the impugned refund. Rule 97A of CGST Rules prescribe that reference to electronic filing under Chapter X of CGST Rules would also include manual filing of an application. Hence, the impugned refund rejection order is contrary to Rule 97A of CGST Rules.

Petitioner also places reliance on Hon'ble Bombay High Court judgement in case of M/s. Laxmi Organic Industries Limited vs. Union of India & Others [Writ Petition No. 7861 of 2021].

Observations and Discussion by Court

Despite Rule 89 providing for electronic filing of applications for refund on the common portal, in respect of any process or procedure, include manual filing of the said application.

Circular would certainly be applicable to all application filed electronically on the common portal but the impugned Circular cannot affect or control the statutory rule i.e. Rule 97A of the CGST Rules or derogate from it.

Petitioner even otherwise could not have filed application electronically since it is not registered under GST.

Judgement pronounced in case of M/s. Laxmi Organic Industries Limited vs. Union of India & Others [Writ Petition No. 7861 of 2021] would squarely apply to the facts of this case.

Decision of High Court

Hon'ble High Court quashed and set aside the impugned refund rejection order.

B. RULINGS BY APPELLATE AUTHORITY OF ADVANCE RULING

1. *M/s VADILAL INDUSTRIES LTD – GUJARAT AAAR [2022-TIOL-33-AAAR-GST]*

Facts and Issue involved

Appellant produces eight different types of Parathas, flat and thick piece of unleavened bread eaten like a Roti or Chapati, and the principal ingredient in all the varieties of Paratha is whole wheat flour. The Parathas are supplied and sold by appellant in packed condition and are to be placed directly on pre-heated flat pan or griddle for being heated on medium flame for about 3-4 minutes.

During the said period, Paratha is to be flipped after every 30 seconds.

Appellant sought an advance ruling on following questions:

1. Whether the product viz. 'Paratha' i.e. various varieties of Paratha produced by the applicant merit classification under HSN Code 19059090?

2. Whether all varieties of Paratha produced by the appellant are chargeable to 5% GST (i.e. 2.5% SGST and 2.5% CGST) under Sr. No. 99A of Schedule-l of Notification No. 01/2017-CT (Rate)?

Gujarat AAR inter-alia observed that Parathas are not ready for consumption product but requires 3-4 minutes of cooking as well as they are not akin to roti or chapattis which are primarily wheat flour product. HSN 1905 covers already prepared or cooked products whereas appellant's parathas requires 3-4 minutes cooking. Heading 2106 covers food preparations not elsewhere specified or included, used directly or after processing such as cooking. For applicability of Entry at Sr No. 99A of Notification No. 01/2017-CT (Rate), AAR observed that 'Khakhra. plain chapatti or roti', which are ready for consumption goods, are mentioned at the said entry and there is no mention of Paratha which requires further processing before consumption and therefore the said entry is not applicable to the product Paratha.

Paratha will be covered under Entry No. 453 of Schedule-III of Notification No. 01/2017-CT (Rate) dated 28.06.2017 for the period from 01.07.2017 to 14.11.2017 and under Entry No. 23 of Schedule-III of Notification No. 01/2017-CT (Rate) dated 28.06.2017 (as amended by Notification No. 41/2017-CT (Rate) dated 14.11.2017) with effect from 15.11.2017 and will be liable to GST at the rate of 18%.

Appeal to AAAR and appellant's contentions

Appellant challenged the above order of AAR before AAAR on following grounds:

- AAR has erred in observing that Paratha is not classifiable under Chapter Heading 1905 on the grounds that it requires 3-4 minutes of cooking. This is because GST Tariff as well as HSN explanatory notes to Chapter 19 does not specifically mention that Heading 1905 only covers ready to eat products.

- GAAR has also erred in observing that plain chapatti or roti does not require any processing before consumption. This is because paratha, chapatti or roti presented in packed condition and bought by consumer require heating process for making them eatable.

  It may please be noted that pizza bread, covered under Heading 1905, is also eligible for concessional rate of duty vide Notification No. 01/2017-CT (Rate) dated 28.06.2017 and 5% GST is applicable on pizza bread, rusk and toasted bread.

There is no doubt that pizza bread and toasted bread require heating and cooking before consumption and this fact alone proves that Heading 1905 is not restricted to product ready for consumption.

- AAR has erred in holding that paratha, not being specially mentioned under Heading 1905, is a distinct commodity classifiable under CTH 2106. Non-inclusion of word Paratha in Heading 1905 does not exclude it from being

classified under the same Heading and availing benefit of Entry at 99A of Schedule I of Notification No. 01/2017-CT (Rate). AAR should have appreciated the nature of goods akin to the goods mentioned in Heading and that the Heading would only broadly describe the goods falling under it. AAR in present case only applied nomenclature test and not given any importance to end user test and how the product is being consumed by people in general. The end user test and how the product is known in the market and the way it is consumed is an essential test for the purpose of classification as it is undisputed fact that the parathas are similar to Chapatti or Roti and many people consume paratha instead of plain roti or chapatti.

Discussions by and observations of AAAR

Appellant has claimed that Paratha is classifiable under Chapter Heading 1905 of Customs Tariff Act, 1975 which is reproduced below:

1905 - BREAD, PASTRY, CAKES, BISCUITS AND OTHER BAKERS' WARES, WHETHER OR NOT CONTAINING COCOA; COMMUNION WAFERS, EMPTY CACHETS OF A KIND SUITABLE FOR PHARMACEUTICAL USE, SEALING WAFERS, RICE PAPER AND SIMILAR PRODUCTS

The general explanatory note to Chapter 19 as per HSN is as follows:

"This Chapter covers a number of preparations, generally used for food, which are made either directly from the cereals of Chapter 10, from the products of Chapter 11 or from food flour, meal and powder of vegetable origin of other Chapters (cereal flour, groats and meal, starch, fruit or vegetable flour, meal and powder) of from the goods of headings 04.01 to 04.04. The Chapter also covers pastrycooks' products and biscuits, even when not containing flour, starch or other cereal products."

The explanatory note to Chapter heading 1905 as per HSN is as follows:

"This heading covers all bakers' wares. The most common ingredients of such wares are cereal fours, leavens and salt but they may also contain other ingredients such as: gluten, starch, four of leguminous vegetables, malt extract or milk, seeds such as poppy, caraway or anise, sugar, honey, eggs, fats, cheese, fruit, cocoa in any proportion, meat, f.sh, bakery "improvers", etc. Bakery "improvers "serve mainly to facilitate the working of the dough, hasten fermentation, improve the characteristics and appearance of the products and give them better keeping qualities. The products of this heading may also be obtained from a dough based on four, meal or powder of potatoes."

From the above and explanatory notes to HSN 1905, it can be easily inferred that above chapter covers preparation of flour, generally used as food, which are made from the products of Chapter 11 and Heading 1905 covers Bread, Pastries, Cakes etc. which are completely cooked and ready for consumption whereas the appellant's product i.e. various types of Parathas require 3-4 minutes of cooking on a pan or griddle before consumption. On this ground, the product in question i.e. various types of Parathas do not merit classification under Heading 1905.

As regard the appellant's contention that their product is similar to roti or chapatti,

the composition of various types of parathas as provided by the appellant and found that they have one common ingredient wheat flour (36% to 62% depending upon the type of paratha) and other ingredients are water, edible vegetable oil, salt, anti-oxidant, aloo (potato), vegetables, mooli (radish), onion, methi etc. whereas, in common parlance, plain roti or chapatti is basically made only from wheat flour apart from water. Thus, it is clear that on the basis of ingredients used in the appellant's product and roti or chapatti, composition of both are very different from each other. Further, Roti or Chapatti is consumed directly but the Parathas manufactured and supplied by the appellant requires to be cooked before the same can be consumed. Thus, Parathas supplied by the appellant will not fall under the category of Roti or chapati and will not be classified under Chapter heading 1905 as contended by the appellant.

The appropriate classification of Parathas would be under Chapter heading 2106 as the subject Parathas require to be cooked before the same can be consumed. Chapter 2106 covers food preparations not elsewhere specified or included and Parathas do not fall under any specific chapter head. Further as per Rule 3(c) of Rules of Interpretation, when goods cannot be classifiable under Rule 3(a) or 3(b) then they shall be classified under the heading which occurs last in numerical order among those which merit consideration. Thus, among the headings 1905 and 2106. latter occurs last in the numerical order and hence heading 2016 would be more appropriate and right classification of appellant's product, even from this consideration.

Ruling of AAAR

Appeal filed by appellant is rejected and ruling of Gujarat AAR is upheld, i.e. Parathas will be liable to GST at the rate of 18%.

2. M/S VISHNU CHEMICALS LTD. [TS-56-AAAR(AP)-2022-GST]

Facts and Issue involved

Appellant is engaged in manufacture of basic chromium sulphate, sodium sulphate and chromic acid. For storing the raw material as well as finished goods, appellant entered into lease agreements with third party vendors.

Appellant received monthly rental bills regularly till March 2018. But for the period April 2018 to March 2019, vendor issued a single tax invoice dated 1st April 2020 mentioning the description as rental charges for period April 2018 to March 2019.

Appellant approached Authority for Advance Ruling ('AAR') seeking ruling as to whether appellant is eligible to claim ITC in respect of invoice dated 1st April 2020 before filing GST Return for September 2021 or Annual return for FY 20-21 in terms of section 16(4) of CGST Act.

AAR ruled that the invoice referred to is hit by limitation period for claiming ITC and amounts to violation of condition stipulated u/s 16(4) of CGST Act on following grounds:

- As per Rule 47 of CGST Rules, tax invoice needs to be issued within a period of 30 days from the date of services. Since, invoice has not been issued within the prescribed time limit, appellant is not eligible for credit; and
- Invoice does not pertain to FY 2020-21 but pertains to FY 2018-19 and hence is not eligible for credit.

Appeal to AAAR and appellant's contentions
Appellant challenged the above order of AAR before AAAR on following grounds:

- Supply of service was in FY 2018-19, invoice was raised in FY 2020-21 and hence, the last date for claiming credit is due date for filing 3B for the month of September'21.
- Delay in issuance of invoice cannot be a ground to deny ITC to buyer.
- There is no condition u/s 16(4) of CGST Act that only invoices issued within due date as per section 31(2) of CGST Act read with Rule 47 of CGST Rules are eligible for credit.

Discussions by and observations of AAAR
Every invoice contains two principal aspects; (1) period to which supply pertains and (2) period to which the invoice pertains. In general conditions, both of them should be same. In current situation both are different i.e. period to which supply pertains is FY 18-19 and period to which invoice pertains is FY 2020-21.

Section 16(4) of CGST Act reads as under:

"*A registered person shall not be entitled to take input tax credit in respect of any invoice or debit note for supply of goods or services or both after the due date of furnishing of the return under section 39 for the month of September following the end of financial year to which such invoice or debit note pertains or furnishing of the relevant annual, whichever is earlier.*

In the instant case, as the invoice pertains to FY 2018-19, vide section 16(4) of CGST Act, the recipient is entitled to take ITC of the same on or before furnishing of return u/s 39 of CGST Act for the month of September'19.

Availment of ITC is subject to satisfying certain conditions prescribed in the statute. Honorable Supreme Court, in case of Jayam and Company [(2016)15SCC 125] observed that:

- ITC is a form of concession provided by the legislature; and
- Concession of ITC is available on certain conditions mentioned in this section.

Ruling of AAAR
Appellant is not eligible to claim ITC on the disputed invoice dated 1st April 2020 that was issued covering the supply of services pertaining to period FY 18-19.

C. RULINGS BY AUTHORITY OF ADVANCE RULING

1. *M/S ZYDUS LIFESCIENCES LIMITED – GUJRAT AAR [2022-TIOL-118-AAR-GST]*

Facts and Issues involved
Applicant is engaged in the manufacture, supply, and distribution of pharmaceutical products. It is having approximately 1200 employees which are registered under Factories Act, 1948. Applicant provides its employees meals at subsidized rate. Subsidized value of is deducted from employee's salary on actual consumption basis. Applicant does not avail ITC of GST charged by canteen service provider. Further, it discharges GST on per plate rate charged by the canteen service provider (i.e. open market value).

Applicant has sought advance ruling on whether subsidized deduction made from salary of employees availing food in factory would be considered as supply? And if

yes, whether GST is applicable on amount deducted from the salaries of its employees?

Applicant's submissions

It is obligatory under Factories Act to provide canteen facility to its employees. There must be a legal intention to enter into a contractual relationship with its recipient, which casts roles and responsibility on each of the contractual party, in order to fall under the ambit of Supply under GST. Unless there is an intention to provide a service, the same shall not be treated as Supply within the meaning of Section 7 of the CGST Act.

Supply of service is taking place from canteen service provider to the employees. Though the invoice is raised on the applicant, the ultimate recipient of canteen service are the employees. It merely allows canteen service provider to use the demarcated area for serving food. It makes payment to the canteen service provider on behalf of employees for administrative convenience. There is no supply of canteen facility by it to its employees.

A supply must involve enforceable reciprocal obligations. If something has been used, but there was no agreement for its supply between the relevant parties, any payment subsequently received by the aggrieved party is not consideration for supply. Deduction in employees' salary made by it would constitute a mere transaction in money between the applicant and its employees.

Applicant relied on Hon'ble Bombay High Court judgement in case of ***Bai Mamubai Trust, Vithaldas Laxmidas Bhatia, Smt. Indu Vithaldas Bhatia vs. Suchitra [2019-TIOL-2158-HC-MUM-GST]*** wherein it was held that for GST to be payable on any payment, there must be the necessary quality of reciprocity to make it a 'supply'.

There is no reciprocity of any activity or transaction i.e. quid-pro-quo, between the Applicant and its employees. Thus, in the absence of an identifiable supply, the activity would not constitute 'consideration' for any supply.

Schedule III read with section 7(2) of CGST Act provides that services provided by an employee to employer in the course of employment is neither supply of goods nor supply of services. In short, consideration paid by employer to employee as a part of employment policy shall be out of scope of levy of GST. Extension of canteen facility to employees is in the course of employment relationship. Applicant relied on CBIC Press release dated 10th July 2017 to contend that supply by employer to employee in terms of contractual agreement entered into between employer and employee will not be subjected to GST.

Applicant also relied on following advance rulings wherein it was held that canteen facility provided to employees against recovery of nominal amount is not liable to GST:

- *M/s. Cadila Healthcare Limited (GUJ/GAAR/R/2022/19 Dated 12.04.2022)*
- *M/s. Amneal Pharmaceuticals Pvt. Ltd [TS-569-AAAR(GUJ)-2021-GST]*
- *M/s. Dishman Carbogen Amcis Ltd (Advance Ruling No. GUJ/GAAR/R/22/2021)*
- *M/s. Dakshina Kannada Co-Operative Milk Producers Union Ltd [2021 (8) TMI 352]*

- *M/s. TATA Motors Limited [GST-ARA -23/2019-20/B-46 dated 25 August 2020]*
- *M/s. TATA Power Company Limited [2021-TIOL-258-AAR-GST]*
- *M/s. Posco India Pune Processing Center Private Limited [2019-TIOL-25-AAR-GST]*

Discussions by and observations of AAR

Applicant is providing canteen facility to its permanent employees (on payroll) pursuant to employer-employee relationship. Circular No. 172/04/2022-GST dated 06-07-2022 clarifies that any perquisites provided by an employer to employee are in lieu of services provided by employee to employer in relation to his employment and hence, will not be subjected to GST.

Provision of transport and canteen facility by applicant is as per the contractual agreement between employer and employee and is in relation to the employment. Hence, the said facilities cannot be considered as supply of goods or services and hence cannot be subjected to GST.

Ruling of AAR

Subsidized deduction made by the Applicant from the employees who are availing canteen services would not be considered a supply under the provisions of Section 7 of CGST Act 2017.

2. *M/s VBC ASSOCIATES – TAMILNADU AAR [2022-TIOL-119-AAR-GST]*

Facts and issue involved

Applicant is a Partnership Firm engaged in the business of maintenance of an immovable property located in T Nagar, Chennai. Applicant, on a monthly basis, raises an invoice for 'EB and DG charges', to the tenants, with GST at 18% and deposits the same to government on a monthly basis under SAC 997221. Applicant pays electricity charges upfront to the Tamil Nadu Electricity Board ('TNEB') for the building as a whole and incurs the expenses of running the DG, along with any other expenses incurred by the applicant for the business. Applicant claims Input Tax Credit charged by vendors on the inward supplies.

Applicant have procured solar panels and the power so generated is proposed to be used for electrical consumption. TNEB, on the electricity consumption charges of the building, would give credit for the units generated against the overall bill raised for the building as a whole. Hence, the applicant has to pay the net cost of electricity consumption [Total consumption by the unit (A) - Credits availed due to generation of Solar power (B)] and remit the same to the TNEB. However, the applicant, at the time of raising the bill to the tenants, would raise a bill of the total consumption of the unit ((A) above) and taxes would be discharged on the said collection from the tenant. Further, there would not be any sale of the power units generated from the solar power panels and the units so generated would be utilized against the consumption of electricity for the leased premises, on which the taxes are being charged to the tenants, on the entire value of services.

Applicant has sought an advance ruling as to whether the input tax credit on solar power panels procured and installed is blocked credit u/s 17(5)(c) and (d) of CGST Act.

Applicant's submissions

As per Section 17(5)(c) and (d) of the CGST Act, ITC is not available for works contract services received for construction

of immovable property and for goods and services received for construction of immovable property (other than plant and machinery) on one's own account. in the instant case, solar panels do not get covered under the definition of immovable property, as panels are neither attached to nor embedded in the earth. Hence, the solar panels are covered under the definition of Plant and Machinery and ITC on the same is to be made available, whether the said item is movable or immovable, as it does not get covered under the restriction of claiming ITC u/s 17(5)(c) or 17(5)(d) of CGST Act.

Discussions by and observations of AAR

Applicant procured electricity from TNEB, which includes electricity generated by Solar Power Panels installed at additional place of business and wheeled by TNEB for captive use at the principal place of business of the applicant. Applicant has paid for the net units consumed after deducting energy units generated by Solar Power Plant. However, the applicant has recovered amount through separate invoice, for the gross energy units consumed by the tenants in the building at the rate charged by TNEB, which implies that the energy generated by Solar Power Plant are sold by the applicant to the tenants on their own account.

In the instant case, 92,184 gross units were consumed and billed by applicant to the tenants. After adjusting 86,904 captive generated units by Solar Power Plant and wheeled by TNEB against wheeling charges, the applicant has paid to TNEB for 5,280 units supplied by TNEB. Applicant has sold 86,904 units of power to the tenants of the building through invoices.

Electrical Energy is goods classified under HSN 2706 and exempted by Notification No.02/2017 CT(R) dated 28.06.2017 vide SI. No. 104. Therefore, electrical energy generated by Solar Panel installed by the applicant is exempted goods supplied to tenants and consequently input tax paid on the Solar Panels are ineligible as credit of input tax on capital Goods used exclusively for supply of exempted supply are not eligible under Section 17(2) of CGST Act read with Rule 43(a) of CGST Rules.

Ruling of AAR

Applicant is not eligible for claim of Input Tax Credit as per Section 17(2) of the CGST Act read with Rule 43(a) of CGST Rules 2017 on the goods /services used in installation of Solar Power Panels.

"All truth is eternal. Truth is nobody's property; no race, no individual can lay any exclusive claim to it. Truth is the nature of all souls."

— *Swami Vivekananda*

CA Rajiv Luthia

CA Keval Shah

INDIRECT TAXES

Service Tax – Case Law Update

1 ***Karnataka State Beverages Corporation Ltd. Versus Commissioner of Service Tax, Bangalore-I — 2022 (64) G.S.T.L. 605 (Tri. - Bang.)***

Background and Facts of the Case

- The appellants, M/s. Karnataka State Beverages Corporation Ltd., are a Government of Karnataka Undertaking. The appellants are designated as a company for sole distribution of liquor in the State of Karnataka.

- The appellant purchases liquor from distilleries from in and outside State of Karnataka and distribute the same in the State. The appellants enter into agreement with distilleries and manufacturers and to sell the same to licensed wholesale dealers in accordance with Karnataka Excise Act and Rules framed thereunder. The appellants sell liquor to various license holders keeping a profit margin varying depending on the type of liquor as per the rates fixed by the Government.

- The appellants would also store liquor for a maximum period of 90 days without charging any storage fee. In case, the liquor is not sold within this period, the appellant is entitled to charge ₹ 2/- per carton as demmurage. The Revenue was of the opinion that the amounts collected by the appellants are towards the services rendered by them under the category of 'Business Auxiliary Service' and 'Storage and Warehousing Services'. Therefore, show cause notice were issued to the Appellant and the demand as alleged in the Show cause notice was confirmed by the department.

- Being aggrieved by the said orders confirming the demand, the Appellant preferred to file an Appeal. In respect of the period October 2011 to September 2012, the Commissioner (A) has dropped the demand following the ratio of Rajasthan High Court's decision in the case of ***Rajasthan Beverages Corporation Ltd. vs. CCE, Jaipur***. The Revenue has filed an appeal against such setting aside by the Commissioner (Appeals) vide Appeal No. 20120/2021.

Arguments put forth

The Appellants submitted as under:

a. The issue is no longer res integra being decided in number of cases i.e.,

- *Rajasthan State Beverages Corporation Ltd. vs. CCE: 2018 (11) G.S.T.L. 157 (Raj.)*;
- *Chhattisgarh State Beverages Corporation Ltd. vs. CCE: 2015 (37) S.T.R. 972 (Chhattisgarh)*;

Decision of Rajasthan State Beverages Corporation Ltd. (supra) has been upheld by SC by dismissing the SLP as reported in 2018-TIOL-270-SC-CX = 2018 (16) G.S.T.L. J131 (S.C.).

b. The Revenue appeal is on the ground that the Learned Commissioner (Appeals) has followed the judgment of *Rajasthan HC (supra)* whereas the departmental Review Petition No. 110/2015 is pending before Rajasthan HC. However, the Rajasthan HC vide order dated 15-2-2022 has dismissed the Review Petition

c. Hence the confirmed demand needs to be set aside and appeal allowed.

The Respondents submitted as under:

a. The Learned Authorised Representative for the Revenue reiterated the findings of impugned orders in respect of party appeals and relied on grounds in the Revenue appeal.

Decision

a. It was held that the case is no longer res integra as submitted by the Learned Counsel for the appellant as the bench in the appellant's own case finds that even if it is considered that the appellants are rendering the services of storage and warehousing, such service is only in respect of the goods owned by them for which, no Service Tax can be levied.

b. The appellants are only recipients of the services of storage and warehousing, and it cannot be said that they are providing the services of Storage and Warehousing so that they would be liable to payment of Service Tax under that category in terms of Finance Act, 1994. The fact that they record the charges collected as "storage charges" would alone be not a proper reason for treating them as storage charges in view of the decisions of the Hon'ble Apex Court holding that the substance of a transaction would prevail over the form.

c. The appellants have discharged their statutory functions as the mandate given by the Karnataka State Excise Act and Rules thereunder and have not rendered any services such as 'Business Auxiliary Service' and 'Storage and Warehousing Service'. Therefore, the payments received by them in the form of commission or warehousing charges are not exigible to service tax.

d. Therefore, the impugned orders as far as they relate to the party's appeals were held not sustainable and hence set aside.

2 *B.G. Exploration & Production India Ltd. Versus Commissioner of CGST & CX., Navi Mumbai — 2022 (64) G.S.T.L. 578 (Tri. - Mumbai)*

Background and Facts of the Case

- In 1992, the GOI issued a Notice Inviting Offers for JV to develop medium sized oil fields in India. Pursuant to the said Notice Inviting Offers, the GOI entered into contracts with private parties for production of petroleum and the costs and profits were shared between the Government and the private parties as per the formula prescribed and agreed in the Contracts. The purpose of the said Contracts was to obtain capital investment and technical expertise from the private parties to achieve the objective of optimum production. The common objective was to explore, develop and produce the maximum amount of mineral resource for commercial sale.

- Pursuant to a Notice Inviting Offers issued for a JV to develop medium sized oil and gas fields, the GOI on 22-12-1994, entered into two separate contracts with Enron Oil and Gas India Ltd. (now the appellant), Reliance Industries Ltd. [RIL] and Oil and Natural Gas Corporation Ltd. [ONGC] for the discovery and exploitation of petroleum resources in 'Panna and Mukta' and 'Mid and South Tapti' fields [the Contract Areas].

- The Appellant, RIL and ONGC entered into a Joint Operating Agreement on 22-12-1994 to define their respective rights, duties and obligations with respect to their operations under the Contracts. In terms of the Agreement, liabilities incurred by any Holder were required to be borne by all the Holders in accordance with the ratio for performing their obligations. These expenses were required to be debited in the joint account and cash calls raised and reimbursement taken from the Joint Account, basis the participating interest of each of the parties to the Contract. There was to be no profit margin on the reimbursement/cost charged to the joint account in fact, such a profit was strictly prohibited under the Agreement and the same was to be charged on actuals.

- On 14-2-2002 all the shares of Enron Oil and Gas India Ltd. were acquired by B.G. Mumbai Holdings Ltd. and the name of Enron Oil and Gas India Ltd. was changed to M/s. B.G. Exploration and Production India Ltd. (which is the appellant). To reflect the aforesaid change in ownership of Enron Oil and Gas India Ltd., the Contract was amended on 19-1-2005, whereby the Holders were made 'Joint Operators' of the Contract and all rights and liabilities of Enron Oil and Gas India Ltd. were assumed by the appellant.

  Initially, the contract required an investment cycle in which the Government did not invest. This investment was made by the Holders. In this phase, since there is a recurring need of finance/capital investment, a joint account is created, and capital contributions are made from time to time depending upon the project requirements through 'Cash Calls'. In case the exploration is successful, the mineral is extracted. The said mineral is

first used by the Holders to recover the expenses incurred i.e. Cost Petroleum and then the excess share is the profit, known as "Profit Petroleum" which is shared amongst the parties to the Contract i.e. the GOI and the Holders in the prescribed proportion as per the investment multiple in the terms agreed in the Contract.

- The Appellant had filed an Appeal against the Order that confirmed the demand of service tax with interest and penalty on entitlement towards "Cost Petroleum" under the "Production Sharing Contract" by treating the same as "consideration" for rendering "mining services" to the GOI for the period April 2011 to June 2017.
- Hence, the present appeal.

Arguments put forth

The Appellants submitted as under:

a. Reliance was placed on the decision of Appellant's previous matter wherein the decision was held in the favour of the Appellant -

   1. ***BG Exploration Production India Limited vs. Commissioner of Service Tax (Audit-I) [2021 (10) TMI 306-CESTAT(Mum) = 2022 (63) G.S.T.L. 351 (Tri. - Mum.)]***

   2. ***BG Exploration & Production India Limited vs. Commissioner of CGST [2020 (10) TMI 579-CESTAT (Mum) = 2021 (49) G.S.T.L. 143 (Tri. - Mumbai)].***

b. The activities undertaken by the co-venturers within the framework of a "joint venture" cannot be considered as rendition of "service", liable to service tax.

   - The appellant has not received any "consideration" under the Production Sharing Contract
   - Under the Production Sharing Contract, co-venturers act at their own risk.
   - "Cost Petroleum" or "Profit Petroleum" does not flow from the GOI to the appellant
   - The components of "Cost Petroleum" and "Profit Petroleum" are inherent and embedded part of the Production Sharing Contract. Consequently, such components cannot be treated as "consideration" for the "services rendered" by the appellant
   - The Circular dated February 12, 2018, clarifies that the Holders carry out the operations under the Production Sharing Contract on their own account
   - The Circular dated September 24, 2014, is inapplicable to the present case.
   - The show cause notice dated December 15, 2016, is barred by limitation.
   - Interest is not leviable under Section 75 of the Finance Act; and No penalty under Sections 76, 77 and 78 of the Finance Act, could have been imposed on the appellant.

c. Hence the confirmed demand needs to be set aside and appeal allowed.

The Respondents submitted as under:

a. Shri S.K. Mathur, Learned Authorised Representative appearing for the Department made the following submissions:

   (i) The activity of the appellant of doing "mining services" for consideration to the Joint Venture, which is not an Incorporated Association of persons, from the common pool lies within the ambit of service tax applicability.

   (ii) The Joint Venture Committee is a body of companies and the appellant is one of the constituent member providing "mining services" for consideration received from the common pool of fund of the Joint Venture and ultimately reimbursed by the beneficiary GOI as Cost Petroleum to the Joint Venture Companies and, therefore, satisfies the criteria of applicability of service tax;

   (iii) The activities of the Joint Venture Companies is in the interest of the Government as the three Companies have no field of their own but the fields belong to the GOI, for which the work has been carried out.

   (iv) In connection with the Final Order dated 11-6-2020 passed by the Tribunal in Service Tax Appeal No. 87085 of 2017, the department has preferred an appeal before the Bombay High Court;

   (v) The SC in ***State of West Bengal vs. Calcutta Club Limited [2019 (29) G.S.T.L. 545 (S.C.)]*** has clearly held that the doctrine of mutuality continues to be applicable to incorporated and unincorporated members club after the 46th Amendment to the Constitution by adding Article 366(29A) to the Constitution of India.

b. Thus, the PMT-JV and the appellant have to be treated as distinct persons and the appellant has rendered service for consideration and hence liable for payment of service tax.

Decision

a. From the provisions of the Production Sharing Contract, it is clear that Cost Petroleum and Profit Petroleum cannot be said to be consideration flowing from the GOI to the appellant and that the components of "Cost Petroleum" and "Profit Petroleum" are inherent and embedded part of the Production Sharing Contract. Consequently, such components cannot be treated as "consideration" for the "services rendered" by the appellant.

b. Contractors carry out the exploration and production of petroleum for themselves and not as a service to the GOI and "Cost Petroleum" is not a consideration for service to GOI and thus not taxable per se. It is, therefore, more than apparent that the aforesaid Circular only confirms the view taken by the Tribunal in the decision rendered on 6-10-2021.

c. The Circular dated 24-9-2014, on which reliance has been placed by the Learned Special Counsel appearing for the Department, is not applicable to the facts of the present case. It needs to be noted that the said Circular is

generically in relation to Joint Ventures. The subsequent Circular dated 12-2-2018 is specifically on the issue involved in the present case, namely taxability of "Cost Petroleum" in relation to a Production Sharing Contract.

d. Therefore, the appeal was allowed.

3 *Flemingo Travel Retail Ltd. Versus Commr. of CGST & C. Ex., Mumbai East — 2022 (64) G.S.T.L. 564 (Tri. - Mumbai)*

Background and Facts of the Case

- The appellant is in the business of running 'duty free shop' in the arrival and departure terminals of Mumbai International Airport and the tax included in the billings raised by the airport operator had, for long, been the subject of litigation with tax authorities insisting that the levy under Finance Act, 1994 was payable on 'rent' charged for immovable property within coverage of 'airport service' for the period prior to 1st July, 2012 and of 'service' for the period thereafter.

- Aggrieved by the dismissal of their appeal challenging the rejection of claim for refund of service tax borne by them in relation to their transaction with Mumbai International Airport Ltd. (MIAL) for the period from 1st October, 2011 to 30th June, 2017 as not subject to levy under Finance Act, 1994, M/s. Flemingo Travel Retail Ltd. (formerly known as DFS India Pvt. Ltd.) seeks setting aside Order-in-Appeal No. CKJ/GST/A-I/82-88/2020-21, dated 25th September, 2020 of Commissioner of GST & CX (Appeals-I), Mumbai and consequential relief amounting to ₹ 57,11,16,849 involved in the seven claims.

- Hence, the present appeal.

Arguments put forth

The Appellants submitted as under:

a. The Learned Senior Counsel, Mr. Vikram Nankani, drew attention to the foundational facts pertaining to the claims filed on 21st September, 2018 for the period from 1st October, 2011 to 31st March, 2014 and on 25th September, 2018 for the period from 1st April, 2014 to 30th June, 2017 following the decision of the Tribunal in ***Commissioner of Service Tax vs. Flemingo Duty Free Shop Pvt. Ltd. [2018 (8) G.S.T.L. 181 (Tri. - Mum.)***] on 28th September, 2017 arising from a dispute with service tax authorities that upheld their entitlement to refund of tax paid on 'services' procured for undertaking 'duty free' supply.

b. According to him, the pendency of their dispute, even as they obliged, as a tentative measure, in remitting the tax amount with the approval of the Hon'ble High Court, did shift the 'relevant date' for the purpose of determining eligibility under Section 11B of Central Excise Act, 1994, applied under the authority of Section 83 of Finance Act, 1994, for disposal of claims for refund of service tax. The tortuous course of the litigation on the coverage of two specified services, enumerated in Section 65(105) of Finance Act, 1994, invoked for charging the appellant with tax on payments made to the airport concession-holder was elaborated upon by him to discountenance the bar of

limitation which the lower authorities took refuge in to repel the claims.

c. Reliance was placed on the decision of the Hon'ble Supreme Court in ***M.G. Shahani & Co. Ltd. vs. Collector of Central Excise, New Delhi [1994 (73) E.L.T. 3 (S.C.)]***

d. It was also pointed out that the contrived discarding of the decision of the GOI, in revisionary jurisdiction, in ***re Arish Altaf Tinwala [F. No. 371/142/B/2018-RA/1391, dated 31st August 2018]*** as well as the affirmation of the very same principle in ***A-1 Cuisines Pvt. Ltd. vs. Union of India [2019 (22) G.S.T.L. 326 (Bom.)***], which attained finality with dismissal of appeal of Revenue before the Hon'ble SC, by the lower authorities demonstrates unwillingness to accept the legal foundations of tax levy. On the finding that unjust enrichment was an impediment to the grant of refund, it was brought to our notice that pricing of products in 'duty free shops' is not linked to the costs but to prices charged by competitors at the several airports around the world and that, furthermore, they had furnished the prescribed certificate from chartered accountant in support of having borne the incidence of tax which was ignored by the lower authorities.

e. The finding of applicability of 'unjust enrichment' is, thus, not only beyond the sanction of law but is also entirely superfluous as the notice issuing authority, cognizant of deficiencies - factual and cognitional - in the claim, had already mapped the boundaries within which claim would be adjudicated. Submissions on the interpretation of principle of restitution by the original authority that did not render a finding on bar of 'unjust enrichment' is too remote a crutch to substitute for the statutory mandate of Section 128A(3) of Customs Act, 1962 which the first appellate, admittedly, did not resort to.

f. Hence the Order needs to be set aside and appeal to be allowed.

The Respondents submitted as under:

a. The Learned Authorised Representative for the Revenue reiterated the findings of impugned orders in respect of party appeals and relied on grounds in the Revenue appeal.

Decision

a. In view of the submissions, the claims for refund were filed within the period permitted under Section 11B of Central Excise Act, 1944, relate to levy which the law did not authorize for collection, and which had been borne by the appellants, appeals are allowed with consequential relief.

b. Therefore, the appeal was partly allowed.

CS Makarand Joshi

CORPORATE LAWS
Case Law Update

SEBI Order - 1

Order of Adjudicating Officer of Securities and Exchange Board of India

Name of the Case: In the matter of IZMO Ltd.

Facts of the case

1. Securities and Exchange Board of India ('SEBI') conducted an examination in the matter of M/s. IZMO Limited (hereinafter referred to as "IZMO" or "Noticee" or "Company"), a company having its shares listed on BSE Ltd. ('BSE') and National Stock Exchange of India Ltd. ('NSE'), based on a reference received from Economic Offences Wing (EOW) with regard to a complaint of Shri Samarth Khullar dated February 03, 2020 ("the complaint"), on behalf of 25 persons, against IZMO, M/s Hughes Precision Manufacturing Pvt. Ltd ("HPMPL") and their directors, KMPs, statutory auditors, etc., to ascertain whether there was any violation of SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015 ("LODR Regulations") and the circulars issued thereunder by the Noticee.

2. On investigation, SEBI observed that the Noticee had made a misstatement in its Annual Report for the Financial Year 2017-18 and its disclosure dated September 26, 2018, made to the Stock Exchanges. IZMO in its Annual Report for the Financial Year 2017-18, stated that *"…Izmo is entering the defense manufacturing sector through its subsidiary, Hughes Precision Pvt. Ltd.…"* In this regard, it is alleged that the said disclosure is a misstatement, as HPMPL was not a subsidiary of IZMO. SEBI gathered that HPMPL is not a subsidiary of Noticee from the disclosure of the Noticee dated September 26, 2018.

3. IZMO, in its disclosure dated September 26, 2018, to the Stock Exchanges had stated that *"….IZMO Ltd., under its (proposed) wholly owned subsidiary company, M/s Hughes Precision Manufacturing Ltd. is pleased to announce that the*

Company has received the license to Manufacture and Proof Test Military Calibre Ammunition....” On perusal of this, it was alleged that the said disclosure read with the rest of the disclosure appears to be misleading as it is unclear who has received the license, i.e., IZMO or HPMPL. SEBI further alleged that Noticee in its disclosure dated September 26, 2018, had inter alia stated that HPMPL would become a wholly owned subsidiary of IZMO Ltd, which is not in tandem with disclosures in the annual report for FY 2017-18. Further, it was observed that the Noticee did not raise funds through Qualified Institutional Placement (QIP) as approved in its Annual General Meeting held during September 2018. However, Noticee’s decision to delay its plan for entering the defense business through HPMPL was not communicated to the investors. SEBI alleged that since the Noticee had disclosed that HPMPL would become a wholly owned subsidiary of the Company, it should have intimated the updates on the same regarding the aforesaid delay. Therefore, it was alleged that the Noticee had violated Regulation 30(7) of LODR Regulations read with Clause 2(i) of the Listing Agreement and for wrong disclosure in the annual report for FY 2017-18 the Noticee has violated Regulation 4(1)(c) and 4(1)(h) of the LODR Regulations read with Clause 2(i) of the Listing Agreement.

Charge

Violation of Regulation 4(1)(c), Regulation 4(1)(h) of the LODR Regulations, and Regulation 30(7) of LODR Regulations read with Clause 2(i) of the Listing Agreement.

Arguments/submissions by Noticee

1. **Mis-statement in the annual report for FY 2017-18:** In this regard, Noticee admitted that Hughes Precision Manufacturing Pvt. Ltd. (HPMPL) is not a subsidiary of IZMO Ltd. and was proposed to be a wholly owned subsidiary of the Company. Still, the word ‘proposed’ was inadvertently missed out before the word ‘subsidiary.’ Therefore, the said misstatement in its Annual report for the Financial Year 2017-18 suffers from nothing more than an inadvertent error/omission, which cannot be termed as a misstatement and therefore denied having violated regulation Regulations 4(1)(c) and 4(1)(h) of the LODR Regulations read with Clause 2(i) of the Listing Agreement.

2. **Disclosure of receipt of license by ‘proposed’ subsidiary is misleading:** As regards its misleading statement in its disclosure dated September 26, 2018, to the stock exchanges, the Noticee stated that the bare perusal of the said disclosure brings out the fact that IZMO was planning a diversification into defense vertical through its proposed subsidiary company viz., HPMPL. Further, it also stated that the disclosure was made by IZMO only to keep the stock exchanges and investors abreast of the developments. Further, the Noticee stated that the object clause in the Memorandum of Association of IZMO does not permit it to enter into defence-related activities. Further, IZMO had not amended the object clause of the memorandum. Therefore, any act beyond the objects of the MOA is ultra-vires and void. Therefore, it

cannot be assumed that IZMO was granted the license to manufacture and proof test military calibre Ammunition under the Arms Act, 1959, and the Arms Rules, 2016. Thus, it cannot be said that the disclosure made by IZMO on September 26, 2018, is misleading, and it is crystal clear that HPMPL had received the license. Therefore, it denied having violated Regulations 4(1)(c) and 4(1)(h) of the LODR Regulations read with Clause 2(i) of the Listing Agreement.

3. **Delayed disclosure that HPMPL would become a subsidiary:** As regards the allegation of delay regarding disclosing that HPMPL would become its wholly owned subsidiary, the Noticee stated that the plan to have HPMPL as its wholly owned subsidiary was not discarded but only deferred. The company has always kept its stakeholders updated about the developments regarding its intentions and projects to enter into the defense sector. The same was evident from the 'notes' section of the Corporate Announcements(s) regarding the outcome of the Board Meeting. Therefore, it denied violating the provisions of Regulation 30(7) of the LODR Regulations read with Clause 2(i) of the Listing Agreement.

Arguments by SEBI

1. **Misstatemententent in the annual report:** In this regard, SEBI stated that Noticee did not have any subsidiary at the relevant point of time to make such a statement in the annual report. This establishes that the statement made in the annual report was a misstatement. Besides, irrespective of whether HPMPL was a "proposed subsidiary" or an actual "subsidiary," the statement, i.e., *"Izmo is entering the defense manufacturing sector through ..... Hughes Precision Pvt. Ltd."* by itself is sensitive enough to materially affect the price of the securities of the Noticee Company since the moment it was decided and used the Name of Hughes Precision Pvt. Ltd., by IZMO. Such information provided by a listed company is deemed to be price sensitive information ('PSI') in terms of the definition as per Regulation 2(ha) of PIT Regulations, 1992, the moment it came into existence since it has the potential to deceive prospective investors. SEBI further stated that as per Clause (c) of sub-regulation 1 of regulation 4 of the LODR Regulations, listed entities are required to refrain from misrepresentation and ensure that the information provided to the stock exchanges and investors are not misleading. As per Clause (h) of sub-regulation 1 of Regulation 4 of the LODR Regulations, the listed entity is required to make specified disclosures and follow its obligations in letter and spirit taking into consideration the interest of all stakeholders. SEBI observed that the said statement is solely a misstatement by the Noticee, which is in direct conflict with the essence of the principles governing the disclosures and obligations as it had wrongly represented a certain vital piece of information to the public i.e. wrongly stating that HPMPL was its subsidiary when in reality it wasn't. SEBI highlighted that, since the Noticee

is casting aside its responsibilities that the law is aiming to ensure, the contention of the Noticee is not at all acceptable that an inadvertent error/omission, cannot be termed as a misstatement and find that its submissions in this regard do not contain any merit. Hence it is clear that Noticee has violated Regulations 4(1)(c) and 4(1)(h) of the LODR Regulations read with Clause 2(i) of the Listing Agreement.

2. **Disclosure of receipt of license by 'proposed' subsidiary is misleading:** SEBI stated that contention of the Noticee that, a bare perusal of the disclosure given on September 26, 2018 brings out the fact that IZMO was planning a diversification into defense vertical through its proposed subsidiary company *viz.*, HPMPL, is not acceptable. In this regard, SEBI stated that it does not specify whether it is IZMO or the wholly-owned subsidiary, which received the license and therefore, it is ambiguous and vague. Further, as regards the Noticee's statement that the said disclosure was made by IZMO only to keep the stock exchanges and investors abreast of the developments, SEBI submitted that it is important to note that clear and unambiguous disclosures of the relevant information by companies are essential for maintaining transparency about the affairs of the company which helps elimination information asymmetry. Therefore, the Noticee's argument in this regard is without any merits. SEBI highlighted that the Noticee also stated that the object clause in the Memorandum of Association of IZMO does not permit it to enter in defence-related activities and therefore, any act beyond the objects of the MOA is ultra-vires and void. Therefore, it cannot be assumed that IZMO was granted the license to manufacture and proof test military calibre Ammunition. In this regard, SEBI submitted that it never assumed such a stand that IZMO was granted the license to manufacture and proof test military calibre Ammunition. It was always SEBI's case that the statement of the Noticee was unclear and misleading. Accordingly, the Noticee's submission in this regard is devoid of merit. Therefore, SEBI said that the Noticee had violated Regulations 4(1)(c) and 4(1)(h) of the LODR Regulations.

3. **Delayed disclosure that HPMPL would become a subsidiary:** SEBI stated that Regulation 30(7) of the LODR Regulations requires all the listed entities to make disclosure updating material developments regularly, until the event is resolved/closed with relevant explanations. In the current case Noticee's plan to have HPMPL as its wholly-owned subsidiary was only deferred as understood from its reply. However, one cannot overlook that the deferment is also material development that needs to be updated regularly in the form of disclosures. Since, the Company had failed to update the relevant the details of the deferment in its plan to have HPMPL as its wholly-owned subsidiary, the argument of Noticee that it always kept its stakeholders updated about the developments regarding its intentions and projects to enter into the defense

sector cannot be accepted. Therefore, there is no merit in the Noticee's argument in this regard, and it is found that it has violated Regulation 30(7) of the LODR Regulations read with Clause 2(i) of the Listing Agreement.

Hence it is clear that Noticee has violated Regulations 4(1)(c), 4(1)(h), and 30(7) of the LODR Regulations read with Clause 2(i) of the Listing Agreement.

Penalty

As per Section 23-I of the SCRA read with Rule 5 of SC(R) Rules, a penalty of ₹ 5,00,000/- (Rupees Five Lakhs Only) was imposed on the Noticee, in terms of the provisions of Section 23E of the Securities and Exchange Board of India Act, 1992.

Cases quoted by Noticee: Nil

Cases quoted by SEBI: ***Ranjan Varghese vs. SEBI (Appeal No. 177 of 2009 and Order dated April 08, 2010), Appeal No. 66 of 2003 – Milan Mahendra Securities Pvt. Ltd. vs. SEBI, Coimbatore Flavors & Fragrances Ltd. vs. SEBI (Appeal No. 209 of 2014 order dated August 11, 2014)***

SEBI Order - 2

Order of Adjudicating Officer of Securities and Exchange Board of India

Name of the Case: In the matter of Securekloud Technologies Ltd and in respect of Securekloud Technologies Ltd, Mr. Gurumurthi Jayaraman, Ms. Padmini Ravichandran, and Mr. G. Sri Vignesh

Facts of the case

A. Practicing Company Secretary ("PCS") viz. M/s P. Sriram & Associates of M/s Securekloud Technologies Limited (the Company/Noticee No. 1) made observations, inter alia, of not following due process for approval of Related Party Transactions (RPTs), Independence of Independent Directors (IDs) in the company, Non-consolidation of accounts of certain companies in the accounts of M/s Securekloud Technologies Limited and other non-compliances in terms of disclosures to be made to the Committees and Board as contemplated under Securities and Exchange Board of India (Listing Obligations and Disclosure Requirements) Regulations, 2015 (hereinafter referred to as "SEBI LODR Regulations 2015") in the certificate on compliance with conditions of Corporate Governance for FY 2018-19, issued under Regulation 34 (3) of SEBI LODR Regulations, 2015. Additional facts peculiar to each allegation are quoted below:

B. **Not following due process in respect of related party transactions:** As per the Annual report for FY 2018-19, the Statutory Auditor of the Company, M/s Deloitte Haskins & Sells made certain observations stating that, "*In the absence of appropriate processes for identifying related parties they would be unable to comment on the accuracy and completeness of the related parties identified and disclosed by the Company including compliance with obtaining necessary approvals, as required, from those charged with governance*". In addition to this, the PCS, in the certificate of compliance issued in the Annual Report for FY 2018-19 for the Company, has inter-alia stated as

follows, "*The company has entered into certain Related Party Transactions without taking prior approval of the Audit Committee and Board as required under SEBI (Listing Obligations and Disclosure Requirements), Regulations, 2015*" In this regard, SEBI advised PCS to provide details of non-compliance with regard to approval process of RPTs. The PCS, *vide* email dated June 08, 2021 *inter-alia,* specified the following: *"Many transactions reported in the Balance sheet under related parties did not find place in the Minutes of Audit Committee Meetings, which included payment of remuneration to Mr. Ravichandran Srinivasan (relative of Independent Director, Ms. Padmini Ravichandran), payment of salary to ID Mr. Gurumurthy Jayaraman, transaction with Sustainable Certification (India) Private Limited. The company had also provided ad-hoc approvals to transactions with subsidiaries without specifying the names of subsidiaries."* Further the Company provided to SEBI relevant minutes of audit committee meetings held for the year 2017-18 and 2018-19 wherever approvals for RPTs were granted. Further comments of the audit committee of the Company were sought by SEBI. SEBI further vide email dated July 30, 2021 raised queries to aforesaid Independent Directors regarding the details of all RPTs entered into by the company in FY 2017-18 and FY 2018-19 along with details of prior approval by Audit Committee and approval by shareholders in case of material RPTs. Aforesaid Independent Directors (excluding Mr. Biju Chandran) vide emails dated August 02, 2021 and August 06, 2021 provided details of the RPTs executed in FY 2017-18 and FY 2018-19 along with the dates on which the Audit committee provided its approval. The Audit Committee members also *inter-alia* mentioned the following: *"All the related party transactions have been disclosed in the Annual report for the FY 2017-18 and FY 2018-19 and prior approval of the Audit Committee has been obtained and since the transactions were within the specified limits, there was no requirement of Shareholders approval as per Reg. 23(4) of the LODR Regulations, 2015."* SEBI noted that Regulation 23(2) of SEBI LODR envisages that "prior approval" of Audit Committee shall be necessary for all RPTs. In the instant case, it was seen from the minutes of the Audit Committee for FY 2017-18 and FY 2018-19, that prior approval has been explicitly sought only for certain RPTs. For other transactions, no explicit approval from Audit Committee was neither observed in the minutes and nor has the company produced any other supporting document proving otherwise. Further, it was seen that few RPTs were ratified by the Audit Committee at a later date.

C. Non-consolidation of accounts of certain companies in the accounts of M/s Securekloud Technologies Ltd: In addition to the above facts quoted at point (A) above, following facts needs to be noted. Statutory Auditor of Noticee no. 1 observed that 3 entities (viz. 8K Miles Cloud Solutions Pte. Ltd., Singapore; 8K Miles Software Services Pte. Ltd., Singapore and 8K Miles Software Services UK Ltd,

UK) have not been considered by the Company as its subsidiaries. Further as per publicly disclosed information, M/s 8K Miles Cloud Solutions Pte. Limited, Singapore has stated itself to be a subsidiary of the Company. This entity was incorporated on May 8, 2017. Further, 8K Miles Software Services Pte. Ltd, Singapore and 8K Miles Software Services UK Limited, United Kingdom exist with the promoter directors appearing as shareholders/directors. Also incorporation of these wholly owned subsidiaries in these countries were approved by the Board of Directors of the Company in their meeting held on May 30, 2018. However, all these three entities have not been considered by the management of the Company as subsidiaries in their standalone financial statements. PCS also opined that the aforesaid 3 subsidiaries viz. 8K Miles Cloud Solutions Pte. Ltd., Singapore; 8K Miles Software Services Pte. Ltd., Singapore and 8K Miles Software Services UK Ltd, UK were neither disclosed as subsidiaries nor were their financials consolidated with that of the Company. Further, Companies House Database of Government of UK, showed Mr. Rama Subramani Ramani alias Mr. R S Ramani, who is the promoter of the Company, as director of 8K Miles Software Services UK Limited, United Kingdom. Based on this, the examination report stated that 8K Miles Software Services UK Limited is a related party of the Company. However, as per the filing dated April 30, 2019 with the Government of UK, it is seen that 8K Miles Software Services UK Limited is dormant and has equity value of GBP 1. Ind AS 24 pertaining to related party disclosures, states that it is appropriate to disclose the related party relationship when control exists, irrespective of whether there have been transactions between the related parties. In the instant case, it is clear that there exists a relationship between 8K Miles Software Services UK Limited, UK and Noticee no. 1, since as per filings with Company House UK, Mr. R S Ramani (promoter of the company) is the sole shareholder of M/s 8K Miles Software Services UK Limited. This relationship is not disclosed by the Company vide its annual reports or any other public disclosure. Hence, by not disclosing all its related parties, it was alleged in the SCN that the Company is in violation of Regulation 48 of SEBI LODR Regulations, 2015 which states that the listed entity shall comply with all the applicable and notified accounting standards from time to time.

Charge

Noticees *viz*. Securekloud Technologies Limited (Noticee No. 1) has violated the various provisions of SEBI LODR Regulations, 2015 and/or Securities Contracts (Regulation) Act, 1956 (hereinafter referred to as SCRA, 1956). Noticee No. 1 is a company listed at BSE/NSE.

Arguments/submissions by Noticee

A. Not following due process in respect of related party transactions was an inadvertent error: Noticee No. 1 submitted that it had inadvertently

missed to take prior approval of certain RPTs from Audit Committee as per Regulation 23 of SEBI LODR Regulations. Noticee No. 1 also referred to four RPTs (*viz*. ₹ 7.23 cr. with 8K Miles Software Services Inc. subsidiary, ₹ 2.03 cr. & ₹ 40.74 cr. with R S Ramani, Promoter, Director and 1.19 cr. with Mr. Suresh Venkatachari) that were subsequently ratified on February 14, 2018. Noticee also relied on Hon'ble Supreme Court judgment passed in the matter of ***National Institute of Technology ('NIT') and another vs. Pannalal Choudhury and Another (2015) 11 SCC 669*** to explain the expression 'ratification'. In respect of RPT to the tune of ₹ 0.55 cr. executed with Mr. Suresh Venkatachari, Noticee No. 1, in its reply, stated that it was an unsecured loan taken from Mr. Suresh Venkatachari and the same was taken in the best interest of the company to help the company meet its financial obligations. Further, Noticee No. 1, in respect of RPT of ₹ 13.95 cr. explained that the company had a working capital facility with IFCI for which personal assets of Suresh including 25,75,000 equity shares (8K miles) were placed as collateral. IFCI sold the pledged shares to realize the loan. Hence, the IFCI loan was replaced with Suresh's loan. So the need for prior approval of audit committee in the said instance did not arise. With respect to director remuneration paid to Mr. Suresh Venkatachari, Noticee No.1, in its reply, stated that no director remuneration was paid to Mr. Suresh Venkatachari from the Company. Rather, he was drawing remuneration only from the overseas subsidiary i.e. Securekloud Technologies Inc. Attention was brought to the relevant pages (140 & 206) of Annual Report for FY 2018- 19. Further, Noticee No. 1 submitted that appointment of Mr. Suresh Venkatachari and Mr. R S Ramani are governed by Sections 196, 197 and 203 of the Companies Act, 2013 read with Schedule V and all other applicable provisions and the Companies (Appointment and Remuneration of Managerial Personnel) Rules, 2014 (including any statutory modification(s) or re-enactment thereof, for the time being in force) of Companies Act, 2013. Noticee No. 1 submitted that since the appointment of both Mr. Suresh Venkatachari and Mr. R S Ramani were approved by the Nomination and Remuneration Committee and the Board itself, there was no role of Audit Committee in respect of such transactions. Noticee No. 1, in its reply, stated that remuneration paid to Independent Directors viz. Gurumurthi Jayaraman, Padmini Ravichandran, Babita Singaram and Dinesh Raja Purmiamurthy are excluded from RPTs. Similarly, Noticee No.1 refuted that remuneration paid to KMPs falls in the category of RPT items specified in Section 188 (1) of the Companies Act.

B. **Non-consolidation of accounts of certain companies in the accounts of M/s Securekloud Technologies Ltd as they were not dormant companies:** Securekloud Technologies Ltd. Has not made any investment in 8K Miles Software Services PTE Ltd, Singapore, 8K Miles Software Services UK Limited,

United Kingdom and 8K Miles Cloud Solutions PTE Limited, Singapore. These Companies are not subsidiaries and no transactions have taken place with Securekloud Technologies Limited (formerly 8K Miles Software Services Limited). Therefore, there was no requirement to consolidate the same in the Company's accounts. In the context of IND AS 24, the Noticee No. 1, stated that as it had not invested any amount in the same company and as such there was no control. The said company was dormant company with equity value of just GBP 1 and never carried/started any business. Therefore, the Noticee No. 1 contended that there was no breach of IND AS 24 in the facts and circumstances of this case.

Arguments by SEBI

A. **Not following due process in respect of related party transactions was not an inadvertent error:** SEBI stated that crux of the allegations is that Noticee No. 1 had not obtained "prior approval" of the Audit Committee with respect to certain Related Party Transactions. These transactions include certain loan transactions to related parties; investments in related parties; generation of revenue from related parties including interest income; repayment of loan to related parties; sale of intangibles; remuneration/sitting fee etc. entered by the company with certain identified related parties during FY 2017-18 and 2018-19. It is to noted that Regulation 23(2) of SEBI LODR Regulations specifically mandates "prior approval of Audit Committee" for RPTs. SEBI highlighted that defense of the company that not obtaining "prior approval" is an inadvertent error, is not acceptable in light of the avowed object underlying the provisions. Likewise, the defense of 'ratification' set up by the company is of no avail, in this context. Judgment of the Hon'ble Supreme Court cited by the Noticee does not pertain to the realm of Companies Act and deals with "ratification" in a totally different context and in the general sense of the term. SEBI further stated that object of introduction of Audit Committee in the governance realm of listed entities and the norms mandating "prior approval of the Audit Committee" for RPTs are significantly different from the governance processes prescribed to be followed in an academic institute (NIT) which was pertaining to case quoted by Noticee no. 1. "Ratification" cannot be a general principle to be extended to defeat the explicit mandate of "prior approval" laid down in SEBI (LODR) Regulations, 2015 for related party transactions. Such RPTs have an impact not only on the investor's interest but also on the level of transparency required in corporate governance. Loans by the related parties advanced to the Company and loan advanced by related parties to the Company such as 8K Miles Software Services Inc. and 8K Miles Media Pvt Ltd etc required prior approval of Audit Committee. Loan transactions between the Company and R S Ramani, the promoter - director as well as the transactions with 8K Miles Software Services Inc. were substantial during the year 2017-18 constituting more than ₹ 85 cr. So, it is evident that there were substantial financial transactions between the company and the related parties, to the tune of close

to ₹ 100 cr. for the said two financial years, which were executed without the knowledge and/or obtaining the prior approval of the Audit Committee of the Company. Remuneration/sitting fees amounting to ₹ 4.06 cr. categorized as RPTs is not very significant and the same may not qualify as material RPT, as contended by the Counsel appearing for Noticee No. 1. Hence, Noticee No. 1, by having entered into substantial financial transactions with its related parties, without obtaining prior approval from Audit Committee, as admitted, has committed a violation of Regulation 23(2) of SEBI LODR Regulations 2015 and is liable for penalty.

B. **Non-consolidation of accounts of certain companies in the accounts of M/s Securekloud Technologies Ltd as they were not dormant companies:** SEBI stated that there is no material brought out in the examination report showing the association of 8K Miles Software Services PTE Ltd, Singapore and 8K Miles Cloud Solutions PTE Limited, Singapore with the company viz. M/s Securekloud Technologies Ltd. As regards 8K Miles Software Services UK Limited, United Kingdom, it is noted from the available records that Mr. R. S. Ramani who is the promoter of the Company, is also the director of 8K Miles Software Services UK Limited which is also evident from documents filed with Companies House, Government of UK. Further, SEBI noted that as on April 30, 2019 it is seen that 8K Miles Software Services UK Limited, has share capital of GBP 1. It is also seen that the documents filed with Companies House, Government of UK that 8K Miles Software Services UK Limited is a 'Dormant Account' and a statement was also mentioned in the Balance sheet that *"For the year ending April 30, 2019, the company was entitled to exemption under section 480 of the Companies Act, 2006 relating to dormant companies"*. Further, from the document filed with Companies House, titled as "Full details of Shareholders", it is seen that Mr. Ramani Rama Subramani is holding 1 share of 8K Miles Software Services UK Limited. Hence looking at all the evidences it can be inferred that sufficient material has not been brought out in the examination report to establish that 8K Miles Software Services, UK Limited is an active subsidiary of Noticee No.1. In view of the facts stated above, SEBI refused to accept that 8K Miles Software Services UK Limited is indeed a "subsidiary", of Noticee No.1 as per the provisions of the Companies Act, 2013**. Penalty under Notice no 1 ₹ 25,00,000, Notice no 2 – ₹ 10,00,000, Notice No 3 - ₹ 10,00,000 and Notice No 4 – ₹ 4,00,000.**

Penalty

Noticee name	***Violations***	***Penalty under provisions***	***Penalty***
Securekloud Technologies Ltd (Noticee no. 1)	Regulation 23(2), Regulation 17(1)(b), Regulation 18(1)(d), Regulation 20(2A) and Clause 17 of Para A of Part A of Schedule III read with Regulation 30(2) read with Regulation 4(1)(h) of SEBI (LODR) Regulations, 2015 and Section 21 of SCRA, 1956.	Section 23 E of SCRA, 1956 read with clause 2 of the Listing agreement	₹ 25,00,000

Co.'s Act Order - 1

In the matter of *Hamlin Trust & Ors. vs. Rattan India Finance Private Limited And Ors.*, NCLAT order dated 7th September 2022

Facts of the case

- Rattan India Finance Private Limited, (hereafter called as Rattan India) is a joint venture (JV) Non-Banking Financial Company (NBFC), and Hamlin Trust, (appellants) is 50% shareholder/JV partner in Rattan India along with Rose Investments ("Respondent").

- Due to a dispute between the Hamlin Trust and Rose Investments, the business operations of Rattan India were hampered, and as a result, both the parties filed cross petitions for operation and mismanagement under Sections 241 and 242 of the Companies Act, 2013 (the Act).

- After filing the main petition under Sections 241 and 242 of the Act, Rose Investments filed one more petition before NCLT for the appointment of Chief Financial Officer (hereafter called CFO) of Rattan India.

- Article 140 of the Articles of Association (AOA) of Rattan India states that Rose Investments had the right to suggest three candidates, one by one, for the post of CFO of Rattan India and if Hamlin Trust rejected the first 2 candidates suggested by Rose Investments, then they shall have to accept the appointment of the third candidate suggested by Rose Investments as CFO.

- Hamlin Trust did not accept the first 2 candidates recommended by Rose Investments and was also disputing the appointment of a third candidate. Therefore Rose Investments filed the said petition.

- NCLT, New Delhi ruled in favor of Rose Investments (petitioners before NCLT), and by passing the impugned order allowed the appointment of the third candidate suggested by Rose Investments as CFO of Rattan India.

- Aggrieved by the said order, Hamlin Trust filed an appeal before NCLAT, New Delhi

Appellants contentions

The Learned Senior Counsel for Hamlin Trust has argued that,

- As per article 140 of AOA of Rattan India, Rose Investments first suggested the name of Mr. Devendra Mehta, which was not approved by the Hamlin Trust, since he was to continue in his parent company Alvarez and Marsal India Private Limited (in short 'A&M') and would have only rendered services to the Company in accordance with his engagement agreement while continuing to work with A&M, his parent company. Further compensation for the services of CFO would have to be paid by Rattan India to A & M, and A & M will pay to Mr. Devendra Mehta.
- Thereafter, the name of Mr. Venkataraman Subramanian was suggested, which was also rejected by Hamlin Trust because he was also seconded for engagement as CFO by Deloitte Touche Tohmatsu India LLP (in short 'DTT') based on an agreement and payment for the services were to be provided to DTT considering Mr. Subramanian as an employee of DTT who would be deployed with Rattan India to work as CFO.
- Referring to sub-section 3 of Section 203, it was argued that both the candidates suggested by Rose Investments were ineligible to be appointed as CFO of Rattan India for the reason that they were already in full-time employment at other companies and Section 203(3) prohibits the appointment of 1 person as KMP in 2 companies.
- Further, it was argued that the third candidate Mr. Bipin Kabra, whose name was suggested for the post of CFO, was the Managing Director of Eunoia Financial Services Private Limited. Therefore, his nomination and the future appointment would also be in contravention of Section 203(3) of the Act. It was also pointed out that in the affidavit filed by Mr. Bipin Kabra, under the Impugned NCLT Order, Mr. Kabra has not explicitly said that he would resign from the position of Managing Director, so that may be in contravention of Section 203(3) of the Act.
- It was contended that Article 140 of AOA of Rattan India did not imply that Rose Investments had an absolute and unfettered right to nominate an ineligible and invalid candidate for appointment as CFO.
- Moreover, since Article 140 of the AOA does not stipulate any procedure or eligibility conditions for the appointment of a CFO, it is perfectly logical and rational that reference is made to the Act and rules made therein to consider the eligibility conditions for CFO.
- Also, it was submitted that the suggestion of ineligible and disqualified persons for appointment as CFO as candidate nos. 1 and 2 is a ploy by Rose Investments to ensure that its chosen candidate, who is the third suggested name, is by default appointed as CFO.

Respondent's contentions

In reply, the Learned Senior Counsel for Rose Investments has strongly argued that:

- Article 140 of AOA of Rattan India fully governs the appointment of a CFO, and the provisions of the Companies Act, 2013, particularly Section 203, are not applicable since Rattan India is a Private Limited Company.
- Article 140 of AOA does not contemplate that a person's nomination can be considered to be valid or invalid for any particular reason, and the Impugned NCLT Order accepts this argument.
- The judgment in the matter of ***Manohar Nathurao Samarth vs. Marotrao, (1979) 4 ACC 93*** was also cited to buttress the claim that the ineligibility criteria must flow from a specific provision of law. The applicability of Section 203 does not hold, and so the NCLT has correctly rejected the Hamlin Trust's contention that the nomination of first two candidates is invalid.

  It was further argued that, even if one were to accept the applicability of Section 203, Rose Investments had demonstrated that Mr Bipin Kabra fulfilled the criteria set out in Section 203(3) of the Act. Hamlin Trust cannot escape the responsibility of accepting the candidature of Mr. Bipin Kabra as the third nomination, as stipulated in Article 140 of AOA.

  It was further submitted that Mr. Kabra had filed an affidavit as required by the Impugned Order of NCLT and had bound himself to comply with the requirements of Section 189(2) and Section 203(3) of the Act regarding disclosure of interests in other entities by KMP and relinquishment of the position of KMP in other entities.

Held

The 2 issues considered by the court regarding the appointment of CFO are:

(i) Whether Article 140 of AOA is the only provision that is applicable concerning the appointment of CFO in the Company and no reference to and compliance of any provision of the Companies Act, 2013, particularly Sections 203, 184, and 189 therein, is necessary? And;

(ii) If reference to Section 203 is found to be necessary for looking at the eligibility of a suggested nomination, whether Rose Investments suggestions of the names of Mr. Devendra Mehta and Mr. Venkataraman Subramanian as first and second nominations comply with the requirement of article 140 of the AOA for appointment of CFO?

- Concerning the **first question**, the NCLAT has held that,
- The position of CFO is included as a KMP under Clause (51) of Section 2 of the Act.
- Section 6 of the Act provides that the provisions of this Act shall override anything to the contrary contained in the Memorandum or Articles of Association of a company.
- Provisions under Sections 184, 189, and 203 of the Act provide rational and reasonable norms and standards

regarding the eligibility of KMP and which are relevant and useful in conducting the affairs of the company in a transparent, independent, and unbiased manner keeping the interest of the company foremost.

- Further, the NCLAT noted that the Impugned Order of NCLT accepts the applicability of Sections 184, 189, and 203 of the Act, and it directs Mr Bipin Kabra to file an affidavit undertaking to abide by the requirements of these provisions.

- Section 203 of the Act lays down that the CFO is a Whole-Time KMP and is prohibited from holding office in more than one company except in its subsidiary company at the same time.

- Article 140 of AOA makes it clear that if JV Partner i.e., Hamlin Trust, rejects the appointment of two suggested candidates, it has to accept the nomination of the third candidate. While the right of Rose Investments' has been made primary, the text of this Article does not imply that any person, even if ineligible by the normal standard of eligibility given in Section 203 of the Act and the requirement of the CFO to be a Whole-Time KMP, can be considered a valid candidate for the position of CFO.

- In the absence of any specific mention regarding eligibility and the method of selection of the CFO in the AOA, it would be logical to take recourse to Section 203 of the Act, in the selection and appointment of CFO, and also keep in view Sections 184 and 189 in adjudging the eligibility of the KMP.

- Concerning the **second question**, the court held that,

- It was argued on behalf of Rose Investments that, Rattan India is a Private Limited Company, and Provisions of Section 203 do not apply thereto. The NCLAT's view was that the principles governing the appointment and qualification of the KMP under Section 203 could be taken for guidance de hors article 140 of the AOA. Therefore, the appellants (Hamlin Trust) are not precluded from arguing the applicability of Section 203 at the appeal stage.

- The NCLAT observed that the proposals for deployment of Mr. Devendra Mehta and Mr. Venkataraman Subramanian in Rattan India are like 'secondment'. Hence the first two suggested names, are ineligible for appointment as CFO as they contravene sub-section (3) of Section 203 of the Act.

- The import of article 140 of the AOA is certainly not that the first two suggestions could be of ineligible candidates so that the Hamlin Trust has to, then, accept the name of the third candidate as Hobson's choice.

- Therefore, NCLAT took the view that all the suggested candidates should satisfy the basic conditions of eligibility as required under Section 203 of the Act so that Hamlin Trust can exercise their right of selecting the most appropriate and suitable candidate in the true letter and spirit of the article 140 of the AOA.

- It was concluded by the NCLAT that the NCLT had committed an error in

inferring that the provision in Article 140 of the AOA does not contemplate that a person's nomination can be considered valid or invalid for any particular reason.

- NCLAT's view was that the suggested candidates should be eligible as per the provision of Section 203 of the Comp Act while applying Article 140 of the AOA.
- The Impugned Order passed by NCLT was set aside. The parties are directed to take necessary action for the appointment of the CFO of Rattan India as per Article 140 of the AOA, after making valid nominations keeping in view Section 203 of the Act and completing the appointment of CFO within a period of sixty days from the date of NCLAT Order.

IBC

In the matter of Mr. Pankaj Dhanuka, Insolvency Professional (IP) order dated 12th April 2022 passed by the Disciplinary Committee of Insolvency Bankruptcy Board of India (IBBI)

Facts of the Case

- Mr. Pankaj Dhanuka (IP) was appointed as an Interim Resolution Professional (IRP) of Corporate Power Limited, the Corporate Debtor (CD) by the National Company Law Tribunal, Kolkata (NCLT) in the matter of Asset Reconstruction Company (India) Limited vs. Corporate Power Limited vide its order dated 19th February 2020 admitting an application for Corporate Insolvency Resolution Process (CIRP) under section 7 of the Insolvency and Bankruptcy Code, 2016 (/IBC). Subsequently, Mr. Dhanuka was appointed as the Resolution Professional (RP) in the said CD.
- Insolvency Bankruptcy Board of India (IBBI) received a complaint against the IP in respect of the said CIRP, and the complaint was examined by IBBI.
- The IBBI issued the Show Cause Notice (SCN) to IP on 25th November 2021 based on the material available on record in respect of his role as an IRP and RP in the CIRP of the CD.
- The SCN alleged contravention of section 208(2)(a) and (e) of the IBC, Regulation7(2)(a) and 7(2)(h) **of the IBBI (Insolvency Professionals) Regulations, 2016 (IP Regulations) and Clause 14 and 23B of the Code of Conduct under the First Schedule of Regulation 7(2) (Code/Code of Conduct) thereof which deals with the functions and obligations of the insolvency professionals.**
- It was observed from the minutes of the 1st meeting of Committee of Creditors (CoC) that Deloitte Touche Tohmatsu India LLP (DDTIL) was appointed to provide support services to the CD. The minutes also noted that IP was an advisor of DDTIL.
- As per section- 5(24A)(g) of IBC, which deals with the related party, a limited liability partnership or partnership firm which acts on the advice of an individual is a related party in respect to that individual.
- Further, as per Clause 23B of the Code of Conduct in specified in the first schedule of IP regulations, a related

party cannot be appointed or engaged by an IP for any work related to an assignment under Code.

- Despite being an advisor of DDTIL - IP appointed DDTIL to provide support services in the CIRP of the said CD, which was in contravention of the IP Regulations. The aforesaid acts and omissions on the part of IP during the CIRP of the CD, when seen in the context of role, functions, responsibilities, and powers conferred upon an IRP/RP, suggest that the conduct was allegedly in violation of the aforementioned provisions.

Submissions made by RP

- It was submitted that he had undertaken duties and obligations during the CIRP of the CD in complete compliance with the provisions of the IBC, IP Regulations wherever applicable, as well as the Code of Conduct.
- That the said appointment was for DDTIL, providing professional advisory services to him during the CIRP.
- The DC noted from the minutes of the 1st CoC meeting stated that DDTIL was appointed by IP to provide support services in the CD. The DC noted that IP and DDTIL are related parties in as much as IP worked as an advisor of DDTIL, and despite being an advisor of DDTIL, he appointed DDTIL to provide support services in the CIRP of the said CD. That the said appointment was for DDTIL to provide professional advisory services to him during the CIRP of the said CD.
- Further, stated that as per clause 23B of the Code of Conduct, an IP should not engage/appoint any related parties in connection with any work relating to assignment under the Code. As per Section 5 (24A)(g) of the Code, in respect of an individual, a related party would consist of an LLP whose partners/employees, in the ordinary course of business, act on the advice, directions, or instructions of the individual.
- Relied on the case of Poppatlal Shah v. State of Madras wherein it was held that *"it is (a) settled rule of construction that to ascertain the legislative intent all the constituent parts of a statute are to be taken together*". *As such, the term 'advice' has to be read and interpreted in the context of the entire provision, not insolation*. Further, the Hon'ble Supreme Court in ***'Rainbow Steels & Anr. vs. Commissioner of Sales Tax, U.P. & Anr.'*** held that "*where two or more words which are susceptible of analogous meaning are coupled together, noscitur a sociis, they are understood to be used in their cognate sense. They take, as it were, their color from each other, the meaning of the more general being restricted to a sense analogous to that of the less general*."
- That the word 'advice', as used in the abovesaid provision, was restricted in its interpretation to the extent that it was analogous to the words 'directions' and ''instructions.'
- The said cardinal principle of statutory interpretation also makes it evident that "advice" as used in Section 5(24A)(g) has to be interpreted as advice

that was binding upon the partners/ employees of the LLP. Such binding nature of "advice" follows from similar connotation and import of the terms "directions" or "instructions" which immediately follow the word "advice".

- That the wording and framing of section 5(24A)(g) of IBC make it abundantly clear that it was aimed at persons on whose advice/directions/ instructions, the partnership/LLP was accustomed or required to act. The provision makes it clear that the partners/employees act on such advice, instructions, or directions in the ordinary course of business. As such, the provision cannot be said to apply to an individual who provides professional advisory services similar in his capacity as a consultant, and only provides the same as and when his/ her advice is solicited. Therefore, as used in Section 5(24A)(g) of IBC, the word "advice" cannot, by any stretch of the imagination, be said to include the advice provided by a consultant engaged by the partnership firm or LLP, as the case may be.

- Section 2(59) of the Companies Act, 2013 states that an "officer" includes any director, manager, or key managerial personnel or "any person in accordance with those directions or instructions the board of directors or any one or more of the directors is or are accustomed to act."

- It is clear that a shadow director must be a person involved very closely with the day-to-day affairs and functioning of the company and that a person who is merely a professional advisor or consultant, who provides his advice on it being solicited for a professional fee, would not be a shadow director.

- Similarly, Sec 5(24A)(g) of the Code is not attracted merely on account of an individual providing purely advisory services to an LLP, with no ability to influence the decision-making or governance of the LLP. In other words, where a professional's consultant advice is not binding on the LLP – where it may at its discretion and option may be followed or may not be followed by LLP at its discretion.

- The interpretation of section 5(24A)(g) would lead to absurd results – for instance, a lawyer appointed by the LLP, which provides legal advice to the LLP, would also, by being an advisor to the LLP, become a related party of the LLP – this could have never been the intention of the legislature.

- That in the present case, as a consultant engaged by DDTIL at its will, is, as a matter of fact, not providing any advice about the governance or management of DDTIL or any other advice to DDTIL which any of its partners or employees are required to act upon in the ordinary course.

- That DDTIL was exclusively managed and governed by its group of equity partners, who are all professionals from various fields, including but not limited to experts in the field of finance, financial advisory (including those on mergers and acquisitions), etc., and of significant standing in their own right.

- As such, IP's role with DDTIL is solely as a consultant providing certain advisory services as and when sought and is limited to one of the business lines of DDTIL, and it cannot be said to be an individual on whose advice DDTIL and its partners and/or employees are accustomed to act.
- That DDTIL is a significant organization with many employees and partners and delivers a wide array of professional services. As such, DDTIL has professional relationships with number of independent consultants, and it would be wholly incorrect to classify them as 'related parties'.
- The term 'advisor' is utilized commonly and frequently within the finance and consulting industry to denote professionals and consultants who provide a wide range of advisory and professional services.
- A professional advisory service in the CIRP of CD does not fall foul of any provisions of the IBC or Code of Conduct or of that matter of IP Regulations.

Submissions made by the Disciplinary Committee (DC) of IBBI

- Under IBC, IP/RP plays a central role in the resolution process of the CD - appointed by the NCLT as an officer of the Code of Conduct the resolution process. It was the duty of RP to conduct CIRP with integrity and accountability in the process and to take reasonable care and diligence while performing the duties. Therefore, it becomes imperative for an IP to perform duties with utmost care and diligence.
- RP was expected to function with reasonable care and diligence to ensure the credibility of the process.
- From the minutes of the 1st CoC meeting that DDTIL was appointed by IP to provide support services in the CD. The DC also noted that IP and DDTIL are related parties in as much as IP worked as an advisor of DDTIL, and despite being an advisor of DDTIL, IP appointed DDTIL to provide support services in the CIRP of the said CD.
- In the instant matter, the submission of IP that restricted interpretation is to be given with respect to the advice given during the engagement as a consultant to DDTIL is not tenable. When a firm engages a professional, usually, the advice given by the individual is acted upon as it is from a professional person, and it gives authenticity to the advice. For that purpose, a consultation fee is also paid. Thus, the DC finds that IP has contravened the provisions of the IBC and the Code of Conduct by engaging DDTIL as its support service provider.

Held

- The DC held that IP should not undertake any assignments under the Code for a period of one year from the date of coming into force of the above order.

CA Hardik Mehta CA Tanvi Vora

OTHER LAWS

FEMA – Update and Analysis

FEMA – A new era in Overseas Investment Regulations - Update and Analysis – Part 3

In continuation of Part 1 and Part 2 of our article (published in September 2022 and October 2022 of The Chamber's Journal) on analysis of the changes in overseas investments rules and regulations, this article brings out the changes to reporting obligations related to overseas investments.

As explained, the Central Government (through Ministry of Finance (MoF)) and the Reserve Bank of India (RBI) vide Notification No. G.S.R 646(E) issued Foreign Exchange Management (Overseas Investment) Rules, 2022 and also notified Foreign Exchange Management (Overseas Investment) Regulations, 2022 vide Notification No. FEMA 400/2022-RB both on 22nd August, 2022 in suppression of Notification No. FEMA 120/2004-RB dated 7-7-2004 [Foreign Exchange Management (Transfer or Issue of Any Foreign Security) Regulations, 2004] and Notification No. FEMA 7(R)/2015-RB dated January 21, 2016 [Foreign Exchange Management (Acquisition and Transfer of Immovable Property Outside India) Regulations, 2015.

These new ODI Rules and Regulations have brought about a complete overhaul of the ODI framework which was in place since almost two decades. In this three-part article we attempted to provide an analysis of the important changes effected by the new framework followed below by an analysis and step by step guide on the compliance and reporting under the new regulations . Due to paucity of space the article has limited the analysis to rules and regulations considered most important for discussion and those amended in comparison to FEMA 120 and/or FEMA 7(R).

Reporting Compliances under Overseas Investment Rules and Regulations

1) The biggest change under reporting obligations is the change of Form ODI to Form FC. In the erstwhile regime, Form ODI was divided into three parts, Part 1 dealt with reporting of investment, Part II was Annual Performance Report dealing with annual reporting of the performance numbers of the overseas investments and Part III dealt with reporting of Disinvestment. The new Form FC covers reporting of ODI Investments and Disinvestment in

different sections in a more elaborate way. There are two separate forms in addition to Form FC, i.e. Form APR (Annual Performance Report) and Form OPI (Overseas Portfolio Investment). Form APR is largely on lines with erstwhile Form ODI Part II except few changes made in accordance with new rules and regulations which have been elaborated below. Form OPI is an entirely new reporting obligation entrusted on the person resident in India which needs to be filed every six months i.e. bi -yearly ended March/ September. FLA filing on FLAIR portal continues for all residents who have made overseas investments outside India.

2) One of the most important clarifications brought out in the new reporting mechanism is that Form FC has to be submitted at the time of making outward remittance or making Financial commitment whichever is earlier. A detailed comparison of Form ODI Part I and Part III with Form FC would bring out the important changes under new reporting mechanism with respect to investment and disinvestment from overseas direct investments. Below is the comparison of both forms for various reporting obligations in a tabular format:-

Particulars	***Section***	***Erstwhile Form ODI***	***New Form FC***
Details of Indian Entity (IE)/Resident Individual (RI)/ Trust/Society	Section A	IP (Indian Party)	IE (Indian Entity)
		JV/WOS	Foreign Entity
		Group to which the IP belongs	Group company of IE in cases of guarantee
		-	Legal Entity Identifier.
		Net worth in INR	Net worth in INR *as on last audited balance sheet*[1].
		This detail was required under Section B in FCY only	Sum of remittance/transaction w.r.t. all foreign entities made until the date of the current transaction in INR as well as FCY
Details of the foreign entity/ Step-Down Subsidiary (SDS)	Section B	-	The foreign entity is a start-up or has its core activity in strategic sector or is engaged in financial services.
		-	Date of incorporation of the foreign entity.

1. As defined under FEM OI Rules 2022 (explained in Article 1 published in September 2022)

Particulars	*Section*	*Erstwhile Form ODI*	*New Form FC*
		-	Legal Entity Identifier[2]
		Estimated cost/Fair Value of overseas acquisition.	Not Required anymore[3]
		Remittance/Transactions w.r.t JV/WOS	Remittance/Transactions being made w.r.t foreign entity to be provided in INR and FCY
		-	Sum of Financial Commitment by IE/RI/group company/Trust/ Society w.r.t. UIN being invested in (in INR and FCY)
		Remittance/Transactions w.r.t. all JV/WOS	Moved to Section A as explained above
		JV/WOS is SPV.	-
		-	The person resident in India has control in the foreign entity (Yes/ No)[4]
		Details of investment/ disinvestment of Step down subsidiary (SDS) of JV/WOS.	Details of SDS of foreign entity now only captures Investment made in SDS, details regarding disinvestment have been moved to Form APR point XII
Details of transaction/ remittance/ Financial Commitment (FC) of the person resident in India	Section C	Details about purpose of investment such a new/supplementary investment by way on participation in JV/WOS or loan or guarantee etc	Not Required anymore

2. LEI is a 20-digit alpha numeric unique number used to identify parties to financial transactions worldwide to improve the quality and accuracy of the financial data systems for better risk management. The Reserve Bank of India ("RBI"), vide its Circular No. RBI/2021-22/137 A.P. (DIR Series) Circular No. 20 dated 10 December 2021, has made the Legal Entity Identifier ("LEI") mandatory for cross border transactions / capital or current transactions of Rs. 50 Crores and above w.e.f. 1 October 2022.
3. The requirement of estimated cost / fair value of overseas acquisition always created a confusion and every AD bank had differing views on what amount was to be inserted there at. It is helpful that the line item is no longer required.
4. Control definition is as per FEM OI Rules 2022 (explained in detail in Article 1 published in September 2022)

Particulars	***Section***	***Erstwhile Form ODI***	***New Form FC***
		Table with respect to Method/Source of Investment	Table with respect to Method of Investment updated as below: — FCCB category removed — Rollover/Change in guarantee added to table (earlier was separate) — Conversion of loan to equity added to table (earlier was separate) — Others category also added which include deferred payment[5], gift, inheritance, etc.
		Separate item under this section	Category of method of investment by way of conversion of loan to equity.
		Separate item under this section	Category of method of investment by way of rollover/change in guarantee.
		Detailed declaration to be signed by AD Bank	The AD Bank declaration has been made concise certifying the *bona fides* of the transaction
Declaration by the Indian entity (IE)/Resident Individual (RI)	Section D	The erstwhile declaration commented on: — Investigations on IP/RI — IP/RI on exporters' caution list or banking defaulters list	The new declaration has been broadened considerably requiring: — NPA/wilful defaulter or under investigation and NOC[6] obtained — Submission of share certificate and all other reporting requirements for the UIN

5. Under new regulations, deferred payment mechanism is allowed, hence for part of the consideration which is deferred will be treated as non - fund based financial commitment and at the time of remittance towards the deferred consideration needs to be reported as conversion of non-fund based commitment to equity capital.
6. As required under Rule 10 of the FEM OI Rules 2022

Particulars	***Section***	***Erstwhile Form ODI***	***New Form FC***
		— Special benefits/ incentives in host country — Submission of share certificate and APR — For SDS in financial service section	— Compliance with OI Rules and Regulations for FC by means of debt — Compliance with pricing and valuation norms — To certify no delay in reporting is pending for regularization[7] — Compliance of FCRA and Schedule III of OI Rules in case where securities acquired by way of gift from PROI — Total LRS remittances by RI in the FY and adherence to threshold The above listed declaration have become more onerous and it is imperative to comply with them all (when applicable) otherwise ODI would not be permitted.
Certificate by the Statutory Auditors of the Indian Entity (IE)/Group Company, as applicable	Section E	The statutory auditor was required to certify on: — Non real estate or banking business of JV/WOS — Networth of IP — Total FC of IP in INR and FCY and if within threshold % of networth	The new declaration has been broadened considerably requiring the statutory auditor to: — certify foreign entity not involved in real estate, gambling business and dealing with financial products linked to Indian rupee — in case of ODI in start-up, certify that investment made from internal accruals

7. As per Regulation 12 of FEM OI Regulation 2022, a restriction on any further financial commitment or transfer is applicable until any delay is reporting is regularized.

Particulars	***Section***	***Erstwhile Form ODI***	***New Form FC***
		— FC of IP within USD 1 billion limit — Compliance with valuation norms — Compliance with ECB guidelines — Compliance with regulation in case of financial services sector — Certify that all APRs for all JV/WOS were submitted	— Certify that the structure does not have more than 2 layers in a round trip scenario — In case applicable, to certify that NOC has been obtained — Networth of IP — Total FC of IP in INR and FCY and if within threshold % of networth — Compliance with valuation norms — Compliance with regulation in case of financial services sector — To certify no delay in reporting is pending for regularization[8] — Certify w.r.t. the total guarantee given by the group company and its compliance with FC limit threshold. Some details may be easy to certify by the auditor on review of the company records however details such as requirement of NOC for NPA or wilful defaulter etc may be difficult to verify in absence of data in public domain. In such cases, a statutory auditor could obtain a undertaking or declaration from the IE

8. As per Regulation 12 of FEM OI Regulation 2022, a restriction on any further financial commitment or transfer is applicable until any delay is reporting is regularized.

Particulars	***Section***	***Erstwhile Form ODI***	***New Form FC***
Reporting of restructuring of the balance sheet of the foreign entity.	Section F	Separate form for restructuring did not exist	A whole New Section has been inserted for restructuring dealing with diminution in the total value of investment including equity and debt. The important part of this section is giving the details of proportionate losses out of total accumulated losses and its impact on the total investment post restructuring captured in the total financial commitment.
Reporting of disinvestment in the foreign entity.	Section G	Part of Form ODI Part III in the erstwhile reporting requirements.	Section G of Form FC now includes these details. While the details in the form have remained similar, the declaration has been amended to: — Declare that price of transfer is arrived on an arm's length basis — Declaration in case of sale through stock exchange removed — Declaration of IP not being under investigation removed — Declare that requisite approvals in case of merger, amalgamation or demerger etc has been obtained

3) Changes in the new Form APR are tabulated below in comparison to erstwhile Form APR (Part II of Form ODI):-

Particulars	***Erstwhile Form ODI Part II***	***Form APR***
Part IV	-	Certify if the Indian Entity/ Resident Individual/Trust/Society has control in the foreign entity
Part V	-	Change in the share holding pattern during the reporting year to be reported

Particulars	***Erstwhile Form ODI Part II***	***Form APR***
Part XII	Choose investment type of SDS between WO SDS or JV SDS)	Not Required
	-	Details of SDS wound up during the reporting period
Declaration from Indian entity/Resident individual	Declare that reporting of investment in SDS has been done	Declare that acquisition/setting up/ winding up/transfer of the SDS and changes in the shareholding pattern of the foreign entity since last APR have been reported.
	Declare that changes in capital structure of the JV/WOS since last APR has been reported under Section C of Form ODI Part I	
	Declare that if SDS is in financial service sector, requisite regulations have been complied with.	-
	-	Declare that the structure of SDS is in compliance with the structural requirements of the foreign entity[9].
Certificate of Statutory Auditor in case of IE/ CA in case of RI	In case where audit is not mandatory in host country, to certify that APR prepared on basis of such unaudited BS and that the Statutory Auditors of the IP certifies that 'The un-audited annual accounts of the JV/WOS reflect the true and fair picture of the affairs of the JV/WOS' and that the un-audited annual accounts of the JV/WOS has been adopted and ratified by the Board of the Indian party.	While the points on the left continue to be certified, the statutory auditor/CA also needs to certify that the IE/RI does not have control in the foreign entity. In case the IE/RI has control in the foreign entity, the relaxation w.r.t. APR on basis of unaudited financial statements would not be available and would therefore need to be audited.

Apart from the above changes, one more important change is the applicability of filing of Form APR. Under new regulations, APR is not required to be submitted in the below situations:-

a) if PROI holds less than 10 percent of the equity capital in the foreign entity i.e. having no control,

b) where foreign entity is under liquidation,

9. In our view this declaration would also include compliance with round tripping structure whenever applicable

c) for the part of the year at the time of disinvestment.

4) Lastly, in order to regulate the Overseas Portfolio Investments, a form has been newly interested namely, Form OPI dealing with making portfolio investment and transferring such investment by a person resident in India being an Indian Entity or Mutual Fund[10].

Particulars	***Section***	***Form OPI***
Details of the Indian Entity	Section A	Detail of Indian Entity/Mutual fund, namely: — Name — LEI — PAN — Address — Net worth in INR — Whether IE is Listed — Contact person (Name, Designation, Mobile number, Email id)
Details of OPI by Indian entity	Section A.(A)	Net opening balance of investment held at cost basis in USD & INR
		Investments made during the half year (including reinvestment) in USD & INR
		Sale/Disinvestment made during the half year in USD & INR
		Net closing balance of investment held in USD & INR
		Remittance amount & Repatriation amount in USD & INR
Details of OPI by a resident individual by way of ESOP/ Employee benefit Scheme (EBS).	Section A.(B)	Net opening balance of ESOP/EBS investment held at cost basis in USD & INR
		Investments made during the Half Year (including reinvestment) in USD & INR

10. Form OPI is applicable to Indian companies, Mutual Funds (MF), Alternative Investment Fund (AIF), Venture Capital Fund (VCF) and ESOP reporting. From OPI is not applicable to resident individuals.

Particulars	***Section***	***Form OPI***
		Disinvestments made during the Half Year. in USD & INR
		Net closing balance of investment held in USD & INR
		Remittance Amount& Repatriation Amount in USD & INR
Details of OPI by MF	Section A.(C)	Details by Mutual fund: — Type of Investment (Equity, Debt Instruments, ADR/GDR, ETF, Mutual Funds, Others) — Opening Balance in USD & INR — Purchases in USD & INR — Sale/Disinvestment in USD & INR — Closing Balance in USD & INR — Remittance from India in USD & INR — Repatriation to India in USD & INR
Details of OPI by AIF/VCF	Section B	Particulars of the IE/RI who has **promoted/invested in VCF/AIF**, namely: — Name. — LEI. — PAN. — Group to which entity belongs. — Activity code of Indian entity. — Address. — Whether IE is listed. — Contact person (Name, Designation, Mobile number, Email id, Fax no).
		Particulars of Indian Company/RI who **manages the VCF/AIF**, namely: — Name. — PAN.

Particulars	***Section***	***Form OPI***
		— Group to which entity belongs. — Activity code of Indian entity. — Address. — Contact person (Name, Designation, Mobile number, Email id, Fax no). Details by VCF/AIF, namely: — Name of VCF/AIF — Date of SEBI Approval — Limit of OI granted by SEBI — Type of Investment (Equity, Equity linked instrument, Other permissible instruments) — Opening Balance in USD & INR — Purchases in USD & INR — Sale/Disinvestment in USD & INR — Closing Balance in USD & INR — Remittance from India in USD & INR — Repatriation to India in USD & INR
Certificate from Indian Entity/MF/AIF/VCF, as the case may be	Section C	The form is to be certified by the Indian Entity/MF/AIF/VCF. Interestingly, the form does not need to be certified/signed by AD Bank as is the case in all other forms explained above.

The new Overseas Investment Rules and Regulations addresses many issues and concerns in the erstwhile regulations. It also liberalizes and simplifies many rules and reporting obligations for the investors. However, we still await FAQs on the Regulations and clarifications on some very important points for smooth implementation of the law. We will write an update to this 3 part series of articles as and when clarifications/FAQs are released by RBI.

Rahul Hakani
Advocate

Niyati Mankad
Advocate

Best of The Rest

DASHRATHBHAI TRIKAMBHAI PATEL VERSUS HITESH MAHENDRABHAI PATEL & ANR - ORDER DATED 11/10/2022 PASSED IN CRIMINAL APPEAL NO. 1497 OF 2022 [SUPREME COURT]

Negotiable Instruments Act, 1881 - Section 138, 56 - When a part- payment of the debt is made after the cheque was drawn but before the cheque is encashed, such payment must be endorsed on the cheque under Section 56 of the Act. The cheque cannot be presented for encashment without recording the part payment. - If the unendorsed cheque is dishonoured on presentation, the offence under Section 138 would not be attracted since the cheque does not represent a legally enforceable debt at the time of encashment.

Facts

In this case the 1st Respondent had borrowed a sum of twenty lakhs from the Appellant on 16 January, 2012 and to discharge the liability had issued a cheque for the same on 17 March, 2014. The cheque was dishonored on 2nd April, 2014 due to insufficiency of fund and the notice of the same was sent to the Respondent calling for the payment of the money. The Appellant filed a criminal complaint in the trial court and the court acquitted the Respondent on the grounds that the Appellant had failed to prove that the respondent had owned a legally enforceable debt of rupees twenty lakhs. The Appellant then took the matter to the High Court where the appeal was dismissed because the Appellant in the cross examination had admitted the fact that the Respondent had paid him an amount of ₹ 4,09,315/- in the course of discharging his debt. Thus, the amount in cheque was higher than the amount due and so statutory notice u/s 138 of negotiable instrument was not held valid. The High Court while dismissing the appeal against acquittal held that the notice issued by the Appellant is an omnibus notice since, it does not represent a legally enforceable debt. Therefore, the Appellant filed the present appeal before the Supreme Court against the Order of the High Court of Gujarat.

Issues

Whether Section 138 of Negotiable Instrument Act, 1881 can be attracted in cases where the amount dishonored was higher than the amount due by the Respondent?

Held

After considering rival submissions, the Supreme Court held that

"(i) For the commission of an offence under Section 138, the cheque that is dishonored must represent a legally enforceable debt on the date of maturity or presentation.

(ii) If the drawer of the cheque pays a part or whole of the sum between the period when the cheque is drawn and when it is encashed upon maturity, then the legally enforceable debt on the date of maturity would not be the sum represented on the cheque;

(iii) When a part or whole of the sum represented on the cheque is paid by the drawer of the cheque, it must be endorsed on the cheque as prescribed in Section 56 of the Act. The cheque endorsed with the payment made may be used to negotiate the balance, if any. If the cheque that is endorsed is dishonoured when it is sought to be encashed upon maturity, then the offence under Section 138 will stand attracted;

(iv) The first respondent has made part-payments after the debt was incurred and before the cheque was encashed upon maturity. The sum of rupees twenty lakhs represented on the cheque was not the 'legally enforceable debt' on the date of maturity. Thus, the first respondent cannot be deemed to have committed an offence under Section 138 of the Act when the cheque was dishonoured for insufficient funds; and

(v) The notice demanding the payment of the 'said amount of money' has been interpreted by judgments of this Court to mean the cheque amount. The conditions stipulated in the provisos to Section 138 need to be fulfilled in addition to the ingredients in the substantive part of Section 138. Since in this case, the first respondent has not committed an offence under Section 138, the validity of the form of the notice need not be decided."

In view of the above, the Supreme Court dismissed the appeal filed against the Judgment of the High Court.

LALANKUMAR SINGH & ORS. VERSUS STATE OF MAHARASHTRA- ORDER DATED PASSED IN CRIMINAL APPEAL NO. 1757 OF 2022 [ARISING OUT OF SLP (CRL.) NO. 8882 OF 2015] [SUPREME COURT]

Drugs and Cosmetics Act, 1940 – Liability of Directors – Averment about role of director in the complaint is necessary to maintain the complaint against the Director.

Facts

In the present case the appellant are the directors of the M/S Cachet Pharmaceuticals Private Ltd and this company was granted the permission to manufacture the 'Hemfer Syrup' which falls under C & C (1) to the Drugs and Cosmetics Rules, 1945. On 30th August 2006 the then Drug inspector of The Food and Drugs Administration, Beed, Maharashtra Mr. N.A. Yadav purchased Hemfer syrup from M/s Priya Agencies and from which he drew samples and one of which he sent to the Government analyst of Maharashtra State Drug Control Laboratory, Mumbai. The report of the same was received which stated that the sample was not of standard quality as the content of Cyanocobalamin was less than the permissible limit. The report was informed to the manufacturing company on the same day. The Deputy Manager of the Company requested for re analysis of the sample which also had the same results stating

that it was not of standard quality. The Drug inspector wanted the company to furnish the particulars of Directors, Articles of Association, Memorandum of Association, copies of License to manufacture and sell drugs, particulars of technical persons, and all such information as was needed to be provided under the Drugs & Cosmetics Act, 1940. On 12th Feb 2009 the required documents were submitted and it was categorically stated therein that the 'Hemfer Syrup' was manufactured under the supervision and technical guidance of Sh. Ashok Kumar, the FDA approved manufacturing chemist for liquid orals. Pursuant to the orders to take legal action against the manufacturer of the drug a complaint was filed before the Chief Judicial Magistrate, Beed under Section 18(a)(i) read with Sections 16 and 34 and punishable under Section 27(d) of the Drug and Cosmetics Act. In the said complaint, the present Appellants being Directors of the Company were arrayed as Accused Nos. 5 to 8. A summons order was issued to all the accused including the appellants of this case. The Appellants filed a Criminal Revision Petition against the summoning order which was rejected by the Sessions Judge and then they filed a criminal writ petition before the HC which was also dismissed on the ground that all the Directors were conducting the business of M/s Cachet Pharmaceuticals Private Ltd and thus, they were involved in the manufacturing process and thus the appeal.

Issue

Whether all the directors of the company are liable for the offence?

Held

The Supreme Court held that merely mentioning that the present appellants, being the Directors of the accused company, were responsible to the company for the conduct of the business of the company would not be sufficient to initiate proceedings against them. It is submitted that, unless and until there is a specific averment as to what was the role in the conduct of the business of the company, a person cannot be proceeded against solely on the ground that he was a director of the company. The law laid down by this Court is that for making a Director of a Company liable for the offences committed by the Company under Section 141 of the Negotiable Instrument Act 1881, there must be specific averments against the Director showing as to how and in what manner the Director was responsible for the conduct of the business of the Company. Thus, the appeal is allowed by the Supreme Court.

"The happiest moments we ever know are when we entirely forget ourselves"

— *Swami Vivekananda*

CA Vijay Bhatt
Hon. Jt. Secretary

CA Mehul Sheth
Hon. Jt. Secretary

THE CHAMBER NEWS

Important events and happenings that took place online/physical between **1st October, 2022 to 31st October, 2022** are being reported as under:

I. ADMISSION OF NEW MEMBERS

The details of new members who were admitted in the Managing Council Meeting held on 13th October, 2022 are as under:

Type of Membership	No. of Members
Life Member	08
Ordinary Member	01
Half Yearly Ordinary Member	07
Student Member	03
Associate Member	01
Total	**20**

II. PAST PROGRAMMES

Sr. No.	*Date*	*Topic*	*Speaker*
		ACCOUNTING & AUDITING	
1.	06.10.2022	Lecture meeting on Opportunities in Forensic Audit	Mr. Shashank Karnad
		DIRECT TAXES	
1.	The Direct Taxes Committee had planned a Virtual program on "Anti Abuse Provisions under Income-tax Act" The session-wise details for the program is as under:		

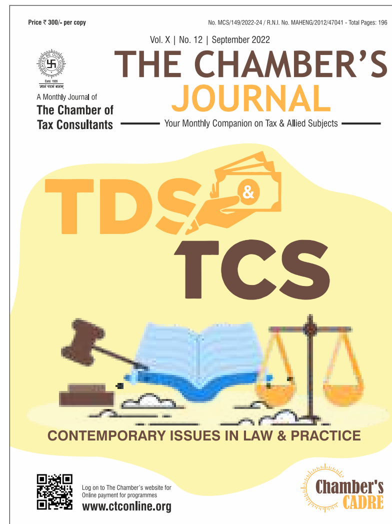
Sr. No.	*Date*	*Topic*	*Speaker*
a.	07.10.2022	Keynote Address	Dr. Nigam Nuggehalli
b.		Issues and controversies relating to Shares & Securities – S. 56(2)(x), S. 50CA and S. 96	CA N. C. Hegde
c.		Issues and controversies relating to Shares & Securities – S. 56(2)(viib) and Rule 11UA	CA Anish Thacker
d.	08.10.2022	Issues and Controversies Relating to Immovable Property – S. 50C, S. 56(2)(X) AND S. 43CA	CA Vyomesh Pathak
e.		Issues and controversies relating to exemptions u/s 56(2)(x) like gift to relative, settlement of Trust, receipt from charities, few S. 47 transactions.	CA Vishal Gada
F.		Issues and controversies relating to Non-residents like place of receipt, benefit under DTAA, S. 9.	CA Ganesh Rajgopalan
2.	12.10.2022	Recent Important Decisions under Direct Tax	Gunjan Kakkad, Advocate
INDIRECT TAXES			
1.	The Indirect Taxes Committee had planned a Virtual program on "Workshop Series on GST Refund and Issues Thereof" The session-wise details for the program is as under:		
a.	07.10.2022	Basics of GST Refund – Time limit, Unjust enrichment, Types of Refund – LUT/No LUT, Interest on Refund	CA Pranav Kapadia
b.	08.10.2022	Refund of unutilized Input Tax Credit – Zero Rated Supply (Export and SEZ)	CA Keval Shah
c.	10.10.2022	Refund of unutilized Input Tax Credit – Inverted Duty Structure	CA Jignesh Kansara
d.	12.10.2022	Refund of IGST paid on Export of Goods/ Services	CA Jinit Shah
e.	15.10.2022	Refund in Other cases – wrong payment, Section 55 refund, Buyer Refund, CGST & SGST VS IGST, Refund of TDS/TCS, DGRAM issues with refund	CA Payal Shah

Sr. No.	*Date*	*Topic*	*Speaker*
2.	13.10.2022	Finer Issues in E-Way Bills, E-Invoicing & GST Returns	Chairman: CA Ashit Shah Group Leader: CA Umang Talati
3.	21.10.2022	Re-Opening of TRANS-1 and rectification of Transitional Credit	Monarch Bhatt, Advocate
INTERNATIONAL TAXATION			
1.	The International Taxation Committee had planned a Virtual program on "Brain Trust on Practical and Controversial Transfer Pricing issues" The session-wise details for the program is as under:		
a.	15.10.2022	1) Economic Adjustments 2) Most Appropriate Method/Benchmarking 3) Tested Party/Profit Level Indicators 4) Three-Tier Documentation 5) Others key topics in transfer pricing	*Moderator*: CA Vispi Patel *Speaker*: Mr. Vijay Iyer Mr. Waman Kale Mr. Bhupendra Kothari
b.		1) Key transfer pricing controversies a) AMP/ DEMPE b) Intra-group services c) ESOP d) Substance over form e) Use of CUP vis-à-vis TNMM f) Maintenance of TP documentation by Non-residents 2) Faceless Assessment Proceedings 3) 10 Years of APA/MAP resolution	*Moderator*: CA Karishma R. Phatarphekar *Speaker*: Mr. Amit Shukla (Hon'ble ITAT Judicial member) Mr. Bipin Pawar Ms. Manisha Pande
STUDY CIRCLE & STUDY GROUP			
1.	11.10.2022	Panel Discussion of ITR 7 for Charitable Trusts with practical example	CA Vipin Batavia CA Ashok Mehta CA Deven Shah
2.	14.10.2022	Recent Judgements under Income-Tax	Tushar Hemani, Senior Advocate

June 2022

July 2022

August 2022



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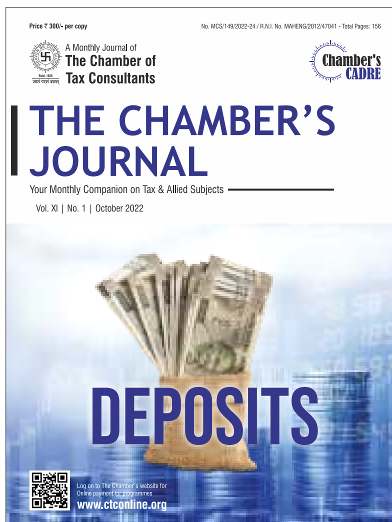

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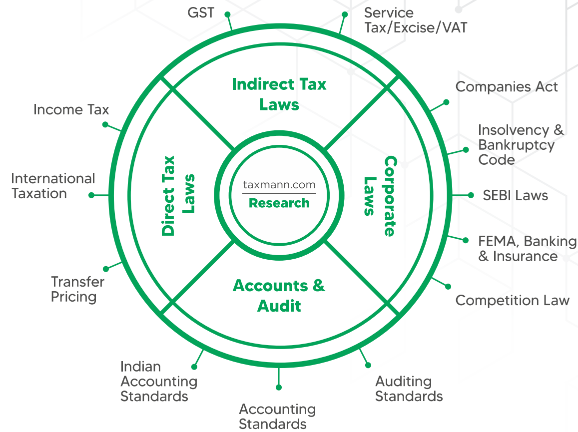

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