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A Monthly Journal of
The Chamber of
Tax Consultants

# THE CHAMBER'S JOURNAL

Your Monthly Companion on Tax & Allied Subjects

Vol. XII | No. 12 | September 2024

# GST LANDSCAPE – ISSUES & CHALLENGES

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## INDIRECT TAXES COMMITTEE

## Glimpses of the Seminar on Amendments made in GST Law in Union Budget 2024, Recent Notifications and Circulars issued by the Government held on 7th August, 2024 at Walchand Hirchand Hall, IMC, Mumbai

CA Vijay Bhatt, President welcoming and giving his opening remarks. Members on Dias (L-R) CA Raj Khona (Convenor), CA Hemang Shah (Chairman), CA Vikram Mehta, CA Keval Shah (Vice Chairman)

CA Hemang Shah, Chairman – Indirect Taxes Committee giving details about the Seminar

CA Rajiv Luthia addressing the audience.

Panel Discussion (L-R) – CA Umang Talati (Convenor), CA Naresh Sheth, CA A.R. Krishnan (panel member), CA Keval Shah (Moderator), CA Sunil Gabhawalla (Panel Member), CA Yash Parmar (Convenor)

View of the audience

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# From the Editor's Desk

My Brothers and Sisters,

यत्र नार्यस्तु पूज्यन्ते रमन्ते तत्र देवताः ।
यत्रैतास्तु न पूज्यन्ते सर्वास्तत्राफलाः क्रियाः ।।

*"The Gods are extremely happy where women are respected;*
*where they are not, all actions (projects) are fruitless."*

This is what the Manusmriti, one of the foremost Hindu religious texts has to say about the status of women in our society. But, alas, when one reads about the shocking incident of the rape and murder of the lady doctor in Kolkata and the various newspaper articles we read every day, on the atrocities, that women face, we need to really introspect as to whether we are mature enough as a society to respect and treat a woman as she deserves to be treated. The fact of the matter is that as males, we are not ready to accept women for what they are, in our society. Indeed, a woman who in addition to standing shoulder to shoulder with her spouse and working full time and at the same time, also managing the home, deserves to be doubly respected for the dual role she plays. The home cannot be a home without a woman's touch. It remains but, a place to reside in. In recent times however, the crimes against women have risen manifold and when an act as dastardly as the Kolkata incident, happens one cannot but express anger stemming from deep rooted anguish as to the sorry state of affairs that prevail today. I would urge each one of us to practice the respect of women, firstly those in our own circle of concern, and then every other woman, who, without any doubt, has been the bedrock of the stable and a civilised society that we live in, today.

Coming to income-tax matters, one is now witness to several decisions of the Hon. High Courts that have interpreted the scheme of reassessment introduced in 2021, in a manner that is resulting in the quashing of a high number of reassessment notices. Provisions like those dealing reassessment have to be properly framed. Law making is a process and that process has to be undertaken in a systematic and proper manner, involving all stakeholders, including taxpayers and taking their views into consideration. And, it is a process that takes a certain amount of time which sadly, cannot be crunched beyond a limit. Through this

communication, on behalf of all taxpayers, I would appeal to the law makers to (a) think over all ramifications of substitution or removal of provisions of our Income-tax Act and; (b) involve the taxpayers in the process. If that is done, we will definitely see lesser litigation and our heavily burdened judiciary will be less burdened. We at the Chamber, have always been at the forefront in carrying the voice of the taxpayers to the tax authorities and have never shied away from doing what is needed to try and bring justice to the taxpayers. This has been one of our key focus areas and will continue to be so, in the future as well.

We are already into the festive season as I write this communication. I wish all of you the very best for the festive season, be it Ganesh Chaturthi, Samwatsari or Eid, all of which will be celebrated soon. Hope this festive season brings everyone good health, prosperity and happiness.

We have this month's edition on the ever evolving world of Goods and Services Tax and the title is "GST Landscape – Issues and Challenges". Indeed, a law which was supposed to be 'good and simple' continues to fox not only businessmen but tax professionals also, with many issues and challenges either subsisting since inception or getting created by amendments and interpretations. I extend my thanks to the Journal Committee for bringing this issue out and would like to especially recognise and thank Ritesh Kanodia for his efforts. Ritesh has really taken great pains for this issue and deserves our deep gratitude. Thank you, Ritesh!

I would like to sign off with a quote from Swami Vivekananda, who I idolise:

> "*Each work has to pass through these stages — ridicule, opposition, and then acceptance. Those who think ahead of their time are sure to be misunderstood.*"

**ANISH M. THACKER**
*Editor*

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# From the President

Dear Members,

As we navigate the festive season, I extend my warmest wishes to you and your families. August and September bring a plethora of compliance requirements, coupled with joyous celebrations like Raksha Bandhan, Janmashtami, Ganesh Chaturthi Samvatsari, and Id-e-Milad. It is essential to strike a balance between fulfilling our professional obligations and indulging in the festive spirit.

Team Chamber is committed to deliver timely updates on the current subjects whether by physical meetings or by webinars or by making timely representations. Our various committees have organized several webinars, study circle meetings and physical seminar on topics such as Budget amendments and recent circulars on GST, tax audits, transfer-pricing course, audit trail, financial statements for Non-Corporate entities, adjudication orders of ROC/RD etc. I commend the chairpersons and their teams for their dedication and hard work.

We have made Post-Budget Representation to the Honorable Finance Minister and CBDT on 7th August, 2024. We have also made Representation on "Draft Foreign Exchange Management Regulations & Draft Directions on Export & Import of Goods & Services" to the Reserve Bank of India on 31st August, 2024.

The Student Committee has released the June issue of the Students' Quarterly Journal "Jignyasa". I express my thanks and also greetings to all the students, who have contributed articles in the said journal. I urge members to encourage their students to contribute articles for this Students journal. Our team of mentors will guide and support them in this endeavor.

Our Pune Study Group organized its 1st meeting of the new term on "Changed Dimensions of Assessments/Reassessments in Search & Seizure cases". I congratulate convenors Shri Dhiraj Dandgaval, Shri Mehul Shah, Shri Parag Kiri and Pune team for the arranging timely session on the subject.

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On 20th August, The Chamber had organized, jointly with the Bombay Chartered Accountants' Society & the ITAT Bar Association, Mumbai, an online lecture meeting as our homage to two of our distinguished members viz. Late Shri S.N. Inamdar (Sr. Advocate and Past President of the CTC) and Late Shri Hiro Rai, Advocate, on the subject "Ethical Professional Practice", an issue which was close to both. The lecture was delivered by Shri R.V. Easwar, Sr. Advocate and Judge (Retd), Delhi High Court, for which I thank him on behalf of the Chamber, BCAS & ITAT Bar Association. The family members of both the members also joined the session.

As per the data of the Income Tax Department, over 7.28 crores of ITR were filed by 31st July, 2024, surpassing last year's figure of 6.77 crores. GST Collection mounted to ₹ 1.75 Lakh Crores in August, 2024 compared to ₹ 1.59 Lakh Crores in August, 2023. These achievements testament to the tireless efforts of tax professionals in ensuring timely compliance.

One needs to be updated on GST law, procedure, recent notifications/circulars. This month's Journal features a special story on "GST Landscape-Issues and Challenges", a topic of great relevance to our profession. I thank all the authors for their knowledge sharing contributions for the benefit of our readers.

As we celebrate the beauty of nature during the monsoon season, let us also take a moment to reflect on our responsibility to protect the environment. I urge you all to participate in the "Ek Ped Maa Ke Naam" campaign launched by our Honorable Prime Minister, Shri Narendra Modi ji and contribute to preserving our natural resources.

...And do take out some time and enjoy a walk in rains without umbrella, remembering your childhood days.

Jai Hind

**VIJAY BHATT**
*President*

# A Tribute to Late Shri S. N. Inamdar

*(Sr. Advocate and Past President)*

## Tribute to Shri. S. N. Inamdar

***Dr. Y. P. Trivedi***

Shri. Inamdar was a unique personality. If one were to look at his career one would wonder how he had achieved such great heights in profession and industry from a humble beginning. He was born in a family which believed in strict adherence to Gandhian philosophy. In his childhood he did not have silver spoon. Born in Amravati and later shifted to Pune he lived with his family where his father believed in simple living and high thinking. Following that virtue he also lived very simply and because of his straight forward approach he endeared himself to one and all. He switched over to Income tax law and was responsible for some memorable judgments. He analyzed the income tax laws in a very systematic manner. He got his guidance from one of our very imminent members of the Tribunal Shri. G.L. Phople who himself was a man of great principles. Apart from his professional excellence he was very simple in his outlook and approach and was accessible to one and all. He had brilliant academic career and legal fraternity is lucky that he embraced legal career. He was a leading authority for explaining tax accounts and had a large practice in Pune and Mumbai. During his tenure as the President of Chamber of Income Tax consultant, he conducted the affairs of the Chamber in very systematic and disciplined manner. Looking at his biography I find that he was great admirer of Indian classical music. It is unfortunate that these days many of those practicing law will not have any other interest except law and to that extent according to me the life is incomplete. Legal profession was always known for its leaders who were very versatile in many fields. His demise at a comparatively young age is a great loss to the profession and even after his death he will always be remembered as a great lawyer and also as a very good human being.

# A Memorable Tribute to the Late Mr. S.N. Inamdar, Senior Advocate: a Paragon of Professional Ethics and Corporate Law

**Dr. K. Shivaram, Senior Advocate,**
**Bombay High Court**

Late Mr. S.N. Inamdar, Senior Advocate was a towering figure in the legal community, a senior advocate whose life and career embodied the highest standards of integrity and moral courage. He was one of the well-known Senior Advocate who was considered an Authority on Direct tax as well as corporate law. Over 55 years of unwavering commitment to the legal profession, Late Mr. S.N. Inamdar stood as a beacon of integrity, dedication and profound legal acumen.

Mr. S. N. Inamdar has carved out an illustrious career, characterized not only by a formidable grasp of corporate law but his journey through the legal landscape has been marked by landmark cases, influential legal opinions and a relentless pursuit of justice.

Mr. S.N. Inamdar possessed a rare blend of intellect, eloquence, and moral fortitude. His legal arguments, always meticulously prepared and passionately delivered, have left an indelible mark on the tax jurisprudence.

In my earlier days of practice, I had the fortune of travelling with Mr. S.N. Inamdar to cities like Sangali, Kolhapur, Pune, Nasik, etc to deliver lectures, according to me Mr. S.N. Inamdar has garnered the highest respect and love from the tax professionals from across Maharashtra.

Mr. S.N. Inamdar was President of the Chamber of Tax Consultants in the year, 2002-2003, Vice -President of the ITAT Bar Association Mumbai in the year 2013-14, he was chairman of the ITAT Bar Associations Co-Ordination committee of the All-India Federation of Tax Practitioners Mumbai in the Year 2010-2011. Mr. S.N. Inamdar was a regular speaker in most of the seminars organised by various professional organisations and written many thought provoking articles.

In the courtroom, his presence was commanding, not just because of his profound legal acumen, but because of the respect he commanded through his unassailable character. Outside the courtroom, he was a mentor, a guide, and a pillar of support to many young tax Practitioners.

Life of Mr. S.N. Inamdar reminds us that the fight against corruption and unethical practices is not just a professional duty but a moral one.

Mr. Rajan Vora, Mr. Subash Shetty and I are very fortunate to have a detailed interaction with him a few months back. Mr. S.N. Inamdar was very kind enough to share his writing.

We have published his writing titled **"My Lineage : How I was moulded"** in itatonline.org. It is a remarkable motivation for many young lawyers who desire to pursue tax litigation practice.

Mr. S.N. Inamdar is no more with us but his ever-smiling face and very affectionate look always inspire many of us in the years to come. A real Tribute to Late Shri S.N. Inamdar would be may his dedication to justice continues to inspire us all, and many of his memories serve as a guiding light for the legal community and beyond.

Om Shanthi.
23rd August 2024

# Tribute to Respected Late Shri S. N. Inamdar Saheb Senior Advocate

**CA. Vipin Batavia**

Late Shri S. N. Inamdar Saheb was a great professional and a lovely human being. He had a sparkling personality in professional circle as well as in society. He had created such image by his hard work with ethical and high standards of integrity and moral. He achieved great heights in profession and industry where in he earned tremendous respect from all corners.

He was born in a middle-class family in Amravati and later shifted to Pune and thereafter to Mumbai. He was mainly practicing in Pune and Mumbai all by himself. He had great knowledge and perfect interpretation of the law which helped him to achieve such notable and distinctive judgments. His analysis of law was very apt and crystal clear and was able to present his case in simple language with required force. He was appointed as a director in many companies in Pune and Mumbai. His great achievement was to be a trustee of Sidhhivinak Temple for one full term. He loved reading books on different topics other than law. He loved classical music and Marathi songs and theatre. He was a star at all the parties for his jolly nature and witty comments.

I was fortunate as I had an opportunity to work with him as a vice president of the Chamber when he was President in the year 2002-03. I learned a lot working with him particularly his excellent way of communication and his guidance. He was very particular about the time management. He had a great vision for the Chamber. It was his idea to go for bigger and spacious office. In fact, the present office of the Chamber was purchased in his tenure and was renovated during my term and was started in Ajit Rohira's term.

He acted upon to start procedure for the historic amendments to change in the constitution of the Chamber to include the Past President forum to give it a legal status as PPAB and the name of the Chamber was also changed from " The Chamber of Income Tax Consultants" to "The Chamber of Tax Consultants' to widen the area of activities by including indirect taxes and other laws and membership base to include other professionals as well which was completed during my tenure. He gave name and fame to the Chamber during his tenure. He always used to say that he possessed many good friends from CTC.

During my tenure of presidentship, Mr. Inamdar saheb gave me full support and guidance to carry out my endeavor and thoughts. He was a perfect mentor for me which helped me to sail through my tenure without any difficulty. During this period, we developed good family relationship which still continued.

Shri S.N. Inamdar has left for his heavenly abode and now not with us but his memories will always be with us. He has left his foot prints for the young professionals to follow. He is a role model for many professionals. I feel great loss due to his demise since he was always available to me for guidance. The Chamber got such a versatile personality as one of our President with the behest of Patil Saheb. He played a great role in putting Chamber on fast track with his vision and courage. His demise is a great loss to the profession. It is my humble homage honoring a beautiful soul. I can just say 'A LIFE WELL LIVED'

# Tribute to Shri. S. N. Inamdar

## An Admirable Personality – Shri. S. N. Inamdar

**K. Gopal, Advocate**

This is a painful moment in my life and my words fail when I try to say something about the towering personality of Mr.S.N. Inamdar. My contact with him had started with distant admiration, had grown up into personal affinity and culminated in an adoration for his immense capabilities. When penning down my ideas about him, I sincerely feel as if I am an imperfect worker, given a baffling task.

When I started my career at Dr. K. Shivram's chambers, we, juniors used to consider Mr.S.N. Inamdar in the league of legends like Dr.Y.P. Trivedi, Mr.S.E. Dastur, and Late Shri.V.H. Patil. At that stage, the way he used to argue before the Income Tax Appellate Tribunal and the Bombay High Court, impressed me a lot as he was able to present complicated legal issues with deceptive simplicity. Clarity of thought and precision of language were his assets.

I was privileged to work with him in the year 2002-03, while he was the President of The Chamber of Tax Consultants (the Chamber) and myself was part of The Managing Council as an elected member. He worked with a missionary zeal in bringing a change the functioning of the Chamber. He was an undeterred leader with set goals. The Chamber would always be indebted to him for his perceptive vision. At a personal level, for me, it was an unforgettable experience as I had many opportunities to come close to him and learnt a lot.

This inspiring personality became close and intimate with me because he had shared his interest in the Hindustani Classical Music with me, from time to time. I was awe-struck by the deftness with which he used to discuss the nuances of Music with me as previously he was, for me, a person, grounded in logic and legal reasoning. Slowly and steadily, during the course of several meeting points in trips like that of the one we undertook to forest sojourns like Bandipur, Jim Corbett and Bharatpur Bird Sanctuary, we used to have invaluable revelations about his rich, personal, and professional life.

This process continued even later, when he was confined to his home for a few years after an accidental fall. Each meeting with him was an experience for us as he used to reopen one anecdote after another. During his last stages, he bade his farewell to life with alarming equanimity, thanking every person in his life. Now, how can a person not be adored? He can be compared only to a cloud in Aurobindo's words:

*"As A cloud plays with lightning's vivid laugh*

*But still holds back the thunder in its heart"*

He was indeed a rare person who was able to spread smiles to others while he himself was caught in between a storm of life and death.

x

# Tribute to Shri. S. N. Inamdar

## We shall miss you Inamdar Saheb !

**CA Jayant Gokhale**

On 18th of July 2024, we got the sad news of the demise of Shri S.N. Inamdar, Senior Advocate, former President of The Chamber of Tax Consultants and a stalwart of the legal profession. On his passing away, the profession, friends and colleagues have lost an icon who stood as a shining example of what can be achieved by dint of hard work backed by intelligence. Inamdar Saheb (as we called him), came from a background with limited financial means. But his father who was a teacher, left him a rich legacy of principles and values. In his early years, he struggled (due to limited finances) to complete his education. He overcame these hurdles only because of his hard work and academic brilliance, and this led him to take up the legal profession (since that was where he was offered his initial employment). But having been called to the legal profession by destiny rather than by choice, he rose to great heights in the legal profession. He was held in high regard by judges, colleagues, and clients; primarily because he was a skilled and highly competent lawyer, abiding by the highest ethical standards. He never hesitated to give correct advice, even if such advice was not what the client had hoped for. His opinions were expressed with absolute clarity in an extremely polite manner. Before reaching his conclusions, he would patiently hear every facet of the facts and every possible argument that would or could be raised by the referring CA or counsel. Even if he disagreed with certain propositions, he was never dismissive of them, taking care to explain his well-reasoned opinion in a logical and erudite manner. To top it all, despite his academic brilliance and razor-sharp intellect, his reasoning and his arguments were presented in a soft-spoken manner with utmost humility.

It was these qualities of head and heart that Shri Inamdar Saheb innately possessed that resulted in his becoming a trusted and personal confidante to some of the top industrialists in Maharashtra. He was thus a director and counsel to companies in the Kirloskar, Finolex, TVS & Kalyani groups to name a few. The Late Shri S.L. Kirloskar had innate trust in Inamdar saheb, and often sought his advice him on even his personal matters. Business leaders & politicians trusted him with their most intimate secrets, including their internal wranglings; secure in the knowledge that he would give sound & unbiased advice, grounded in practicality and devoid of any self-interest. Apart from his qualities as a counsel, he was equally skilled in his advocacy before the courts. His phenomenal memory and easy grasp of the intricacies of law led him to be engaged to represent some of the large sugar cooperatives and consequently he advised some of the top politicians too. The case of *CIT vs. Someshwar Sahakari Sakhar Karkhana Ltd* which was argued by Shri Inamdar before the Bombay High Court is a landmark judgement rendered on the subject of depreciation claim. Similarly, despite a highly negative perception then prevalent about the teachings and philosophy of Acharya Rajneesh (as Osho was then called), Inamdar saheb, represented the facts very skilfully to convince the Bombay High Court that the activity carried on by the Rajneesh Foundation indeed met the requirements of law as an institution pursuing a “charitable purpose” as defined in S. 2(15).

But simply alluding to Shri Inamdar's detailed & skilful pleadings, or his excellent work as a counsel is to portray him as a unidimensional professional which he was certainly not. Those of us who were fortunate to get close to him; saw him as a multifaceted diamond. His keen interest, understanding and passion for music in all forms, including Indian classical and Western classical was well known. But not many knew about his instinctive resonance with and deep understanding of literature and poetry. He was equally comfortable in discussing the nuances of legislative history or constitutional law as he was in holding forth on the beauty and sentiment conveyed by poetry of Kavi Grace or Savarkar. Amazingly enough, in a single conversation he was capable of sharing nuggets of information about the music of Mozart or Bhimsen Joshi. To top it all, he had a keen sense of appreciation of the visual and performing arts. The sheer expanse of his interest, understanding & appreciation of nuances of music, literature, poetry, theatre, and art would show that he was truly a person of refined tastes and culture.

And despite all such refined cultural tastes, he always remained a very approachable person, enjoying diverse interests such as history, philosophy, and wildlife. Listening to his views and varied experiences & recollections over a quiet drink was one of the high points of some of the most memorable evenings we have spent together. It was while returning from one of such visits to the Kabini Wildlife Sanctuary that we had occasion to visit the Mysore Palace.

Above all, having faced numerous difficulties in early life, he never forgot his debt of gratitude to society and the profession. He remained a simple person at heart, and this is reflected in his lifestyle. He preferred to remain involved and committed to numerous social causes without any fanfare. He always maintained a low profile in his contributions to various causes whether in monetary form or by way of personal involvement. He had a long-standing involvement with the institutions run by the Amte family. Similarly, as President of the Chamber of Tax Consultants he led team CTC to new heights for which the entire community of tax professionals shall be forever grateful.

Our beloved Inamdar Saheb, a person who conquered all the difficulties he faced in early life, rose by dint of hard work and has left an enduring mark on every facet of life that he touched. We shall deeply miss you Inamdar Saheb!

# A Brilliant Person

**Dr. Sunil U. Pathak**
**Income Tax Consultant,**
**Pune**

Shri Inamdar was a brilliant student who had topped in the University, in B. Com and LLB examinations. Thereafter, he started practice and very shortly, he became a leading Income Tax Consultant in Pune. Right from the beginning, he became a consultant to various big industrial and business groups in Pune. He had a very sharp memory, clarity in thinking and arguments, and profound knowledge of Income Tax Law and accountancy principles, which qualities were reflected in his arguments and submissions in various cases. Owing to his clarity of thinking, he always explained the cases in a very simple manner. Many complicated issues in appeals were simplified in his arguments. His arguments were very brief and he never played to the gallery while arguing the cases. Whenever he had no case, he wasted no time in admitting the same before the members of ITAT and this quality was always appreciated by the Bench of the Tribunal.

He always had a pragmatic approach to the problems which were referred to him. He exhibited extremely positive approach in solving the cases before him. He combined a quick perception and comprehensive knowledge of the subject in dealing with the cases. Instead of relying on number of court decisions, he always believed in explaining the propositions on the basis of the basic interpretation of the provisions. Because of these qualities, he was a leading Advocate for Income Tax matters for more than three decades in Pune.

He was associated for a number of years with the major industry groups in Pune as an Income Tax advisor. He was on the board of a number of public limited companies in Pune and rendered excellent services in both the capacities which were widely appreciated by these groups.

He had a great interest in literature and music. He always found time from his busy schedule for his hobbies.

May his soul rest in peace.

# Tribute to Shri. S. N. Inamdar

***Pradeep R. Rathi***
***Chairman***
***Sudarshan Chemical Ind Ltd***

Rathi Family has lost a friend, philosopher and guide in passing away of Shri Inamdarsaheb. He was a trusted confidant of all the members of the family and Sudarshan and his advice went way beyond taxation. We will miss his wisdom and insight.

May his soul Rest in Peace.

Om Shanti

# GST on Related Party Transactions: A Comprehensive Analysis

Kumar Visalaksh
Advocate

CA Ashish Garg

**Overview**

*In the GST Regime related party transactions has emerged as one of the key issues of dispute. The challenge has been particularly compounded by the underlying law which treats related party transactions as supply regardless of presence of consideration. This article delves into complexities surrounding GST implications on such transactions, focusing on chargeability, valuation, and the key open issues. We also examine judicial precedents and recent clarifications issued by Central Board of Indirect Taxes and Customs (CBIC), which are shaping the interpretation qua GST implication in this context.*

*Inevitably in the course of any investigation/audit carried out by the GST department, related party transactions invariably attract closer scrutiny. Gathering from our experience in last seven years, few prominent issues analysed in this article are - (a) Corporate guarantees, (b) Right to use of brand name, trademarks, and other intellectual property by related entities, and (c) Secondment of employees by overseas group entity.*

The introduction of Goods and Services Tax (GST) in India in July 2017 was a pivotal moment in the country's tax reform journey, streamlining various indirect taxes into a single, unified system. While GST has significantly contributed to improving ease of doing business by simplifying the indirect tax structure, it has also brought to the forefront several contentious issues that persisted under the previous indirect tax regime as well. Among these, the treatment of related party transactions particularly remains susceptible to disputes sparking debates regarding both - the applicability of tax and the mechanism for valuing such transactions.

This article delves into complexities surrounding GST implications on related party transactions, focusing on chargeability, valuation, and the key open issues. We also examine judicial precedents and recent clarifications issued by Central Board of Indirect Taxes and Customs (CBIC), which are shaping the interpretation *qua* GST implications in this context.

## I. Overview of Relevant Provisions

### *Definition of Related Persons*

Under the Central Goods and Services Tax Act, 2017 ('CGST Act'), the term "related person" is broadly defined under the explanation to Section 15. This definition includes, among others, legally recognized business partners, employer-employee relationships, any person

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who directly or indirectly owns/controls 25% of the equity, entities under common control, and members of the same family.

Owing to the broad definition - determining whether the entities are related or not become crucial, as it directly influences the valuation and chargeability of GST on transactions between them.

### *Chargeability of GST on Related Party Transactions*

The chargeability of GST is primarily governed by Section 7 of the CGST Act, which defines the scope of the term "supply". According to Section 7, supply includes all forms of transactions such as sale, transfer, license, rental, exchange, etc., provided they are made or agreed to be made for consideration by a person in the course or furtherance of business.

However, transactions specified in Schedule I of the CGST Act are treated as supplies even if they are made without consideration. Schedule I notably includes transactions between related persons within its scope. This provision enables the levy of GST on related party transactions, regardless of presence of monetary consideration. Introduction of related party transaction in Schedule – I signifies a substantial shift in the tax position qua levy and valuation from the service tax regime.

### *Valuation of Related Party Transactions*

The valuation of supply under GST is governed by Section 15 of the CGST Act. For standard transactions, Section 15(1) stipulates that the value of supply shall be the "transaction value", which refers to the price actually paid or payable, provided the parties are not related and the price is the sole consideration. However, when the value cannot be determined under Section 15(1), the valuation is to be made in accordance with manner as prescribed under the Central Goods and Services Tax Rules, 2017 ('CGST Rules'). Accordingly, for valuation of related party transactions – evaluation of valuation rules become imperative.

Rule 28 of the CGST Rules sets forth the mechanism for valuing supplies between related entities. The rule prescribes a hierarchical approach to valuation: first, by determining the Open Market Value (OMV); if the OMV cannot be ascertained, then by applying the value of goods/services of like kind and quality; if neither of these methods is feasible, the cost-plus method (Rule 30) or the residual method (Rule 31) can be applied.

Notably, the terms "OMV" and "supply like kind and quality" are further clarified in the explanations to the valuation rules. OMV refers to the full value in money, excluding GST, payable by a person in a transaction, where supplier and recipient are not related and price is the sole consideration, to obtain such supply at the same time when the supply being valued is made. "Supply of like kind and quality" means any other supply of goods/ services made under similar circumstances, which in respect of the characteristics, quality, quantity, functional components, materials, reputation, etc. is same or closely resembles that supply of goods/services.

Additionally, Qua OMV, the second proviso to Rule 28 is particularly noteworthy. It states that if the recipient of the supply is eligible for full input tax credit (ITC), the value declared on the invoice shall be deemed to be the OMV. This provision aims to reduce disputes over valuation in cases where the recipient is entitled to full ITC.

The complexities inherent in these provisions render the valuation of related party transactions one of the most intricate aspects of GST law.

## II. Key Open Issues

Inevitably in the course of any investigation/ audit carried out by the GST department, related party transactions invariably attract closer scrutiny. Gathering from our experience in last seven years, few prominent issues are - (a) Corporate guarantees, (b) Right to use of brand name, trademarks, and other intellectual property by related entities, and (c) Secondment of employees by overseas group entity.

### *A. Corporate Guarantee*

Corporate guarantee between group companies has emerged as one of the key issues in recent times. The core issue in these arrangements is whether such guarantees constitute a supply of services under GST law.

"Corporate Guarantee" is a common practice in the corporate world, often provided by a holding company for its subsidiary. These guarantees are typically issued when a subsidiary seeks to secure a loan, such as a term loan or working capital loan, from a financial institution. Such guarantees are generally provided without any charge or consideration, with the main objective being to enable the subsidiary to quickly access funds from lenders.

In 2023, insertion of sub rule (2) to Rule 28 actually compounded the complexity of the issue. Sub rule (2) for the first time prescribed a value of 1% of the amount of such guarantee offered, or the actual consideration, whichever is higher - as the value of supply of service by way of providing corporate guarantee to any banking company or financial institution by a person who is a related and located in India.

In this context, CBIC vide **Circular No. 204/16/2023-GST dated 27.10.2023 ('Circular No. 204/2023')** *inter-alia* stated that in all such cases of supply of services by a holding company to a subsidiary company in the form of providing corporate guarantee to a bank/ financial institution, the taxable value will henceforth be determined as per the provisions of Rule 28(2), irrespective of whether full ITC is available to the recipient of services or not.

The effect of Rule 28(2) and CBIC circular is that providing a corporate guarantee on behalf of a subsidiary (to a bank or financial institution) is presumed to be taxable supply of services, with a prescribed value of 1% of the guaranteed amount without any timeline or prescription of payment.

Recently, Rule 28(2) has been retrospectively amended (w.e.f. 26.10.2023) by **Notification No. 12/2024 - Central Tax dated 10.07.2024** and a proviso is inserted to provided that where the recipient is eligible for full ITC, the value declared on the invoice shall be deemed to be the value of said supply of services. It also provided that value of 1% shall be calculated on amount of such guarantee offered per annum.

Additionally, CBIC vide **Circular No. 225/19/2024-GST dated 11.07.2024**, *qua* valuation of corporate guarantee inter-alia clarified that – **(a)** For corporate guarantees issued or renewed before 26.10.2023, the valuation would be determined based on Rule 28 as it existed at that time, **(b)** In cases where full ITC is available to the recipient, the value declared on the invoice shall be deemed to be the value of supply of the said service.

This retrospective amendment and circular offer some relief, particularly in cases where the subsidiary (recipient of supply) is eligible for full ITC, as it is clarified that the deeming provisions under Rule 28(2) mandatorily will not apply. Moreover, in such cases any value declared on the invoice should be considered as the OMV.

Despite this, the underlying issue that whether the provision of corporate guarantee constitute a supply of services on merits still persist. Rule 28(2) presumes that providing a corporate guarantee on behalf of a subsidiary constitutes a taxable supply of services under the CGST Act. However, basis the following grounds it can be contended that the said activity should not be considered a supply of services:

a) These guarantees are issued by the holding Company to protect its own investments, by enabling the subsidiary to source funding and improving its creditworthiness. The subsidiaries may not have the appropriate financial bandwidth to borrow money from financial institutions without a guarantee.

b) Providing a corporate guarantee can be seen as a quasi-capital or "shareholder activity". For this reason, even under the erstwhile Service Tax regime, the same was not taxed a service to the subsidiary and is also not treated as a "provision of services" under the Transfer Pricing provisions of the Income-tax Act.

c) Rule 28(2) as far as the same provides for a deemed valuation is manifestly arbitrary, beyond the provisions of the CGST Act, and results in an excessive and confiscatory levy.

Therefore, the assessee may consider challenging the legality of Rule 28(2) and the Circular No. 204/2023 by approaching the jurisdictional High Court or the appellate authority as the case may be. High Courts have already admitted writ petitions on this issue, and in a case, the effect and operation of Circular No. 204/2023 have been stayed.

### *B. Use of Brand Name, Trademarks, and Other Intellectual Property by Related Entities*

Another arrangement between related entities - which is susceptible to dispute - under GST law is qua the grant of right to use of intellectual property, such as brand names, trademarks, and logos, by one group entity to the other. The primary issue centres on whether the grant of such right to use constitutes a taxable supply of services, and if so, how such a supply should be valued.

Recent media reports suggest that GST authorities have issued notices to large conglomerates and banking entities qua these arrangements. The department's stance is that the grant of the right to use a brand name to a related entity, even without consideration, constitutes a supply of service.

Whether these arrangements qualify as a separate supply or not depends on various underlying factors, such as the commercial relation between entities, purposes of granting the right to use, etc. However, given the broad definition of supply under GST, particularly for related party transactions, the right to use a brand name by a related party may in general qualify as a "supply" even in the absence of monetary consideration. However, the valuation of such transactions remains a complex issue.

As discussed above, the valuation of related party transaction is to be made at OMV. A perusal of the definition of OMV suggests that same is the price at which supply of services is made when the supplier and recipient are not related, and the price is the sole consideration. Essentially, OMV is the full monetary value of services payable by an unrelated person for "such supply" at the same time when the supply being valued is made.

Qua these transactions, the biggest challenge is to arrive at a OMV as not only each brand is unique but it is unlikely that same trademark simultaneously also offered to an unrelated entity. Additionally, as grant of the right to use a trademark is intangible in nature, factors like quantity, functionality, and materials are not applicable. Moreover, the reputation and quality associated with a particular brand are unique characteristics that cannot be easily compared to another brand. Hence, determining the OMV of such supplies, or even the value of a supply of like kind and quality, may not be feasible task.

In absence of availability of OMV and value of supply of like kind and quality, for the purposes of valuation one may go further down in the hierarchy prescribed under Rule 28, which states that value can be determined as per Rule 31 (residual method). Under the residual method, while no specific methodology is prescribed, the overall principle which emerges is that the value adopted should be at arm's length.

The assessee may, therefore - as one of the alternatives - identify companies engaged in similar activities and attempt to draw a comparison with the consideration or royalty charged or paid by those companies for the use of a brand name. This comparison may require adjustments to account for differences specific to the comparable entities and factors unique to the assessee.

To arrive at the arm's length price, the assessee may also consider conducting a study and preparing a report outlining the methodology used to select comparable companies, the value attributed to the use of the brand name, and various transfer pricing principles, including those relating to arm's length pricing. However, this exercise is not a easy one. Although, it is noteworthy that by virtue of second proviso to Rule 28 - in cases where full ITC is available, the value declared on the invoice should ideally not be subject to litigation by the department.

### *C. Secondment of Employees*

The issue of employee secondment, where employees of a parent company are seconded to a subsidiary or associate company is also one of the contentious matter under GST. The key question revolves around whether such secondment constitutes a supply of manpower services and consequently attracts GST.

Typically, in a secondment arrangement, expatriates from a foreign parent company are deputed to an Indian subsidiary. The foreign and Indian entities enter into a secondment agreement that governs the terms of the arrangement. This is often accompanied by a separate employment agreement between the secondee and the Indian entity, specifying the terms of employment such as tenure, place of work, salary, and termination.

Under the GST regime, similar to the erstwhile service tax regime, services provided by an employer to its employee are excluded from the scope of supply. Various Tribunal orders in the service tax regime have held that secondees work under the control and supervision of the Indian entity as employees, with no direct or indirect consideration paid by the Indian entity to the foreign entity. Therefore, these transactions would not qualify as manpower supply services.

However, the Judgment of Hon'ble Supreme Court in the case of ***CCE & ST Bangalore (Adjudication) vs. Northern Operating Systems Private Limited [2022 SCC Online SC 658],*** unsettled the said legal position which had been previously followed by the Tribunals in a catena of judicial precedents. The Court, applying the "substance over form" principle, held that the secondment of

employees from an overseas group company to an Indian company would attract service tax under reverse charge.

It is crucial to note that the decision in Northern Operating was based on the specific facts of that case. There was a "service agreement" between the group companies for back-office support services, where the Indian entity received a 15% markup on the overall expenses. Given these particular circumstances, the Supreme Court observed that the overseas group company's business required highly skilled personnel to fulfill its contracts. The Indian entity's role was to execute specific tasks assigned by the overseas company. As part of this agreement, employees of the overseas company were seconded to the Indian entity for the required duration to complete the tasks. The salaries of these seconded employees were paid by the overseas entity and subsequently reimbursed by the Indian entity. On these facts, the Court concluded that "the overseas employer, in relation to its business, deploys them to the assessee on secondment".

Despite the Northern Operating judgment being fact-specific, it has triggered widespread investigations and notices by tax authorities. Given the similarities between the provisions under GST and Service Tax regime qua applicability of tax on import of services, the issue has also surfaced under GST, with the department scrutinizing secondment arrangements and attempting to levy GST under RCM based on this judgment.

To address these challenges and contest the tax demand on its merits, it become crucial to distinguish the facts of one's case from the Northern Operating. Accordingly, it is advisable to carefully analyse the existing secondment agreements, focusing on whether the arrangement constitutes an employer-employee relationship or a supply of manpower services. Key factors to consider include the control and supervision of the employees, the method of salary payment, and whether the Indian entity has the right to accept or reject specific secondees. Depending on the specifics of each case, taxpayers can advance their arguments to establish that arrangement should not be treated as a supply of manpower services. In fact, on similar lines, the writ petition preferred by the taxpayers are pending before various high courts and certain cases the stay has also been granted on the recovery proceedings.

Additionally, in case where full ITC is available, a contention can be made that the valuation of such services ought to be determined in accordance with the second proviso to Rule 28(2) of the CGST Rules. Further, in this regard reference can be made to **Circular No.210/4/2024-GST dated 26.06.2024 ('Circular No. 210/2024')** wherein it is clarified that where the foreign affiliate is providing certain services to the related domestic entity, and full ITC is available the value declared on the self-invoice may be deemed as OMV. Further, if the self-invoice is not issued - the value of such services may be deemed to be declared as 'Nil'.

Accordingly, as the parties in a secondment arrangement are related, taxpayers (if full ITC is available) basis the Circular No.210/2024 can contest the GST demand under RCM by applying Rule 28 and valuing the secondment services at NIL, resulting in no GST liability.

Further, for future transactions, it is essential to clearly set out the secondment agreements in a manner that clearly establishes the existence of an employer-employee relationship. Key factors which can be considered while drafting such agreement are – **(a)** the entities having operational and functional control on the employee, **(b)** period

of secondment, and **(c)** manner or remitting salary.

These factors will be crucial in establishing whether the arrangement constitutes an employer-employee relationship or a supply of manpower services subject to the levy of GST.

### III. Conclusion

GST on related party transactions remains one of the most complex and evolving areas of GST law. The wide scope of the term "supply", coupled with the detailed valuation rules, in certain transactions presents a unique set of challenges in evaluating related party dealings.

Recent CBIC clarifications vide Circulars have provided some relief in cases involving full ITC, however, the interpretation of "full ITC" in itself remains a potential point of contention. On one hand, it could be argued that full ITC eligibility should be assessed with respect to the specific transaction for which the valuation is being made. Conversely, department may argue that eligibility should be assessed at the entity level. This ambiguity can lead to differing interpretations, making this aspect of valuation particularly susceptible to disputes.

Thus, Companies must be vigilant while formulating the agreements with related entities. In many cases, prior to finalisation of such agreements - it may be prudent to conduct detailed examination from the GST perspective. Ultimately, the key to navigating these challenges lies in a proactive approach—careful planning.

***Comments from Tax Head***

**Mr. Rajesh Gosain,** Head of Tax, Ericsson India.

"Related party transactions under GST present significant challenges and frequently attract heightened scrutiny from GST authorities. The broad definition of "related persons" under the GST Law, combined with the provision that such transactions are deemed taxable supplies even in the absence of consideration, adds substantial complexity to GST compliances.

Valuation of these transactions remains a particular concern, especially for services. For instance, determining the OMV for intangible assets like IPR often proves difficult, particularly when no comparable transactions are available. Although recent CBIC clarifications have provided some relief, further advisory guidance on best practices for valuing related party transactions would be beneficial.

Further, introducing a standardized approach to defining "full ITC" eligibility will aid in bring more consistency and reducing the likelihood of litigations. By implementing these measures, the government can support businesses in navigating GST compliances in relation to related party transactions more effectively. This article deals with burning issues surrounding the controversy and is a good read."

# Emerging Technologies in Streamlining Tax Administration & Compliance

CA Jigar Doshi

**Overview**

*Emerging technologies are revolutionizing tax administration and compliance by streamlining processes and enhancing accuracy. By integrating technologies, tax authorities and businesses can enhance compliance, reduce errors, and create a more efficient tax system. The challenge lies in effectively implementing and integrating these tools into broader business strategies.*

*The article covers author's views on the following technologies:*

1. *Robotic Process Automation (RPA) automates repetitive tasks, boosting productivity and allowing tax professionals to focus on more complex activities. Blockchain technology ensures data immutability and transparency, which can revolutionize customs management and payroll tax processes.*
2. *Machine Learning (ML) enables real-time error detection, enhancing tax compliance and reducing the likelihood of disputes.*
3. *Generative AI (GenAI) is being used to automate routine compliance tasks and improve communication with tax authorities.*
4. *Cloud computing provides scalability, security, and accessibility, allowing tax data to be managed efficiently.*

**Setting the stage**

India's revenue collection from Direct Taxes over nine years between FY 2013-14 and FY 2022-23 has increased by a whopping 160%. On the indirect tax front, collection between FY 2017-18 and FY 2021-22 increased by 41%. Further, the department has claimed that more than INR 1.2 lakh crores of tax evasion has been identified using data analytics and AI-driven tools by 2023. These numbers look unreal but in true sense, India has been able to achieve all of this and more with heavy reliance on technology. From its primitive manual return filing systems and assessments in person, we have fast progressed to auto filled returns and faceless assessments.

The above statistics can be significantly attributed to the **digitization and digitalization** of the tax ecosystem in India. In the digital era, the dynamics of societal interactions are evolving rapidly. Advances in technology and shifting economic conditions have reshaped how citizens perceive and engage with both businesses and public services, including tax authorities. Today, individual taxpayers and

businesses prefer fast, seamless experiences that integrate with their daily systems, enabling them to manage their tax affairs in real time without unnecessary friction.

**Direct Tax transformation**

The Central Board of Direct Taxes (CBDT) has a longstanding tradition of embracing technology early on. Over several years, it has implemented key initiatives to digitize the direct tax administration such as:

- The **introduction of e-filing** replaced manual return submissions and was further improved with the launch of the new tax e-filing portal 2.0. This updated portal includes features such as **pre-filled forms** based on previous returns and data from sources like 26AS and AIS, making the process more efficient and reducing the likelihood of errors.
- The Centralized Processing Centre (**CPC**) which was established to streamline the handling and processing of income tax returns has been further upgraded by the use of data analytics and automation. This has greatly shortened the time required for processing returns and issuing refunds, thereby boosting taxpayer satisfaction and compliance.
- Direct Tax Vivad Se Vishwas Scheme, launched in 2020, leveraged technology, to resolve tax disputes and reduce litigation. This helped taxpayers settle pending disputes through an online portal, ensuring transparency and efficiency.
- Over the years, India's extensive population has seen a significant increase in internet access, largely due to the widespread use of smartphones. Recognizing this trend, **a mobile application - My I-tax**, was launched as part of the new tax e-filing portal. This enabled individual taxpayers to file their returns, monitor their tax status, and receive updates on policy changes directly on their smartphones with just a few taps.
- **Project Insight** is an initiative which has leveraged advanced analytics and artificial intelligence (AI) to scrutinize taxpayer data. Additionally, AI algorithms are actively deployed to analyse extensive datasets, identify patterns, and detect potential instances of tax evasion.

**Indirect tax reforms**

The digitization of the tax ecosystem on the indirect tax front received a significant boost with the introduction of GST. It was the first major tax reform launched entirely on a tech platform, GSTN. It aimed to deliver a smooth experience for taxpayers by leveraging technology while also improving tax compliance. Some of the key initiatives introduced post the implementation of GST:

- It provided a seamless platform for taxpayers to file their returns online, reducing paperwork and manual errors.
- The advent of a nationwide e-way bill system has spared taxpayers from lengthy queues and extensive paperwork, while also enabling the government to more effectively track non-compliance.
- Introduction of the e-invoicing system - E-invoicing has automated the generation and verification of invoices, which has minimized the risk of fake invoices and facilitating easier audit trails, thus improving overall tax compliance.

To add to these, just earlier this year, revenue secretary Shri Sanjay Malhotra announced that the customs department was developing a fully

automated trade interface system – Customs 2.0. The digitization of customs clearance facilitates paperless trading by allowing traders to submit clearance and supporting documents online, eliminating the need for physical paperwork.

The adoption of technology extends beyond tax administration, as demonstrated by the migration of the MCA portal from Version 2 to Version 3. This upgrade has brought about a transformative change, allowing users to complete e-forms directly on the portal and save partially filled forms for later submission.

Furthermore, the government agencies are comprehensively scrutinizing the information provided by taxpayers across various portals to identify any discrepancies or inconsistencies. For example, the GST authorities have issued notices to companies based on their IGST paid during Customs clearance for demand of GST under RCM on Ocean freight. Additionally, the furnished data is being used to conduct a trend analysis to verify if the sales are understated or purchases are overstated. These examples are just a few instances which demonstrate the substantial steps the Government has taken towards digitisation.

**Global footprints of technology**

Across the globe, we are seeing initiatives by various countries to digitize and further digitalize their tax administrations such as 'Making Tax Digital' or commonly known as MTD of the UK Government, e-invoicing by EU nations, Australia's strategy to fully digitize the Australian Tax Office (ATO) by 2030, Gulf Cooperation Council (GCC) VAT. These tax initiatives are not static but dynamic with a vision to digitalize the tax administrations.

Taking cognizance of the Governments initiatives towards digitizing the tax ecosystem, more and more organizations have implemented steps to be steps ahead of the Governmental agencies. The industry is gearing up by integrating technology into various tax functions, such as regular compliances, tax reporting, litigation management etc. Tax technology enables businesses to maintain precise and comprehensive historical data. Such data assists the corporations in better decision making, reduces tax disputes, ensures accurate compliances and provides an electronic audit trail.

**Digitization v/s Digitalization**

Majority of the initiatives mentioned above were aimed at transforming the tax ecosystem through the digitization of processes. However, in recent years, there has been a growing emphasis on the digitalization of the tax ecosystem. Before dwelling further, it is important to understand the difference between digitization and digitalization in brief.

Digitization is the process of transforming information from a physical format to a digital version. Example of digitization in the Indian tax ecosystem is the transition from manual ITR to e-filing of ITR, moving to digital invoices from the earlier paper invoices. Digitalization on the other hand, involves leveraging digital technology to improve and automate processes, making them more efficient and streamlined. Further digitalization creates the opportunity for tax administration to be "increasingly built into the natural systems used by taxpayers in their daily lives and businesses". Examples of digitalization in the tax ecosystem in India are the introduction of pre-filled ITRs and e-invoicing.

From the above, it is clear that digitalization — already underway — entails utilizing technology to improve and streamline processes. Given that technology is continuously evolving, it is essential to stay updated about emerging technologies that can be harnessed in the digitalization of the tax ecosystem.

## Emerging Technologies

### 1. *Robotic Process Automation (RPA)*

RPA is a feature of Intelligent Process Automation (IPA) that uses robots or bots to handle repetitive tasks based on predefined rules applied to structured data. These rules are driven by logic and designed to streamline processes. Rather than replacing human workers, RPA aims to boost productivity by managing high-volume, repetitive tasks efficiently, allowing humans to focus on more complex and strategic activities. For instance, an employee might spend days reconciling two sets of data manually, while an RPA bot can complete the same reconciliation swiftly using the same logical rules. This allows the employee to redirect their time and effort towards more intricate and valuable tasks.

Packaged RPA solutions are well-established and have been widely adopted by various organizations. Examples of packaged RPA solutions which have already been implemented are payroll processing, customer service automation, compliance monitoring, employee onboarding etc. These packaged RPAs have already enabled organizations in enhancing efficiency, error reduction, consistency to list a few.

While packaged RPA solutions have seen widespread adoption, customized RPA solutions are still emerging to address the evolving needs of various industries and specific reporting requirements. Customized RPA solutions are tailored automation tools that cater to the unique needs and workflows of a specific organization. Unlike packaged, off the shelf RPA solutions, customized RPA is crafted to tackle particular challenges and requirements unique to an organization. For example, an organization in a regulated industry (e.g. insurance) may develop a custom RPA solution to generate reports that adhere to specific tax and regulatory requirements.

### 2. *Internet of Things (IoT)*

Internet of Things or IoT is an infrastructure by which ordinary device registers, collects and shares data with third parties through the internet. IoT is currently a technology in expansion, which is used for multiple purposes.

The Internet of Things (IoT) offers transformative possibilities for tax compliance and enforcement by providing detailed, real-time data. IoT tools can enable tax administrations and taxpayers to prove rights and obligations more accurately and efficiently. For instance, IoT devices such as sensors, thermostats, and microchips collect vast amounts of data, including:

1. Location and movements: traceability – this could be helpful in E-way bill issuance and tracking the route taken by vehicles delivering goods.
2. Physical Changes: Monitoring alterations, size, value, as well as level performance.

By enabling precise data collection, IoT simplifies the verification of facts, improves the assessment of tax obligations, and supports more effective dispute resolution, ultimately transforming both tax administration and compliance.

### 3. *Blockchain Technology*

**In digital age, data is a resource and information is power.** Businesses thrive on timely and accurate information. Blockchain technology can ensure that information across industries remains immutable, meaning it cannot be altered once recorded. Blockchain functions as a shared, immutable ledger that records transactions and tracks assets within a business network. This immutability guarantees that all authorized network members have a consistent, unchangeable view of the data. As a result, businesses gain a comprehensive, end-to-end view of

transactions, enhancing confidence, efficiency, and unlocking new opportunities.

These features of the blockchain technology can be leveraged to evolutionize systems for recording transactions and their taxation, as well as automating many of the processes that characterize today's tax systems.

For example, Blockchain can enhance customs management by updating the customs flow system from origin to destination. Customs would be able to see the necessary and accurate data such as seller, buyer, price, quantity, carrier, finance, insurance, etc. that has been tied with the good to be declared. Customs authorities will also be able to keep track of the location and status of goods in real time. With blockchain technology, they can access information directly from primary sources, improving risk analysis and targeting due to superior data quality.

Further, in the payroll tax business, blockchain technology would allow employees to be paid — and consequently all related deductions and contributions made — in real time. It would also provide various entities with instant access to all employee records and payments received.

In India, the CBDT is already in the process of piloting two use cases of blockchain-based solutions to enhance certain income tax processes. Few examples are as follows:

| ***Sr. No.*** | ***Income Tax Process*** | ***Key Problem*** | ***Blockchain Approach*** |
|---|---|---|---|
| 1 | Form 15G and 15H: Individuals use these forms to inform banks that no TDS should be deducted from their interest income, as their income is below the taxable threshold. | Banks lack a consolidated view of an individual's Form 15G and 15H or their interest income across multiple banking relationships | A unified ledger of interest income from all banks provides CBDT with a complete view, enabling CBDT to flag income exceeding the threshold and helps banks verify in real time if an individual's Form 15G or 15H is within permissible limits. |
| 2 | Form 26AS:<br>A report consolidating all TDS, tax collected at source, and self-paid taxes, providing a complete view of a taxpayer's income. Borrowers often use it as proof of income for lenders. | Lenders had no means to verify Form 26AS with CBDT to prevent income inflation by borrowers, as requesting CBDT verification was neither feasible nor allowed by existing laws and practices. | A unified reporting application can collect data from all tax depositors and generate a cryptographically secure report. Lenders can verify its authenticity by comparing the document's hash value with the one on the platform, without revealing borrowers' personal information. |

### *4. Machine Learning*

Machine Learning (ML) – a subfield of artificial intelligence and computer science - uses data and algorithms to enable AI to learn and improve. Some of the most common examples of machine learning which we have all interacted with in our day-to-day lives are

- Recommendation engines that suggest songs, television shows, movies such as those found on Amazon, Spotify or Netflix.
- Speech recognition software that allows you to convert voice memos into text
- A bank's fraud detection service which automatically flags suspicious transactions

We've all heard of the saying, "Prevention is better than cure". By leveraging technologies such as machine learning, we can move towards a model of **"prevention before correction"** in our tax ecosystem. For example, tax authorities can use ML to enable real-time prompts to get taxpayers to check the amounts they enter, as they complete their income tax returns. If a taxpayer enters a value on a form that is outside of the expected range, a nudge message asks them to check that number, which a taxpayer can ignore if it's correct.

Such preventative tools will assist tax authorities in safeguarding their revenue while making it easier for taxpayers to comply with their tax obligations. Additionally, real-time feedback mechanisms enable tax authorities to engage with taxpayers proactively, addressing potential issues before they escalate. At the same time, these mechanisms ensure the accuracy of the information entered, potentially reducing the likelihood of disputes or audits. It also reduces the time taxpayers spend reviewing their returns for errors.

### *5. Generative Artificial Intelligence (GenAI)*

In simple terms, GenAI is a category of artificial intelligence (AI) algorithms that create new content – such as text, images, videos, audios, computers code, etc - based on training data. When exposed to the right training data, GenAI can generate human-like responses to queries. Currently GenAI tax assistants are being designed and piloted in an effort to empower tax professionals by automating and accelerating routine compliance tasks and uncovering valuable data hidden within organizational silos. This aims to enhance productivity and streamline tax-related processes.

For example, tax teams will be able to use simple everyday language to ask an AI bot to search for problematic invoices and alert them when they find one.

Further GenAI tools may allow:

- Enhanced consistent communication with tax authorities across various tax types and jurisdictions, where data and issues from one domain are seamlessly shared and applied to others.
- Increased level of awareness of possible issues before they surface combined with the ability to anticipate queries and investigations and risks before they occur.
- The capability to present the most current and compelling arguments in managing any disputes.
- The ability to interact with a tax auditor or public or judicial official in a way that meets their expectations, using language and approaches that are most likely to resonate with them.

### *6. Cloud Computing*

As demonstrated above, emerging technologies are set to shape the future of tax ecosystems. Therefore, it is crucial for organizations and tax agencies to integrate capabilities that address the constantly evolving technological landscape.

Cloud's flexibility to meet the ever-changing demand for computing power has the ability to address this need. Arguably the greatest gain from cloud adoption is to enable organizations and tax authorities to integrate fully into the digital system with high levels of assurance on security and compliance. Further a key priority for most tax administrations as they continue their digitalization journey is to allow tax administration process to be incorporated into natural systems that individuals and organizations use in their everyday activities. Cloud adoption provides a way for tax administrators to do this efficiently and effectively at scale.

Cloud-enabled agility not only enhances the efficiency of tax systems but also transforms security and compliance from mere obligations into strategic assets. By leveraging the comprehensive range of secure and resilient services offered by cloud providers—including computing, databases, analytics, and AI/ML—tax authorities can strengthen their operational capabilities while gaining a competitive edge.

Further it also makes tax-related data easily accessible to organizations. For example, if an organization decides to migrate its processes to a cloud-based platform, it can easily access any and all tax related data from anywhere and at any time.

### Conclusion

In conclusion, the evolution of tax administration and compliance is being dramatically reshaped by technology, reflecting a broader shift toward digital transformation.

In a landscape where rapid technological advancement is the norm, staying ahead of the curve is essential. By embracing these digital tools and strategies, both tax authorities and businesses can navigate the complexities of tax administration with greater ease and effectiveness, ensuring a more streamlined and equitable system for all. However, the C-suite often face a critical question – How to use tax technology effectively? This question is complex, as it involves balancing several factors, including cost, efficiency, data security, and the need for specialized expertise.

Tax technology has the potential to transform the way organizations handle their tax obligations, offering tools that can automate compliance, improve accuracy, and provide real-time insights. But with these opportunities come challenges. The effectiveness of tax technology depends not just on the tools themselves, but on how they are implemented and integrated into the broader business strategy.

***Comments from Tax Head***

**Mr Mohan -**Senior Vice President & Global Tax Head at LUPIN LIMITED

**Role of technology in streamlining tax administration and compliance**

Globally, the digitization of tax and finance compliance is transforming industries, and India is no exception. In the pharmaceutical sector, technology is not just shaping the future but is also becoming central to tax administration and compliance efforts.

For the first time since India's independence, the industry finds itself trailing behind the government's advancements in technological governance. The government is rapidly introducing new processes and compliance requirements, with further advancements on the horizon, while the industry is striving to keep pace. These dynamics underscore the importance for businesses to accelerate their technological adoption and stay aligned with government initiatives.

Industry at large, in my view, have made substantial investments in technology to not only match the government's pace but to potentially surpass it. With the proliferation of technology in tax reporting processes, in-house tax teams have become the custodians of the highest quality data in an enterprise. Use of technologies such as artificial intelligence (AI), machine learning (ML), and robotic process automation (RPA) on such data have not only simplified and expedited the compliance tasks but have become a great source for analytics and providing business insights. Tax teams are increasingly focusing more on strategic decision-making and business partnering rather than routine compliance work.

From an industry perspective, while technology has indeed made many processes more efficient and faceless, it also presents challenges. The government often introduces new measures with short implementation timelines, leaving the industry with limited time to adjust its ERP systems and deploy new technological solutions accordingly. Whether it's e-invoicing, e-way bills, TDS provisions, or other regulatory measures, the industry requires adequate time to integrate these changes into their systems to ensure seamless compliance.

"Many a time comes when we want to interpret our weakness and cowardice as forgiveness and renunciation."

— *Swami Vivekananda*

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# The Much-Awaited Waiver/ Amnesty Scheme under Goods and Services Tax

Ritesh Kanodia
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CA Chintan Vasa



**Overview**

*The article discusses the introduction of an amnesty scheme under the Goods and Services Tax (GST) in India, aimed at reducing tax litigation. The scheme, announced during the 53rd GST Council meeting, offers a conditional waiver of interest and penalties for tax demands from FY 2017-18 to FY 2019-20. This initiative is designed to alleviate the burden on both taxpayers and the government by resolving disputes amicably.*

*The scheme covers various scenarios, including show cause notices and adjudication orders, provided the full tax amount is paid by a specified date, likely March 31, 2025. However, it excludes demands for erroneous refunds and does not allow for partial settlement of disputes within a single notice.*

*The article also highlights concerns about the scheme's limited coverage, as it only applies to the first three years of GST and excludes Section 74 notices, raising allegations of fraud or suppression. Additionally, taxpayers who have already paid interest and penalties are not eligible for refunds.*

*The author calls for the government to extend the scheme's coverage and provide clear rules and clarifications to ensure its effectiveness in reducing litigation and easing the compliance burden on taxpayers.*


Benjamin Franklin famously said, *"…in this world, nothing can be said to be certain, except death and taxes."* This is also true for tax litigation, which is inevitable. While some disputes arise from genuine interpretation issues, many stem from the revenue-driven mindset of authorities, who often prefer to adopt a conservative/pro-revenue approach. Consequently, they issue demand notices despite clear provisions of law or judicial precedent from higher forums, resulting in unwarranted litigation.

The sheer volume of litigation, both reasonable and absurd, places a heavy burden not only on taxpayers but also on the Government. There are matters where taxpayers may not want to litigate and close the matter by paying the tax; however, they are forced to continue litigating to avoid payment of hefty interest and penalties, which cumulatively could be more than the tax amount.

Recognizing this, the Government has periodically introduced various amnesty schemes to ease the load both for taxpayers

and the Government. Such schemes have been introduced for both direct and indirect taxes. One such scheme worth mentioning is the one introduced in 2019, called the Sabka Vishwas (Legacy Dispute Resolution) Scheme, 2019 ('SVLDRS'). This was introduced as a one-time measure for the liquidation of past disputes of Central Excise and Service Tax. As per the press release, 1,89,225 declarations involving total tax dues of ₹ 89,823 crores were received, and the scheme led to the recovery of ₹ 27,866 crores, making this the best-performing scheme in the history of indirect taxes. This clearly establishes that if given an option, taxpayers do not like to litigate and would want to close such issues amicably.

An amnesty scheme for Goods and Services Tax (GST) has been in demand for quite some time, considering that GST was a new law, and the initial days saw many errors committed by taxpayers resulting in demands for interest and penalty. While there were reliefs granted from time to time with respect to late fee waivers, an ask for a full-fledged amnesty scheme always got a negative reaction from the Government, until it finally saw the light of day as announced by the 53rd GST Council meeting. While the scheme is not explicitly called an amnesty scheme (considering that such schemes are sometimes viewed as supporting tax evaders and penalizing genuine taxpayers), it is an amnesty scheme and will be referred to as such hereafter in this article.

The GST Council recommended a conditional waiver of interest or penalty or both, relating to demands raised under Section 73, for FY (Financial Year) 2017-18 to FY 2019-20. Consequently, Section 128A has been inserted in the CGST (Central Goods and Services Tax) Act via the Finance (No. 2) Act, 2024 (to be made effective from the date to be notified). The gist of the Amnesty Scheme is discussed in the forthcoming paragraphs.

**Coverage**

The scheme provides amnesty with respect to tax payable for the period from July 1, 2017, to March 31, 2020, under the following situations:

- Show Cause Notices (SCNs) and deemed SCNs issued but not adjudicated.
- Adjudication orders [Order in Original] against which no order is passed by the Appellate Authority or by the Revisional Authority.
- Order passed by the Appellate Authority [Order in Appeal] or the Revisional Authority against which no order has been passed by the Appellate Tribunal.
- SCN which is deemed to have been issued under Section 73(1) of the CGST Act on account of orders passed by the Appellate Authority or Appellate Tribunal in accordance with Section 75(2) of the CGST Act.
- Conversion of notice from Section 74 to Section 73 of the CGST Act.

**Amnesty**

The scheme provides for a waiver of interest and penalties. Furthermore, the proceedings with respect to the underlying notice/order would also be deemed concluded. The amnesty is subject to the condition that the full amount of tax is paid. Furthermore, such tax must be paid on or before a date to be notified (the notified date is likely to be March 31, 2025, as recommended by the GST Council). An appeal or writ petition filed before the Appellate Authority or Appellate Tribunal, or the Court needs to be withdrawn before the notified date. In a scenario where:

- An appeal is preferred by the department before the Appellate Authority, or Appellate Tribunal or High Court or Supreme Court;

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- Proceedings have been initiated by the Revisional Authority;
- Proceedings initiated against the order passed under Section 75(2) [Conversion of notice from section 74 to section 73];

Then the additional amount as determined in the order passed by the respective authorities must be paid within 3 months of the date of the said order.

The scheme does not apply to the demand for an erroneous refund granted earlier. Once the scheme is opted for and the required tax is paid under the scheme, an appeal cannot be filed. In other words, no appeal mechanism would be available with respect to the tax paid under the scheme. Also, no refund would be available to those taxpayers who have already paid the interest and penalty over and above the tax due.

**Points of Concern**

The decision to grant a waiver from interest and penalties is a welcome move. However, considering how the scheme has been formulated, it may not bring in the desired outcome considering that the coverage of the scheme is very restrictive. First, the scheme has only been restricted to the first three Financial Years of GST, i.e., until March 31, 2020. Considering that this is the first scheme introduced after 7 years of GST, the same should have been extended to all pending notices issued before the scheme is notified. If the intent is to reduce litigation and costs arising therefrom, it is not logical to restrict the scheme to only up to March 2020.

Secondly, Section 74 notices have not been covered under the purview of the scheme. As has been seen in the past, notices under Section 74 are issued very casually, and it is then left to the taxpayer to defend the same and establish that there is no fraud or suppression involved. In many situations, such notices are frivolously issued only to overcome the period of limitation or to levy a higher penalty. Hence, restricting the scheme to only Section 73 notices is unwarranted and will reduce the benefits that ought to arise out of the scheme. There are cases where a notice which can never be a Section 74 notice has been issued as such, e.g., notices on the secondment issue whereby the Hon'ble Supreme Court has itself held that the issue does not warrant involving the longer period of limitation, thereby concluding that there is no fraud or suppression involved. It is also seen that where the normal period of limitation has expired, notices are being issued under Section 74 only to circumvent the bar of limitation. All such notices will lose the benefit of waiver.

Further, the scheme creates a discrimination between a Section 74 notice that is adjudicated or where an order has been passed or will be passed by the Appellate Authority [i.e., notified date which appears to be before March 31, 2025] and a Section 74 notice where adjudication remains pending, or the Appellate authority does not decide the matter before the notified date [March 31, 2025]. Such discrimination between similarly placed notices can be a subject matter of challenge considering that there appears to be no *intelligible differentia* in treating the two situations differently. It is relevant to note that no such distinction was made in the earlier amnesty schemes.

Thirdly, taxpayers at times choose to avoid litigation by paying tax, interest, and penalties at the audit stage itself. The scheme is unfair for such taxpayers who chose not to litigate, considering that the interest and penalty that has already been paid are not refundable. This anomaly even existed under the earlier schemes.

Another question which is unanswered is whether the scheme can be applied to only

some of the issues/demands raised in the SCN/ order or how can the benefit of the scheme be availed where one SCN covers demands for multiple Financial Years, including for FY 2021 and beyond [for which the scheme is not applicable]. Can taxpayers choose to settle the dispute partly? It is noteworthy that divergent practices are being followed across States on issuance of notices, where in some States, issue-wise/year-wise notices are being issued, whereas, in some other States, a single SCN is issued for multiple issues/years. Also, there could be situations where some issues raised in the SCN may get dropped at the appeal stage before the notified date and the taxpayer may want to avail themselves of the benefit of the scheme for pending issues. These should get covered. However, can a taxpayer withdraw an appeal for certain years (where multiple years are under dispute via a single SCN) and go for a waiver for the covered years? For example, if an appeal has been filed against an order confirming demand for the FY 2017-18 to FY 2021-22, can the appeal be withdrawn for the FY 2017-18 to FY 2019-20 and go for amnesty for the same? There is no clear answer to this yet. The past schemes have not permitted taxpayers to settle disputes issue-wise if part of a single SCN. If not permitted under the current scheme as well, many taxpayers will not be eligible, thereby again significantly reducing the coverage of the scheme. One may have to wait for the rules to be issued in this regard.

Another issue for debate would be the GST credit, specifically for GST demand notices under the Reverse Charge Mechanism (RCM), considering that for forward charge notices, the time for taking credit would have lapsed. Considering the recent Circular on credit for RCM invoices and the fact that the scheme is applicable only to Section 73 notice, the only logical conclusion would be that the credit should be available. Hence, taxpayers may consider paying the tax under RCM and apply for amnesty in situations where the tax paid is fully creditable.

Also, if the scheme is to be implemented through the GST portal, whether it would map the show cause or orders that were passed manually? As was the case in SVLDRS, would the taxpayer under the given Amnesty Scheme be a victim of technical glitches leading to rejection of the application and yet again leading to another litigation just to get the application admitted?

**Concluding remarks**

As in the past, the provisions do not offer complete clarity on Amnesty Scheme coverage. For the scheme to truly serve its purpose and for taxpayers to start evaluating coverage under the Scheme, it is imperative that the government swiftly releases the relevant rules and appropriate clarifications on the issues. It is also desirable that the Scheme is extended to Section 74 notices and not merely restricted to Section 73 notices. If implemented properly, this Amnesty Scheme could reduce the volume of litigation expected to reach the GST Tribunal.

Also, as next steps, taxpayers should start analyzing the merits of their matter, coverage under the scheme and more importantly, take steps to ensure that for Section 74 notices adjudication is completed or an order is obtained from the Appellate Authority Appellate Tribunal/Court before March 31, 2025, confirming that Section 74 is not sustainable even if the demands were to get confirmed on merits.

### *Comments from Tax Head*

***Aditya Gupta**, India Tax Lead, Mondelez International*

"The announcement of an amnesty scheme is a good step, especially since the industry faced many problems when GST was first implemented, including system issues. However, there are still some unclear areas where clarity is much needed to make it successful.

Few Areas where the Industry expects govt to address include,

- If the scheme covers show cause notices for multiple issues where a company might want to settle only some of them.
- If the scheme would cover notices for years not included in the scheme (like 2017-18 to 2020-21).
- Also, for want of a few fake credits, Govt would not want to penalise the entire industry. Hence it would be interesting to see how the Government covers notices under Section 74, which often involve fraud and suppression. One way to address it could be to limit to cases of fake invoices or fake credit, as the current coverage might reduce the scheme's effectiveness. Therefore, it is suggested that the scheme's scope and coverage be reviewed, including extending it to all notices issued before the scheme is notified.

Despite these concerns, the scheme still gives the industry a chance to review their ongoing litigation and decide if they want to continue with litigating some of these. The removal of extra costs of interest and penalty has been a damper (even though only for Section 73 notices), and companies may use this opportunity to do a cost-benefit analysis and close some of the pending litigations."

### *Comments from Tax Head*

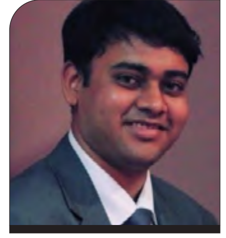
***Ravi Tela, Head of Tax, Nuwama Group***

"The article presents the contours of the recently announced GST Amnesty scheme u/s 128 of the CGST Act, 2017 vide the Budget 2024 covering periods from 1st July 2017 to 31st March 2020, in a succinct manner whilst also bringing out vividly and in great detail the various nuances of the scheme and the issues that need to be addressed in order to make it a huge success.

My compliments to Aurtus team for so insightfully capturing the various scenarios in which the Scheme may not be implementable. Some of the noteworthy points in this regard are extending the coverage of the scheme for periods beyond March'20, credit/ refund of interest and penalty paid by taxpayers during the announcement and enactment of the scheme, clarity on the manner of dealing with cases involving periods beyond the March'20 or cases wherein only partial amnesty is preferred by the taxpayer.

I would sincerely urge the law makers to kindly examine them holistically and make the necessary tweaks to the scheme so that maximum taxpayers could take advantage and avoid avoidable litigation on issues, being the key objective of the scheme."

# Dispute Resolution Mechanism under GST Laws – Efficacy and Challenges



Sudipta Bhattacharjee
Advocate

Arjyadeep Roy
Advocate

**Overview**

*The introduction of GST regime ushered in a new era of indirect taxation. The motto of 'One Nation One Tax' by removing various multi-layered Central and State levies have been achieved under the GST regime. However, as is true for any statutory framework, having an effective dispute resolution mechanism contemplated under the statute is a hallmark of a futuristic legislation. To that extent, law should have the capability to adapt to changing business and technological landscape and provide for dispute resolution mechanism accordingly. In this context, the GST laws have contemplated a complete code in itself wherein dispute resolution mechanism has been made a key feature of the statute. It provides for a multi-pronged approach to ensure that a dispute / interpretational issue reaches its logical end, ensuring ease of doing business as well protecting the interest of the revenue. However, like any other legislation, seamless implementation on ground remains a challenge and the same is true of the dispute resolution mechanism under the GST laws. In this context, the authors have tried to examine the structure of the dispute resolution mechanism and the broad-based challenges that the industry has experienced in terms of the overall framework and its implementation.*

**Introduction**

A taxing statute is typically a complete code in itself with dispute resolution mechanism forming a key part of its overall framework. The Goods and Services Tax ("GST") laws also contemplate and provide for detailed procedure for adjudication, appellate & revisionary proceedings. However, given the technicalities and the nuances involved in tax laws and more specifically GST being simultaneously levied by Centre and States, there can arise substantial challenges insofar as the process in entirety is concerned.

The authors in this article have attempted to dissect the overall framework pertaining to the dispute resolution mechanism under the Central Goods and Services Tax Act, 2017 ("CGST Act") and have also attempted highlight issues and challenges that have emanated from the existing procedure.

**A. Overall adjudicatory and appellate framework under GST laws**

***I. Adjudication process under GST laws:***

a. The initiation of any proceeding under the CGST Act typically starts

with issuing an intimation notice in terms of Rule 142(1A) of the Central Goods and Services Tax Rules, 2017 (**"CGST Rules"**). While the issuance of an intimation notice is not mandatory with effect from 15 October 2020 on account of amendment in Rule 142(1A) vide Notification No. 79 / 2020 – Central Tax dated 15 October 2020, at times, especially in high-stake matters, as a pre-cursor to formal initiation of proceedings, an intimation in Form GST DRC-01A is issued.

b. A regular taxpayer thereafter has an option to either make the payment of the amount so demanded or in case he desires to contest the same, can file his submissions in Part B of Form GST DRC-01A. The proper officer if satisfied with the submissions or with the payment (if the payment is made), can close the same by issuing an intimation in Part C GST DRC-01A.

c. Although the process of issuing an intimation notice is a step towards ease of doing business and consultative adjudication, rarely do proceedings get closed at that stage, which ultimately results to proceedings under Section 73 or Section 74 of the CGST Act.

d. Section 73 as well as Section 74 provides for time limits for issuance of show cause notice and completion of adjudication. Section 73 is invoked in cases where there is no allegation of fraud or suppression. Section 74, on the contrary, is invoked in cases where there are allegations of intentional evasion of tax on account of fraud or suppression on part of the regular taxpayer.

e. Section 73(2) states that the show cause notice shall be issued three months prior to the date of issuance of the order under Section 73(10). Section 73(10) states that the order of adjudication has to be issued within three years from the due date of furnishing the annual return for the financial year to which the dispute relates. Therefore, on a conjoint reading of Section 73(2) and Section 73(10), it can be inferred that there is a specified time limit within which the entire adjudication process needs to be completed.

f. Similar to Section 73, Section 74(2) specifies that the show cause notice shall be issued six months prior to the date of the issuance of the order under Section 74(10). Section 74(10) requires order of adjudication to be issued within five years from the due date of furnishing the annual return for the financial year to which the dispute relates. However, at this juncture, due reference needs to be made to Section 75(11) of the CGST Act. It provides that if an appellate authority or the GSTAT or the High Court has rendered a decision prejudicial to the interest of a revenue in one case and an appeal stands filed in that case, then for the same issue in question for another taxpayer, the time period spent before the date of the final decision from the higher forum shall stand excluded for passing an order under Section 73 or Section 74. **In essence, this provision may be misused to provide a carte blanche to the GST authorities to keep an issue pending for eternity till a higher forum decides on the same issue.**

g. Both Section 73 and 74 allows a regular taxpayer to voluntarily make payment of the tax along with interest prior to issuance of the show cause notice on his own ascertainment, in which case a show cause notice is not issued. In case of a proceeding under Section 74, a regular taxpayer also needs to make payment of penalty to the tune of 15%.

h. In a scenario where a regular taxpayer intends to contest the demand so raised, he can file his reply within a period of 30 days from the date of receipt of the notice. As per Section 75(4) of the CGST Act, a taxpayer also has to be afforded an opportunity of hearing to present his case. Subsequently, the order under Section 73(10) or Section 74(10), as the case may be, is issued.

***II. First appellate process under GST laws:***

a. Section 107 of the CGST Act provides for the first appellate remedy against the order passed in adjudication either under Section 73 or Section 74 of the CGST Act. Section 107(1) states that any person aggrieved by an order passed by an adjudicating authority can appeal within a period of three months from the date of communication of the order.

b. Section 107(4) states that if the appellate authority finds that the taxpayer was prevented by sufficient cause in not filing the appeal within the period of three months, he/she may condone the delay for a further period of one month.

c. Therefore, the maximum time period within which an appeal has to be filed before the appellate authority is 3 months with a further period of 1 month available under law. However, the additional time period of 1 month is discretionary on part of the appellate authority and a taxpayer needs to show 'sufficient cause' to avail benefit of the additional period of 1 month.

d. The question of whether the appellate authority can condone the delay even beyond 1 month (which is a statutorily prescribed period) has been a debatable issue. While the appellate authorities tend to take a strict view, the High Courts have in some cases held that appeals filed even beyond the condonable period of limitation can be admitted if 'sufficient cause' is shown[1].

e. Section 107(6) provides for the condition of pre-deposit while filing an appeal in Form GST APL-01. It inter-alia states that if the amount of tax, interest, fee, fine and penalty is admitted by the taxpayer then, the entire amount has to be paid. In other cases, a sum equal to 10% of the amount of 'tax' in dispute subject to a maximum of INR 25 crores in relation to the appeal sought to be filed has to be pre-deposited.

f. While the cap currently is INR 25 crores, this has been amended to bring it down to INR 20 crores vide Section 141 of the Finance Act, 2024 which is yet to be made effective.

1. *Gaddipati Venakteshwara Rao vs. Additional Commissioner (Appeals), WP No. 1248 of 2024, Arvind Gupta vs. Assistant of Revenue, WPA No. 2904 of 2023.*

g. Section 107(7) states that once the appeal is filed along with pre-deposit, the balance amount shall be deemed to be stayed. Sections 107(8)(9) and (10) pertain to observance of principles of natural justice.

h. Section 107(11) of the CGST Act provides that the appellate authority can uphold, modify, confirm or annul the order appealed before him but shall not refer the case back to the adjudicating authority. Section 107(13) requires the appellate authority to dispose off the appeal within a period of 1 year from the date of its filing, where it is possible to do so. Therefore, while there is no specific time limit for passing an order in appeal (unlike Section 73 or Section 74 of the CGST Act), the statute does require that wherever feasible, the appeal should be disposed in a time bound of manner.

***III. Revisionary process under GST laws:***

a. Section 108 pertains to the power of the revisionary authority to pass review an order passed under the CGST Act. Section 108(1) of the CGST Act bestows power on the revisionary authority to review any order passed under the CGST Act, if it is found that the order passed is prejudicial to the interest of the revenue or is illegal or improper.

b. Section 108(1) is widely worded inasmuch as revisionary authority on his own motion or upon information received by him or on a request from the Commissioner of State Tax or Union Territory Tax can call for the records and examine the same. Further, the revisionary authority after hearing the affected party can stay the order in question for such period as deemed fit or if he thinks fit, enhance, modify or annul the order.

c. However, Section 108(2) outlines the limitation period within which the power of revision has to be exercised. It inter-alia states that the review should to be initiated within a period of six months (appellate time period for the Department to file an appeal under Section 107) and not beyond three years from the date of the order sought to be reviewed. It also states that if the said order is already a subject matter of appeal, no review can be undertaken.

d. Section 108 also encompasses that the entire process has to be undertaken after hearing the affected party. An order passed under Section 108 is appealable before appellate tribunal in terms of Section 112 of the CGST Act.

e. It is pertinent to note that the power to review is quite wide and is available only to the Department. This may primarily be because one of the ingredients for invoking the power under Section 108 is that the order in question has to be prejudicial to the interest of the revenue.

***IV. Second Appeal process under GST laws:***

a. Section 109 provides for constitution of Goods and Services Tax Appellate Tribunal (**"GSTAT"**). The constitution and establishment of GSTAT has unfortunately been contentious since the inception of GST laws. Section 109 as it existed at the time of its incorporation

was struck down by the Hon'ble Madras High Court.[2] Primarily, the constitution of GSTAT was struck down since the number of technical members outweighed the judicial members.

b. However, Section 109 was re-introduced vide Finance Act, 2023. Notification No. S.O. 1(E) dated 29 December 2023 was issued establishing the Principal Bench at New Delhi. Subsequently, vide Notification No. 18/10/2024-EO (SM.II) dated 1 May 2024, President of GSTAT was appointed. Subsequently, Notification No. S.O. 3048(E) dated 31 July 2024 (**"Notification No. 3048"**) has been issued superseding Notification No. S.O. 1(E) dated 29 December 2023. As per Notification No. 3048, Principal Bench of the GSTAT is constituted at New Delhi. Further, State benches of GSTAT have also been prescribed for each State and Union Territory.

c. While GSTAT has now been notified, its operation is yet to commence. It will be a formidable challenge to clear backlog of cases of the last 7 years in an effective manner. It is relevant to note that as per the current framework[3], the time period of commencement of three months as provided under Section 112 of the CGST Act to file an appeal before GSTAT shall be the later of the following dates - (i) date of communication of the order or (ii) the date as notified by the Government for filing the appeal.. Section 112 of the CGST Act is also amended vide Section 143 of the Finance Act (No.2) of 2024 to give effect to the aforesaid changes but the said provision is yet to be made effective.

d. The purpose of GSTAT is to hear appeals against orders passed by appellate authorities or revisional authorities.

e. Section 112 pertains to the procedural framework of filing an appeal before the GSTAT. It *inter-alia* states that either party is entitled to file cross-objections against the appeal filed within the prescribed period.

f. Section 112(8) pertains to the further pre-deposit required before the GSTAT. While the cap currently is INR 50 crores, this has been amended to bring it down to INR 20 crores vide Section 141 of the Finance Act, 2024 which is yet to be made effective. Once the pre-deposit as aforesaid is made, the recovery proceedings for balance amount is deemed to be stayed.

g. Proviso to Section 109(5) provides that in case an issue pertains to determining place of supply, the same shall be heard only by the Principal Bench.. 'Place of supply' issues will have ancillary bearings on the applicable rate of GST, classification of the supply, etc. In such a scenario, the possibility of most of the appeals being filed before the Principal Bench, leading to a logjam, cannot be

2. *Revenue Bar Association vs. Union of India & Ors, 2019 SCC OnLine Mad 8910.*
3. Recommendations of GST Council post 53rd meeting on 22 June 2024.

ruled out. Given that there is already a backlog of close to 7 years, it will be worthwhile to see as to how the same is dealt with, once GSTAT starts functioning.

***V. Proceedings before High Court/ Supreme Court:***

a. Section 117 of the CGST Act pertains to appeal before the High Court. It inter-alia states that an order passed by the State Bench of GSTAT is appealable before the High Court within a period of 180 days.

b. Section 118 pertains to appeal before the Supreme Court. It inter-alia states that an order passed by the Principal Bench of GSTAT or a judgment passed by the High Court can be challenged before the Supreme Court. It is important to note that insofar as filing an appeal before the Supreme Court is concerned, there is no prescribed period of limitation under Section 118. However, as per Supreme Court Rules, 2013 ("**SCR**"), a civil appeal has to be preferred within sixty days from the date of the order[4] and a special leave petition has to be preferred within 90 days from the date of the order[5]. Given that there is no specific time limit prescribed under the CGST Act, the time limits provided under the SCR can be construed to be periods within which Supreme Court should be approached.

**B. Issues & challenges in the current mechanism of dispute resolution:**

The foregoing analysis shows that insofar as the GST laws are concerned, the overall mechanism of dispute resolution is a complete code in itself. However, since the inception of GST, certain issues and challenges have arisen which has led to a surge of litigations before High Courts.

a. *Non-application of mind while passing orders* – The entire framework is modelled in a manner which requires the adjudicating authority to comply with the principles of natural justice including passing of reasoned orders. However, on many occasions, it is seen that the adjudicating authorities have passed orders without taking into consideration the submissions (despite the same being on record). Standard observations have been made that the taxpayer failed to submit any reply or that the reply is unsatisfactory without any explanation. Such a scenario compels the taxpayer to approach the High Courts.

b. *Extension of time-limits to pass orders under Section 73 of the CGST Act* – Section 73 of the CGST Act provides for the outer time limit within which an adjudication order has to be passed. On account of COVID-19, pandemic, the Government exercised its powers under Section 168A of the CGST Act to extend the time limit for passing of orders. While Section 168A can be exercised

4. Clause 2 of Order XIX of SCR.
5. Clause 1 of Order XXI of SCR.

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only in extraordinary circumstances and not in a routine manner, this provision has been exercised routinely to extend the time limits on 4 occasions[6].

c. *Issue vis-à-vis 'communication' of orders on the GST portal* – As per the framework, the limitation period for filing of an appeal commences from the date of 'communication' of the order. In many cases, due to the complexity of the GST portal, the taxpayers are unaware that the orders stand uploaded on the GST portal. The Department treats uploading of the orders as valid 'communication' and appeals have accordingly been dismissed on the grounds that the same was filed after delay. This has led to additional litigation before High Courts.

d. *Insufficient time to respond to notices or appear for personal hearing* – Principles of natural justice require that sufficient time is granted to respond. On many occasions, it has been seen that sufficient time is not granted – absurdly low time period like 3 to 5 days' time gets allotted for personal hearing which has been held to be a violation of natural justice by various High Courts.

e. *Non-constitution of GSTAT* – While constitution of GSTAT has been notified after close to 7 years of implementation of GST, its functioning is yet to commence. This has led to several taxpayers approaching the High Courts directly on urgent GST issues including refund rejections.

### C. Scenarios where the jurisdiction of the High Courts may be invocable at the stage of show cause notice itself

While the CGST Act provides for a detailed adjudication mechanism, the option of directly invoking the writ jurisdiction of the High Courts at the show cause notice can still be availed of in certain cases. Primarily, in the following scenarios, option of moving the jurisdictional High Court directly can be evaluated:

a. The show cause notice is sans jurisdiction - Issues such as that of the notice issuing authority not being a 'proper officer' or that the proceedings are parallel proceedings (both central GST and State GST officers have initiated proceedings).

b. The proceedings are in breach of natural justice inasmuch as sufficient time has not been given or complete set of documents have not been provided.

c. The show cause notice is conclusive and pre-determined, and the entire proceeding is illusory.

d. The show cause notice has been issued in gross contravention of settled legal principles and binding judicial precedents.

6. Validity of notifications extending time limits for adjudication pending before various High Courts including Punjab & Haryana High Court, Karnataka High Court and Bombay High Court. However, the Kerala High Court in the case of *Faizal Traders Pvt. Ltd. vs. Deputy Commissioner, WP No. 24810 of 2023* and the Allahabad High Court in the case of *Graziano Transmissioni vs. Goods and Services Tax & Ors, WP No. 132 of 2024* uphold the validity of aforesaid extension notifications.

e. The provisions which form the edifice of raising the demand suffers from constitutional infirmities.

f. The show cause notice is beyond the period of limitation.

### D. Proposed insertion of new Section 74A vide Union Budget 2024

Finance Act, 2024 has proposed to introduce Section 74A to the CGST Act from Financial Year 2024-25. Going forward, Section 74A shall be the substantive provision for initiation of adjudicating proceedings. As per Section 74A(2), the time-period to issue a notice is capped at 42 months from the date of furnishing of annual return for the concerned financial year. One of the most substantive changes which this provision seeks to bring about is that the distinction between cases of fraud, suppression or collusion (Section 74) and cases not involving such elements (Section 73) is sought to be done away with.

Currently, the limitation period for cases under Section 73 is 36 months whereas for fraud, etc. is 60 months. With a view to reduce the litigation, the Legislature has intended to have a common time limit for all forms of proceedings. While the intention may be noble, on a first brush, it appears that the provision may be vulnerable to a constitutional challenge:

a. As per settled principles of law, unequals cannot be treated equally. Section 74A seeks to treat a bona fide taxpayer and taxpayer who wilfully defrauds the revenue at par[7].

b. From the current structure, for cases of bona fide nature, there is an increase of the limitation period by 6 months whereas for cases of fraud, there is a decrease of the limitation period by 18 months. Such differential treatment can be stated to be arbitrary.

### E. Conclusion

As is evident from the foregoing discussion, the GST laws envisage a complex mechanism of dispute resolution, with new changes being sought to be introduced for ease of doing business.

It is hoped that once the GSTAT framework is duly in place, the dispute resolution mechanism under GST will lead to more effective adjudication and reduce litigation before higher judicial fora.

7. This principle of law in the context of taxation matters has been applied in the case of *Commissioner of Trade & Taxes & Anr vs. Arise India Ltd., SLP No. 36750 of 2017*.

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# An overview of GST Audits/Assessments

CA Niraj Bagri CA Karan Awtani

**Overview**

*The GST department has recently concluded the assessments for FY 2019-20 to meet the deadline for issuance of show cause notices under Section 73 of the CGST Act and the focus will now shift to FY 2020-21. Every assessment and audit performed by the GST department comes with its share of learning experiences, both for the department and the assessee. In this article, the authors have summarized different types of assessment or audits that are provided by the statute, standard issues that are being taken up by the department in such proceedings and favorable judgments or clarifications on such issues. Comments from industry leaders sharing their practical experiences have also been incorporated, providing useful insight. The article also discusses the steps that can be taken by an assessee in anticipation of the audit/assessments, in order to improve the turnaround time and efficient handling of the entire process.*

**Introduction**

One of the salient features of the Goods and Services Tax (GST) regime is self-assessment by the assessee to determine the tax liability to be discharged for each tax period. Instead of assessing each return as and when it is filed, the tax department, after the end of the financial year, undertakes the review of the financial records of the assessee. This process is popularly referred to as 'GST Audit', wherein the tax department ascertains whether the correct amount of tax has been discharged, whether Input Tax Credit (ITC) has been appropriately availed and utilised, and whether the assessee has followed the prescribed procedures, conditions etc.

Apart from the periodical 'GST Audit', often based on system reported risk parameters, the tax department is also empowered to undertake scrutiny of individual returns, assessments, etc. In case of intel of tax evasion involving high value transactions, the tax departments resort to its powers of inspection, search and seizure to prevent tax leakages.

Various provisions have been enacted to meet the aforesaid objective, these are discussed in the ensuing paragraphs.

**Broad overview of GST provisions related to department audits/assessments**

The government has enacted a wide range of provisions, which includes scrutiny of returns, audit of financial records, special audits, investigation, inspection and search and seizure, in order to verify the records of an assessee. The frequency of such scrutiny actions is dependent upon the criteria laid down based on the risk assessment, the

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volume and value of transactions or receipt of any specific intelligence.

- Scrutiny of returns and assessment – The proper officer can verify the correctness of the returns filed by an assessee such as GSTR-1, GSTR-3B, GSTR-9, etc. and identify any discrepancies from such scrutiny. The discrepancies need to be communicated to the assessee by issuing notice in Form ASMT-10 and an opportunity to explain the discrepancies is also provided. To maintain uniformity in the manner of scrutiny of returns, the CBIC has issued a Standard Operating Procedure[1] (SOP) prescribing the methodology of scrutiny of such returns and other related procedures. The SOP also enumerates an indicative list of parameters to be verified during the scrutiny, providing a roadmap to the department.

- Best Judgment Assessment – The proper officer can assess the tax liability of a person on best judgment basis, from the relevant available records, in cases where an assessee fails to obtain registration, or if the registration of the assessee has been cancelled, or an assessee has not filed its GSTR-3B return for a tax period or final return with the prescribed period. The proper officer generally computes the estimated value of supplies made during a tax period from the E-way bill or E-invoicing records fetched from the respective portals, Form 26AS, tax paid in the previous tax period(s), etc. and may also suitably adjust it with an ad hoc percentage of growth in turnover to arrive at the estimated taxable value on which tax is required to be paid.

- Summary assessment – Summary assessment is done by way of passing an assessment order, if the tax department has evidence that the assessee is undertaking transactions to evade the payment of tax and any delay in doing the assessment may adversely affect the interest of the Revenue. Summary assessment can be done only with prior permission from the Additional Commissioner or Joint Commissioner.

- Audit of records – Any officer authorised by the Commissioner can conduct an audit of records of the assessee at the place of business of the assessee or in their own office. This is an extensive review of the records such as sales register, purchase register, reconciliation of turnover and ITC with books of accounts, sales and purchase invoices, review of exemptions claimed, liabilities under RCM, deemed supply transactions, etc. A notice in Form ADT-01 is issued to the assessee intimating the conduct of audit and the list of documents and information required for the purpose of conducting the audit. The law prescribes that the audit should be completed within three months of the date of submission of all information by the assessee or institution of audit at the place of business, whichever is later. This period can be extended for a further period of six months with the permission of the Commissioner. After discussing the preliminary findings of the audit with the assessee and considering their explanations, the proper officer is required to issue an audit report in Form ADT-02 intimating the issues which have

1. Instruction No. 02/2022-GST, dated 22nd March 2022 modified by Instruction No. 02/2023-GST, dated 26th May, 2023

been dropped and issues for which the proper officer is not convinced with the submission of the assessee. The proper officer then proceeds to issue a Show-cause Notice (SCN) under section 73 or 74 of the CGST Act, initiating the adjudication process and ending the audit proceedings.

- Special Audit - At any stage of scrutiny, inquiry, investigation or any other proceedings, considering the nature and complexity of the case, the proper officer, with the prior approval of the Commissioner, may direct an assessee to have its accounts examined and audited by a chartered accountant or a cost accountant who will file a report directly with the proper officer.

- Inspection, search and seizure – If a proper officer, not below the rank of Joint Commissioner, has reasons to believe that an assessee has suppressed any transaction of supply or has claimed ITC in excess of its entitlement or has transported or stored the goods which have escaped assessment, the proper officer may inspect the business premises of the assessee. If the proper officer is of the opinion that any records will be useful and have been secreted, he may search the premises and seize the records.

**Generic issues arising during audits**

The department officers verify the records of the assessee in detail and some of the standard issues raised during such audits are discussed below:

- The most common issue raised in audit proceedings is related to the mismatch in ITC claimed in the GSTR-3B return and ITC reflected in GSTR-2A during a financial year. The GST portal has developed a functionality which gives the department officers an automated report of such differences. This issue has been a nightmare for the assessees and causes a financial loss, since even though the assessee has paid the amount of tax to the supplier, the department demands reversal of such ITC. Recognising the difficulties faced by the assessees, the Government has issued circulars[2] allowing assessees to claim the ITC which is not reflected in GSTR-2A based on the self-declaration from the supplier or a certificate from the CA of the supplier. With section 16(2) of the CGST Act being amended, now ITC can be availed only if its details are reflected in GSTR-2B. Unlike GSTR-2A, which was a dynamic statement, GSTR-2B is a static statement, which makes reconciliation with purchase registers easier. Also, since the Government has issued a circular[3] to streamline reporting of ITC in GSTR-3B returns, this issue ideally should not arise in future.

- The assessees are being denied ITC on goods or services procured from dealers, whose registration is either cancelled or where the dealer is not traceable irrespective of the fact that the dealer was registered and available at the time of supplying the goods or service and the assessee was

2. Circular No. 183/15/2022-GST dated 27th December 2022 and Circular No. 193/05/2023-GST dated 17th July 2023
3. Circular No. 170/02/2022-GST dated 6th July 2022

in possession of documents such as invoices, e-way bills, payment receipts, etc. It has now been held by various High Courts that the ITC should not be denied merely due to cancellation of registration of the supplier when the recipient has sufficient documentary evidence to support the genuineness of the transaction.

- Transactions between related parties have always been a focus of the tax department. Related party transactions are identified from the disclosures made in the financials to ascertain whether the assessee has discharged appropriate tax by adopting the appropriate valuation. Recently, the CBIC has issued a circular[4] to clarify that in the case of import of service by a related party who is eligible for full ITC, any value declared on the invoice will be deemed to be the open market value of the service. The circular also states that if no invoice is issued, the open market value of the service will be deemed to be nil. This clarification should bring relief to a large number of assessees. The department's attention would now be limited to transactions wherein full ITC is not available to the recipient.

- Taxability of corporate guarantee has been another contentious issue since the inception of GST. Rule 28 of the Central Goods and Service Tax Rules 2017 (CGST Rules) has been amended[5] effective from 26th October 2023, to provide that the value of supply of corporate guarantee service will be 1% of the amount of guarantee offered or the actual consideration, whichever is higher. However, the computation of the value of such service prior to the amendment still remains ambiguous. The recent CBIC circular[6] contained a similar clarification to the circular on import of service referred above, which should put to rest the dispute around taxability of corporate guarantee by related parties when the recipient is eligible for full ITC.

- The department has been drawing comparisons between the turnover reflected in Form 26AS with the turnover reported in a particular State to raise demands for short payment of taxes. In such cases, a very basic fact is being ignored that Form 26AS contains the details of turnover on pan India basis and cannot be compared to the turnover reported of a particular State in the GST returns. The High Courts have taken cognisance of such instances and have held that a demand of tax cannot be raised merely based on differences in turnover reflected in Form 26AS and returns filed, without further inquiry of the reasons for such differences.

- Another common issue raised in audit proceedings pertain to RCM liabilities auto-populated in GSTR-2A/GSTR-2B, especially given the fact that the time of supply of such RCM supplies may not trigger in the same month in which invoices are reported by the supplier, or

4. Circular No.210/4/2024-GST dated 26th June 2024
5. Notification No. 52/2023-Central Tax dated 26th October 2023 and Notification No. 12/2024-Central Tax dated 10th July 2024
6. Circular No. 225/19/2024-GST dated 11th July 2024
7. Z R Enterprise v. State of Gujarat [2024-VIL-430-GUJ-ST]

that supplier may have made a mistake in reporting invoices by erroneously declaring invoice under RCM although tax has been charged and paid by the recipient to the supplier.

- On many occasions, the assessee is asked to submit a trial balance of the Company at a State level. The GST registrations in different states are distinct persons only for the purpose of the GST Act. The reporting of turnover and ITC is done on the basis of specialised GST reports developed in the system to fetch State-level data. For all other purposes, the assets, liabilities, profit and loss are reported on a consolidated basis for the company as a whole. Thus, it is not possible for the assessees to comply with such requests.

- Some other points picked up in each audit relate to reconciliation of turnover reported in GSTR-1 with turnover reported in GSTR-3B and GSTR-9, whether payment to supplier is made within 180 days or not, compliance of all conditions for goods or services exported, compliance of provisions of Section 18(6) of the CGST Act in cases of disposal of fixed assets, reconciliation of the value on which tax is discharged under RCM with the corresponding expense booked in the financials, etc.

**Challenges being faced by taxpayers**

- Each assessee has been assigned to either State or Central jurisdiction for administration purposes. It may happen that an assessee allocated to the State jurisdiction receives a notice for conduct of audit of records for a particular period, and the same assessee may also receive another notice seeking information from the Central Authority. An assessee may also be subjected to enquiry or investigation for the same period or issue from specialised authorities such as DGGI, Anti-Evasion, etc. This is despite the fact that Section 6(2) of the CGST Act prohibits duplicity when one authority has already initiated proceedings on a subject matter. Concurrent proceedings for the same period or issue have been a source of hardship for the assessees. This creates uncertainty in the conclusion of assessment of a particular financial year till the expiry of a longer period of limitation provided under the statute. The High Courts have held that parallel proceedings initiated should be clubbed and continued by a single authority.

- There have been numerous instances where the assessee keeps on receiving multiple notices for the same financial year or tax period till the statutory time period for issuing notices has expired. Each notice deals with an incremental issue. This leads to uncertainty amongst the taxpayers regarding closure of assessment of a particular period and adds to the efforts put in litigating the same.

- The Commissioner has powers under Section 83 of the CGST Act to provisionally attach property of the assessee for a period of one year for protecting interest of the Revenue in case of an ongoing assessment or search or adjudication proceedings. There has been abuse of this power in blocking the electronic credit ledger, even without a cogent reason, for periods exceeding one year. Relief has to be then sought from the High Court, which is an added litigation cost.

- Section 70 of the CGST Act empowers the proper officer to summon any person whose attendance is necessary for giving oral evidence or producing a

document. CBIC has issued instructions[7] prescribing detailed guidelines to be followed while issuing summons. The instructions also state that the power of summons should be used judiciously and with due consideration. Unfortunately, a summons is being issued to the senior management for submission of long list of documents. It is also seen that the power of summons is being used as a tool to pressure the assessee to make payment of taxes, even where the assessee has a different point of view and would want to litigate the same.

- It is the general practice of the department to allow a short period of seven days for filing a reply to any notice which requires undertaking reconciliation or factual verification. In many cases, the reply cannot be prepared within the prescribed time, as the process of fetching old data and reconciling it is a time-consuming process. In spite of the assessee filing an extension letter on the GST portal, there is no action taken by the assessing officer to extend the timeline. In such situation, due to lapse of time limit and no action of the officer, the portal is blocked for any further filing of a reply. The assessee is therefore unable to submit the reply and is required to resort to other modes of communication, such as E-mail or physical submission. There is a high probability that the reply submitted through such modes will not be taken on record by the assessing officer before concluding the proceedings of the notice.
- Transfer of authorities happens at regular intervals. This leads to re-opening of audits and assessments by the new authority which have already been reviewed and closed.
- In some situations, the tax department does not issue closure reports concluding the inspection/investigation, resulting in a lack of sufficient evidence of conclusion of inspection of records for a particular period. This causes duplication of work and investment of time and effort of the assessee in futile exercises.

**How companies should prepare for future audits, considering past experience**

It is worth noting that the Government has initiated various training sessions for its officers and also subscribed to software which makes the officers better equipped in conducting audits. To effectively tackle audits with minimum issues being raised, an assessee can be well-prepared in advance by undertaking periodic checks to ensure that there are no mismatches between the figures reported in the GST returns and those in the books of accounts. A thorough and detailed reconciliation of revenue and ITC should be undertaken at the time of preparing and filing the annual return and reconciliation statement. An assessee should also reconcile the revenue reported in GST returns with the corresponding details available on E-way bill and E-invoice portals to identify any mismatches. Any deviation noticed during such reconciliation should be correctly disclosed in the annual return and reconciliation statement, to avoid allegations of suppression or fraud by the department.

The conclusion would be incomplete without getting a perspective from the people directly being impacted by the GST audits.

8. Instruction No. 03/2022-23 (GST-Investigation) dated 17th August 2022

***Comments from Tax Head***

**Mr Vikas Garg,** VP Finance & Accounts – Head - Tax, Tata Projects Ltd, remarks:

"Having gone through multiple audits by now, our experience is that a face to face/ in-person audit is likely to be closed much more expeditiously and amicably as compared to a virtual audit. On most of the occasions, issue are still around factual aspects such as GST credit mismatch and turnover reconciliations rather than any technical issues. Explaining these in a face-to-face meeting has been far more fruitful.

A major challenge which keeps coming is that there is a huge overlapping of audits & inquiries from different authorities. After completing a regular comprehensive audit u/s 65 of the CGST Act, it is expected that the various authorities are well coordinated amongst themselves and do not raise queries for the period which has already been subject to audit. Secondly, GST credit mismatch issues which are beyond the control of the taxpayers need to be looked at with much more flexibility and open mind. Such issues rarely warrant invocation of proceedings u/s 74. Despite that, we keep observing invocation of stringent provisions by the authorities.

One suggestion to improvise the overall audit experience could be that each Commissionerate can have periodic meetings with various business chambers/ industrial bodies to seek suggestions/ feedback."

***Comments from Tax Head***

**Mr Abdulla Pettiwala,** Head of Tax at HDFC General Insurance Company Limited, says:

"The GST era ushered in change for the revenue officers as also for the tax professionals. The ecosystem of multistate taxation is new to the service sector who may not have experienced the nuances of the VAT regime, which calls for less of the technical finesse and more of simple logic, understanding people and human connect. This requires the companies to have tax professionals with relevant talent to manage the state wise GST across the country. A great deal of the time and energy is spent in reconciliations without much value add towards improvement in tax management. The success of GST audits before the state officials in my experience require us to ensure that the officer is aware of the business and its transactions and how and when the output and input invoice recording is done, especially for transactions in banking, finance and insurance sector."

# Landmark Judicial Precedents: Steering the direction of Indirect Tax Laws

Shivam Mehta
Advocate

CA Tanya Garg

**Overview**

*This article examines four key issues which have plagued taxpayers since the inception of the GST law. The first pertains to secondment of employees wherein the decision of the Supreme Court in* ***Northern Operating*** *upended established jurisprudence. While circulars issued in this regard provided some relief, issues concerning valuation and interest liability continue to evade amicable settlement. The second issue pertains to the auto ancillaries sector which is reeling under the impact of* ***Westinghouse*** *wherein too, the Supreme Court unsettled settled jurisprudence regarding classification of auto components. With notices showing no signs of letting up, the road ahead remains tough for these assessees. The third issue relates to denial of ITC to recipients on the anvil of Section 16(2)(c). The problem is compounded by the recent decision of the Supreme Court in* ***Ecom Gill*** *wherein the threshold for discharging the burden of proof qua ITC was raised significantly for the recipients. In contrast to all of the above, the decision of the Odisha High Court in* ***Safari Retreats*** *offers a glimmer of hope inasmuch as Section 17(5)(d) was read down to exclude cases where an assessee was making outward taxable supply using construction services. However, without the blessings of the Supreme Court, this hope remains stillborn.*

Notably, introduction of Goods and Services Tax (GST) law was a significant breakthrough towards the comprehensive indirect tax reforms in the country. The notion behind it was introduction of a 'Simple Tax' by eliminating multiple taxes, simplifying compliance, reducing cascading effects of taxes, and promoting economic integration in the country. The journey to establish current GST framework has not been a matter of few months or a year and was definitely, not a piece of cake. From the idea of GST being mooted in 2000 by Kelkar Task Force to the release of first discussion paper in 2009 to the implementation of GST in July 2017, the collaborative efforts of the State and Central Government to create a dual GST model have been commendable.

As we are now celebrating the 7th anniversary of GST law, it is paramount to see if the vision behind introduction of GST is materializing or will take few more years to achieve its desired objective.

India's GST law is, unquestionably, a gamechanger which has truly lived up to the expectations of establishment of 'One Nation, One Tax'. It has not only made a positive impact on taxpayers, consumers, businessman in terms of compliance, costs, digitization but one can also see a revolutionary change in the

revenue of the Government, over these past 7 years.

GST, being a new law in India, was considered to be experienced with fresh eyes by the entire nation including authorities, taxpayers and courts. However, since GST law mirrors the pre-GST laws in various aspects, the taxpayers are not only getting affected by the unveiling of surprise decisions that are pronounced under the GST law but are also getting entangled in the relevance of the decisions of the erstwhile regime, leaving taxpayers in a puzzled state.

**Taxability on Secondment of Employees – Haunting Shadows of Pre-GST Rulings!**

The decision pronounced by a three Judge Bench of the Hon'ble Supreme Court in the case of ***Northern Operating Systems Private Limited***[1] is an ideal example of how the taxpayers are still caught in the grips of the previous laws.

The issue as to whether Service Tax was payable on secondment of employees under manpower supply was largely settled by the decisions of the Tribunal, affirmed subsequently through dismissal of appeals by the Apex Court as well[2]. The Courts have held that under secondment arrangements, the foreign companies were not engaged in providing 'manpower recruitment or supply agency' but there was an employer-employee relationship between the Indian company and the seconded employees, which could not be subjected to service tax.

However, the 3-member bench of the Apex Court decided to take a stand, contrary to the series of earlier orders which came as an utter shock to the entire industry insofar as it disturbed the established jurisprudence. It held that the Indian Company was receiving services of manpower recruitment and supply from the overseas company, which was susceptible to service tax.

Soon after the decision was pronounced, the orders held in favour of the assessees came to be largely impacted. Not only that, even the notices under the GST regime also started pouring in, demanding GST along with interest from the inception of GST on 'import of services'.

Since most of the industries were not paying GST on it, considering the settled jurisprudence, the industries were taken aback by the huge GST demands along with interest, unsure of how to respond to such notices. Many taxpayers took a call to pay GST on reverse charge on full salary of seconded employees including perquisites (under protest) by raising self-invoices on that very date and simultaneously, availing ITC on the same. The ITC was subsequently denied by the authorities on the premise that the time period to avail ITC had expired since as per the authorities, it has to be seen from the receipt of services and not from the date of self- invoice.

These notices were challenged in various High Courts wherein some high courts distinguished the matter on merits, while the others granted

1. 2022 (5) TMI 967
2. *Nissin Brake India Pvt. Ltd. vs. CCE, Jaipur, 2019 24 GSTL 563 (Tri-Del.), Spirax Marshall Pvt. Ltd. vs. CCE, Pune-1, 2016 44 STR 310 (Tri-Mum), Vidarbha Iron & Steel Co. Ltd. vs. CCE, Nagpur, 2016 45 STR 464 (Tri-Mumbai) as well as Volkswagen India vs. CCE, Pune, 2014 (34) STR 135 (Tri Mumbai).*

relief with respect to Indian portion of salary and some of them gave favourable decisions with respect to availability of ITC. However, the requests of the industry to waive off the interest for the past period is not yet taken into consideration by the Government.

While the taxpayers were still pondering over the future course of action, the Government issued benevolent circulars which settled the complex dilemmas. Circular No. 211/5/2024 dated 26th June 2024 clarified that the date of availment of ITC is to be seen basis the date of self-invoices. Similarly, Circular 210/4/2024 dated 26th June 2024 was issued clarifying that the value of supply as declared in the invoice or Nil (in case no invoice has been issued) can be said to be the open market value if full ITC is available to recipient in case the services are received from a related party located outside India.

Further, an amnesty scheme in the form of proposed insertion of Section 128A is being introduced to waive off the interest in case of notices issued under Section 73 for the period upto March 2020.

The above circulars and the amnesty scheme have undoubtedly set the stage for the taxpayers struggling with future uncertainties.

However, the industry is still wondering if there is a need to pay GST on secondment in future or not or the value of such services can be said to be 'Nil'.

If the value of the services can be considered as 'Nil', what would be the fate of the Show Cause Notices issued demanding tax along with interest?

On a careful reading of the circular, it is evident that the circular has dealt with the transactions covered under Schedule I of CGST Act, involving no consideration. The issue as to whether the circular will be applicable when a debit note is issued by the foreign party such as in case of secondment is still an open question. The possibility of department denying the benefit of circular to assessees wherein a debit note is issued by the supplier located outside India to the Indian importer (i.e. there is some consideration involved) cannot be denied.

It will be intriguing to watch the final fate of these Show Cause Notices demanding tax alongwith interest and whether Government will intervene to protect the taxpayers from colossal interest liability by way of waiver of interest in cases of secondment.

### Westinghouse Saxby Verdict: Shaking the foundations of Classification!

Classification of any product is of paramount importance since it decides the rates applicable on the goods and services and thus, the cost structure of any product. The debate surrounding the classification has persisted for decades, affecting taxpayers adversely.

The verdict, which has captured the attention of the taxpayers across the nation was a three-judge Bench decision of the Supreme Court in the case of ***Westinghouse Saxby Farmer Ltd***.[3] which had laid the groundwork for another significant avenue of legal dispute. In this case, the issue before the Apex Court was whether 'relays' manufactured by the assessee and used only for railway signalling equipment would fall under Chapter 86, as

3. 2021 (3) TMI 291

claimed by the assessee, or under Chapter 85, as claimed by the Department. The Apex Court applied the "sole and principal use" test in Note 3 to Section XVII as an exclusive test to determine whether an article should be classified as a "part or accessory" under Section XVII. Consequently, the Hon'ble Supreme Court applied the aforesaid "sole and principal use" test to the prejudice of the specific exclusions under Note 2 to section XVII, thereby, rendering Note 2 entirely meaningless.

Ideally speaking, the decision has not taken into account the HSN Explanatory Notes and completely ignored the law settled by the Apex court itself in the case of ***Intel Design Systems (India) Pvt. Ltd.***[4] and ***Uni Products Ltd.***[5]. It has also been considered as *per incuriam* by various tax experts.

The fact that the Department had itself filed a review petition against the *Westinghouse* judgment proves that even the Revenue itself was not in agreement with the position laid down in this judgment. However, under the GST law, since parts and accessories of automobile attract higher GST rates than the other headings, rightly or wrongly, the decision is in favour of authorities under GST. The authorities are leveraging this advantage, leading to a flood of notices throughout the automotive industry. The authorities have been demanding GST at the rate 28% by considering each and every part of the automobile as 'part and accessories', ignoring the settled jurisprudence and the rules of classification.

Many players in the industry, considering the revenue neutral situations have changed the classification to Chapter 87/86 as 'parts and accessories' of vehicles and started discharging GST at a higher rate, only to avoid protracted litigation, without going into the merits of classification. However, this practice of charging higher rate of tax is not consistent owing to the fact that these parts are also sold in after sale markets and charging higher rate of tax in such cases would make such parts expensive for the end consumers.

The Government acknowledged the disorder created by the decision, post which an Instruction No. 01/2022-Customs dated January 5, 2022 was issued, clarifying that the decision of Supreme Court in the case of *Westinghouse* is at variance with its other earlier decisions and it was suggested that the said decision should not be applied to wider issues. It has been specifically stated that classification of parts of Section XVII is to be decided taking into account all the facts, details of individual cases and decisions.

Even after the above instruction, the flood of notices showed no signs of letting up, leaving taxpayers at crucial crossroads, pondering how to steer through such notices. The viable approach to seek relief in such cases would be to challenge such notices and distinguish the decision of the Apex Court on merits of the case.

It is a high time that the taxpayers must revisit their classification not only from the standpoint of *Westinghouse* decision but in the light of rules of interpretation, HSN Explanatory Notes and the law settled by other Apex court decisions.

4. 2020 (372) E.L.T. 465 (S.C.)
5. 2022 (382) E.L.T. 292 (S.C.)

**Safari Retreats: Finding Respite amongst Unfavourable Decisions**

While the trend of the unfavourable rulings and decisions is at its peak, there is a glitter of hope amongst the real-estate industry, the reason being the decision pronounced by the Orissa High Court in the case of ***Safari Retreats Private Limited***[6], whose fate is in the hands of Apex Court.

To outline the background briefly, GST law under Section 17(5)(d) specifically disallows the ITC on expenses incurred for construction of immovable property such as cement, steel, bricks etc. and the related services, where the construction is being done on his own account or when the goods are services are used in the course or furtherance of the business.

The above provision was contested by the petitioners before the Orissa High Court who had availed ITC on purchase of goods and services for construction of a shopping mall which was let out on rental basis. While reading down Section 17(5)(d) so as to not impose restriction in the cases where an assessee is making outward taxable supply using such services, the ITC was allowed by the Orissa High Court.

Though the decision gave a glimmer of hope to the assessees engaged in construction of buildings which are used for their own purpose or are leased out after the completion, how far the benefit can be taken will be interesting to see. This is because the decision is itself pending before the Hon'ble Supreme Court. Though the hearings have concluded, the order has been reserved and the ball is clearly in the court of the Apex Court.

While the businesses await the Supreme Court's verdict, they are facing a critical decision point with respect to availment of ITC in such cases. The ideal strategic move in such cases would be to avail ITC without utilising the same till the verdict is pronounced so that the businesses do not miss on the timeline to avail ITC. Parking the credit in the electronic credit ledger will also protect them from unwarranted interest liability.

Even otherwise, if the decision is upheld by the Apex Court, it would elicit a significant question on the scheme of blocked credits under GST wherein the credit on certain expenses had been mindfully disallowed. The said section, beginning with notwithstanding clause itself substantiates that the credit should be disallowed even if the expenses are incurred in the course or furtherance of business.

In case the decision of Orissa High Court is endorsed by the Apex Court, it would open the doors for the taxpayers to challenge the entire Section 17(5) on the principal of equity.

**ITC being denied to Genuine Taxpayers: The legal saga continues**

The removal of cascading effects was one of the central intentions behind introduction of GST law. The statute has allowed the taxpayers to offset the taxes paid at the input stage against the output tax liability. Though the provision of availment of ITC was introduced as a beneficial provision, the setbacks being encountered by the taxpayers denote otherwise.

The legal wrangling surrounding the availment of ITC by genuine taxpayers in case of non-payment of tax by supplier or proving the burden of claim by recipients is not new and have existed for a long time.

6. 2019 (25) GSTL 341 (Ori.)

The legal battles[7] over this issue in pre-GST regime in context of VAT had established that it is practically impossible for the recipient to ensure that the tax pertaining to credit availed by recipient is duly deposited to the Government by the supplier. Imposition of such conditions on the recipient was held to be unjustifiable and impractical.

Following the said principles, various High Courts in the GST regime including Delhi, Kerala, Madras High Courts and others have held that the proceedings must be initiated against the supplier first, before initiating recovery from the recipient. One of the decisions rendered by the Calcutta High Court is that of ***Suncraft Energy Private Limited***[8]. This decision has been blessed by the Supreme Court[9] as well.

The above decisions would give the impression that there is no need for more discussions and the matter clearly stands resolved in favour of recipients. Alright, It's a long way from reality!

Despite the above decisions, the authorities are questioning the eligibility of the ITC to the taxpayers due to non-fulfilment of condition of Section 16(2)(c) of CGST Act. It is crucial to mention that though some of the High Courts such as Kerela High Court[10], and Patna High Court[11] have upheld the constitutional validity of Section 16(2)(c) of CGST Act directly or indirectly, the matter with respect to the constitutional validity of Section 16(2)(c) is still pending before various other High Courts and will be ultimately settled by the Apex Court.

Amidst all this, the taxpayers are still struggling to substantiate its claim in absence of any practical mechanism provided by the Government. However, till the time the provision is held to be un-constitutional, the authorities will keep challenging the credit eligibility, which is well within their powers, since the legal provisions mandate the deposit of tax to the Government, as a pre-condition of availment of ITC by recipient. As a matter of fact, in case the payment of tax is not made by the supplier to the Government, the same would ultimately result in loss to exchequer. Thus, hoping for relief from the Government until the provision is stuck down would be truly unrealistic.

Moreover, the taxpayers may also be burdened to prove the receipt of the goods and services, relying upon Section 155 of CGST Act, more so after the decision in the case of ***Ecom Gill Coffee Trading Private Limited***[12] which was pronounced by the Hon'ble Supreme Court in context of Karnataka VAT. The Apex Court has held that the burden of proof lies with the recipient to substantiate that the goods and services have been received by it. The said claim should be proved beyond doubt by furnishing the name and address of the selling dealer, details of the vehicle which has delivered the goods, payment of freight charges, acknowledgement of taking delivery of goods, tax invoices and payment particulars etc.

7. *Quest Merchandising India Pvt. Ltd. vs. Govt. of NCT of Delhi, 2018 (10) G.S.T.L 182 (Del.), Commissioner of Trade and Taxes, Delhi vs. Arise India Ltd. 2018-TIOL-11-SC-VAT, Commissioner of Central Excise, Jalandhar vs. Kay Kay Industries reported at 2018 (10) G.S.T.L. 182 (Del).*
8. 2023 (8) TMI 174- Calcutta High Court
9. 2023 (12) TMI 739 - SC Order
10. 2024 (6) TMI 288 – Kerala High Court
11. 2023 (77) G. S. T. L. 372 (Pat.)
12. 2023 (3) TMI 533- Supreme Court

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It was nearing reality that the taxpayers would be asked to prove such burden, all the more, after the decision of Ecom Gill. Unsurprisingly to the taxpayers, the authorities have already started denying the benefit to the taxpayers in case they are not able to prove the burden of actual movement of goods and genuineness of transactions, beyond doubt using relevant documents. Allahabad High Court[13] in various cases have held in favour of revenue in case the taxpayers were unable to discharge the onus to prove the genuineness of transactions and actual movement of transactions. One of the decisions of High Court was subsequently affirmed by Supreme Court[14] as well. Also, various High Courts have remanded back[15] the matters, giving directions to consider the matter afresh and to produce the documents in relation to transactions.

Thus, the recent trends clearly emphasize the need for the taxpayers to establish the genuineness of the transactions and appropriate documentation, in order to safeguard themselves from any tax liability.

It is worthwhile to note that though the decision of *Quest Merchandising (under Delhi VAT)* was specifically distinguished in the decision of E-Com Gill (rendered under Karnataka VAT) and was not overruled by the Apex Court, the extent to which the earlier decisions would be accepted by the authorities under the GST regime in cases wherein the notices being issued by the authorities do not raise any ground of burden of proof relying on Section 155 of the CGST Act is another issue to watch out for.

Though the decision has laid down certain principles and illustrations for proving the burden of receipt of goods, no such principles have been laid down for proving the receipt of services, the reason being that the decision was rendered in context of VAT Act. In such cases, it will be noteworthy to watch how the taxpayers will prove the burden of receipt of services, on account of services being intangible in nature, keeping in mind the principles laid down by Apex Court in E-com Gill.

By and large, the taxpayers are eagerly waiting for some clarity from the Government on the ITC front so that the businesses may be carried without any hindrances. It is clear that unless intervened by the Government, the battles around the credit eligibility are not going to end soon.

## Conclusion

The continuous amendments in the GST law and the verdicts being pronounced in context of indirect tax reforms have been significantly influencing the business operations of taxpayers. From the recent changes and clarifications in GST regime, it is clear that over the past years of GST implementation, assessees, professionals, the department and the Government have shifted their emphasis from mere compliance/matching/mismatching issues to issues involving legal interpretation. This measure would mark a significant stride towards more matured GST legislation. With the tribunals being formed, everyone is hopeful that the issues involving legal interpretations would get resolved in a timely manner, which would contribute towards economic growth of the nation.

13. *M/s Malik Traders [2023 (78) G. S. T. L. 465 (All.)], M/s Anil Rice Mills [2024 (8) TMI 904 - ALLAHABAD HIGH COURT]*
14. 2024 (2) TMI 1416 - SC ORDER
15. TVL. CLEON OPTOBIZ PVT. LTD. [2024 (82) G. S. T. L. 122 (Mad.)], Soma Enterprises Ltd. [2024 (3) TMI 123 - ALLAHABAD HIGH COURT]

***Comments from Tax Head***

***Mr. Mayank Jain*** *Tax Head- Orange Business India- Mr. Mayank Jain*

One can just hope that decisions such as one pertaining to secondment is made effective prospectively (by applying doctrine of prospective overruling). Demanding GST coupled with interest at a rate as high as eighteen percent, on the tax issues which were more or less settled in the past, not only increases compliance cost on the companies but also creates atmosphere of uncertainty in the mind of global investors. Issues such as secondment requires Government intervention to give positive message globally. On the issue of secondment, clear clarification from the Government, treating value of such services as 'NIL' at the option of recipient, especially where full credit is admissible, is dying need of the industry. Moreover, interest demand in such cases should be waived off, at the least for the period till the decision is pronounced.

***Comments from Tax Head***

***Mr. Anil Sahani,*** *Vice President-Tax – Maruti Suzuki India Limited*

Classification of parts used in automobile under Chapter 87 when such parts are clearly and correctly classifiable under other headings such as Chapter 84/85/90 etc. not only results in increased rate of GST but also has impact on BCD which can make such products expensive for the automotive industry. When entire industry is already at the stage of learning new law of GST, it is difficult to handle unwarranted litigations and fresh disputes on the settled issue of classification of goods, making things more complicated for the taxpayers. Confusion in classification of goods under correct heading adds to complications in implementing tax law since many times, different vendors classify same product under different tariff headings. When GST tariff is more or less aligned with the Customs tariff, the industry demands some clarity on settled issues such as classification of goods.

At the same time, industry also demands some support from the Government to waive off the past demands and interest in case the entire industry is following a particular practice or charging a particular tax rate, similar to what was prevalent in Excise Regime, rather than issuing notices to them, so that the taxpayers can focus on the businesses in an efficient manner. Under Excise regime, these type of tax disputes did not arise because the standard excise duty rate of 12.5% was applied to all goods. So, the industry seeks support from Government to notify standard rate of GST, preferably 18%, for all auto parts and accessories (irrespective of the chapter heading). This would foster a more conducive environment for businesses to thrive and would actually fulfil the motto behind introduction of GST.

### *Comments from Tax Head*

***Mr. Gurinder Pal Singh** Head – Indirect Taxes, L&T Construction*

One of the pivotal objectives of GST, as highlighted in all discussion papers leading to its introduction, has been the seamless flow of credit. The scheme of blocked credits, denying credit on specified goods and services clearly creates an impediment in achieving the aforesaid objective. The blockage of credit particularly on works contract service or goods and services leading to the construction of an immovable property for own business use is regressive and may be the reason for the corporates to go-slow in taking investment decision in developing their own world class office infrastructure. While decision of Orissa High Court gives a glimpse of hope to taxpayers on availment of credit on construction activities, the final decision lies with Apex Court of India. Regardless of the decision by the Apex Court, the Government is expected to revisit such restrictions on availment of credit on construction activities with a fresh mind. It can always bring suitable checks and balances in the event of pre-mature sale of such property on the lines of similar controls that are in place in respect of capital goods. A specified procedure for availment or reversal of ITC in case of construction sector may be notified by Government to prevent taxpayers from taking undue advantage wherein the property being given on rent is ultimately sold. The Government may also appreciate that the quantification and verification of various goods and services used in construction activity, especially steel and cement is not a challenge in the GST regime where every inward invoice for availing input tax is available on the GST portal. Thus, the various reasons for denying the credit on construction activities have diluted to a large extent and it is high time that the Government should revisit its decision of denying credit on construction activities keeping in view, the overall objective of GST to allow seamless flow of credit. This will have an overall positive impact on the economy.

### *Comments from Tax Head*

***Mr. Aditya Gupta** India Tax Lead- Mondelez India Foods Private Limited*

The issue of availment of ITC has been haunting the genuine buyers, day and night, leaving them doubtful about how to move forward. Many a times, the taxpayers are bound to settle the matter owing to the amount involved and the business necessity since approaching the High Courts and challenging the provision is not viable in each case. The issue has been lingering over the entire industry, with no exceptions at all. The Government which already has a repository of taxpayers' data from various return filings is best placed to intervene and provide practical solution to this problem. Intervention in the form of FAQ's with illustrative examples or legislating the exact requirements /obligations on businesses is highly warranted, in absence of which, the businesses of the taxpayers would be highly effected, which will be clearly against the agenda behind introduction of GST.

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# Place of Supply – Provisions and Key issues

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**Overview**

*The article explores the constitutional and legislative framework for determining the Place of Supply (POS) under GST and delves into the need for determining the correct Place of Supply (POS) for supply of goods and services in case of domestic and cross-border transactions. Determination of POS is essential as it affects taxability, jurisdiction, eligibility for input tax credits, proper tax allocation between states and prevents cascading taxes and legal disputes.*

*The article also discusses key issues relating to POS for goods involving sale and leaseback transactions, and bill-to-ship-to transactions. The article analyses POS for performance-based services and challenges faced in determining the POS due to the inherent nature of such services that require availability of recipient's goods. Further, issues arising for determination of POS for cross border services have also been discussed briefly with specific emphasis on intermediary services, which has been a bone of contention since its introduction in the service tax regime. To this end, the article highlights the ongoing disputes about the definition and taxability of intermediary services and references various judicial precedents on what constitutes intermediary services.*

*The conclusion emphasizes the importance of accurately determining the POS, noting that this can be complex and requires careful consideration of the transaction's nature, applicable laws, and judicial precedents.*

**Powers under the Constitution of India**

Article 246A (2) of the Constitution of India gives the Parliament exclusive powers to make laws for inter-state supplies. Explanation to Article 269A (1) provides that supply of goods, or services, or both in the course of import into the territory of India shall be deemed to be supply of goods, or of services, or both in the course of inter-State trade or commerce. Further, Article 269A (5) gives powers to the Parliament to formulate the principles for determining the place of supply ('POS'), and when a supply of goods, or of services, or both takes place in the course of inter-State trade or commerce.

Identifying the appropriate POS is therefore crucial to determine whether a particular transaction is liable to GST as an intra or inter-state supply, which then also determines who has the power to tax (Centre or State). In a cross-border scenario, it is also relevant to determine whether a transaction is liable to GST or not.

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**Provisions under the Integrated Goods and Services Tax Act, 2017 (IGST Act)**

The IGST Act contains provisions for the levy and collection of tax on the inter-state supply of goods or services by the Central Government. The provisions related to the determination of POS are contained in Section 7 (which deals with Inter-State supply), Section 8 (which deals with Intra-State supply), and Section 9 (which deals with supplies in territorial waters).

Section 7 provides that the supply of goods or services shall be treated as inter-state supplies where the location of the supplier and the POS are in two different States, two different Union territories, or a State and a Union territory. However, this is subject to Sections 10, Section 12, and 13 which lay down the provisions relating to the determination of the POS in different scenarios. A crucial facet to determining the POS rules is also whether a particular transaction would qualify as an export of services, and therefore zero-rated or whether a service provided by a non-resident supplier be liable to be taxed in India if the POS is in India (under the Reverse Charge Mechanism). In this article, we have broadly discussed the POS provisions and some of the key issues arising therefrom.

**Place of Supply provisions**

The IGST Act provides for distinct POS provisions for the supply of goods (other than imports and exports) and the supply of services. The provisions related to POS for services, where the supplier and recipient of services are in India, are contained under Section 12, whereas the provisions related to POS for services where either the supplier or recipient are located outside India are contained under Section 13. Further, separate provisions are also incorporated under the law to determine POS for the import and export of goods.

It is to be noted that Section 12 becomes crucial to determine the nature of tax viz. whether a particular transaction is liable as an intra-State (CGST + SGST) or inter-State transaction (IGST), and who has the powers to levy and collect such tax. Further, what is not intra-state supplies get taxed as inter-state supplies. However, Section 13 primarily determines the taxability of cross-border services transaction. Such supplies are covered under Section 7 and treated as inter-state supplies.

***POS for supply of goods***

Goods are tangible and there should not be any difficulty in determining their POS. As per the default provision, the POS is the destination of the goods (Default POS). However, there could be scenarios where there is no movement involved or for that matter, the goods are delivered to a different State other than that of the buyer, or where the goods are installed or assembled at site or where the goods are delivered on board a conveyance etc. The POS provisions are self-explanatory and hence, are not explained in detail for the sake of brevity. However, some of the key points and issues are discussed below:

— As mentioned, location where the movement of goods terminates for delivery to the recipient is the default provision which applies to most supplies involving goods. An amendment made in 2023 has carved out an exception stating that notwithstanding anything to the contrary under the Default POS provision or Section 10(c)[3] above, the POS shall be the location as per the address of the said person recorded in the invoice issued in respect of the said supply and the location of the supplier where the address of the said person is not recorded in the invoice.

1. An exception carved out for supplies by unregistered suppliers or to unregistered customers – where place of supplier / supply is the address mentioned on the invoice
2. Section 10(1) (ca) of the IGST Act
3. Determination of POS where goods do not involve movement

— In this regard, the CBIC has issued a clarification[4] stating that in cases involving the supply of goods to an unregistered person, where the address of delivery of goods recorded on the invoice is different from the billing address of the said unregistered person on the invoice, the place of supply of goods as per the provisions, shall be the address of delivery of goods recorded on the invoice. While the clarification is in line with the destination-based consumption tax principle, it creates system complications for some players (e.g. e-commerce operators) who may need to keep changing the nature of the tax on the go where a customer is registered with a particular address on the website and provides a different address for delivery in another State (e.g. delivery in the NCR region). The address on record could have been the ideal proxy to avoid complications.

— Contract is for supply of goods ex-factory, and the recipient takes the delivery of the goods in State A and transports the goods to another State B. The moot question is whether in such case the movement of goods terminates in the State of delivery or the destination and what would be the POS as per the Default POS provision. A closely linked issue is whether the transaction is an intra or inter-state transaction, and if the transaction is treated as an intra-state transaction in State A, whether the recipient in State B will get an input tax credit.

— Bill to ship to transactions[5] : What is the meaning of 'third' person and whether a branch in another State is also a 'third' person. This would mean that a bill-to-ship-to transaction could also cover a scenario where goods are billed to the branch and shipped to the customer. Since the law considers the branch as a distinct person, legally, it can also qualify as a 'third' person. Also, in a 'bill to ship to' transaction, there are two supplies that happen, one from Bill to party to the third person and then from the third person to the final recipient. Another issue that remains open is in such cases whether there is a separate supply when the goods are billed to the branch but shipped to the customer under a service contract. The CBIC has clarified[6] that inter-state movement of goods under a service contract (which is the supply in the instant scenario) for the provision of service on its own account by a service provider, where no transfer of title in such goods or transfer of goods to the distinct person by way of stock transfer is not involved is not a separate supply transaction, and therefore not liable to GST.

- There could be a scenario of a sale and leaseback transaction (say of a plant) where there is no movement of goods. The provisions stipulate that in such case, the POS shall be the location of goods at the time of delivery to the recipient. Arguably, a bill-to-ship-to transaction is possible even in a sale and leaseback scenario involving no movement of goods. It is relevant to note that Section 10(b) especially talks about delivery either before or during movement. Does it therefore mean that the lessor will have to mandatorily take registration in the State where the goods are being physically used?

4. Circular No. 209/3/2024-GST dated 29th June 2024

5. Where the goods are delivered by the supplier to a recipient or any other person on the direction of a third person, the POS is the principal place of business of such third person [Section 10(b)]

6. Circular No. 80/54/2018-GST dated 31.12.2018

***POS of goods imported into or exported from India***

The provisions state that the POS of goods imported into India shall be the location of the importer, and that of goods exported from India shall be the location outside India. The term "export of goods" means taking goods out of India to a place outside India. It is relevant to note that there have been a lot of disputes in the erstwhile regime as to what constitutes "taking to a place outside India" specifically where supplies are made in territorial waters or where supplies are made at duty-free shops to an inbound or outbound passenger or supply of bunker fuel to outgoing ships/ vessels.

In this regard, Section 9 of the IGST provides for POS of goods supplied in territorial waters to be the coastal State or Union territory where the nearest point of the appropriate baseline is located.

As regards duty-free shops are concerned, as per Article 269A (1) of the constitution read with Section 7(2) of the IGST Act, the supply of goods imported into the territory of India, ***"till they cross the customs frontiers of India",*** shall be treated to be a supply of goods in the course of inter-State trade or commerce. Customs frontiers mean the limits of a customs area as defined in section 2[7] of the Customs Act, 1962. Consequently, the term "till they cross the customs frontiers of India" would mean clearance for home consumption. In a duty-free shop, goods are sold before they cross the customs frontier. To settle this controversy on taxability, the Government has amended Schedule III to include the supply of warehoused goods before consumption to be neither a supply of goods nor a supply of services.

***POS for supply of services***

Services are intangible. Hence, unlike goods, it is not possible to determine the destination of such services or for that matter where the services are finally consumed. Some of the services by their nature are capable of being provided, performed, and received at different locations across a larger geographical territory falling in more than jurisdiction, and determination of the POS could be challenging. Considering the difficulties in determining the actual place of delivery or consumption of services, certain proxies are used for determining the place of supply of a service.

Sections 12 and 13 of the IGST Act relating to POS in case of supply of services use various proxies to determine the place of supply.

By default, the POS for supplies is the location of recipient of services (Default Services POS). However, certain instances have been carved out where the Default Services POS does not apply, such as immovable property related services (e.g. renting of property), or are performance-based services where POS is determined based on where services is performed (e.g. restaurant, catering, personal grooming, organisation of cultural, artistic event, admission to cultural, artistic events etc.) or where POS is determined based on the address on records or at the time of delivery, etc.

***POS of services – where the location of supplier and recipient is in India (Section 12)***

As mentioned earlier, Section 12 contains provisions for determination of POS where location of supplier and recipient is in India. This is essential for determining the nature of tax viz. whether the transaction is an inter-State transaction (and consequentially, IGST should apply) or the transaction is an intra-State transaction (and consequentially, CGST + SGST should apply). This becomes important considering that for an inter-state transaction, the revenues go to the Central

7. means the area of a customs station 7[or a warehouse] and includes any area in which imported goods or exported goods are ordinarily kept before clearance by Customs Authorities

Government, which is then allocated between the Centre and State. However, in the case of an intra-state transaction, the SGST revenues directly go to the respective State. One could argue that this should not impact the taxpayer, as ultimately, he is paying GST and therefore, even if there is a wrong determination of the type of GST, the same should not have any impact on the taxpayer. However, this may sometimes lead to a loss for the taxpayer e.g. where a transaction is wrongly classified as IGST, and subsequently, the taxpayer is required to pay CGST + SGST. In this scenario, the IGST credit availed by the recipient (in a different State) is incorrect and will have to be reversed. Further, the supplier will have to discharge CGST + SGST[8] and apply for a refund for wrongly paid IGST, which would be subject to the period of limitation[9].

Another aspect, though of less significance, is the sequence of the utilisation of credit. IGST is fungible against both CGST and SGST and therefore, sometimes offers cash flow advantages.

Some of the key points/issues arising under Section 12 are discussed below:

— In the case of immovable property services:

- While the POS is the location of the immovable property; a key issue arises is whether the supplier must also obtain GST registration in the State where the immovable property is located. The law defines 'location of supplier of service', ('LOS') which inter alia means the registered premises or a fixed establishment, and when there is more than one establishment, the most directly concerned with the provision of services. One could strongly contend that the LOS can be contractually decided and need not necessarily be the physical location of goods or in the instant case, the location of the immovable property.
- Further, there have been disputes in the past about whether a particular supply constitutes an immovable property service E.g. Co-location services involving hosting and IT Infrastructure provisioning services or warehousing services. It has been clarified[10] that the arrangement of the supply of co-location (data centre facility) services not only involves providing a physical space for server/network hardware but also involves the supply of various services by the supplier related to hosting and information technology infrastructure services like network connectivity, backup facility, firewall services. POS for such services will therefore be governed by the Default Services POS[11], and not that applicable for immovable property services. Further, where the activity involves providing warehousing services, it may not simply mean providing a warehouse on rent and hence, is not an immovable property service. Further, there are disputes on what constitutes an 'immovable property' under the GST law, and more such issues could likely arise in the future.
- A common issue that arises in the context of immovable property or performance-based or event-based services is the availability

8. Section 77 of the CGST Act also provides that in such case, no interest will be applicable.
9. Before the expiry of two years from the relevant date i.e. the date of payment of tax
10. Circular No. 203/14/2023-GST dated 27.10.2023
11. Section 12(2) of the IGST Act

of credit which is linked to the determination of POS. If the recipient does not have registration in the State where the POS is, the GST charged thereon will not be available as set-off (as the GST charged is CGST + SGST). This is against the very fundamental principle of GST that there should not be cascading of taxes.

— The determination of the right POS is also sometimes closely linked to determining the true nature and essence of the transaction, which could determine eligibility to take credit. E.g. Repair and maintenance services under an insurance claim. The insurance company may be centrally registered; however, the repair and maintenance services could be provided by garages across India. Here, if the nature of the transaction is held to be a separate transaction of goods and services (where the maintenance would have also involved the replacement of a part along with the rendition of services), the supply of goods would be liable to a CGST + SGST (as the parts are replaced locally within the State). On the other hand, if the transaction is characterised as a composite supply of services (as the pre-dominant element is that for providing services), the POS will be the place of the recipient, i.e. the insurance company, and therefore, the GST charged would be IGST and eligible as credit. This is equally true for companies providing warranty services across India.

***POS of services – where the location of supplier or recipient is outside India [cross border supplies] (Section 13)***

The Default Services POS[12] is the location of the recipient of services. The exceptions and some of the issues arising therefrom are briefly discussed below:

— Performance-based services: The following has been covered under such services:

- Services supplied in respect of goods which are required to be made physically available by the recipient of services to the supplier of services, or to a person acting on behalf of the supplier to provide services. An example of this would be repair and maintenance services carried out on goods. It is to be noted that there is a carveout for goods temporarily imported into India for repairs or treatment or process without being put to use in India and exported thereafter. There have been disputes in the past on POS for R&D services where certain research material is provided by the recipient. In this regard, a carve-out has been created for the pharmaceutical sector whereby the condition regarding fulfilment of POS outside India has been relaxed and such R&D services are treated as export of services[13]. In such cases, the materials provided were incidental to the R&D activity. To fall within the purview of this provision, the services must be provided on the goods. However, a relaxation akin to that provided to the pharmaceutical sector is not accorded to other similar services such as in the case of technical testing services where materials are consumed during the testing activity but not exported back. R&D on the prototype developed by the Indian Company and not supplied by the principal foreign

12. Section 13(2) of the IGST Act

13. Notification No. 4/2019-I.T., dated 30.09.2019 issued pursuant to powers conferred by section 13(13) of the IGST Act

company is covered under the Default Services POS[14]. However, R&D services on goods provided by foreign companies are not covered under Section 13(2). the POS as per section 13(3) shall be the location where the services are performed.

- For services provided remotely by use of electronic means, the POS is where the goods are located at the time of supply.
- Services supplied to an individual (either on his own account or on account of a third party), which requires the individual to be physically present with the supplier for the supply of services. An example could be beauty treatment services or makeup services. It is to be noted that only services provided to an 'individual' are covered here.

— Immovable property services: This is like what has been discussed in the context of Section 12. Hence, where the Immovable property is outside India, the POS is outside India, and vice-versa. One key aspect that is important to note is where the supplier is in India, and the POS is outside India, that by itself does not make the transaction non-taxable. One will have to satisfy the conditions of export of services for the supply to be zero-rated. A key condition to qualify as exports is that the consideration should be received in convertible foreign exchange. If the same is not received, the transaction becomes liable as IGST. Also, as already mentioned, the determination of whether the services are related to immovable property or not assumes significance (such as data centre services or warehousing services discussed earlier), as that would per se be determinative of the taxability of the transaction.

— Location of supplier of services: This is perhaps one of the most significant provisions (and more specifically the intermediary issue) that has created the largest controversy since the service tax regime. The relevant sub-section covers the following services:

- Services supplied by a banking company, a financial institution, or a non-banking financial company, to account holders, where the POS is where the supplier is located. One of the disputes that has got clarified positively is for custodial services. It has been clarified that the custodial services provided by banks or financial institutions to FPIs are not to be treated as services provided to 'account holders'[15].
- Taxability of intermediary services: Taxability of intermediary services has been a controversy since the introduction of the 'Place of Provision of Service Rules, 2012'. The fundamental principle of destination-based consumption tax suggests that tax is levied in the event the consumption is within the taxable territory and exports are not to be taxed[16].

  However, in the case of intermediary services, irrespective of the fact that the supply is made by the supplier in India to recipients outside India, and convertible foreign exchange

14. *In Re: Hilti Manufacturing India Pvt. Ltd. [2024 (82) G.S.T.L. 319 (A.A.R. - GST - Guj.)]*
15. Circular No.220/14/2024-GST dated 26.06.2024
16. *All India Federation of Tax Practitioners vs. Union of India [2007 (7) S.T.R. 625 (S.C.)]*

is earned, the supply is yet not considered to be an export for the POS being the location of the supplier of services, and consequently, the Indian supplier must charge GST on such supplies.

As per section 2(13) of the IGST Act, the term "intermediary" is defined to mean "a broker, an agent or any other person, by whatever name called, who arranges or facilitates the supply of goods or services or both, or securities, between two or more persons, but does not include a person who supplies such goods or services or both or securities on his/her own account."

There continues to be a lot of bewilderment regarding the interpretation of the words "arranges or facilitates". In simple terms, any person who facilitates the supply of goods/ services between two persons (typically without altering them) is considered as an intermediary.

In this context, the CBIC's Circular No. 159/15/2021-GST dated 20.09.2021 clarified to state that an intermediary 'arranges or facilitates' the supply of goods or services or both (main supply), between two or more persons (requires a minimum of three parties), and does not himself provide the main supply. Further, an intermediary does not include a person who supplies such goods or services or both or securities on his own account. And lastly, sub-contracting for a service is not an intermediary service.

Some of the services where this dispute constantly arises include marketing and promotion services, back-end support services, services of promotion of courses of foreign universities amongst Indian students, advertising services, services provided by branch/ liaison office, etc. Overtime, several judicial pronouncements have been issued that have laid down some of the key principles for determining whether the services should not qualify as 'intermediary services', some of which are summarised below:

- A person engaged in sales promotion and had no role in fixation of price, nor they negotiate in any manner between the foreign principal and their clients cannot be called an 'intermediary'[17].
- Services provided on a principal-to-principal basis without direct contact with the customer do not qualify as intermediary services[18].
- Rendering advisory or consultancy services on its own account cannot be considered as 'Intermediary Services' and merely because the foreign recipient, acted based on advisory services provided by the Company, it could not be construed to mean that the Company had rendered advisory services as an 'Intermediary'[19].

17. *Chevron Phillips Chemicals India Pvt. Ltd. vs. Commissioner of CGST & C.E., Mumbai East, [2021 (53) G.S.T.L. 268 (Tri. - Mumbai)]*
18. *Commissioner of Service Tax vs. Gupshup Technology India Pvt. Ltd. [2018 (9) G.S.T.L. 305 (Tri. - Mumbai)], and Evalueserve.com Pvt. Ltd. vs. Commissioner of Service Tax, Gurgaon [2019 (365) E.L.T. 546 (Tri. - Chan.)]*
19. *Cube Highways and Transportation Assets Advisor Pvt. Ltd. vs. Assistant Commissioner of CGST [2023 (77) G.S.T.L. 387 (Del.)]*

- Rendering market research services on its own directly to an overseas entity, and not to the customers of the overseas entity was held to be not acting as intermediary services[20].
- When the appellant would not be paid any consideration for services provided if no business was generated, it was held to be intermediary services[21].
- Sub-contract services are not intermediary services[22].

Despite the clarifications and judicial rulings, the negative Advance Rulings under GST have created a lot of confusion[23]. Besides the above, a few Advance Rulings have also analysed the term *'any other person, by whatever name called'* to include persons who are not necessarily similar to 'broker' or 'agent' and interpreted that the principle of ejusdem generis shall not be applicable in instances where the preceding words are entirely different concepts[24].

This therefore remains a vexed issue. The issue is a mixed question of facts and law, and it is important that the form and substance of the transaction very clearly bring out the nature of the service being performed. To this end, a functional analysis of the exact functions being carried out becomes necessary, and it may also be necessary then to segregate functions that could constitute intermediary services and charge a separate consideration for such activities.

— Passenger transportation services: POS is the location where the passenger embarks on the conveyance for a continuous journey. Similarly, for services provided on board a conveyance during the course of a passenger transport operation: POS is the first scheduled point of departure of that conveyance for the journey. The term 'continuous journey' has been defined under the law.

— Online information and database access or retrieval services (OIDAR) services: POS is the location of the recipient of services. OIDAR services provided to a registered recipient in India are covered under RCM, but those provided to unregistered recipients in India require the foreign supplier to obtain registration in India for payment of tax. Considering the electronic nature of the provision of services, certain additional proxies have been introduced such as IP address of the device used, country code of the SIM card used, bank account used for payment, payment card used for settlement of payment etc. that deem the persons receiving such services to be located in the taxable territory and assist in determining the POS.

Previously, OIDAR services were defined under GST as services that are [*essentially automated and with*

20. *OHMI Industries Asia Pvt. Ltd. vs. Assistant Commissioner of CGST [2023 (75) G.S.T.L. 26 (Del.)]*
21. *In Re: Global Reach Education Services Pvt. Ltd. [2018 (15) G.S.T.L. 618 (App. A.A.R. - GST)]*
22. *Genpact India (P.) Ltd. vs. Union of India [2023 (68) G.S.T.L. 306 (A.A.R. - GST - Mah.)]*
23. *Re: Vservglobal Private Limited [2019 (26) G.S.T.L. 127 (App. A.A.R. - GST)]* and *In Re: Global Reach Education Service Pvt Limited. [2018 (15) G.S.T.L. 618 (App. A.A.R. - GST)]*
24. *Siddheshwari Cotton Mills Pvt. Ltd. [1989 (39) E.L.T. 498 (SC)], In Re: McAfee Software (India) Pvt. Ltd. [2019 (31) G.S.T.L. 662 (A.A.R. - GST)]* and reiterated in *Re: Airbus AAAR [Order No. KAR/AAAR/09/2021-22 dated 09.11.2021]*

*minimal human interaction*][25] provided electronically over the internet. The inclusion of such a subjective criterion in the definition led to disputes with the tax authorities for the classification of various services as OIDAR services for the tax period until 30.09.2023. After the omission of the aforesaid criteria vide Finance Act, 2023 w.e.f. 01.10.2023 from the definition, a gamut of services is now classified under OIDAR services regardless of the quantum of human intervention, thereby also widening the tax net.

## Conclusion

Companies need to determine the right POS for each of their transactions. While in some cases, this is simple, in certain other situations, the determination may be complex (as discussed above). One needs to be mindful of various factors such as the exact nature of service and the applicable provision of law, relevant judicial precedents, impact on revenue to the Government in taking a particular interpretation, or whether is it a revenue-neutral situation, taxability of transaction (in a cross border scenario), impact on eligibility to take credit or whether there is an intent to register in the other State.

### *Comments from Tax Head*

**Ms. Baisakhi Baid** – *Tax Head, Nutricia International Pvt. Ltd.*

"The article aptly summarizes the POS provisions and delves into the complexities of determining the place of supply (POS) under the IGST Act, which is crucial for determining the taxability of a transaction. Correctly identifying the POS is essential for businesses to determine whether a transaction is intra-state or inter-state. This distinction is important because it dictates what tax should apply (whether CGST + SGST or IGST). Misclassification can lead to significant compliance issues, financial penalties, and tax losses. Incorrect determination of POS can lead to the denial of ITC to the recipient.

For companies engaged in international trade, the provisions related to intermediary services are particularly contentious. The current rules are not in sync with the fundamental principle that taxes should not be exported out of the country. Despite numerous clarifications and judicial precedents, the intermediary issue has been a point of litigation since the service tax regime. At first, who is an 'intermediary' is an extensively debated question. Secondly, any tax collected becomes a cost for the foreign recipient which can discourage international business operations.

The government should consider revising the classification of intermediary services under the Default POS, i.e., the location of the recipient of services. This change would align with the principle of destination-based taxation, ensuring that taxes are levied where the services are consumed rather than where they are supplied. Such a revision would not only simplify compliance but also promote fairness in the tax system, encouraging more businesses to engage in cross-border trade without the fear of double taxation or undue tax burdens or possibility of litigation.

In conclusion, while the POS provisions under the IGST Act are designed to support the destination-based consumption tax principle and ensure that each State gets its due share of revenue, they also present challenges. By addressing the issues related to intermediary services and issuing timely clarifications on interpretational issues, the government can create a more business-friendly environment that supports economic growth and international trad

25. Omitted from the definition of OIDAR services vide Finance Act, 2023 w.e.f. 01.10.2023.

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# GST Credit – Challenges and Issues

CA Parita Jugal Shah

**Overview**

***Introduction***

*The concept of Input Tax credit is at the core of the GST Regime which allows seamless flow of credit across value chains so as to avoid cascading effect of tax on tax. However, it is pertinent to note that input tax credit is a mere concession and it cannot be claimed as a right. It is a concession which is available subject to conditions prescribed under the provisions of section 16 of the GST law. The below Article briefly discusses certain challenges and issues arising in the provisions of input tax credit.*

1. ***Non-reflection of Tax in GSTR-2B***

   *One key issue is whether the non-reflection of tax paid in Form GSTR-2B can justify denying input tax credit. Section 16 of the GST law outlines the conditions for eligibility of credit which includes amongst other conditions payment of tax by the supplier and filing of return by the supplier. These two conditions appear to be arbitrary and beyond the control of the buyer. When it is justified and proven that the transaction is a genuine transaction where the buyer is in possession of tax invoice and has received the goods and services and have also made payment to the supplier, the disallowance of credit on the ground of non-compliance by the supplier is unfair. There are several judicial pronouncements which have held that when the credit is legitimately availed the credit should be allowed. A long-drawn litigation is however expected in this area considering the provisions of law.*

2. ***Time limit for availment of Input Tax Credit on Reverse Charge Payments whether to be considered from the date of payment?***

   *The time limit for availability of input tax credit for tax paid under reverse charge is another area of concern. Section 16(2)(a) read with Rule 36(1)(b) clearly provides that input tax credit shall be availed on the basis of a self-invoice subject to payment of tax.* ***Circular No. 211/5/2024-GST dated 26th June, 2024*** *clarifies* ***the relevant financial year for calculation of time limit for availment of input tax credit*** *under the provisions of section 16(4) of the CGST Act* ***will be the financial year in which the invoice has been issued by the recipient under section 31(3)(f) of the CGST Act, subject to payment of tax on the said supply by the recipient****. Accordingly, time limit for availment of input tax credit for tax paid under reverse charge should be considered from the date of payment of tax.*

3. ***Reversal of input tax credit on wastage arising in the process of manufacture***

   *The treatment of Input tax credit concerning wastage in manufacturing processes is also debated. Section 17(5)(h) restricts credit for goods lost or destroyed, but normal manufacturing wastage is typically an inherent part of the process. Court rulings, including those from the Madras High Court and the Supreme Court, have supported the view that normal manufacturing losses should not trigger credit reversal, as these losses are intrinsic to the production process.*

4. ***Input Service Distribution***

   *The Input service distribution mechanism, designed to centralize and distribute credit for input services across multiple branches, has been made mandatory from April 2025.. The ISD mechanism requires detailed compliance, including registration, issuance of tax invoices, and proper documentation for distributing credits. The organisations will have to strategize and design systems so as to align their business with the new provisions of law.*

## 1. Introduction

GST has overhauled multiple tax regimes into a single tax. With the Goods and Services Tax, the indirect tax regime in India has undergone a complete revamp which has brought about a unique amalgam of fiscal powers where both the Center and the State operate jointly on a single transaction. Input tax credit is at the core of the GST regime. The concept of input tax credit allows a seamless flow of credit of tax paid on procurement of goods and services so as to avoid the cascading effect of tax on tax. However, input tax credit is a mere concession and it cannot be claimed as a matter of right. The Hon'ble Supreme Court in the case of ***Jayam and Company vs. Assistant Commissioner and another, (2016) 15 SCC 125 (Jayam)*** holds that *"input tax credit is a form of concession provided by the Legislature and can be made available subject to conditions"*. Input tax credit therefore is not a right vested with the suppliers of goods and services. It is a concession which is available subject to conditions prescribed under the provisions of the Act. These conditions and restrictions prescribed in the law lead to various debates and discussions resulting in long drawn litigation. In this article an attempt has been made to discuss a few such challenges which the industry is already confronted with and its plausible interpretation which may assist in arriving at a reasonable outcome.

## 2. Is non-reflection of tax in the GSTR – 2B a sufficient ground to deny credit?

2.1. The eligibility and conditions prescribed for taking input tax credit are contained in section 16 of the Central Goods and Services Tax Act, 2017[1] (the Act).

1. Reference made to Central Goods and Services Tax Act, 2017 similarly apply to the Integrated Goods and Services Tax Act, 2017 as well as the State/UT Goods and Services Tax Act, 2017.

Sub-section 2 of section 16 of the Act commences with a non-obstinate clause stating that notwithstanding anything contained in section 16(1) no registered person shall be entitled to the credit of any input tax in respect of any supply of goods or services unless:

(a) *he is in possession of a tax invoice or debit note issued by a supplier registered under this Act, or such other tax paying documents as may be prescribed;*

(aa) *details of the invoice or debit note referred to in clause (a) has been furnished by the supplier in the statement of outward supplies and such details have been communicated to the recipient of such invoice or debit note in the manner specified under section 37;*

(b) *he has received the goods or services or both.*

(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;*

(c) *subject to the provisions of section 41*[2] *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; and*

(d) *he has furnished the return under section 39;*

With respect to the confirmation of payment of tax by the supplier, it is pertinent to note that there is no mechanism per se developed by the Government for tracking of the said payment. As contemplated by the legislature, the return filing process would involve the filing of outward supplies in the GSTR-1 (auto-populated in the GSTR-2A) followed by filing of inward supplies in the GSTR-2 (auto-populated in the GSTR-1A) and finally the payment of tax in the GSTR-3. However, the said planned return filing mechanism as envisaged could not take off due to non-availability of the relevant infrastructure. The filing of the GSTR-2 and the GSTR-3 was altogether scrapped. Therefore, in absence of the relevant mechanism to apply the said provision of law, the provision itself is rendered redundant. Reliance in this reference can be made to the decision in the case of ***Sun Dye Chem vs. The Assistant Commissioner (ST) (Madras High Court) (W.P.No.29676 of 2019, dated 06.10.2020*** where it is held that since the return filing mechanism could not be implemented, genuine errors in availing input tax credit should be allowed.

2.2. Further, the condition of requirement of filing a statement of outward supplies by the supplier and communication of the said details to the recipient vide clause (aa) of section 16(2) is introduced in the law w.e.f. 1st January, 2022 vide Notification No. 39/2021-CT dated 21.12.2021. Consequently, an amendment was brought about in Rule

2. Substituted "section 41" (w.e.f. a date yet to be notified) by s. 8 of The Central Goods and Services Tax (Amendment) Act, 2018 (No. 31 of 2018).

36 of the Central Goods and Services Tax Rules, 2017[3] (Rules) where at sub rule 4 it has been provided that "

*(4) No input tax credit shall be availed by a registered person in respect of invoices or debit notes the details of which are required to be furnished under subsection (1) of section 37 unless,-*

*(a) the details of such invoices or debit notes have been furnished by the supplier in the statement of outward supplies in Form GSTR-1, as amended in FORM GSTR-1A if any, or using the invoice furnishing facility; and*

*(b) the details of input tax credit in respect of such invoices or debit notes have been communicated to the registered person in* ***Form GSTR-2B*** *under sub-rule (7) of rule 60.]*

Accordingly, w.e.f. 1st January, 2022, input tax credit as reflected in the GSTR-2B only is available as credit. Section 38 read with Rule 60 has been amended w.e.f. 1st October, 2022 to provided that the details of outward supplies furnished by the registered person shall be available to the tax payer in an auto-generated statement – Form GSTR-2B every month electronically through the common portal. Thus, the law implies that one cannot take credit unless the supplier files the statement of outward supplies in the GSTR-1 which is communicated to the tax payer in Form GSTR-2B. Isn't this condition arbitrary and against the principles of natural justice?

2.3. The Apex Court in the case of ***Bharti Airtel Ltd [2021] 131 taxmann.com 319 (SC)*** holds at para 46 *"Form GSTR-2A is only a facilitator for taking an informed decision while doing such self-assessment. Non- performance or non-operability of Form GSTR-2A or for that matter, other forms, will be of no avail because the dispensation stipulated at the relevant time obliged the registered person to submit returns on the basis of such self-assessment in Form GSTR-3B manually on electronic platform".* Also, the press release dated 18.10.2018 at para 4 provides, *"It is clarified that the furnishing of outward details in FORM GSTR-1 by the corresponding supplier(s) and the facility to view the same in FORM GSTR-2A by the recipient is in the nature of taxpayer facilitation and does not impact the ability of the taxpayer to avail ITC on self-assessment basis in consonance with the provisions of section 16 of the Act".* Reliance can also be placed on the decision in the case of ***Suncraft Energy (P.) Ltd [2023] 153 taxmann.com 81 (Calcutta)*** where the purchasing dealer was in possession of the tax invoice, had received the goods and services, made the payment to the supplier of goods and services. The credit was denied only on the ground that the detail of the supplier is not reflecting in the GSTR-1. The High Court noted that without resorting to any action against the selling dealer, ignoring the tax invoices, bank statements establishing the payment against the invoice, the action of the respondent of disallowing the input tax credit is branded as

3. Reference made to Central Goods and Services Tax Rules, 2017 similarly apply to the Integrated Goods and Services Tax Rules, 2017 as well as the State/UT Goods and Services Rules, 2017.

arbitrarily. The Special Leave Petition has been dismissed by the Supreme Court reported at ***[2023] 157 taxmann. com. 352 (SC)***. Accordingly, the judicial pronouncements have consistently held that the recovery of the taxes should be done from the seller and not the buyer who has legitimately availed credit on the basis of a tax invoice and on payment of the tax to the seller. It is not justified on the part of the department to initiate recovery proceedings against the buyer of the goods and/or service in cases where there is a genuine claim of credit. This is unfair, arbitrary and inimical to the business interests.

2.4. Further, this provision in law treats the "guilty purchasers" and the "innocent purchasers" at par whereas they constitute two different classes. This is violative of the Article 14 of the Constitution of India inasmuch as it treats both the innocent purchasers and the guilty purchasers alike. A legislative measure which treats unequals equally is violative of Article 14 of the Constitution. A statute should be read in such manner so as to do justice to the parties. If it is held that the person who does not deposit the tax would be put in an advantageous position and the person who has already paid the tax would be worse, the interpretation would give result to an absurdity leading to abuse of the business and profession which is violative of Article 19(1)(g) of the Constitution of India. A landmark decision in this reference is the case of ***Arise India Limited vs. Government of NCT of Delhi [MANU/DE/3276/2017] dated 26.10.2017*** where the special leave petition is dismissed by the Supreme Court ***[2018 (1) TMI 555-SC Order].*** The decision has read down the provisions of section 9(2)(g) of the DVAT Act and has held at para 53 *"In light of the above legal position, the Court hereby holds that the expression 'dealer or class of dealers' occurring in Section 9 (2) (g) of the DVAT Act should be interpreted as not including a purchasing dealer who has bona fide entered into purchase transactions with validly registered selling dealers who have issued tax invoices in accordance with Section 50 of the Act where there is no mismatch of the transactions in Annexures 2A and 2B.* ***Unless the expression 'dealer or class of dealers' in Section 9(2)(g) is 'read down' in the above manner, the entire provision would have to be held to be violative of Article 14 of the Constitution"***. The judgement clearly highlights the fact that the selling dealer who has violated the provisions of law should be penalized by invoking the recovery proceedings prescribed in law and the genuine buyer should be allowed input tax credit in the interest of fairness and justice.

**3. Input Tax credit with respect to tax paid under reverse charge : Whether time limit for availment of credit to be considered from the payment of tax?**

3.1. Section 16(2)(a) of the Act provides that *"no registered person shall be entitled to the credit of any input tax in respect of any supply of goods or services or both to him unless, (a) he is in possession of a tax invoice or debit note issued by a supplier registered under this Act,* ***or such other tax paying documents as may be prescribed;"***. Rule 36(1)(b) of the Rules prescribes *that* ***input tax credit shall be availed*** *by a registered person interalia* ***on the basis of an invoice*** *issued in accordance with the provisions of clause (f) of sub-section (3) of section 31 of the CGST Act,* ***<u>subject to the payment of tax</u>***. Further, clause

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(f) of sub-section (3) of section 31 of the Act provides that a registered person, who is liable to pay tax under sub-section (3) or sub-section (4) shall issue an invoice in respect of goods or services or both received by him from the supplier who is not registered on the date of receipt of goods or services or both. Accordingly, where the supplier is unregistered and recipient is registered, and the recipient is liable to pay tax on the said supply under reverse charge, **the recipient is required to issue an invoice as per section 31(3)(f) of the Act and pay the tax in cash and avail input tax credit**. Accordingly, in our view, input tax credit is allowable in case of tax paid under reverse charge on the basis of the self-invoice and the payment challan which together is a tax paying document for the purpose of availment of input tax credit.

3.2. The above view is also supported by **Circular No. 211/5/2024-GST dated 26th June, 2024** wherein it has been categorically clarified as under:-

*Accordingly, it is clarified that in cases of supplies received from unregistered suppliers, where tax has to be paid by the recipient under reverse charge mechanism (RCM) and where invoice is to be issued by the recipient of the supplies in accordance with section 31(3)(f) of the CGST Act,* ***the relevant financial year for calculation of time limit for availment of input tax credit*** *under the provisions of section 16(4) of the CGST Act* ***will be the financial year in which the invoice has been issued by the recipient under section 31(3)(f) of the CGST Act, subject to payment of tax on the said supply by the recipient*** *and fulfilment of other conditions and restrictions of section 16 and 17 of the CGST Act.*

Accordingly, credit is available on the basis of payment of tax supported with a self invoice. The Finance Act, 2024 prescribes a time line for issuance of a self-invoice, in our view, therefore any delay in issuance of the self-invoice will be subject to interest and penalty. However, merely a delay in issuance of a self - invoice should not hamper the availment of credit and the above Circular clarifying the position and intention of the legislature shall hold good.

### 4. Reversal of Input Tax Credit on wastage arising in the process of manufacture

4.1. The next notable issue is with respect to section 17(5)(h) of the Act dealing with blocked credit with respect to *"goods lost, stolen, destroyed, written off by way of gift or free samples"*. The issue considered is with respect to the normal loss arising in the course of manufacture of goods. Wastage arising in the process of manufacture is a normal loss arising in the manufacturing process and is inherent to the process of manufacture. The Madras High Court in the case of ***Rupa & Co. Ltd vs. CESTAT, Chennai [2015- TIOL-2125-HC-MAD-CX]*** holds at para 13

*"13. To say that what is contained in finished product is only a quantity of all the inputs of the same weight as that of the finished product would presuppose that all manufacturing processes would never have an inherent loss in the process of manufacture. The expression 'inputs of such finished product', 'contained in finished products' cannot be looked at theoretically with its semantics. It has to be understood in the context of what a manufacturing process is.*

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***If there is no dispute about the fact that every manufacturing process would automatically result in some kind of a loss such as evaporation, creation of by-products, etc., the total quantity of inputs that went into the making of the finished product represents the inputs of such products in entirety.'"*** *The court clearly holds that every manufacturing process results in loss of inputs which is inherent to the process and the same is not consciously lost.* Thus, all the inputs are considered to be used in the manufacturing of the final products in its entirety.

4.2. Reference is also made to the decision in the case of ***M/s ARS Steels and Alloy International Pvt. Ltd [2021-TIOL-1393-HC-MAD-GST]*** decided in the context of GST where the court clearly holds that the *"loss that is occasioned by the process of manufacture cannot be equated to any instances set out in clause (h). The situations as set out above in clause (h) indicate loss of inputs that are quantifiable and involve external factors or compulsions. A loss that is occasioned by consumption in the process of manufacture is one which is inherent to the manufacture itself"*. Thus, no reversal of input credit is required in the case of inputs lost in the process of manufacture.

**5. Input Service Distribution [ISD]: Centralised system of control and distribution of tax credit on services across multiple branches**

5.1. The concept of input service distribution has been passed through from the service tax regime to the GST regime. Since the inception of the provision in the GST regime there has been confusion and debate on the application of the said provision of law. As an alternate to distribution of credit through the ISD mechanism the route of cross charging to the branches located in different states was preferred by the companies so as to reduce the compliance cost, paper work and documentation. The cross-charging mechanism is also accepted as an option to the ISD system vide Circular No. 199/11/2023 dated 17th July, 2023 where it is clarified that the head office can issue a tax invoice on the branch offices in respect of any input services procured from the third party vendors instead of distribution of the credit. However, the 50th Council meeting recommended making ISD mechanism mandatory for distribution of credit on input services Notification 16/2024 – Central Tax dated August 06, 2024 has made registration as an ISD mandatory for distribution of common credit amongst multiple branches of the company w.e.f. 1st April, 2025.

5.2. Section 24 of the Act, requires an input service distributor to separately obtain registration as an ISD and issue a tax invoice as per Rule 54 for the purpose of distribution of credit. The tax invoice issued for the purpose of distribution should contain name, address and GSTIN of the ISD, serial number, name, address and GSTIN of the recipient to whom the credit is distributed, amount of credit distributed and the invoice should be signed. Also, common input services availed by branches having the same PAN, can transfer the credit to the ISD by issuance of tax invoice containing the various details of the invoice and the GSTIN of the ISD for the purpose of distribution of credit.

Similarly, the third - party vendors providing common services as a whole for the company should quote the GSTIN of the ISD at the time of issuance of tax invoice. Accordingly, with the compulsory implementation of the ISD mechanism, the vendor contracts need to be reviewed to provide the correct GSTIN of the ISD to ensure smooth distribution of credit. The businesses also need to ascertain the location which will be registered as the ISD, whether it is the head office or the administrative office or the branch office. Also, the expenses which needs to be distributed requires to be ascertained. Only after assessing the above details the same should be communicated to the vendors to ensure timely GST compliances.

5.3. Section 2(61) of the Act is amended to define the term "Input Service Distributor" as:

- an office of the supplier of goods or services or both
- receives tax invoices towards receipt of input services,
- including invoices in respect of services liable to tax under sub-section (3) or sub-section (4) of section 9 for and on behalf of distinct persons referred to in section 25 and
- liable to distribute the input tax credit in respect of such invoices in manner provided in section 20.

The definition of input service distributor has been expanded to provide that the ISD shall also receive invoices in respect of services liable to GST under reverse charge. Rule 39(1A) has been inserted in the Rules to specifically provide that RCM liability shall be first paid by a registered person having the same PAN and located in the same state as the ISD. Such person shall then issue an invoice as per Rule 54(1A) to transfer the input tax credit of the tax paid under reverse charge to the ISD. Subsequently, the ISD shall distribute the credit to the branch offices/distinct entities. It is pertinent to note here that ISD is a mechanism of distribution of credit, the same cannot be considered as the recipient of service to discharge taxes under reverse charge. Thus, the branch discharging the tax under reverse charge is required to issue an ISD invoice which then will be distributed amongst the branches to which the said service is attributable.

5.4. The procedure of distribution of credit has been provided in Rule 39 read with section 20 of the Act. The important points to note are as follows:-

(a) The input tax credit available for distribution in the month should be distributed in the same month and the details should be furnished in Form GSTR-6.

(b) The credit attributable to more than one recipient should be distributed on a pro-rata basis considering the turnover during the relevant period. Where, the credit is only attributable to a single recipient, the same should be directly distributed to the said recipient.

[Relevant period shall be the preceding financial year to which the credit is to be distributed and if the said turnover is not available the turnover of the last quarter to the month in which the credit is to be distributed should be considered]

(c) Eligible as well as Ineligible credit requires to be distributed on the above basis.

(d) The distribution should be as under:-

| *Credit Available with ISD* | *Recipient unit is located in the same state as ISD* | *Recipient unit is located in different state as ISD* |
|---|---|---|
| Central Tax | CGST | IGST |
| State Tax/ UT Tax | SGST/ UTHST | IGST |
| UT Tax | UTGST | IGST |
| Integrated Tax | IGST | IGST |

(e) Issuance of ISD Invoice/ISD credit note/ISD debit note with the details provided in Rule 54 discussed above.

(f) The distribution of ISD credit note is required to be done in the same ratio as the original invoice was distributed.

5.5. One of the most important aspect of the ISD distribution is the accurate determination of expenses to be distributed and the proportion in which the credit should be distributed. Maintaining proper records and documentation is essential to comply with the GST regulations. The requirement of distribution of the tax on credit note in the ratio of original invoice is also cumbersome. Any discrepancies or errors in the records may lead to disputes resulting in disallowance of credit and consequent interest and penalty. The ISD mechanism will increase the compliance cost manifold. The IT system needs to be robust for monitoring and controlling the credit on input services. Since ISD has now become mandatory, a proper planning and understanding of the legal and administrative aspects will result in accurate compliance with the law. Also, the concept of cross charge can continue with respect to common goods procured and with respect to services provided by the distinct entities themselves to their own units.

Input tax credit is a concession granted by the legislature which is available subject to satisfaction of the prescribed conditions. These conditions prescribed many times lead to absurdity and unreasonable conclusions thereby defeating the entire intent and purpose of the provision leading to injustice to the tax payers. The requirement such as matching of credits places businesses in a precarious situation where apart from the business credentials they are expected to determine whether the intentions of the suppliers are opportune or not. The procedures prescribed for compliance with the ISD mechanism are lengthy and will definitely affect the ease of doing business. The law makers therefore need to bring about the necessary amendments in the law in line with the interpretations recorded by the landmark judicial pronouncements to ensure development of a tax efficient and a transparent system.

### *Comments from Tax Head*

***Simachal Mohanty*** *– Head Global Taxation | Direct & Indirect Tax(GST)| Dr. Reddy's Laboratories*

The cornerstone of GST law is the seamless flow of GST Input Tax credit thereby eliminating the cascading impact of the tax in the system. The main conditions of availment GST Input tax credit as per Section 16 of CGST Act are the possession of tax invoice, receipt of goods/services and furnishing of invoice details in GST return by the supplier.

However, one of the disputes relating GST credit is that such credit is available to the recipient only upon the supplier making payment to GST department. In order to avoid these litigative situations, the recipients are incorporating specific clauses in contracts with the suppliers to ensure that the suppliers pay GST to Govt and file the tax return within due date so that such credit is duly reflected in GSTR 2A.

Another area of debate emerges around the cross charge of services vis-à-vis distribution of Input Tax Credit. The law has not provided abundant clarity about segregation of the instances between cross charge and ISD. A guiding principle can be adopted stating that where there is a service rendered by any unit or HO, then cross charge will come into picture. Where the invoice is received at HO in respect of services relating to multi-locations, then ISD principle come into play.

### *Comments from Tax Head*

***Rinku Nehra -*** *Sr Finance Manager, Honeywell International India Private Limited*

GST was implemented with the intention to improve the credit flow in the overall supply chain and reduce the leakage of credits. However, making the availability of credit to buyers subject to pre-conditions such as payment of tax by the seller and furnishing of returns has not only resulted in adverse cashflow implications for the businesses but has also increased the compliance burden on them. Given the level of digitalization envisaged under the GST regime, it was expected that the Government would be able to enforce compliance effectively but in the current state of affairs, it seems as if the task has been delegated to the taxpayers. The ISD structure initially found few takers as the requirements were complex and seemed impractical. With the provisions being made mandatory from 1 April 2025, it will further create confusion and increase litigation for the taxpayers. GST implementation was seen as a step into the future but it seems we have taken one step forward and two steps back!

HOT SPOT

# e-Dispute Resolution Scheme – Tread carefully

CA Nikhil Mutha

## 1. Introduction

The Central Board of Direct Taxes (CBDT), in its ongoing efforts to reduce litigation and address taxpayer grievances, introduced the e-Dispute Resolution Scheme (e-DRS), 2022. This Scheme is designed primarily for MSMEs and other small taxpayers, as it applies only to cases where the variation made or proposed by the Assessing Officer does not exceed ₹ 10 lakhs, and the assessee's total income for the relevant assessment year does not exceed ₹50 lakhs.

The scheme, established under Section 245MA of the Income Tax Act, 1961 (Act), aims to provide an alternative to traditional appellate mechanisms by constituting Dispute Resolution Committees (DRCs). The enactment of these provisions was followed by issuance of:

(a) Notification [G.S.R. 274(E) dated 5 April 2022 framing applicable Rules [Rule 44DAA to Rule 44DAD]

(b) Notification [S.O. 1642(E)] dated 5 April 2022 prescribing the procedure to be followed and notifying the Form [Form 34BC] in which application is to be made

The activation of the above-mentioned legal provisions was deferred, awaiting the formal establishment of the Dispute Resolution Committees. Recently, the CBDT issued a Press Release dated 30 August 2024 constituting 18 DRCs across jurisdictions/ regions head by Principal Chief Commissioner of Income-tax (Pr CCIT).

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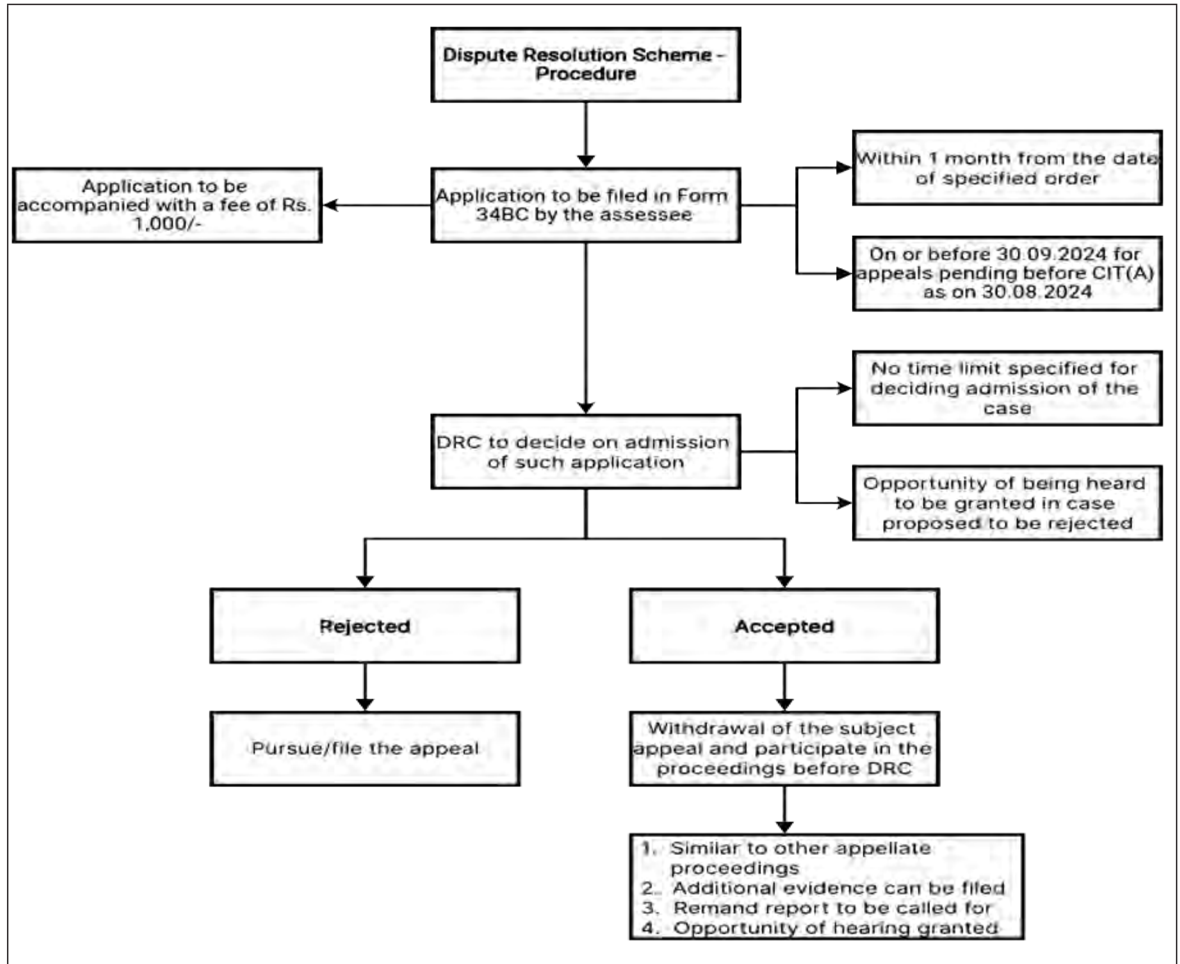
## 2. Procedure

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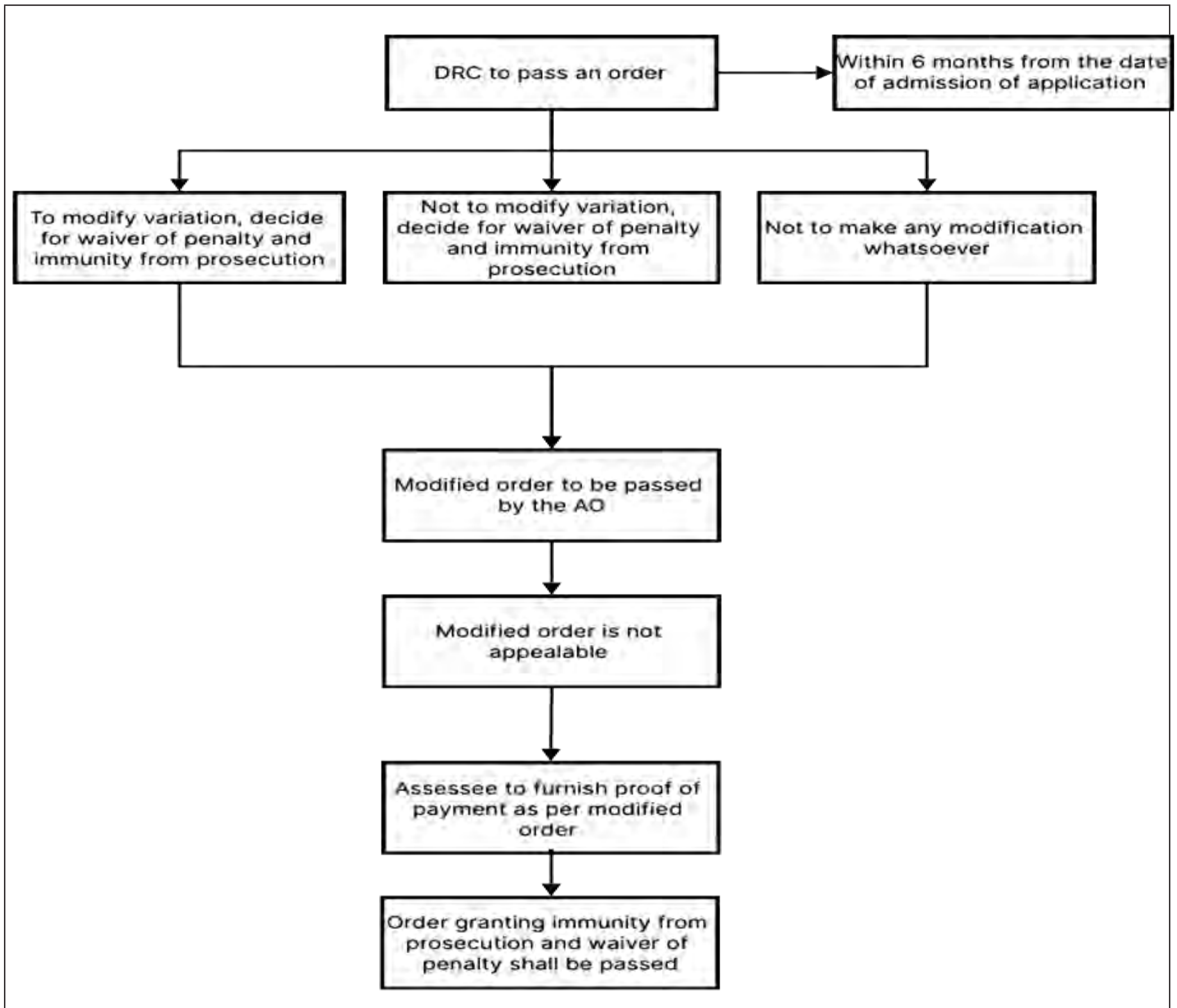


2.1 The procedure to be followed under the provisions of section 245MA is captured in a flow chart below:

2.2 **Certain key aspects of the procedure:**

a) The Dispute Resolution Committee (DRC) comprises three members: two retired IRS officers who have served as CIT or in an equivalent or higher rank for at least five years, and one serving officer of PCIT or CIT rank, as designated by the Board.

b) The application must be submitted in Form 34BC within one month of receiving the specified order, or by 30 September 2024 for pending appeals before the CIT(A).

c) The application must address all issues in the specified order; selective issues cannot be included under the Dispute Resolution Scheme.

d) All proceedings are conducted electronically, including the

submission of documents and attendance at hearings.

e) The procedure consists of two stages: (i) Screening/Admission and (ii) Adjudication. While a timeline is specified for the completion of the adjudication proceedings, no timeline is provided for the screening/admission stage, where the application is either accepted or rejected.

f) If the application is not admitted, the assessee may continue with the regular appeal process before the CIT(A) or DRP, with the time limit for filing an appeal extended by the duration taken by the DRC to decide on admission.

g) If the application is admitted, the assessee must withdraw any pending appeals before proceeding with the resolution process.

h) The resolution may not necessarily be favorable to the assessee. If the DRC denies relief, the assessee has no option to pursue the issue further through the regular appeal process, as the modified order issued by the Assessing Officer following the DRC's directions is not subject to appeal.

2.3 **Eligible Assessee**

The eligible assessee is the person who satisfy Specified conditions as per Explanation (a) to Section 245MA of the Act which provides for a negative list and excludes the assessee in respect of whom:

(a) An order of detention is passed under the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (52 of 1974); or

(b) Against whom prosecution proceedings has been initiated or he is convicted for offences punishable under the specified enactments [viz., the Indian Penal Code (45 of 1860), the Narcotic Drugs and Psychotropic Substances Act, 1985 (61 of 1985), the Unlawful Activities (Prevention), the Prohibition of Benami Transactions Act, 1988 (45 of 1988), the Prevention of Corruption Act, 1988 (49 of 1988) or the Prevention of Money-laundering Act, 2002 (15 of 2003)]; or

(c) Who is notified under section 3 of the Special Court (Trial of Offences Relating to Transactions in Securities) Act, 1992.

Additionally, the proceedings under the Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Act, 2015 (22 of 2015) should not have been initiated for the assessment year for which resolution of dispute is sought.

2.4 **Specified Order/ Categories of Order which can be made part of the Scheme:**

Specified Order means such order, including draft order, wherein the aggregate sum of variation proposed or made does not exceed an amount of INR 10 Lakhs and where return of income has been filed for relevant assessment year, the total income does not exceed an amount of INR 50 Lakhs. Also, such order shall not be an outcome of search/

requisition under section 132/ 132A of the Act or survey under section 133A of the Act or based on information received under an agreement under section 90/90A of the Act.

Further, only following categories of order is made part of the present scheme:

| Order assessing the total income under section: | | Order assessing the TDS/ TCS liability* | |
|---|---|---|---|
| a) | 143(3) – assessment order | a) | 200A(1)/ 206CB(1) – Intimation |
| b) | 147 – reassessment order | b) | 201/ 206C(6A) – Assessee in default |
| c) | 144C – draft order | | |
| d) | 143(1) – Intimation | | |
| e) | 154 – rectification order | | |
| * In case of Order assessing TDS/ TCS liability, the amount of variation shall refer to the amount on which tax has not been deducted or collected. | | | |

2.5 **Termination of the proceedings:**

The DRC has an authority to terminate the proceedings on following acts of the Assessee:

(a) Fails to co-operate;

(b) Fails to respond to the notices and fails to file the submissions;

(c) Conceals material particulars or produce false evidence;

(d) Fails to pay demand as per the modified order

If the proceedings are terminated as per the present construct of the scheme, the Assessee cannot revive the regular appeal mechanism, if the termination is post admission of the resolution but before adjudication.

2.6 **Exploring the intricacies – Key Insights and Nauances**

***a) Limited Scope of the Scheme***

The Scheme's applicability is notably constrained, as it is limited to cases where the total variation or adjustment in the assessment order does not exceed ₹ 10 lakhs and the total income as per the return does not exceed ₹ 50 lakhs. The number of cases falling within this narrow bracket is minimal and typically may not even attract scrutiny unless specific external information prompts the Department to initiate such proceedings. Conversely, under the provisions of the Act, proceedings under Section 148, after three years (and up to five years), are initiated only where the income escaping assessment exceeds ₹ 50 lakhs. When compared to the threshold prescribed for reassessment proceedings, the limit set under the e-Dispute Resolution Scheme (e-DRS) appears disproportionately low.

Typically, salaried individuals fall within this category, where their income is subject to the full rate of TDS, with an obligation on the employer to ensure appropriate claims for deductions or incentives. Additionally, for TDS/TCS appeals, the value of the underlying transaction, on which the default has

occurred, must be considered. This often results in a TDS demand ranging between ₹ 20,000 and ₹ 100,000, given that the applicable rate generally varies between 2% and 10%.

The inflationary pressures and the consequent diminishing value of money do not justify maintaining a threshold of ₹ 10 lakhs, as the resulting tax impact would be negligible. Moreover, this threshold would significantly restrict the number of cases eligible under the scheme, thereby reducing its overall efficacy.

Establishing an extensive apparatus for minor appeals may not be justifiable. Therefore, it is advisable that the provisions be extended to cover cases where the variation is up to ₹ 50 lakhs and the total income is up to ₹ 5 crores.

***b) Unfavourable Order Leaves the Assessee Without Recourse***

Under the current framework of the e-DRS, 2022, the assessee is required to navigate a two-step process: (i) admission and (ii) adjudication. If, for any reason, such as disqualification due to exclusions discussed earlier, the assessee's case is not admitted, they retain the option to pursue the matter through the standard appellate process.

However, once the case is admitted and the Dispute Resolution Committee (DRC) issues an unfavourable decision—providing no relief on the merits of the case, nor on penalties or prosecution—the assessee is left without any further recourse. This is because the modified order passed under e-DRS, 2022 is not subject to appeal. In such a scenario, the only remaining option for the assessee is to file a writ petition before the Jurisdictional High Court. Given that the Scheme is intended for small taxpayers, many may lack the resources or capacity to pursue such legal action.

This potential outcome could deter assessees from opting into the Scheme, as the risk of being left without a remedy may outweigh the perceived benefits. Therefore, it is crucial that objective guidelines be established to ensure that cases are considered favourably, not only in terms of granting waivers from penalties and prosecution but also in providing substantive relief on the merits of the case. This would help assuage concerns and encourage greater participation in the Scheme.

***c) Clarity on Conditions for Grant of Waiver from Penalty and Prosecution***

The Notification [S.O. 1642(E) dated 5 April 2022] outlines the procedure to be followed by Dispute Resolution Committees (DRCs) under the e-DRS Scheme. Specifically, Clause (6) of this notification governs the procedure for granting waivers from penalties and prosecution. According to this clause, such waivers can be granted in accordance with Rule 44DAC. Rule 44DAC(1) stipulates that DRCs may grant waivers from penalties or prosecution, subject to conditions they deem necessary, with these conditions and the reasons for imposing them being recorded in writing. Additionally, Rule 44DAC(3) provides that the immunity granted under Rule 44DAC(1) will be withdrawn if the assessee fails to comply with any of the conditions on which the immunity was granted.

The primary incentive for taxpayers to opt into the e-DRS Scheme is the immunity it offers from penalties and prosecution. This feature of the Scheme is designed to strike a balance between the Department's objective of collecting the base taxes and interest, and the taxpayer's interest in avoiding additional burdens such as penalties and prosecution. However, neither Rule 44DAC nor the e-DRS FAQs provide clear guidelines on the specific conditions under which this immunity or waiver from penalties and prosecution will be granted to the assessee.

This lack of clarity on such a crucial aspect of the Scheme can significantly diminish the incentive for taxpayers to participate. If taxpayers are uncertain about the conditions for receiving immunity, they may be reluctant to opt for the Scheme, thereby undermining its effectiveness. Therefore, it is essential that clear and detailed guidelines be issued, outlining the conditions under which immunity from penalties and prosecution will be granted. Such clarity would not only enhance the attractiveness of the Scheme for taxpayers but also ensure that the Scheme's objective of reducing litigation and providing relief is fully realized.

***d) Comparison between e-DRS Scheme and VSVS, 2024***

The Finance (No. 2) Act, 2024 introduced the Vivad Se Vishwas Scheme (VSVS), 2024, which bears similarities to the earlier VSVS of 2020. However, while both schemes (e-DRS and VSVS) aim to reduce litigation, they serve distinct purposes:

(i) **e-DRS Scheme:** This scheme primarily targets small and medium taxpayers, offering an efficient and transparent mechanism for resolving disputes arising from assessments and adjustments. It is designed as an ongoing effort to expedite dispute resolution for small taxpayers, providing them with a streamlined process.

(ii) **VSVS, 2024:** This scheme provides taxpayers with a one-time opportunity to settle their disputes by paying a specified amount, thereby reducing litigation and unlocking government revenue. VSVS, 2024 is intended to clear the backlog of litigation by offering certainty in tax obligations and a waiver of interest, penalties, and prosecution.

As of now, both schemes apply to appeals pending before the CIT(A) as of 22 July 2024. VSVS, 2024, however, offers broader coverage, including litigation at all levels, without any thresholds, and encompasses appeals related to disputed interest, penalties, or fees. It is particularly advantageous because it provides clarity on the tax amount to be paid and guarantees waivers of interest, penalties, and prosecution.

Given this, it is crucial for taxpayers to carefully evaluate the merits of their cases under the e-DRS Scheme before deciding whether to pursue an application under e-DRS or to file a declaration under VSVS, 2024. If the taxpayer has strong grounds for substantial relief on the merits, along with the benefits of penalty waivers and

immunity from prosecution, opting for e-DRS may be preferable. However, in cases where the relief under e-DRS is uncertain, VSVS, 2024 may offer a more secure alternative.

***e) No Automatic Stay of Demand***

The e-DRS, 2022 does not offer any relief from the recovery of demand during the pendency of proceedings before the Dispute Resolution Committees (DRCs). Consequently, taxpayers must continue to manage inquiries and pressure related to the collection of demand. Additionally, the possibility of adjusting any pending refunds under the provisions of Section 245 of the Act remains a significant concern.

It is advisable that the scheme be amended to include provisions for an automatic stay of demand during the DRC proceedings. Providing such relief would alleviate the undue burden on taxpayers, allowing them to focus on the resolution of their disputes without the immediate pressure of demand recovery or potential adjustments against pending refunds. This adjustment would enhance the efficacy and fairness of the scheme, ensuring that taxpayers are not prejudiced while their cases are being adjudicated.

***f) Need for Clarity on Admission of Cases for Non-Filers***

It is acknowledged that the e-DRS is primarily designed for small taxpayers. However, it is often observed that due to operational challenges and lack of proper guidance, many of these taxpayers fail to file their return of income, whether under Section 139(1) or even in response to a notice under Section 148 of the Act. In numerous instances, the Assessing Officer has proceeded to resolve matters on a best judgment basis, as the assessee was unable to respond to notices issued by the Faceless Wing due to various administrative reasons.

According to the current requirements, as clarified by the FAQs on the e-DRS Scheme and as per Form 34BC (refer to Q. No. 15), proof of payment of tax as per the return of income is necessary. If this requirement is strictly enforced, cases resolved on a best judgment basis may not qualify under the Scheme. It is important to note that Explanation (b) to Section 245MA, which defines a "specified order," states that when a return of income is filed, the threshold of ₹ 50 lakhs must be tested. This suggests that even if the assessee has not filed a return of income, they may still participate in the Scheme. However, the FAQs and the associated Form do not provide sufficient clarity on this matter.

To ensure inclusivity and fairness, it is advisable that the Scheme's guidelines be clarified to explicitly state the eligibility of cases where the return of income has not been filed. This is particularly important, as many appeals from small taxpayers involve instances where they have not filed their return of income, and clear guidance on their inclusion would significantly benefit this group.

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g) ***Exclusion of Certain Categories of Orders from the Scheme's Scope***

The e-DRS currently covers only orders passed under specified provisions that assess total income or ensure compliance with TDS/TCS requirements. However, the Scheme does not extend to orders related to penalties, interest, or fees. This limitation in scope excludes a significant category of cases that, from a coverage standpoint, should ideally be included under the Scheme.

In many instances, taxpayers, often due to a lack of proper guidance, may adopt erroneous tax positions, leading them to accept the assessment order without contesting it on merit. Subsequently, these taxpayers may find themselves subject to penalties, which are appealed independently of the original assessment order. If the e-DRS does not encompass penalty orders, these taxpayers may be deprived of the opportunity for relief under the Scheme.

Given the Scheme's objective to provide a comprehensive and efficient resolution mechanism for small taxpayers, it is advisable that its scope be expanded to include orders related to penalties, interest, and fees. Including these categories would ensure that taxpayers facing such orders are not left without recourse, thereby enhancing the Scheme's efficacy and aligning it more closely with its intended purpose of reducing litigation and providing holistic relief to small taxpayers.

**2.7 Conclusion**

The e-Dispute Resolution Scheme (e-DRS) presents a valuable opportunity for small taxpayers to resolve disputes efficiently while offering immunity from penalties and prosecution. However, the success of the Scheme depends on addressing several critical aspects:

The key attraction of the e-DRS lies in the immunity it offers against penalties and prosecution, significantly lightening the burden on taxpayers. However, the current framework lacks specific guidelines on the conditions under which these waivers will be granted, creating potential uncertainty.

Additionally, the Scheme currently excludes orders related to penalties, interest, and fees, which could undermine its ability to provide comprehensive relief to taxpayers. Expanding the Scheme's scope to cover these areas would ensure that a broader range of cases can benefit from the available relief.

Moreover, taxpayers may be left without adequate recourse if the Dispute Resolution Committee (DRC) issues an unfavorable decision, as the modified orders under e-DRS are not appealable, except through writ petitions. Introducing an appeal mechanism, wherein the same could be filed before the Tax Tribunal, would offer taxpayers additional avenues for redress in such situations.

To enhance confidence in the e-DRS, it is essential to issue detailed guidelines that clearly define the conditions under which immunity from penalties and prosecution will be granted. By addressing these recommendations, the e-DRS can evolve into a more attractive and effective tool for reducing litigation and providing meaningful relief to small taxpayers, thereby achieving its intended goals.

## The Dastur Essay Competition 2024

# Was the revocation of Article 370 of the Constitution of India justified and desirable?

Beauty Gupta

**Abstract**

*The revocation of Article 370 of the Indian Constitution on 5th August 2019 sparked debates on its justification and implications. This essay delves into an analysis of the justification of this step through a legal lens by exploring the historical context, procedural aspects, justifications provided by the Indian government and criticisms raised against the move. The essay navigates the implications of the move to assess whether the revocation was desirable or not.*

**Keywords**: Article 370; Constitution; historical; justification.

### Introduction

The revocation of Article 370 of the Indian Constitution on August 5, 2019, was a pivotal moment in the history of Jammu and Kashmir (J&K), originally introduced as a temporary provision in 1949, it granted J&K special powers, including a separate constitution, flag, and autonomy over internal administration except for defence, communications, and foreign affairs.[1] This article granted limited powers to the Parliament of India to enact laws in J&K, subject to consultation with the State Government.[2]

Additionally, Article 35A, added to J&K's constitution in 1954, conferred special rights and privileges to permanent residents regarding property ownership, employment, and education, while restricting non-permanent residents from these benefits.[3] The revocation of Article 370 and Article 35A have reshaped the legal landscape of J&K, leading to significant socio-economic implications.

As the debate surrounding the justification and desirability of these actions continues to unfold, this essay endeavours to analyze the legal framework underpinning the revocation of Article 370 and consider its implications on the region over past four years.

### History and Evolution of Article 370

The historical background of Article 370 originates from the aftermath of the Partition of India and Pakistan in 1947. Maharaja Hari Singh, the last ruling monarch of the princely state of J&K, was confronted with a crucial decision amidst Pakistan's invasion, ultimately

1. A K Ganguly, Kashmir Face Off' India's Quandary: Options for India (OUP 2021, VIJ Books (India) Pvt Limited).
2. Ibid.
3. Krishnadas Rajagopal, 'What is Article 35A' The Hindu (August 26, 2017) < https://www.thehindu.com/news/national/what- is-article-35a/article19567213.ece> accessed on 17 March 2024.

opting to accede to India under specific terms concerning defence, foreign affairs, and communications.[4] This accession was formalized through an Instrument of Accession (IoA) that was aimed to safeguard the state's sovereignty in delineated areas.[5]

The genesis of Article 370 can be traced back to discussions within the Constituent Assembly, where it was recognized that the situation in J&K was unique, given ongoing conflicts and unrest at that time.[6] As a temporary measure, Article 370 was devised to establish an interim system of governance until a permanent solution could be reached. This Article reflected the principle that the extent of J&K's integration with India would be determined by its Constituent Assembly.

With the passage of time, several amendments and orders were implemented to adapt the Indian Constitution J&K. The Constitution (Application to J&K) Order, 1950, along with subsequent orders, specified which subjects and articles of the Indian Constitution would apply to J&K.[7] These measures aimed to balance the integration of J&K into the Indian Union while preserving its unique identity and autonomy.

However, the 'dissolution of the J&K Constituent Assembly in 1957'[8] left Article 370 ambiguous, lacking a clear mechanism for modification or repeal, despite its initial temporary intent.

## PART-A

## Analysis of the justification behind the revocation of Article 370

### I. Legal and Constitutional Aspects:

#### a. *Procedure laid down in the Indian Constitution to revoke Article 370*

The procedure to revoke Article 370 is laid down in Article 370(3) of the Indian Constitution as per which the President holds the authority to declare the cessation of operation of this article or its operation with specific exceptions and modifications, and from a specified date. However, it is important to note that such a notification from the President requires the recommendation of the Constituent Assembly of the State. Thus, even though the procedure for removal of Article 370 is laid down, it could not be materialized due to the non-existence of Article 370.

#### b. *Procedure followed in the revocation of Article 370*

In 2015, the political landscape of J&K underwent a significant shift when the BJP formed a government in coalition with the PDP. However, this alliance fractured in the year 2018, leaving a power vacuum as no party could establish a stable government.[9] The Constitution of J&K stipulates that if the

4. Vaibhav Goel Bhartiya and Shivani Sharma, 'Anatomy of Article 370 and 35A: Tracing the Past to the Present' [2020] CPJLJ 13.
5. Ibid.
6. Ibid.
7. S.P. Jagota, 'Development of Constitutional Relations between J&K and India 1950-50' [1960] Journal of the Indian Law Institute 519.
8. Supra 4.
9. Ekta Handa, 'BJP-PDP Split' India Today (19 June 2018) < https://www.indiatoday.in/india/story/bjp-pdp-split-j-k-governor- forwards-report-to-president-all-you-need-to-know-1264595-2018-06-19> accessed on 22 March 2024.

state's constitutional machinery fails, the Governor's rule with the consent of the president can be imposed for a maximum of six months.[10]

Consequently, from June to December 2018, the Governor's rule was in effect. Then, from December 2018 onward, the President's rule was enforced through a notification which designated the Governor to oversee J&K administration on behalf of the President.[11] During the President's rule, the Governor assumes a pivotal role effectively acting as the de facto leader of J&K akin to a Prime Minister. The notification also stated that in the absence of any government or Vidhan Sabha in J&K, the Indian Parliament will act on its behalf.[12] In a nutshell, during the president's rule, the governor was the sole representative of J&K and the legislative assembly of J&K was subordinated by the Indian Parliament. Consequently, the central government faced minimal hindrances in enacting and implementing laws in the region.

The culmination of this transition occurred on August 5, 2019, when President Ram Nath Kovind issued the Constitution (Application to J&K) Order 2019, with the consent of the J&K Government, represented by the Governor.[13] This order, replacing the 1954 Presidential Order, introduced significant amendments, including the insertion of Article 367(4).[14]

Of particular importance was Article 367(4)(d), which effectively amended Article 370 by substituting the reference to the 'Constituent Assembly of the State' with the 'Legislative Assembly of the State'.[15] Consequently, the erstwhile order of 1954, along with Article 35A and the unique Constitution of J&K, ceased to exist through the 2019 Presidential Order.[16]

Following the issuance of the 2019 Presidential Order, the Home Minister introduced two resolutions. The first rendered Article 370 inoperative, fundamentally altering J&K's constitutional status.[17] The second resolution proposed the Reorganisation Bill of J&K, which led to the division of the region into two separate Union Territories that is Ladakh and J&K, thus completing the overhaul of the region's governance structure.[18]

10. Constitution of J&K 1956, article 92.
11. MANU/HOME/0163/2018 < https://updates.manupatra.com/roundup/contentsummary.aspx?iid=18407> accessed on 23 March 2024.
12. Ibid.
13. 'Article 370 'Scrapped': Full Text of President's Order' The Indian Express (5 August 2019) < https://indianexpress.com/article/india/article-370-jammu-and-kashmir-removal-full-text-of-presidents-order-5879178/> accessed on 19 March 2024.
14. Ibid.
15. Press Information Bureau, MHA, GOI < https://pib.gov.in/pressreleaseshare.aspx?prid=1581391> accessed on 20 March 2024.
16. Ibid.
17. Press Information Bureau, 'Government Brings Resolution to Repeal Article 370 of the Constitution' (MHA, GOI, 5 August 2019 < https://pib.gov.in/newsite/PrintRelease.aspx?relid=192487> accessed on 20 March 2024.
18. Ibid.

### I. Justifications cited by the Indian government for the revocation of Article 370

The Indian government justified the revocation of Article 370 based on several factors and legal interpretations. Firstly, it argued that Article 370 was intended as an interim provision, established during wartime conditions in the state, and thus deemed temporary. Moreover, it contended that the President's authority under Article 370(3) was unrestrained by constitutional provisions. By replacing 'Constituent Assembly' with 'Legislative Assembly', the aim was to democratize decision-making processes.[19]

Furthermore, the Union government justified the revocation as a step toward promoting national unity and equality. It asserted that special privileges to J&K residents through Articles 370 and 35A impeded the goal of ensuring equal status among all Indian citizens.[20] The removal of Article 35A was deemed necessary as it violated Fundamental Rights and denied Kashmiri women the right to property upon marrying individuals from other states.

### II. Justifications cited by Critics against the revocation of Article 370

Critics of the abrogation of Article 370 have raised several compelling arguments against the decision. Firstly, they argue that Article 370 had gained permanence following the dissolution of the Constituent Assembly of J&K, requiring specific conditions for its abrogation as stipulated in Article 370(3).

Secondly, critics highlight J&K's internal sovereignty, as articulated in the IoA, which emphasized that the IoA was not any symbol of acceptance of "any future Constitution of India"[21] (Para 7 of IoA) and reiterated the preservation of the Maharaja's sovereignty (Para 8 of IoA).

Thirdly, critics contended that while exercising authority under Article 356 of the Indian Constitution, the President should refrain from implementing actions with irreversible consequences in a state under the President's rule. They highlighted the legislative changes made during this period, such as the revocation of J&K's special status, the division of Ladakh, and its conversion into a union territory. This unilateral decision-making raised concerns about the erosion of state autonomy and the weakening of India's federal structure.[22]

Moreover, critics argue procedural objections, particularly the failure to consult the Constituent Assembly of J&K, as mandated by Article 370(3). This disregard for established constitutional procedures casts doubt on the adherence to constitutional principles.

19. 'Government's rationale behind removal of special status to J&K' The Hindu (5 August 2019) < https://www.thehindu.com/news/national/full-text-of-document-on-govts-rationale-behind-removal-of-special-status-to- jk/article28821368.ece> accessed on 21 March 2024.
20. Ibid.
21. Venkatesh Nayak, 'The Backstory of Article 370: A True copy of J&K's IoA' Indian Express (5 August 2019) < https://thewire.in/history/public-first-time-jammu-kashmirs-instrument-accession-india> accessed on 24 March 2024.
22. Alok Prasanna, 'With Article 370 Verdict, SC has let down federalism' Indian Express (13 December 2023) < https://indianexpress.com/article/opinion/columns/with-article-370-verdict-sc-has-let-down-federalism-9065637/> accessed on 27 March 2024.

Furthermore, critics highlight the lack of meaningful consultation with stakeholders, including the people of J&K, undermining the democratic process and disregarding the voices of those most directly impacted. They argue that the revocation infringes upon the right to self- determination of the people of Kashmir, denying them the opportunity to express their political will democratically.[23]

**III. Whether the move was justified?**

The Constitutional Bench of the Supreme Court in its judgment upheld the validity of the revocation of Article 370.[24] The legal justification provided by the Supreme Court is mentioned below.

***(i) Article 370 was a temporary provision.***

The Supreme Court determined that Article 370 was designed to be a temporary measure for two main reasons. Initially, it aimed to facilitate the integration of J&K into the Union of India, particularly during the turbulent situation prevailing in the state in 1947. Additionally, it served as a transitional measure to facilitate the establishment of a constituent Assembly in J&K tasked with drafting the state constitution. The court highlighted its placement in part XXI of the constitution, titled "Temporary, Transitional and Special Provisions," indicating the intention of the constitution framers.

***(ii) J&K did not retain the sovereignty.***

The critic contended that J&K possessed internal sovereignty primarily citing paragraphs 7 and 8 of the IoA. However, the court ruled that the effect of these paragraphs ceased following a proclamation issued by Yuvraj Karan Singh (son of Hari Singh). This proclamation declared that the Indian Constitution would govern the relationship between J&K and the Union, effectively resulting in a 'merger' akin to other princely states. Additionally, the proclamation stated that the provisions of the Indian Constitution would supersede the constitutional provisions of J&K inconsistent with it that were then in force in the state.

Furthermore, the Supreme Court pointed out that Article 1 of the Indian Constitution explicitly establishes India, or Bharat, as a union of states, implying that J&K, as a state at that time, was a part of the union. The preamble and Section 3 of the Constitution of J&K affirm that J&K is an integral part of India and lacks any form of sovereignty. The court emphasized that every state of India possesses internal autonomy, and the elevated autonomy enjoyed by J&K does not imply a distinct form of sovereignty.

***(iii) Constitutional validity of proclamations issued under Article 356 of the Indian Constitution with irreversible consequences.***

The Court rejected the petitioner's argument that the President should abstain from implementing actions with irreversible consequences in a state

23. Srishti Jain and Nikhil Mishra, 'Violation of Right to Self-determination and Constitutional Mandate in context of Removal of Article 370' [2020] JCLJ 205.

24. 2023 SCC OnLine SC 1647.

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under the President's rule. It argued that challenging the exercise of presidential power based on irreversibility could lead to obstructing routine administrative actions, causing administrative paralysis in the state. However, the Court emphasized that such exercises must be reasonably connected to the objective of the presidential proclamation. It also stressed that the burden of proof rested on the person challenging the President's actions to demonstrate *prima facie* that they were carried out in a "*mala-fide* or extraneous exercise of power".

Reliance was placed on ***S.R. Bommai v. Union of India***[25], where it was established that the removal of the government is an inevitable consequence of imposing the President's Rule, aiming to prevent simultaneous governance by the Union and state governments. This dilutes the federal structure since the Union assumes the executive and legislative powers of the State. Considering the purpose of Article 356, which is to restore the functioning of the constitutional machinery in the state, actions taken by the President during the proclamation should align with this objective.

The court also determined that the president under Article 370(3) of the Constitution, can unilaterally declare the cessation of Article 370 as mandated by Article 370(1)(d) and does not need concurrence of state.

***(iv) President still has the power to abrogate article 370 even after the dissolution of the J&K Constituent Assembly***

The court determined that the president possesses the unilateral authority to revoke Article 370 under Article 370(3). Failure to exercise this unilateral power, particularly after the dissolution of the Constituent Assembly, would result in the stagnation of integration, contradicting the intent behind introducing the provision. While the dissolution of the Constituent Assembly extinguished its authority to make recommendations regarding the status of Article 370, it did not diminish the president's power under Article 370(3).

***(v) Article 370 can be amended through the interpretation clause of Article 367.***

On August 5, 2019, the Presidential Order (CO 272) was issued, amending the reference from the 'Constituent Assembly' to the 'Legislative Assembly' in Article 370(3). The court found this amendment to be unconstitutional, as any alteration to Article 370 should adhere to the specific procedure outlined in Article 368 (Procedure for the amendment of the constitution) rather than modifying an interpretation clause. However, notwithstanding this, the Court deemed the remainder of the paragraph of CO 272, which permitted the amendment of Article 370 without the recommendation of the Constituent Assembly, as valid. This was because

25. [1994] 3 SCC 1.

the President had the authority, under Article 370(1)(d), to apply the entire Indian Constitution to J&K, similar to the power under Article 370(3).

Regarding CO 273, which declared the cessation of Article 370's operation, the court emphasized that the President's decision was a policy matter falling within the executive's realm. The application of the entire Indian Constitution to J&K through CO 273 was viewed as a step towards its complete integration into India, reflecting a non-malicious intention behind CO 273 and thus, its validity was upheld.

**Concerns raised over Supreme Court Judgment**

Upholding the legal validity of the revocation of Article 370, the Supreme Court verdict raises the below-mentioned concerns.

Firstly, there's apprehension regarding the interpretation of "statehood" under the Constitution, particularly concerning whether the Union possesses the unilateral authority to extinguish a state's status without due consultation or adherence to federal principles. The Court's reluctance to address this pivotal question raises doubts about the sanctity of federalism within India's constitutional framework.

Moreover, the court's categorization of Article 370 as "temporary" differs from other provisions like Article 371-A to Article 371-J, which are seen as protecting asymmetrical federalism. Thus, the verdict undermines the idea of asymmetrical federalism.

Secondly, the judgment raises concerns about the democratic process and whether the people of a state have the authority to say how they are governed. The court's framing of the issue as a mere procedural matter undermines the principle of consultation with the state legislature and the representation of the people's interests.

Overall, the unilateral abrogation of Article 370 is viewed as a challenge to core constitutional tenets such as federalism and democracy.

**PART-B**

***Assessing the Desirability of the Revocation of Article 370***

The revocation of Article 370 was seen by some as a groundbreaking move, while others perceived it as discriminatory and authoritarian, potentially disturbing peace not only in Kashmir but also across the entire country. Now four years have passed, and the effects of the revocation of Article 370 are becoming evident.

**Security Implications**

As per 2023 data from the government, the terror-related incidents have reduced drastically from 228 in 2018 to 44 in 2023 (up to 15th December 2023).[26] The official figures also reveal that there have been zero incidents of Organized stone Pelting stones and Organized Hartals in 2023.[27] Schools are now functioning without interruptions caused by hartal calls, and the fear of stone-pelting has diminished, contributing to a decrease

26 MHA, 'Ministry of Home Affairs: Year End Review 2023' (31 December 2023) < https://pib.gov.in/PressReleasePage.aspx?PRID=1991936> accessed on 28 March 2024.

27. Ibid.

in mob violence. Another significant change is the decline in the influence of separatist leaders, who previously relied on shutdown calls and protests to assert their agenda.

The improvement in the security situation can be gauged from the fact that the Cinema Hall reopened after more than 30 years.[28] The number of tourist inflow has increased substantially.[29] Diwali was celebrated at Shrada Temple after 75 years. Muharram Procession returned to Kashmir streets after 34 years.[30] Moreover, the G20 Tourism Summit was also successfully held in Srinagar.

**Administrative changes**

After the revocation of Article 370 and the reorganization of J&K, both J&K and Ladakh became integrated with mainstream India. This integration allowed the people of J&K to access the benefits and welfare schemes of the central government and all the fundamental rights. Previously, any law or scheme proposed by the central government had to pass through the J&K State Assembly and sometimes political dynamics deprived the people of J&K of these benefits. For instance, the Right to Education Act 2009 and the RTI Act of 2005 were not implemented in J&K, and certain marginalized communities like Gujjars, Bakarwals, and Gaddis couldn't benefit from specific laws such as the ST & Other Traditional Forest Dwellers Act 2006 and the SC & ST (Prevention of Atrocities) Act.

To further strengthen the democratic spirit in J&K, elections were conducted for Panchayati Raj Institutions like Panch, Block Development Council, and District Division Council. Amendments introduced by the Home Ministry aimed to enhance the existing Panchayati Raj System, aligning with the principles of Sarvodaya advocated by Mahatma Gandhi and establishing a robust three-tiered grassroots democracy.[31]

In another step, the J&K cadre for All India Services was amalgamated with the existing cadre of Arunachal Pradesh, Goa, Mizoram, and Union Territories (AGMUT). This move aimed to streamline administrative efficiency and foster uniformity within the civil services.

The introduction of domicile laws in J&K signified a significant change in residency and recruitment regulations. The new domicile laws make it easier for non-residents to obtain domicile status. This change required individuals to have resided in J&K for fifteen years or completed seven years of education in the region and this aimed to diversify the demographic makeup.

Furthermore, amendments to land laws brought notable changes in land ownership regulations in J&K. Previous laws protecting land holdings exclusively for permanent residents were repealed, allowing individuals and entities from outside the region to invest in land. However, these changes

28. 'Almost after 30 years of forced closure, J&K gets Cinema Halls' The TOI (19 Sep 2022) < https://timesofindia.indiatimes.com/city/srinagar/after-almost-30-years-of-forced-closure-jk-gets-cinema- halls/articleshow/94291546.cms> accessed on 30 March 2024.
29. Arya S., 'Right to Self Determination: An analysis of the Unresolved Conflict within the context of Article 370' [2023] JCLJ 234.
30. Peerzada, 'Muharram Procession' The Hindu < https://www.thehindu.com/news/national/other-states/shia-community- takes-out-muharram-procession-after-3-decades-on-gurubazaar-dalgate-route-in-srinagar/article67126307.ece> accessed on 30 March 2024.
31. Jehangir Ali, 'As Panchayat Terms End, J&K's only elected institution is DDC' The Wire (10 Jan 2024) <https://thewire.in/government/jammu-and-kashmir-elected-representatives-panchayat> accessed on 30 March 2024.

raised concerns among locals about potential demographic shifts and loss of control over land resources, sparking debates about the preservation of cultural identity and socio-economic interests amidst evolving land ownership dynamics.

**Economic Changes**

The special status of J&K previously prevented citizens from outside the state from purchasing property, which hindered financial investment in the region. Consequently, the growth of businesses and industries stagnated, leading to a lack of job opportunities or unemployment and hindering the growth of the youth and the state itself. Unemployment has also been seen in some way or another with terrorism and militancy spread in the valley.

To address the economic disparities and promote investment in the Kashmir valley, both the Central and State Governments have introduced various packages and schemes. The administration of J&K implemented a 'New Industrial Development Policy' with a package worth ₹ 28,400 Crore, valid until 2037, along with policies for private industrial estate development and industrial land allotment.

Since the abrogation of Article 370 and the introduction of the 'New Industrial Development Policy', J&K has witnessed a significant increase in investment proposals, totalling ₹ 81,222 crores in 2021-23 as per Lieutenant Governor of J&K Manoj Sinha.[32] However, the actualization of these proposals has been relatively slow.

In a bid to further augment foreign investment, the J&K administration released a Foreign Direct Investment Policy in February 2022. The region secured its first significant foreign direct investment from UAE's Emaar, with plans for a mega-mall and IT towers in Jammu and Srinagar. Besides the rise in tourism is contributing substantially to the economy of J&K.

Despite these advancements, economic challenges persist, evidenced by higher inflation rates compared to the national average.

**Social Change**

The government of J&K undertook significant initiatives to bring about social change in the region. The government established AIIMS Jammu in 2020 and another AIIMS to be established at Awantipora in Kashmir.[33] Eight new medical colleges, two cancer institutes (state-run), and 3,000 health and wellness centres have been set up. Additionally, universal health insurance was introduced under the PMJAY-SEHAT Scheme for all families.

A 1990 report stated that since the 1990s, security concerns have forced 44,167 Kashmiri migrant families to leave the valley. According to a government written statement from March 2022, a total of 3,841 young Kashmiri migrants have returned to their home region in recent years and have found work in several districts under the Prime Minister's Rehabilitation Package.[34] Additionally, the government

32. Deeptiman, 'In 3 Years J&K got 84,544 cr' The Indian Express (12 Dec 2023) < https://indianexpress.com/article/political- pulse/jammu-kashmir-investments-after-article-370-abrogation-9063291/> accessed on 30 March 2024.
33. 'Two AIIMS like institutions, 8 Medical colleges in J&K, Ladakh' Indian Express (10 Dec 2019) < https://indianexpress.com/article/education/two-aiims-like-institutions-8-medical-colleges-in-jammu-kashmir-ladakh-govt- 6159847/> accessed on 30 March 2024.
34 Ministry of Home Affairs, 'Rajya Sabha Unstarred Questions No. 2425' (17 March 2021) < https://www.mha.gov.in/MHA1/Par2017/pdfs/par2021-pdfs/rs-17032021/2425.pdf> accessed on 30 March 2024.

announced that 1,997 candidates were selected for jobs under the same package in April 2021. It further mentioned providing residential accommodation to the returning migrants in Kashmir.

The region has also witnessed substantial infrastructure development, including the construction of the world's highest railway bridge over the Chenab River and the Qazigund- Banihal Tunnel, which has halved travel time from Jammu to Srinagar. Under the Swachh Bharat Mission (Grameen) Phase-II J&K's villages have achieved 100% ODF Plus status.[35]

Furthermore, work on the Zojila Tunnel (the longest tunnel in Asia), is progressing rapidly, with over 35% of the main tunnel's construction completed. This tunnel will ensure all-weather connectivity between Kashmir and Ladakh and is expected to be completed by 2026. Notably, J&K improved its ranking in the Pradhan Mantri Gram Sadak Yojna (PMGSY), achieving the third rank in 2020-21 from the ninth position in 2016-17.

***Ladakh***

Ladakh is not only important from a strategic point of view because of its border with China and Pakistan-Occupied Kashmir but it also has the importance of the tourism sector and different culture.

The most important thing for the inclusive development of Ladakh was infrastructure development and development of its inter-regional and intra-regional connectivity. Ladakh has now been connected to the National Grid to ensure reliable and quality power supply to the region. This step eliminates the dependence of Ladakh on diesel-powered generators. The remote village of Ladakh is being connected with solar-powered optical fibres to bring the internet there.[36]

To promote research and education, the government has established the first Central University in Ladakh in which the Centre on Buddhist Studies has also been opened.

Amchi Tibetan Medicine has been an integral part of Ladakh's traditional Health System for several 1000 years. To promote it, not only the Indian and Local Governments but also International Organizations are making efforts. In this direction, the National Research Institute for Sowa-Rigpa has been opened for the research of traditional medicines.[37]

**Concerns have emerged regarding the negative developments following the revocation of Article 370**

Critics argue that the move has fueled anti-India sentiments and led to a resurgence in terrorist activities, resulting in increased targeting of civilians. However, it's worth noting that insurgency typically requires local support to sustain.

The revocation also had significant implications for gender dynamics, particularly affecting Muslim women in Kashmir. They experienced heightened tensions and restricted movements due to the heavy military presence and security measures in the region.[38]

35 Ministry of Jal Shakti, 'J&K achieves 100% ODF Plus Model Status' (30 Sep 2023) < https://pib.gov.in/PressReleaseIframePage.aspx?PRID=1962394> accessed on 31 March 2024

36. Ministry of Communication, 'TRAI releases recommendation on improving Telecom Coverage and Backhaul Infrastructure in Ladakh' (25 April 2023) <https://pib.gov.in/PressReleaseIframePage.aspx?PRID=1919494> accessed on 31 March 2024

37. < https://pib.gov.in/PressReleaseIframePage.aspx?PRID=1857836> accessed on 31 March 2024.

38. Seema Kazi, 'Women, gender Politics and Resistance in Kashmir' [2022] Socio-legal Rev. 95.

The establishment of the State Investigation Agency (SIA) aimed to enhance counter-terrorism efforts but raised concerns about misuse of power and violations of civil liberties. Additionally, stringent laws like the Public Safety Act and UAPA are being enforced more rigorously, leading to arrests even for minor offences.

These changes have had significant social implications, resulting in divisions among ethnic and regional groups and weakening the sense of a unified Kashmiri identity. Conflict between Kashmiri Muslims and Hindu nationalists in Jammu, as well as feelings of marginalization among Ladakhi Muslims, have exacerbated tensions. Increased military presence and security measures have further restricted freedoms.

## Conclusion

While debates persist over the implications of centralization and the suppression of voices in Kashmir, the true measure of progress lies in the restoration of peace and stability. Development is not a fixed destination but an ongoing journey that requires us to move forward with integrity, empathy, and a commitment to justice. Only by fostering dialogue, inclusivity, and respect we can pave the way for a future where the diverse voices of J&K find expression, and the region flourishes in unity and prosperity.

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# DIRECT TAXES
## Supreme Court

Keshav B. Bhujle
Advocate

**1** ***Principal CIT vs. Adadyn Technologies Pvt. Ltd.; [2024] 465 ITR 49 (SC): Dated 13/05/2024:***

**Business expenditure — Capital or revenue expenditure — Expenditure incurred on developing software for advertisement — Due to rapid change in technology, application to be developed becoming obsolete and assessee abandoning product — High Court holding assessee in effect incurring loss and not getting any enduring benefit — Expenditure revenue and allowable — Supreme Court dismissed special leave petition filed by the Revenue: S. 37 of ITA 1961: A. Ys. 2015-16, 2016-17**

For the A. Ys. 2015-16 and 2016-17, the Assessing Officer treated the expenditure incurred by the assessee for development of a software platform for desktop computers for advertisement services as capital expenditure on the ground that it would have given the assessee enduring benefits.

The Tribunal allowed the appeal and held that the expenditure was revenue and not capital in nature.

The Karnataka High Court upheld the decision of the Tribunal and held as under:

"i) The assessee's investment to develop a software platform for desktops had become obsolete due to rapid change in the technology and the assessee had abandoned further development as a result of which it had abandoned the product and incurred a loss. The project having been abandoned, the assessee would not get any enduring benefit.

ii) The Tribunal, on a correct analysis of the facts, had held that the expenditure was revenue and not capital in nature. There was no ground to interfere with the findings recorded by the Tribunal."

(see ***Principle CIT vs. Adadyn Technologies Pvt. Ltd. [2024] 465 ITR 353 (Karn)).***

The Supreme Court dismissed the petition for special leave to appeal filed by the Revenue and held as under:

"i) Delay condoned.

ii) Heard the learned counsel appearing for the petitioners.

iii) We are not inclined to interfere with the impugned judgment and order passed by the High Court. Hence, the special leave petition is dismissed."

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**2** ***Gujarat Urja Vikas Nigam Ltd. vs. CIT(Exemption); [2024] 465 ITR 798 (SC): Dated 12/09/2012:***

**Business expenditure — Deduction only on actual payment — Electricity company — Electricity duty on sale of power payable to Government adjusted against sums due to assessee from Government — Assessee entitled to deduction — But must produce certificate from Chartered Accountant to establish adjustment made within time as claimed: S. 43B of ITA 1961: A. Y. 1990-91**

The assessee was an electricity company. For the A. Y. 1990-91, the Assessing Officer disallowed u/s. 43B of the Income-tax Act, 1961, the electricity duty payable to the State Government by the assessee on sale of electric power, rejecting the assessee's contention that the electricity duty payable had been adjusted against other amounts receivable from the Government and holding that there was no proof of such adjustment having been made within the stipulated period.

The Tribunal held in favour of the assessee.

The High Court on a reference answered the question of law in favour of the Department following ***CIT vs. Ahmedabad Electricity Co. Ltd. [2003] 262 ITR 97 (Guj***).

The Supreme Court allowed the assesses appeal and held as under:

"i) In this case, there is no dispute that the assessee is entitled to the benefit of section 43B of the Income-tax Act, 1961.

ii) The narrow controversy which arises in this case is that the assessee has not produced the certificate of a Chartered Accountant, as defined in the Explanation to section 288 of the Act. The fact remains that, till today, such certificate has not been produced. In the context of section 43B of the Act, apart from entitlement, the assessee was duty bound to produce the certificate showing the proof of payment which the assessee claims by way of adjustment on August 21, 1990.

iii) In the above circumstances, we direct the assessee to produce the certificate before the Assessing Officer within a period of four weeks. The Assessing Officer will take the certificate on record and decide the matter in accordance with law."

**3** ***Principal CIT vs. Kuntala Mohapatra; [2024] 466 ITR 50 (SC): Dated 04/03/2024:***

**Undisclosed investments — Additions made on basis of statements of entry operators recorded in other proceedings much before survey at assessee's premises — Assessee not given opportunity to cross-examine operators — Tribunal affirming order of Commissioner (appeals) deleting additions — High Court affirming — Supreme Court dismissed special leave petition filed by the Revenue: Ss. 10(38), 68, 69, 131(1) and 133A of ITA 1961: A. Y. 2014-15**

Pursuant to a survey u/s. 133A of the Income-tax Act, 1961, during the course of scrutiny assessment u/s. 143(3), or the A. Y. 2014-15. a revised return was filed by the assessee claiming exemption u/s. 10(38). The Assessing Officer rejected the claim.

The Commissioner (Appeals) was satisfied that the purchase of liquid shares was made through account payee cheques and the shares

themselves were held in a dematerialised account for more than twelve months and then sold through a recognized stock exchange after payment of securities transaction tax and held that if an assessee had wrongly offered an item of income or omitted to make a claim of deduction in the return of income that he was entitled to correct such a mistake by making a request to the Assessing Officer to that effect. The Tribunal held that reliance was placed on the statement of the "so-called entry operator" to justify the additions u/s. 68 and 69, that these statements were recorded on various dates in some other proceedings not connected with the assessee much before the date of the survey conducted on the assessee and that the assessee did not have an opportunity to challenge such statements and no opportunity to cross-examine the so-called entry providers was given to the assessee.

The Orissa High Court upheld the decision of the Tribunal and held as under:

"i) The claim for deduction u/s. 10(38) and the denial of an opportunity to cross-examine the entry provider whose statement was recorded were based on facts. The Tribunal was justified in accepting the plea of the assessee that the failure to adhere to the principles of natural justice went to the root of the matter. Also, the CBDT circular that permitted the assessee to file revised returns u/s. 139(4) if he had omitted to make a claim was also not considered by the Assessing Officer.

ii) The Tribunal committed no error in concurring with the view of the Commissioner (Appeals)."

(See ***Principal CIT v. Kuntala Mohapatra [2024] 466 ITR 47 (Orissa)).***

The Supreme Court dismissed the petition for special leave to appeal filed by the Revenue and held as under:

"i) Delay condoned.

ii) Heard the learned Additional Solicitor General.

iii) We are not inclined to interfere with the impugned judgment and order passed by the High Court. Hence, the special leave petition is dismissed.

"Work for work's sake. There are some who are really the salt of the earth in every country and who work for work's sake, who do not care for name, or fame, or even to go to heaven."

— *Swami Vivekananda*

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# DIRECT TAXES
## High Court

Jitendra Singh
Advocate

Radha Halbe
Advocate

Harsh Shah
Advocate

### 1 *Sri Venkataramana Reddy Patloola vs. DCIT [Writ Petition Nos. 13353, 16141 and 16877 OF 2024, order dated 24.07.2024]*

**S. 148: Reassessment – Notice for reopening was issued by the Jurisdictional Assessing Officer to a Non Resident Assessee – After introduction of Faceless Scheme, 2022, notice under section 148 can only be issued by Faceless Assessing Officer – thus, impugned notice issued under section 148 of the Act is bad in law.**

**Facts**

The assessee before the Hon'ble Telangana High Court is a Non Resident Indian (NRI). The Jurisdictional Assessing Officer sought to reopen the assessment of the assessee by issuing the notice under section 148 of the Act. The assessee challenged the same before the Hon'ble Telangana High Court by way of Writ Petition on the ground that the notice under section 148 of the Act has to be issued in conformity of section 144B of the Act and in accordance with the scheme enacted by the Central Government under section 151A of the Act.

**Ruling of the High Court**

Hon'ble High Court was pleased to allow the petition of the Petitioner by observing that literal interpretation of provisions of Section 144B of the Act read with clause 3(b) of the notification dated 29 March 2022 shows that issuance of notice under Section 148 of the Act is squarely covered under the Scheme, and therefore for the purpose of issuance of notice, the faceless procedure must be followed. Hon'ble High Court further observed that a careful reading of the faceless scheme shows that the law makers have drawn a distinction between assessment, reassessment and computation and issuance of notice under Section 148 of the Act. Therefore, the CBDT's notification dated 6 September 2021 providing for exemption to international tax charge cases would not apply in case of issuance of notice under Section 148 of the Act.

### 2 *Ravi Kumar Sinha vs. CIT [2024] 165 taxmann.com 472 (Delhi)*

**Salary - Perquisite – section 17(2) of the Income Tax Act 1961 - Assessee was allotted shares at concessional rate under Employee Stock Purchase Scheme (ESPS) – Taxing the difference between market price and concessional rate at which shares were allotted as perquisite - unjustified.**

**Facts**

The assessee was allotted 11,50,500 shares at the rate of ₹ 15 per share under an Employees Stock Purchase Scheme. Twenty-five percent of above stock was subject to a lock-in-period of 12 months while the balance seventy-five locked-in for 18 months. The share certificates which were handed over to the assessee also

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carried an appropriate endorsement to the aforesaid effect. The Assessee during relevant previous year had only paid ₹ 10.50 per share against issue price of ₹ 15 per share and as per the valuation certificate obtained by the employer company, a price of INR 22.50 per share came to be ascribed for each share. The assessee while filing the return of income took a position that the shares were not marketable in view of lock-in stipulation. The Assessing officer however held that although the assessee was allotted shares at a concessional rate of ₹ 15 per share, the market price quoted at the relevant time stood at ₹ 49.45 per share. Accordingly, the AO concluded that the difference between the allotment price and market price i.e., ₹ 34.45 per share was liable to be taxed as perquisite in terms of Section 17(2)(iia) of the Act and thereby made an addition of ₹ 3,96,34,725 in the hands of the Assessee.

The Assessee aggrieved by the aforesaid addition, filed an appeal before the Commissioner of Income-tax (Appeals) who held that since the shares were subject to lock-in-period stipulation, it would be inappropriate to take the quoted price as appearing on the Stock Exchange. However, bearing in mind the valuation report obtained by the employer company, he held that the Fair Market Value ('FMV') per share should be taken as ₹22.50 per share. On further appeal to the Tribunal, the tribunal confirmed the view taken by the CIT(A).

The assessee being aggrieved by the order passed by the Tribunal challenged the same before the Hon'ble Delhi High Court.

**Ruling of High Court**

Hon'ble High Court was pleased to allow the appeal of the assessee by observing that shares allotted to the assessee under ESPS were subject to lock-in period and could not be sold in open market owing to a complete embargo on sale of those shares, quoted price or Valuation Report of expert valuing shares at higher amount would have no application. Thus, impugned addition made on account of difference between market value as per report and concessional rate at which shares were allotted to assessee could not be sustained.

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**3** ***Samp Furniture Pvt. Ltd. vs. ITO [2024] 165 taxmann.com 581 (Bombay)***

**Notice – Section 148 of the Income Tax Act 1961 – AO issuing notice under section 148 on the ground which was already decided in appeal by the CITA – department has filed appeal cannot be the reason for not following a binding decision – Notice bad in law.**

**Facts**

The Assessee's case was finalized under section 143(3) by making an addition of ₹ 4,00,00,000 being cash deposited in the bank account of the Assessee in old SBNs (Specified Bank Notes) invoking the provisions of section 69A of the Act. On appeal, the Commissioner of Income Tax (Appeals) deleted the addition made by the AO. Thereafter, a notice was issued by the Jurisdictional Assessing Officer under section 148A(b) of the Act proposing to initiate reassessment proceedings on the basis of information on the Insight Portal that the Assessee had deposited ₹ 4,00,00,000 in its bank account which was allegedly not offered to tax in its return of income. Subsequently, order under section 148A(d) was passed by the JAO holding that it is a fit case of issuing the notice under section 148 of the Act and also notice under section 148.

The Assessee challenged the notice by way of a Writ Petition on the grounds that the issuance of notice under section 148 by Jurisdictional Assessing Officer was bad in law in light of the decision in case of ***Hexaware Technologies Limited vs. ACIT [2024] 464 ITR 430 (Bombay)*** and also on the ground that it was a case of change of opinion which is impermissible in the eyes of law since the issue of cash deposits was already examined in the course of assessment proceedings under section 143(3) of the Act.

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**Ruling of the Hon'ble High Court**

Hon'ble Bombay High Court was pleased to allow the writ petition filed by the assessee by observing that that the issue was already examined in the assessment proceedings. Moreover, despite all materials being available with the department, a mechanical sanction was granted under Section 151(ii) of the Act by the Chief Commissioner of Income tax, which was also without application of mind. Further, the addition made in the course of assessment proceedings were deleted by the CIT(A) upon consideration of the submissions and documentary evidences placed on record by the assessee. The High Court also observed that there was no acceptable/cogent reason or any justification whatsoever, for the Assessing Officer not to consider, discard and overlook the legal effect of such orders passed by the appellate authority. Such significant material which had a direct bearing on any notice to be issued under Section 148A(b) and an order to be passed thereon, and in issuance of further notice under Section 148, was absolutely negligent, discarding from the path of law.

Hon'ble High Court further held that the department had not "accepted" the Hexaware Technologies Limited judgment and had filed an appeal before the Hon'ble Supreme Court but it would not mean that till same was set aside in a manner known to law, same had lost its binding force.

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**4** ***Bhoomi Viral Shah vs. ITO [2024] 165 taxmann.com 682 (Bombay)***

**Latches in filing petition – delay in approaching the court - cannot validate notice which was void ab initio - alternate remedy not a bar for filing writ petition.**

**Facts**

A notice under section 148 of the Act was issued to the Assessee beyond the limitation as prescribed under the provisions of Section 149 that is beyond 6 years from the end of the assessment year in question, namely, assessment year 2013-14. The Assessee filed a Writ Petition on the ground that the notice under section 148 was without jurisdiction being issued beyond the period of limitation. Department contested the Petition on the ground that the petition ought not to be entertained as the Assessee had approached the Court with a delay of over a year without any cogent explanation for such inordinate delay.

**Ruling of the Hon'ble High Court**

Hon'ble High Court was pleased to allow the petition and quashed the impugned notice by observing that admittedly the notice was issued two years after the limitation period had expired. Thus, being a jurisdictional issue, looked from any angle, the notice under section 148 is barred by limitation. Even an assessment order was passed on the basis of such notice. Thus, this was clearly a case where the Assessing Officer had proceeded without jurisdiction. Therefore, once the notice itself was inherently without jurisdiction, the order passed on such notice although was passed without granting hearing to the Assessee, would obviously be rendered illegal. An order which is ab initio void cannot be saved in any circumstances or labelled to be not illegal and void, merely because the Assessee belatedly approached the Court. Alternate remedy is not a bar against filing a writ petition. Any acquiescence to an illegal order can never bring about a situation where the illegality attributed to such an order would stand extinguished and the order can be termed to be legal. The law cannot be read in such manner. Thus, in the present case, an order which is illegal and void ab initio is sought to be given effect to, which could not be permitted to be done.

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# DIRECT TAXES
## Tribunal

CA Nikhil Mutha    CA Viraj Mehta    CA Kinjal Bhuta
Advocate

**1** ***Hasmukhbhai Makanbhai Padariya vs. ITO [ITA No. 63/RJT/2020 dated 06.08.2024] [AY 2016-17]***

**Section 54G –Deduction claimed by assessee for shifting of business undertaking from urban area to rural area–Assessing Officer disallowed the deduction that investment made by the firm and not a partner- no such condition in the section that investment to be made in name of assessee- Primary condition to shift undertaking from urban to rural area– deduction allowed**

**Facts of the case**

The assessee was a proprietor having a business of manufacturing and job work and filed his return of income, claiming a deduction u/s. 54G of the Act as he had invested in a firm and the firm had invested in factory building and plant & machinery. The case was selected for limited scrutiny on the issue of claiming deduction u/s. 54G. The assessee had executed a deed of assignment for the plot of land registered in the name of the assessee under a long lease of 99 years. The said consideration was invested by assessee as a partner in a partnership firm. The amount was invested by the partnership firm in acquiring a factory building and plant and machinery. The assessee contended that he has been carrying out manufacturing activity for past many years at Aji GIDC, Rajkot and has shifted the undertaking along with Plat & Machinery at Jiyana, Kuwadva, the said area is also notified as a rural area and duly eligible for deduction u/s 54G of the I. T. Act. The assessee has entered into a Memorandum of Understanding (MOU) with 3 other persons to shift existing business to the rural area and also carry out expansion and also make further investment to the extent of sale proceeds received from the sale of the old land and building. The AO rejected the said deduction stating that the assessee is an individual and he shifted the undertaking from an urban area to a rural area, to a partnership firm which is a different entity. Since the investment was made by the firm and not the assessee, the deduction u/s. 54G was rejected. The assessee filed an appeal before the CIT(A) against the said addition.

Before the CIT(A), it was submitted that the main conditions of section 54G of the Act had been obeyed and fulfilled by the assessee to shift the undertaking to rural area and also to make further investments. The CIT(A) rejected the contention of the assessee and observed that in section 54G of the Act, there is specific mention that who is eligible for claim of deduction u/s. 54G of the Act. The assessee, an individual and a partnership firm, as a person, are clearly different assessees. The case pertains to an individual assessee, whereas, investment in the new industrial undertaking, in the rural area, is made by another assessee, a partnership- firm.

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Therefore, the ld. CIT(A) noted that assessee has not fulfilled the conditions of section 54G of the Act and upheld the disallowance of deduction.

### Held

Before the Hon'ble ITAT, the authorised representative explained that the assessee had shifted the aforesaid undertaking along with Plant & Machinery at a small village, named Jiyana, which is a specified rural area, as per the Act. The confirmation of rural area from Gram Panchayat of Jiyanai, Talati-cum- Mantri Certificate, was furnished by the assessee. Therefore, the said area is notified as rural area and duly eligible for deduction u/s 54G of the I.T. Act. It was also submitted that assessee has duly complied with all the conditions of shifting of the undertaking and there is no other condition required, as to direct investment or indirect investment. The primary condition is that the assessee should have invested in the undertaking shifted in a rural area, nowhere in the provision it is stated that the asset should be acquired in the name of the assessee and for which assessee relied on various case laws of the High Courts. Whereas, the AO argued that the investment made was a way of introducing capital as a partner of the firm and not by direct acquisition in his name.

It was held by the Hon'ble ITAT that, the object of section 54G of the Act, is to promote decongestion of urban areas, as well as achieve a balanced regional growth. The section 54G of the Act, exempts capital gains on the transfer of plant, machinery, land, building etc., used for the purpose of the business of industrial undertaking. The transfer must be affected in the course of or in consequences of shifting of the industrial undertaking from an urban area to a non-urban area. The capital gain would be exempt to the extent, it is utilized within a period of one year before or three years after the date of transfer. The assessee under consideration had complied with and satisfied the conditions. Moreover, the assessee had invested an amount in the firm as a partner, and the same was utilized in the construction of the building and purchasing of plant and machineries. It was further held, that each partner is the owner of the assets to the extent of his share in the partnership, hence, exemption u/s 54G of the Act, should not be denied to the assessee under consideration. The primary condition is that the assessee should have invested in the undertaking shifted in a rural area, nowhere section 54G of the Act, states that asset should be acquired in the name of the assessee. Therefore, the assessee was eligible for exemption u/s 54G of the Act.

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## 2

***R. L. Education Sanstha vs. CIT(Exemptions) [ITA No. 806/PUN/2024 dated 05.08.2024] [AY 2014-15]***

**Section 80G –Registration of trust rejected - delay in filing Form 10AB should not bar approval u/s. 80G(5)**

### Facts of the case

The appellant was a trust registered u/s.12A of the Act. It had applied for approval under clause (iii) of the first proviso to section 80G(5) of the Act. The trust was granted provisional vide approval dated 01st October, 2021 valid upto 30th September, 2024. Subsequently, the appellant trust filed an application in Form No.10AB under clause (iii) of first proviso to section 80G (5) of the Act in September 2023. According to the ld. CIT(Exemptions), the Appellant trust was required to file the application in Form No.10AB for regular approval within six months from the date of provisional approval 31.03.2022 (extended to 30.09.2022 as per CBDT circular No. 08/2022) or within 6 months of commencement of activities,

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whichever is earlier. The activities of the trust had commenced on 16.03.2011. The application was made on 29.09.2023. Therefore, the ld. CIT(Exemptions) denied the approval on the ground that the appellant trust had not filed the application within the prescribed time limit under clause (iii) of first proviso to 80G(5) of the Act. Further, the ld. CIT(Exemptions) observed that in the absence of compliance with the notices issued through ITBA portal, he could not reach a conclusion about the genuineness of the activities of the trust and the fulfilment of the conditions laid down in clause (i) to (v) of section 80G of the Act.

**Held**

The Hon'ble ITAT observed that there are two categories of institutions; (1) the institutions that had commenced the activity subsequent to the grant of provisional approval (2) the institutions that had commenced the activity much before the date of grant of provisional approval. No doubt, in the case of the former category the literal interpretation of clause (iii) of proviso to section 80G(5) does not lead to any hardship, absurdity or injustice. It is only in the case of the later category the literal interpretation leads to hardship, absurdity or injustice as it is impossible to comply with the time limits prescribed under the proviso which had commenced the activities six months prior to the date of grant of provisional approval. Thus, the provision produces a manifestly absurd and unjust result that could never have been intended by the Legislature. In such a situation, it is a settled rule of construction that the courts may modify the language used by the Legislature or even "do some violence" to it, so as to achieve the obvious intention of the Legislature and produce a rational construction.

It was held by the Hon'ble ITAT that a fair and reasonable construction of clause (iii) of proviso to section 80G(5) of the Act have to be made. Therefore, the proviso was to be read as under :

"(iii) where the institution or fund has been provisionally approved, at least six months prior to expiry of the period of the provisional approval or within six months of commencement of its activities, whichever is later."

It was held that the assessee trust commenced its actual activities on 16-3-2011 and in view of the above construction of clause (iii) of proviso to section 80G(5) of the Act, the Appellant trust is entitled to file the application for regular approval prior to six months of expiry of the provisional approval, i.e., on or before 31-3-2024. The application filed by the Appellant trust for grant of regular approval is not barred by limitation prescribed under the proviso to section 80G(5). The Ld. CIT (Exemptions) was not justified in denying the grant of approval on the ground of delay in submission of Form No.10AB. The matter was remanded to the file of the Ld. CIT (Exemptions) with a direction to dispose application on merits.

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**3** ***Govindam Export vs. DCIT (ITA Nos. 429 to 433/JP/2024 dt. 01.08.2024) (AY 98-99)***

**Section 144/145(3) – If books are rejected – Mandatory to complete the assessment u/s 144 – Order cannot be passed other than Section 144**

**Facts of the case**

The Department carried out the search and seizure operation on business premises of the assessee on 24-06-2003 and in consequent to that the assessment proceedings were initiated u/s 153A of the Act. Ld. AO. while making the addition for all purchases, rejected the books of accounts for AY 1998-99 by resorting to the provision of section 145(3) of the Act. Ld. AO

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in assessment rejected the books and passed the order & passed the assessment u/s 153A wrs. 143(3) of the Act. On challenging the same before the CIT(A), the CIT(A) rejected the contention of the asseesee. Hence, appeal before the Hon'ble ITAT is filed.

**Held**

The Hon'ble ITAT held that for provisions of section 145(3) of the Act to apply, there must be a finding on the ingredients of section 145(3) of the Act, which is not present in the order of lower authorities. Further, the assessments were completed u/s 153A of the Act not u/s 144. If the AO was unsatisfied with the correctness and completeness of the accounts of the assessee or where a proper method of accounting is not followed regularly or where accounting standards notified by the Central Government are not followed by the assessee, only in such circumstances section 145(3) of the Act mandates that the assessment must be completed u/s 144 of Act. Hence, the order passed u/s 153A of the Act shall not stand valid and additions were liable to be deleted.

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### 4 ***Rajesh Kumar (Shiva Construction Co.) vs. ACIT (ITA No.61/Del/2023 dated 07.08.2024) (AY 2018-19)***

**Section 147 – No reassessment proceedings can be initiated while the original return filed u/s 139(1) is pending to be processed and the time limit for completing scrutiny u/s 143(3) is not expired**

**Facts of the case**

The assessee filed a return of income for AY 2018-19 u/s 139(1) of the Act declaring a total income of INR 1,11,12,390. Following a survey operation u/s 133A of the Act at his business premises on 30/11/2018, the AO reopened the assessment u/s 147 of the Act, based on material found during the survey.

A notice u/s 148 of the Act was issued on 23/08/2019. In response, the assessee filed a return of income u/s 148 of the Act declaring a total income of INR 1,06,67,440 on 20/08/2019. Thereafter, notices u/s 143(2) and 142(1) of the Act were issued and the assessee submitted his responses to the said notice. In the course of reassessment proceedings, the assessee filed objections against reopening of the assessment which were disposed-off vide Order dated 14/11/2019.

The AO passed an order making various additions and computed the total income of the assessee at ₹ 22,21,82,510. Aggrieved by the said order, the assessee filed an appeal before the CIT (A), wherein the appeal of the assessee was partly allowed reducing the additions made by AO. Aggrieved by the order of CIT (A), the assessee and the Revenue were in appeal before the ITAT.

**Held**

The learned AR submitted that the reassessment proceedings were ex-facie illegal and contrary to the settled principles of law since the assessment was reopened despite the fact that the original return filed u/s 139(1) of the Act was not processed and there was time available for taking up assessment for scrutiny u/s 143(3) of the Act. On the other hand, the learned CIT(DR) that the proceedings are valid since the conditions embodied u/s 147 of the Act are satisfied. Further, the learned CIT(DR) also referred to sub-clause (b) of Explanation 2 to section 147 of the Act.

The Hon'ble ITAT referred to various judicial precedents in this context and more specifically relied on the Third Member decision of the Hon'ble ITAT in the case of ***Super Spinning Mills Ltd (2010) 37 DTR (Chennai) 1 (TM)***, wherein the issue has been decided in favour of the assessee after considering clause (b) of Explanation 2 to section 147 of the Act and the Hon'ble SC decision in the case of ***Rajesh Jhaveri Stock***

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***Brokers (P) Ltd (291 ITR 500) (SC)***. It has been held that proceedings are said to have commenced once the return is filed and terminates when the return is processed u/s 143(1) and the time limit for issuing notice u/s 143(2) of the Act is over. The proceedings u/s 147 of the Act can be initiated only after the earlier proceedings have been terminated. The Hon'ble ITAT also relied on the decisions of the Hon'ble Madras High Court in the case of ***CIT vs. Qatalys Software Technologies Ltd 308 ITR 249 (Madras HC)*** and the Hon'ble Delhi High Court in the case of ***CIT vs. Ved & Co. (2008) (302 ITR 328) (Delhi HC)***.

Basis the same the Hon'ble ITAT concluded that the impugned reassessment cannot be sustained and deserves to be quashed.

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**5** ***Pankaj Suresh Rach vs. ITO, Int Tax Ward, 4(1)(1), Mumbai [ITA No. 2290/MUM/2024 dated 20.08.2024] [AY 2017-18]***

**Section 149 and 151 – Escapement of income was ₹ 9,00,000/- - notice issued u/s. 148 is barred by limitation as per amended Section 149(1)(b) - Sanction obtained from Pr.CIT instead of Pr. CCIT – Sanction is invalid u/s. 151**

**Facts of the case**

The assessee's case was reopened based on information received from the DIT (I & CI), Mumbai, alleging that the assessee had sold an immovable property at a consideration of ₹ 48,00,000/- below the stamp duty value of ₹ 57,01,500/-. A notice u/s. 148 of the Act was issued on 01.05.2021. Pursuant to the decision of the Hon'ble Apex Court in the case of ***CIT vs. Ashish Agarwal (444 ITR 1),*** the AO issued a notice u/s. 148A(b) of the Act and underlying documents and materials were provided to the assessee on 28.05.2022. Subsequently, the assessment order was passed u/s.147 r.w.s. 144C (13) of the Act.

**Held**

In the appeal before Hon'ble ITAT, the assessee challenged the reassessment proceedings on two grounds. Firstly, that the AO has erred in obtaining sanction u/s. 151 of the Act from the incorrect authority. The sanction was accorded by Pr. CIT instead of Pr. CCIT. Secondly, the notice issued u/s. 148 of the Act for AY: 2017-18, pursuant to the decision of ***Ashish Agarwal (supra)***, is barred by limitation as per the amended Section 149 of the Act.

The Hon'ble ITAT relying on the decision of the Hon'ble Bombay High Court in the case of ***Siemens Financial Services (P.) Ltd. (457 ITR 647)*** held that the sanctions obtained were invalid. The AO ought to have obtained sanction u/s. 151 from Pr. CCIT and not PCIT. The Hon'ble ITAT further held that the escapement of income was only ₹ 9,00,000/-, which is less than the limit of ₹ 50,00,000/- prescribed u/s. 149(1)(b) of the Act. Therefore, the notice issued u/s. 148 of the Act is barred by limitation. Reliance was placed on the decision of the Hon'ble Delhi High Court in the case of ***Ganesh Dass Khanna vs. ITO (156 taxmann.com 417)***. It was held that notice issued u/s 148 of the Act is without jurisdiction and the resultant re-assessment order is null and void.

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**6** ***DCIT vs. M/s. Blueline Foods (India) Pvt. Ltd (ITA Nos.182, 183/ Bang/2023 dated 07.08.2024) (AY 2017-18, 2018-19) (Third Member Bench)***

**Section 153A – The search authorization in the name of the assessee but carried out on the premises of the Directors – proceedings concluded under the provisions of section 153A is invalid**

**Facts of the case**

A difference of opinion arose between the Hon'ble Members as to whether the

proceedings conducted u/s 153A of the Act are valid in the facts and circumstances of the case. A search action was conducted basis the warrant in the name of the assessee company, whereas, the places covered in the warrant were the residences of the Directors. The Department also simultaneously conducted survey action on the Company's registered office and issued an order impounding certain books of accounts/documents u/s 133A of the Act. Hence, it was being contended whether in such facts, it would constitute a valid search u/s 132 of the Act in the case of assessee company itself, to initiate proceedings u/s 153A of the Act or whether the proceedings should have been conducted u/s 153C of the Act.

The CIT(A) held that since there is no search u/s 132 of the Act in the premises of the assessee company, the precondition for issuance of notice u/s 153A is not satisfied. Hence, Revenue had filed an appeal before the Hon'ble ITAT.

**Held**

The Hon'ble Third Member observed that a search u/s 132 was carried out on the residential premises of the Directors of the assessee company on 23/01/2019. Simultaneously, a survey was conducted on the registered office and the business premises of the Respondent assessee company on the same date. Having perused the warrants of authorization in Form No.45 and panchanamas drawn, it was observed that while the warrant is in the name of "Blueline India (Foods) Pvt Ltd", the search was conducted only at the residential premises of the three Directors. Additionally, the authorization was issued simultaneously to conduct a survey u/s 133A of the Act on the assessee company and an order was issued u/s 133A(3)(ia) of the Act for impounding certain books of accounts/ documents/digital evidence. Emphasis was also laid on the remand report issued by the AO in the course of the first appeal proceedings wherein the AO confirmed that it was a search conducted on the premises of the Directors and Survey in the premises of the Company.

The Hon'ble Third Member, thereafter, referring to multiple judicial precedents, held that it is a settled legal position that search and seizure provisions u/s 132 of the Act are always in relation to a person and the competent authority under the said provision can authorize the search of a person at any number of places. A corporate entity, being a distinct legal entity and a taxable person under the Act cannot be considered to be the same as its Directors or Shareholders. Thus, a warrant must be issued in the name of the person being searched and such a warrant must be executed at the place or places authorized to be searched and a valid panchanama must be drawn in the name of the person searched at the conclusion of a search. There is no doubt that panchanama being a critical document that records the names of the persons searched, the places where the search was conducted and the events that took place during the search, has evidentiary value. The proposition canvassed by the Revenue that the search conducted at the residence of the directors has to be considered as a search conducted on the company itself and panchanama drawn at those places as those drawn in respect of the Company cannot be agreed to.

The Hon'ble Third Member held that the legislative intent is very clear from the use of the expression "such person" in section 153A(1)(a) of the Act. The expression clearly relates to a person in respect of whom search u/s.132 of the Act has been initiated and conducted as provided in section 153A of the Act. In the present case, in view of the facts noted, there is no search conducted u/s.132 of the Act in the case of Respondent assessee company i.e., Blueline Foods (India) Pvt. Ltd. Hence, it is clear beyond any shadow of doubt that the notice u/s 153A of the Act was

issued without any jurisdiction. Accordingly, as a corollary, the Hon'ble Third Member held that all the proceedings flowing from such invalid notice, including the resultant assessment order, are bad in law and hence, to be quashed.

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## 7 *DCIT vs. Marsh Fincom Pvt. Ltd. (ITA No.1342/PUN/2023 dated 13.08.2024) (AY 2010-11)*

**Section 153A - Absent incriminating material, for an unabated assessment year, addition cannot be made merely based on a statement recorded during the search**

**Facts of the case**

The assessee is a private limited company engaged in the business of buying and selling of shares and securities and financing loans. The assessee company furnished its original return of income for AY 2010-11 u/s 139(1) of the Act, declaring a total income of INR 60,87,010.

A search and seizure action u/s 132 of the Act was conducted at the business & residential premises of different members/associate concerns of the Jhaveri Group at Mumbai/ Aurangabad & their directors & business concerns. The search warrant was issued u/s 132 of the Act in the name of the assessee & its directors.

A notice u/s 153A of the Act was issued on 21/08/2015. In response to the notice u/s. 153A of the Act, the assessee furnished a revised return of income declaring total income at INR 4,02,87,010 which included undisclosed income of INR 3,42,00,000. During the course of search proceedings, the statement of the director of the company was recorded u/s 132(4) of the Act, wherein he agreed to offer INR 17 crores as additional/undisclosed income in the nature of non-genuine share capital and share premium. However, out of INR 17 crores agreed in the statement, INR 10 crores were offered to tax for AY 2011-12 and AY 2012-13 and INR 3.42 crores was offered to tax for AY 2010-11 i.e. the period under consideration.

It was found by the AO that an amount of INR 6.62 crores was received towards share application/premium money during the period under consideration. But out of this amount, only INR 3.42 crores were offered to tax for the year under consideration being not genuine, and, therefore, the balance amount of INR 3.2 crores was added by the AO to the income of the assessee on the basis of statement of director of the company.

The assessee filed an appeal before the learned CIT(A), whereby the appeal filed by the assessee was allowed and the assessment was quashed. Being aggrieved by the said order of the CIT(A), the Revenue has filed an appeal before the Hon'ble ITAT.

**Held**

The Hon'ble ITAT observed that during the course of the search, a statement of the Director was recorded, wherein due to bad health conditions & to buy peace of mind, he admitted to offering ₹ 17 crores received as non-genuine share capital and premium amount in last 4-5 years and accordingly, voluntarily made a declaration of income in the case of the assessee. The Hon'ble ITAT thereafter referred to the findings made by the learned CIT(A), wherein he quashed the assessment made u/s 153A of the Act on the ground that in the absence of incriminating material found during the search, the concluded assessment cannot be disturbed. The CIT(A) in arriving at the said conclusion recorded a finding that seized material nowhere refers to the fact that it was found from the premises of the Appellant and the impugned additions are made merely on the basis of the statement made by the Director.

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Thereafter the Hon'ble ITAT relied on the decisions of the Hon'ble Delhi High Court in the case of ***Best Infrastructure Pvt Ltd (84 Taxmann.com 287***) and *Harjeev Agarwal (70 Taxmann.com 95)*, wherein it has been held that disclosure u/s 132(4) of the Act is not an incriminating material. Accordingly, the Hon'ble ITAT held that even if a search is conducted in the case of assessee as per warrant of authorization, the addition cannot be made dehors of seized material. Hence, the Hon'ble ITAT held that the findings and conclusions of the learned CIT(A) do not call for any interference and dismissed the appeal of the Revenue.

**8** ***Bhavna Modi vs. ITO (ITA No. 298/ Raipur/2024 dated 16.08.2024) (AY 2020-21)***

**Section 272A(1)(d) – Penalty cannot be levied when assessment is completed u/s 143(3) – Penalty deleted**

**Facts of the case**

The case of the assessee was selected for limited scrutiny under the 'CASS'. Accordingly, notice u/s 142 of the Act was issued and duly served upon the assessee. The AO observed to initiate penalty proceedings u/s 270A of the Act for under reporting/ misreporting of income along with penalty u/s 272A(1)(d) for non-compliances of notices u/s 143(2)/142(1) of the Act. In penalty proceedings, notice u/s 274 r.w.s. 272A(1)(d) was issued to the assessee. The assessee's reply was not found to be satisfactory by the AO, therefore, the penalty for non-compliance u/s 272A(1)(d) of the Act was imposed at ₹ 10,000/- per default, thus, considering the two defaults involved, a penalty was levied at ₹ 20,000/-. The CIT(A) also dismissed the appeal and hence, an appeal was filed before Hon'ble ITAT.

**Held**

Ld. AR of the assessee submitted that the assessee has furnished all the necessary information during the course of assessment proceedings in response to subsequent notices issued by the AO and the assessment was completed u/s 143(3) r.w.s. 144B of the Act. Ld. AR also relied on decisions of ***Rambhai Kanjibhai Patel vs. The DCIT, Central Circle-2, Surat in ITA No. 106 to110/SRT/2023 dated 11.05.23*** and ***Saleem Ahmed Khan vs. Income Tax Officer in ITA Nos.88,89 & 98/JAB/2022 dated 13.09.2023*** to substantiate its arguments. It was further submitted that the Ld. AO is deemed to have condoned the absence of the assessee or his authorized representative on earlier occasions when subsequently, the details were furnished by him and the assessments were ultimately completed u/s 143(3) of the Act.

Hon'ble ITAT held that the assessee failed to respond to certain notices of the AO, which were issued u/s 143(2) and 142(1) of the Act, however, in response to subsequent notices, the assessee has made necessary replies and accordingly assessment was completed u/s 143(3). Therefore, respectfully following the co-ordinate bench decisions penalty u/s 272A(1)(d) of the Act is not justifiable in the present case, as the Ld. AO himself has been deemed to have condoned the absence of assessee or his Authorized Representative on earlier occasions. Subsequently, the necessary information and evidence were furnished by the assessee to assist in the completion of the assessment. Since the assessment was completed u/s 143(3) of the Act, penalty u/s 272A(1)(d) cannot be imposed. Therefore, appeal filed by the assessee was allowed.

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# INTERNATIONAL TAXATION
## Case Law Update

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## A. SUPREME COURT

### 1 *DDIT vs. Vodafone Idea Ltd. - [2024] 165 taxmann.com 392 (SC)*

**SLP was dismissed against order of Hon'ble Karnataka High Court holding that payments made to non-resident telecom operators by assessee, telecommunication service provider, for providing interconnect services and transfer of capacity in foreign countries were not chargeable to tax as royalty at the time when payment was made to non-resident telecom operator for A.Y 2008-09 to 2012-13 since the amendment in Explanation 4 to sec 9 (1)(vi) had prospective operation and consequently the assessee could not be treated as assessee in default for not deducting tax in respect of the said payments.**

**Facts**

i. Assessee held an International long i. Assessee held an International long distance (ILD) License and provided telecommunication services. In order to provide ILD services, it made certain payments (for A.Y 2008-09 to 2012-13) for availing certain services offered by Non-resident Telecom Operators (NTOs) for international carriage and connectivity.

ii. Assessee claimed that as NTOs were located outside India and they provided telecom services outside India, it was not necessary to deduct TDS in India for the relevant period.

iii. AO passed order u/s 201, treating assessee as "assessee in default" for failure to deduct TDS while making payments to NTO.

iv. The Hon'ble Karnataka High Court in V***odafone Idea Ltd. vs. DDIT, (International Taxation) [2023] 152 taxmann.com 575 (Kar)*** held that when payments were made to NTO for providing inter-connect services and transfer of capacity in foreign countries for AY 2008-09 to 2012-13, the same were not chargeable to tax as royalty and the amendment in Explanation 4 to sec 9(1)(vi) had prospective operation. Thus, no tax was deductible when the said payments were made and consequently, the assessee could not be treated as "assessee in default"

v. Aggrieved, the Revenue filed SLP before the Hon'ble SC.

**Decision**

i. The Hon'ble SC noted that the impugned issue was covered by its judgement in ***Engineering Analysis Centre of Excellence Pvt. Ltd. vs. CIT – [2022] 3 SCC 321*** which had also been followed in other cases.

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ii. In response to the Revenue's submission that since a Review Petition was pending before the Hon'ble SC for which a notice was also issued, there was no reason for entertaining any subsequent matter; the Hon'ble SC noted that by order dated 23.04.2024 passed by a three-judge bench in Review Petition (C) Diary No(s) 35475/2023 etc. titled ***CIT vs. GE India Technology Pvt. Ltd. [2024] 161 taxmann.com 707 (SC)***, it had dismissed the said Revenue Petitions both on the ground of delay as well as on merits.

iii. Consequently, the impugned SLP was also dismissed on merits following the aforesaid judgement/order.

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**2** ***Nestle SA vs. Assessing Officer – [2024] 165 taxmann.com 334 SC***

The Hon'ble SC dismissed the review petition filed against its judgement holding that a notification under section 90(1) is a mandatory condition to give effect to a DTAA, or any protocol changing its terms or conditions, which has effect of altering existing provisions of law and thus, for a party to claim benefit of a 'same treatment' clause, based on entry of DTAA between India and another state which is member of OECD, relevant date would be entering into treaty with India and not a later date, when, after entering into DTAA with India, such country becomes an OECD member, in terms of India's practice.

## B. TRIBUNAL

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**3** ***ITO vs. Tata Teleservices Ltd. - [2024] 165 taxmann.com 603 (Delhi – Trib.)***

**The Hon'ble Tribunal held that where assessee made interest payment to China Development Bank (CDB), same was not taxable in India (even in F.Y 2015-16) as CDB being a financial institution wholly owned by Government of China (despite only 36.45% of its shares being held by Government of China) was covered under the exemption provided both under the pre-amended and post-amended Article 11(3) of India-China DTAA as clarified by the notification dated 17.09.2019.**

**Facts**

i. Assessee company made interest payment to China Development Bank (CDB) without deducting tax at source under section 195 claiming benefit of article 11(3) of the India-China DTAA, on the ground that CDB was a financial institution owned by the Government of China.

ii. AO held that since as per Financial Statement of CDB only 36.45% shares in said Bank was held by Government of China during relevant period, i.e., FY 2015-16, CDB could not claim benefit of DTAA and, hence, assessee was liable to deduct tax under section 195.

iii. CIT(A) held that China Development Bank is a financial institution wholly owned by the Government of China in view of the amended Article 11(3) of India-China DTAA vide Notification No. S.O. 2562(E) [No. 54/2019/F.No. 503/02/2008-FTD-II] dated 17.07.2019 whereby the aforesaid bank has been stated to the included in the list of financial institution wholly owned by the Govt. of China.

iv. Aggrieved, the Revenue filed appeal before the Hon'ble Tribunal on the grounds that CIT(A) failed to appreciate

  a. The fact that as per the Financial Statement of China Development Bank only 36.45% shares in the said Bank was held by the Government of China (Ministry of

Finance) during the relevant period i.e. FY 2015-16.

b. Aforesaid amendment had been made w.e.f. 17.07.2019 which was not applicable during the relevant F.Y 2015-16.

**Decision**

i. The Hon'ble Tribunal held that the erstwhile Article 11(3) and amended Article 11(3) of the India-China DTAA provides that interest arising in India and derived/paid to any financial institution wholly owned by the Government of China is exempt from tax on the interest earned.

ii. It further noted that, in the Protocol to the India-China DTAA, paragraph 3 was simultaneously inserted by deleting the erstwhile paragraph 3 vide the same notification itself i.e. Notification No. 10. 2562(E)(No.54/2019/F.No. 503/02/2008FTD-II). Dated 17-7-2019, which defined the term 'Central bank' and 'Any financial institution wholly owned by the Government of the other Contracting State' as under:

"........................

3. *For the purpose of paragraph 3 of Article 11 (Interest):*

(a) *the term "Central Bank" means, in the case of China, the People's Bank of China, and in the case of India, the Reserve Bank of India*

(b) *the term 'any financial institution wholly owned by the Government of the other Contracting State' means:*

(i) *in the case of China:*

(A) *the China Development Bank:*

(B) *the Agricultural Development Bank of China:*

(C) *the Export-Import Bank of China:*

(D) *the National Council for Social Security Fund:*

(E) *the China Export & Credit Insurance Corporation:*

(F) *the China Investment Corporation:*

(G) *any other institution wholly owned by the Government of China as may be agreed from time to time between the competent authorities of the Contracting States.*"

iii. In view of the above, it held that paragraph 3 of the Protocol for the purpose of Article 11(3) of India-China DTAA inserted in 2019 has also clearly clarified that China Development Bank is a financial institution wholly owned by Government of China. Paragraph 3 of the Protocol as reproduced above uses the word "means" and not 'includes' or 'deemed to be included" which suggests that CDB is and has always been a financial institution wholly owned by the Government.

iv. It further held that, with the inclusion of the above definition and for the purpose of defining the term financial institution wholly owned by the Government, the protocol restricted the scope of the financial institutions covered under Article 11(3) of India-China DTAA to include the specified institutions or any other institution wholly owned by

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the Government of China as may be agreed from time to time between the competent authorities of the Contracting States.

v. It thus concluded that, the specific institutions listed in the protocol for both India and China, were always covered as a government owned financial institution for the purpose of Article 11(3) of India- China DTAA. The Article as if stood during the relevant FY was more expansive and after the definition of financial institution wholly owned by the Government in the protocol, wherein China Development Bank is specifically included, it is clear and beyond doubt that China Development Bank is and has always been a financial institution wholly owned by the Government and hence, eligible for the benefit for the provisions of Article 11(3) of India-China DTAA and therefore, the assessee could not be treated as "assessee in default" with respect to non-deduction of tax u/s 195 of the Act on interest payments made to China Development Bank.

vi. Accordingly, the order of the CIT(A) was upheld and the Revenue's appeal was dismissed.

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## 4 *Coursera Inc. vs. ACIT. - [2024] 165 taxmann.com 683 (Delhi – Trib.)*

**The Hon'ble Tribunal held that , a US based company, operated a global online learning platform, offering access to online courses and degrees from leading universities and companies, the Hon'ble Tribunal held that since assessee was merely an aggregation service provider, which brought educational learning on one platform and did not provide services of technical nature to customers, receipts earned by assessee could not be brought to tax as FIS under article 12(4) of India-USA DTAA**

**Facts**

i. The assessee, a non-resident corporate entity incorporated in United States operated a global online learning platform, which offered anyone, anywhere access to online courses and degrees from leading universities and companies.

ii. For the above purpose, it had developed a proprietary platform to host multimedia courses for consumption by end-users. Through its platform, assessee offered online education/courses in various disciplines, including but not limited to management, arts, humanities, data analysis and philosophy etc.

iii. For this purpose, the assessee had entered into agreements with Indian customers including universities from outside India to provide access to its platform in India. The assessee had provided services to individuals, educational institutions and corporates and for providing such services, the assessee had earned fees of ₹ 75,66,52,591/-, which it claimed to be not taxable in India as the same was neither in the nature of royalty nor FTS (and the assessee did not have a PE in India.)

iv. The AO observed that the assessee was not merely providing Content Services to the customers of India, but was also providing a whole range of "User Services", which were user specific, and involved a high degree of human intervention. According to him, the assessee provided customized services to its clients. Though the course content may be prepared by other educational institutions and not by the assessee, however, the fact that the content services and user

services were being provided to Indian customers by the assessee and the completion certificate bore the logo of the educational institution as well as assessee, signified that the training services were being provided by assessee itself. Thus, the AO held that the nature of services provided by the assessee was technical. He further held that while providing such services, the assessee made available specialization, technical skill and knowhow to its customers. Therefore, make available test was also satisfied in terms of Article 12(4) of the treaty. Insofar as assessee's contention that the receipts should fall within the exception provided under Article 12(5) of the tax treaty, the assessee being an educational institution providing teaching facility, the AO negated such contention by stating that the assessee was not an educational institution, rather an aggregation service provider, which brought the educational institutions and learners on one platform by using special cutting-edge technology and services.

v. Aggrieved, the assessee filed appeal before the Hon'ble Tribunal.

**Decision**

i. The Hon'ble Tribunal noted that, it was established on record that the assessee provided a global online learning platform, wherein, various courses and degrees from leading universities and companies were provided and that the said courses and degrees were created by the concerned universities and companies and not by the assessee. The assessee acted as a mere facilitator and provided access to the contents of the universities/companies through the platform on receipt of fees.

ii. These facts clearly indicated that while providing access to various courses/ degrees, the assessee did not provide services of technical nature to the customers. The AO had not brought on record any material to establish the fact that the assessee provided technical services through its online platform. Merely because the assessee had a customized landing page, it did not mean that the assessee provided technical services that too, through human intervention.

iii. Even, assuming for argument's sake, the services provided by the assessee was of technical nature, that by itself would not be enough to bring such receipts within the purview of Article 12(4) of India - USA DTAA, unless the make available condition was satisfied. Burden was entirely on the Revenue to prove that.

iv. Further, relying on decisions of the co-ordinate bench viz ***Elsevier Information systems GmbH DCIT, ITA No. 1683/Mum/2015*** and ***Relx Inc. vs. ACIT, ITA No. 1876 & 1877/Del/2022***, the Hon'ble Tribunal held that the impugned receipts did not qualify as FIS under Article 12(4) of the India- USA Tax Treaty.

## 5 ***Krishnakumar Balasankara Subramanian vs. DCIT - [2024] 165 taxmann.com 500 (Bangalore – Trib.)***

The Hon'ble Tribunal held that filing of Form No. 67 is not mandatory but a directory requirement, therefore, FTC could not be denied to assessee for non-compliance of procedural requirement of late filing of Form No. 67.

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# INDIRECT TAXES
## GST

CA Naresh Sheth    CA Jinesh Shah

## A. WRIT PETITIONS

### 1 *Aberdare Technologies (P.) Ltd. vs. CBIC [2024] 165 taxmann.com 325 – Bombay High Court*

**Facts and Issues involved**

Petitioner filed GST returns within time but after some time in December 2023, realized that there were certain errors with no loss of Revenue to the State. The time prescribed u/s 39(9) of CGST Act states the rectification of such omission or incorrect particulars must be made on or before 30th day of November, following the end of the financial year to which such details pertained.

Petitioner made a request in writing to the concerned authorities to permit rectification because they had missed the deadline, which has not been granted. Hence, petitioner preferred present writ petition.

**Petitioner's submission**

The petitioner has relied on following cases wherein it was held that if there is no loss of Revenue, amendment/rectification of the Form GSTR-1 should be permitted even if it is made after 30th November:

- ***Star Engineers (I) Pvt. Ltd. vs. Union of India & Ors.***
- ***M/s. Sun Dye Chem vs. Assistant Commissioner (ST) & Ors.***
- ***Pentacle Plant Machineries Pvt. Ltd. vs. Office of GST Council & Ors.***
- ***Shiva Jyoti Construction vs. The Chairperson, Central Board of Excise & Customs and Ors.***

**Discussion by and Observations of High Court**

Section 37 of CGST Act provides for furnishing details of outward supplies. Section 38 of CGST Act provides for furnishing details of inward supplies. Section 39 of CGST Act provides for furnishing of returns. Section 37(3) of CGST Act provides that any registered person, who has furnished the details under sub-section (1) for any tax period and which have remained unmatched under Section 42 or Section 43 of CGST Act, shall, upon discovery of any error or omission therein, rectify such error or omission in such manner as may be prescribed, and shall pay the tax and interest, if any. The proviso below sub-section (3) stipulates that no rectification of error or omission in respect of the details furnished under sub-section (1) shall be allowed after furnishing of the return under Section 39 for

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the month of September, following the end of the financial year to which such details pertain.

Further, Sub-section (9) although provides for rectification of any omission or incorrect particulars, the proviso therein precludes the assessee from any such rectification or omission or incorrect particulars being allowed after 30th day of November following the end of financial year to which such details pertain, or the actual date of furnishing of relevant annual return, whichever is earlier. Subsection (10) provides for extension of time in the event the assessee has not furnished the return for one or more previous tax period or has not furnished the details of outward supplies as per sub section (1) of section 37 in the said tax period.

Provisions of sub-section (3) of Section 37 read with Section 38 and sub-sections (9) and (10) of Section 39 need to be purposively interpreted. One cannot read subsection (3) of Section 37 to mean that the assessee would be prevented from placing the correct position and having accurate particulars in regard to all the details in the GST returns being filed by the assessee and that there would not be any scope for any *bonafide*, and inadvertent rectification/correction. This would pre-suppose that any inadvertent error which had occurred in filing of the returns, once is permitted to be rectified, any technicality not making a window for such rectification, ought not to defeat the provisions of sub-section (3) of Section 37 read with the provisions of sub-section (9) of Section 39 read de hors the provisos.

The proviso ought not to defeat the intention of the legislature as borne out on a bare reading of sub- section (3) of Section 37 and sub-section (9) of Section 39 in the category of cases when there is a *bonafide* and inadvertent error in furnishing any particulars in filing of returns, accompanied with the fact that there is no loss of revenue whatsoever in permitting the correction of such mistake. Any contrary interpretation of sub-section (3) of Section 37 read with sub-sections (9) and (10) of Section 39 would lead to absurdity and/or bring a regime that GST returns being maintained by the department having incorrect particulars become sacrosanct, which is not what is acceptable to the GST regime, wherein every aspect of the returns has a cascading effect. This is necessarily required to be borne in mind when considering the cases of inadvertent human errors creeping into the filing of GST returns.

As a result of the above discussion, the State Tax officer ought to have granted the petitioner's request to rectify/amend the Form GSTR-1 for the period July 2021, November 2021 and January 2022, either through Online or manual means

Situation like in the present case, were also the situation in the proceedings before the different High Courts as mentioned by petitioner, wherein the errors of the assessee were inadvertent and *bonafide*. There was not an iota of an illegal gain being derived by the assessee. In fact, the scheme of the GST laws itself would contemplate correct data to be available in each and every return of tax being filed by the assessee. Any incorrect particulars on the varied aspects touching the GST returns would have serious cascading effect, prejudicial not only to the assessee, but also to the third parties.

**Decision of High Court**

The respondents are directed to permit the petitioner to amend/rectify the Form GSTR-1 for the period July 2021, November 2021 and January 2022, either through Online or manual means within a period of four weeks

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from today.

## B. RULINGS BY ADVANCE RULING AUTHORITY

### 1 *Roppen Transportation Services Pvt Ltd [Advance Ruling No. KAR ADRG 36/2024] – Karnataka AAR*

**Facts and issue involved**

Applicant is engaged in the business of providing technology-based services to their end users for booking two-wheelers and three-wheeler passenger transport services offered by third party drivers by means of company website and its mobile app "Rapido".

The applicant proposes to introduce mobile application services to independent four-wheeler cab service providers on subscription basis to enable them to connect with potential end user (passengers).

Applicant shall not collect any charges from passengers. There would be subscription charges from the driver for usage of app. Applicant raises an invoice on driver and charges GST thereon. The settlement of consideration for ride shall be between the driver and user and applicant is not involved in the same. The service provided by the app is purely discovery platform. It is driver who provides the commuting service to passenger and collects consideration directly from passenger.

In light of above, applicant has sought advance ruling in respect of the following questions:

a. Whether the Applicant satisfies the definition of an e-commerce operator and the nature of supply as conceptualized in Section 9(5) of CGST Act, 2017 r/w notification No 17/2017 dated 28.06.2017?

b. Whether the supply by the independent four-wheeler cab service provider (person who has subscribed to Rapido' app) to his passengers (who do not pay any subscription fee) on the app platform amounts to supply by the Applicant?

c. Whether the Applicant is liable to pay GST on the supply of services provided by the independent four-wheeler cab service provider (person who has subscribed to applicant's 'Rapido' app) to his passengers on the Applicant's app platform?

d. What is the rate at which GST shall be collected on the ride monitoring fee and the SAC code that shall be applicable?

e. Whether the Applicant is liable to pay GST on the supply of services provided by the independent three/two-wheeler cab service provider (person who has subscribed to applicant's 'Rapido' app) to his passengers on the Applicant's app platform?

**Discussions and Observations of AAR**

The core issue is to decide whether applicant is an e-commerce operator or not and whether they are liable to discharge GST in terms of section 9(5) of CGST Act.

E-commerce operator is defined u/s 2(45) of CGST Act to mean any person who owns, operates or manages digital or electronic facility or platform for electronic commerce. In instant case applicant owns digital platform ('Rapido' App) for supply of services. Thus, applicant fits into definition and qualifies to be an electronic commerce operator.

In order to be covered under charging Section 9(5) of the CGST Act 2017, following conditions should be satisfied, namely:

a. Category of service should be notified by Government;

b. Supply of such services should be intra-state supplies; and

c. Supply of such services is through e-commerce operator.

Vide Notification No. 17/2017 – CT(R) dated 28.06.2017, Government has notified tax on intra-state supplies for services by way of transportation of passengers by a radio taxi motor cab, maxi cab and motorcycle shall be paid by electronic commerce operator.

In instant case, services of transportation of passengers are provided by four-wheeler car, which is a motor vehicle and hence, qualifies to be a motor cab. Thus first two conditions are satisfied in instant case.

It is pertinent to mention here that neither the definitions of electronic commerce nor the charging Section 9(5) of the CGST Act 2017 stipulates that the e-commerce operator has to collect the consideration.

The most important issue is whether impugned services are supplied through the e-commerce operator or not. As per Merriam Webster dictionary, the word 'through' is used as a function to indicate means, agency, intermediacy such as by means of, by the agency of, etc. Putting it into Section 9(5) of CGST Act, it gives the meaning that services are supplied by means of/by agency of/from begging to the end/during entire period by e-commerce operator.

From the facts, it is apparent that App not only generates leads about customers to drivers, but also provides a platform for fare negotiation between the customer and driver. Once the ride fare is finalized, location of customer and pick up point is shared by App; the start of ride, route taken for ride, end or ride are captured and notified to customer through the App. Thus effectively the services of transportation of passengers by the driver is supplied through the App/portal from beginning to end. Thus the third condition that services are supplied through e-commerce operator is also satisfied.

**Ruling of AAR**

a. Applicant satisfies the definition of an e-commerce operator.

b. The supply by the independent four-wheeler cab service provider to his passengers on the App platform amounts to supply by the Applicant by virtue of Section 9(5) of CGST Act.

c. Applicant is liable to pay GST on the supply of services provided by the service provider to his passengers on the Applicant's app platform, being an e-commerce operator u/s 9(5) of CGST Act..

d. 18% GST (9% CGST and 9% SGST) is applicable on the ride monitoring fee and SAC code 9985 is applicable for the said service.

e. Applicant is liable to pay GST on the supply of services provided by the service provider to his passengers on the Applicant's app platform.

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## 2 *Maharashtra Jain Education Society [Advance Ruling No. 91 OF 2022-23] – Maharashtra AAR*

**Facts and Issues involved**

Applicant, a registered Charitable Trust, is inter-alia engaged in providing accommodation

services in the hostels. Such services are provided only to the students studying in 11th standard up to the student's pursuing graduation. The accommodation is provided in the hostels, which are equipped with bunk beds, steel cupboards, study tables, chairs, clothes drying stands, and fixtures and fitting. The fees for hostel accommodation services charged from the student is ₹ 1,10,000. A concession fees is provided to student on need based. The fees for vacation period from 1st May to 30th June is collected at Rs. 10,000 per month.

Applicant has sought advance ruling as to whether the hostel accommodation services provided by the applicant would be eligible for exemption under Sr. No. 12 of Notification 12/2017 - Central Tax (Rate) dated 28th June 2017 i.e., services by way of renting of residential dwelling for use as residence?

**Applicant's submissions**

Following conditions are required to be satisfied for services to be exempt:

1. Services should be a renting service;
2. Property let out must be residential dwelling; and
3. Such residential dwelling should be given for use as residence.

The supply of hostel accommodation, mess facility, facilities in room, hot water facility are taxable supplies under GST. Supply of hostel accommodation is principal supply and other supplies are ancillary to main supply. The hostel accommodation services is nothing but renting of immovable property and hence, first condition stands satisfied.

Residential accommodation used for long term stays can be considered as residential dwelling. Stay in hostels does not qualify as temporary stay. Further, stay in hostel is different from stay in hotels, motels, inns, etc. Thus, second condition also stands satisfied in given case.

The hostel accommodation provided is used by the students for the purpose of residence. Residence connotes permanency in nature i.e., when a person resides for a considerable time. Students come to hostel for longer stay and not a temporary period and hence, third condition is also satisfied in given case.

Applicant also relied on decision of Honorable Karnataka High Court in case of Taghar Vasudeva Ambrish vs AAAR, Karnataka wherein it was held accommodation services provided by hostels to students is exempt.

**Discussions by and observations of AAR**

*Supply of hostel accommodation services to students with mandatory supply of meals and other amenities for duration of stay of 10 months:*

There is no binding judgement of Bombay High Court and Supreme Cout on the matter. Thus, relying on decision of non-jurisdictional Karnataka High Court in case of Taghar Vasudeva Ambrish, supply of hostel accommodation services with supply of meals and necessary amenities for 10 months is exempt under entry 12 of Notification No. 12/2017 – CT(R) dated 28.06.2017.

*Supply of hostel accommodation services to students with mandatory supply of meals and other amenities for duration of stay of 1 to 2 months during vacation period:*

Duration of stay of 3 to 12 months are to be exempted as per above mentioned judgements. Duration of less than 3 months is not decided by these judgements. When a person goes for casual or temporary visit, it cannot be termed as a residence. Hence, duration of stay for

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1 to 2 months is not exempt under entry 12 of Notification No. 12/2017 – CT(R) dated 28.06.2017.

*Supply of hostel accommodation services to old students with mandatory supply of meals and other amenities for duration of stay of 1 to 2 months during vacation period who are already staying for 10 months:*

Earlier tenure of 10 months is extended further by period of one month or 2 months by the old students. This will not change the nature of earlier stay of 10 months to temporary accommodation and hence, such supplies will also be long term tenure and considered as eligible for exemption benefit under entry 12 of Notification No. 12/2017 – CT(R) dated 28.06.2017.

**Ruling of AAR**

Hostel accommodation services to students with mandatory supply of meals and other amenities for duration of stay of 10 months is exempt.

Hostel accommodation services to students with mandatory supply of meals and other amenities for duration of stay of 1 to 2 months during vacation period is not exempt.

Hostel accommodation services to old students with mandatory supply of meals and other amenities for duration of stay of 1 to 2 months during vacation period who are already staying for 10 months will also be treated as exempt.

### 3 *Metropolitan Transport Corporation [[2024] 164 taxmann.com 784] – Tamil Nadu AAR*

**Facts and issue involved**

Applicant is a Government of Tamil Nadu undertaking, primarily engaged in providing passenger transportation services, which is exempt under GST. Applicant had entered into a lease agreement with the Government of Tamil Nadu, represented by the Regional Transport Officer (RTO) Chennai, to rent out the premises owned by the applicant.

As per the agreement, both the parties mutually agreed to revise the rent once every three years based on existing government orders, starting from 1st September 2005. Due to unresolved negotiations, such rent revisions, for the respective years, have not been implemented.

Only during the fiscal year 2023-24 did both the parties agree to revise the rent, settling on a 15% increase every three years. This revision was applicable retrospectively and hence the incremental rent was calculated from 1st September 2005. Pursuant to the above, the tenant agreed to pay the differential amount of ₹ 1,60,42,203/- to the applicant upon issuance of supplementary invoices for the same.

Applicant submitted that, though the tenant has agreed to pay the enhanced rent, they are of the view that GST is not applicable to the enhanced rent. The tenant's argument rests on the premise that GST came into effect only on 1st July 2017, therefore, invoices relating to the period prior to the said date will not be subject to GST since they relate to a period when Service Tax was applicable and hence they will be exempt from GST.

Due to this ambiguity, applicant has been unable to raise the relevant invoices and collect the revised amount from the tenant.

In a recent communication dated 24.12.2023, the tenant expressed willingness to remit the revised rental value inclusive of GST, contingent upon the provision of successive Advance Ruling order affirming the applicant's stance that such rent is indeed taxable under GST Law.

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In light of the above, applicant sought an advance ruling for the following issues:

1. Whether collection of increased rents for the past period be considered as 'supply' as defined under GST Law?

2. If the answer to above is in affirmative,

   a. Is the entire increased amount of ₹ 1,60,42,203/- subject to GST? Or

   b. Only the portion of the invoice value of ₹ 99,19,432/- relating to the period post 1st July 2017 is liable to GST and the rest ₹ 61,22,771 is exempt as it is related to service tax period?

**Discussion by and Observations of AAR**

There is no ambiguity of applicability of GST on the differential rent amount due to upward revision of rent relating to the period from 1st July 2017 to 31st August 2022 i.e., GST is payable on the same.

When GST was introduced, it sought to consolidate multiple taxes into one and hence it was essential to have transitional provisions to ensure that the transition to the GST Regime is smooth and hassle-free and no ITC/ benefits earned in the existing regime are lost. The makers of GST Law have incorporated such provisions foreseeing the issues which may arise post transition into GST era.

Reference was made to one such provision which is relevant to the instant case i.e. Section 142(2)(a) which states that in case of an upward price revision for a contract entered into before introduction of GST, the registered person shall issue a supplementary invoice within 30 days from the date of revision and such revision will be taxable shall be treated as taxable supply under GST.

Hence, in the instant case, collection of increased rents for the past period i.e., 1st September 2005 to 30th June 2017, will also be treated as supply under GST and tax will be applicable on the entire increased rent of ₹ 1,60,42,203/-.

**Ruling of AAR**

The collection of the increased rents for the past period will be treated as 'supply' under the CGST Act. The entire increased amount of ₹ 1,60,42,203/- shall be liable to GST under the CGST Act.

***Lokmat Media Private Limited [[2024] 165 taxmann.com 92 – Maharashtra AAR***

**Facts and issue involved**

Applicant is a publisher of Maharashtra's leading daily newspaper in Marathi, Hindi and English languages. It provides advertisement services in print media to a diverse range of customers, including the Central Government, State Government, Local Bodies, and the private sector across Maharashtra.

They have two streams of revenue:

(i) Sale of Newspaper

(ii) Sale of Space for Advertisement in Print Media (Newspaper)

Applicant provides the said services to 'Pune Municipal Corporation' (PMC) and 'Pimpri Chinchwad Municipal Corporation' (PCMC) at the Government rates for the 'setting of Space for Advertisement in Print Media'.

Applicant charges GST at the rate of 5% in accordance with Notification No. 11/2017 – Central Tax (Rate). However, PMC and PCMC do not reimburse their GST Liability on the

same. PMC and PCMC are of the view that GST will not be applicable to advertisement services provided to the Municipal Corporation as they qualify as 'Pure Services'. 'Pure Services' is defined in Notification No. 11/2017 – Central Tax (Rate) to mean services provided to any Government or Government Authority by way of any activity in relation to function entrusted to the respective authorities under Article 243G/243W of the Constitution.

Applicant sought an Advance Ruling in respect of whether the goods/services provided by it to PMC and PCMC can qualify as 'Pure Service' and be exempt from GST as per Notification No. 11/2017 – Central Tax (Rate).

**Applicant's Submissions**

Applicant provides sale of advertisement space in print media service to PMC and PCMC which are local authorities. However, the material component (newspaper) forms a major part of the value of supply, which involves various raw materials used for such supply. Hence, the said notification is not applicable as the applicant is supplying both goods and services and is not engaged in providing pure services.

Also, providing services in relation to sale of advertisement in print media is not covered under the scope of any entry under Article 243W of the Constitution of India i.e., it is not an essential service for the activity in relation to the function of PMC and PCMC. Therefore, the services provided by the applicant cannot be said to be an activity related to the function of PMC and PCMC. Hence, even when providing services to local authorities, the applicant does not meet the definition and conditions laid down for the exemption. Therefore, the exemption entry mentioned in Notification No. 11/2017 – Central Tax (Rate) is not applicable to the applicant and it has rightfully charged GST at the rate of 5%.

**Discussions by and Observations of AAR**

In supply of space for advertisement in print media, only the rights to publish advertisement are available to the recipient specified in the publication, in which such advertisement is published. No property in goods in form of newspaper or print media is transferred to the recipient of service of supply of selling space in print media.

Therefore, it is held that supply of selling space in print media is a supply of pure service as envisaged in Notification No. 11/2017 – Central Tax (Rate).

On perusal of relevant rules framed by PMC and PCMC along with relevant case laws, it was found that the purpose for which PMC and PCMC had procured services from the applicant was related to their function under Article 243W of the Constitution.

**Ruling of AAR**

Service provided by applicant qualifies as pure service as provided in Notification No. 11/2017 – Central Tax (Rate) and hence is exempted from tax.

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# INDIRECT TAXES
## Service Tax

CA Rajiv Luthia CA Keval Shah

### 1 *M/s Hooghly Met Coke and Power Co. vs. CST 2024-(8)- TMI-611-CESTAT- Kolkata*

**Backgrounds and facts of the case**

- The appellant is a manufacturer of coke at their factory located at Haldia in State of West Bengal.
- For the purpose of setting up the Heat Recovery Coke Oven Project in the said factory, the appellant entered into five Agreements, all dated October 27, 2005, with Beijing Sino-Steel Industries and Trade Group Corp (hereinafter referred to as "SSIT"), Beijing, China. The said plant simultaneously provides for production of power from the heat generated in the coke oven during conversion of coal to coke.
- One of such agreements, was for supply of designs and drawings for manufacture of indigenous equipment and civil structure utilities and other services for the purpose of erection, start-up commissioning and demonstration of performance test, etc. As per Clause 2.1 of this Agreement, the contract price for supply of the imported designs and drawing was USD 1 million.
- The Department was of the view that supply of designs and drawings, by SSIT amounts to providing the taxable service of "Intellectual property services".
- The appellant paid service tax of ₹ 48,78,395/- along with interest 'under protest' and informed the Department about the payment 'under protest' vide letter dated 28.02.2008. Subsequently, the appellant paid service tax for various other taxable services also. Thus, the appellant paid a total sum of ₹ 91,90,101/- (including cess), along with interest thereon amounting to ₹ 9,77,463/-, towards the services" received by them from SSIT. The SCN for the period 10th November, 2005 to 31st March 2008 was issued for the above demand.

**Arguments by the Appellant**

- That transferring of technical know-how from SSIT is not a taxable service liable for service tax; supply of designs and drawings by SSIT would not qualify as a taxable service under the category of "intellectual property right service" as defined under Section 65(55a) of the Finance Act, 1994 unless the said intellectual property right is registered or patented in India.

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**Decision of the Hon'ble Tribunal**

- That these designs and drawings were considered as goods under Customs Act, 1962 and customs duty has already paid on the same at the time of importation of the goods; hence, no service tax is payable on the designs and drawings under the category of taxable service of "Intellectual property services" (IPR Services). We find merit in the contention of the appellant. The designs and drawings have been considered as 'goods' at the time of importation and customs duty has already been paid on the same. Hence, we hold that the imported drawings and designs cannot be considered as taxable service under the category of "intellectual property services". Therefore, the demand of service tax to the extent of ₹ 48,78,395/-in the impugned order, under the category of Intellectual property services", paid by the appellant under protest, is not sustainable

- From the statement dated 06.07.2007 recorded of the appellant, it is observed that the appellant has made payments towards receiving of various other services such as supervision charges and Training of personal etc. for which the appellant paid service tax, under reverse charge without any protest.

- That there is no suppression of facts with intention to evade the payment of tax established in this case. The appellant has paid service tax under the category of "consulting engineering service" instead of "intellectual property service" as claimed by the Department. If service tax is paid under a different category, it is only a procedural lapse, for which no penalty can be imposed.

- As regards the invocation of extended period, we observe that no cogent evidence has been adduced for invocation of the extended period or establish suppression of facts with an intent to evade tax. Therefore, the demand for extended period, and the penalties are set aside. However, the liability to interest will be recalculated as per the demand to be recalculated by the adjudicating authority.

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**2** ***Shanti Realty Pvt Ltd vs. CCE, Indore 2024-(8)- TMI-604-CESTAT-New Delhi***

**Backgrounds and facts of the case**

- The appellant is engaged in providing taxable services of construction of residential complex and was availing Cenvat credit on service tax paid on various input services used in the construction of two residential complexes, namely 'BCM Paradise' and 'BCM Planet'.

- Show cause notice dated 28.09.2020 was issued on the basis of service tax audit that the appellant continued to avail the Cenvat credit and have taken the credit of ₹ 9,59,263/- from October 2014 to June2017 on 'BCM Paradise' even after completion certificate was received on 20.12.2012.

- The Adjudicating Authority confirmed the demand of ₹ 2,06,443/- along with interest under Section 75 and penalty under section 78 of the Act and dropped the demand of ₹ 7,52,820/- pertaining to the period, October 2014 to March 2015, as time barred.

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- Thereafter, the appellant filed refund application within one year from the date of cancellation of booking of flats. The said refund claim was initially rejected holding that the refund claim has been filed beyond the time limit prescribed under 11B of the Central Excise Act, 1944 and the same has been filed after one year from the payment of service tax.
- Hence the present appeal.

***Arguments by Appellant Assessee***

- Relying on the notification no. 13/2016–CE (NT) dated 01.03.2016 it was submitted that sale of immovable property is neither service nor goods, such a prospective amendment included within ambit of rule 6 of CCR, 2004, sale of property after completion certificate, only after 1.4.2016.
- That in the present case, taxable service as exempted subsequently, and when the credit was availed, the activity was taxable and, therefore, the same will not be denied or reversed unless there is specific provision in law to do the same. In support of the submissions, the learned counsel relied on the decision of this Tribunal in the case of M/s. Alembic Ltd.

**Arguments by Department**

- That the appellant availed cenvat credit on immovable property constructed by them after issuance of completion certificate, thereby rendering the credit ineligible ab initio

**Decision of the Hon'ble Tribunal**

- After the issuance of completion certificate, the sale of property is merely transfer in the title of goods or immovable property, which is specifically not included in the definition of 'service'. Consequently, neither service tax is leviable nor Cenvat Credit can be availed after the completion certificate is issued. In that event, the submission of the learned Counsel for the appellant that insertion of Explanation-3 in Rule 6 w.e.f. 01.04.2016, whereby the definition of 'exempted service' under Rule 2(e) included an activity which is not a 'service' as defined under Section 65B(44) of the Act is prospective and hence the Cenvat Credit cannot be denied for the period prior to the said date, is not correct.
- The main substantive provisions clearly reflected the true legal position that once the completion certificate is issued, the appellant would not be liable to pay service tax and logically will not be eligible to avail the Cenvat credit.
- The next submission raised by the learned counsel for the appellant was that Rule 6 of CCR cannot be invoked when the credit availed by them was eligible at the time of availment but the same became ineligible later on. The appellant has misconstrued the provisions of law as well as the factual matrix that the credit in the present case was availed after the completion certificate was issued and, therefore, it rendered the credit ineligible ab initio.
- The relief granted by the Tribunal in ***M/s. Alembic Ltd. (supra)*** were on different footing where the credit was availed on input services before the completion certificate was issued. The present case is clearly distinguishable as the appellant claimed the credit

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much later the completion certificate was issued.

- Accordingly, conclude that the appellant is not entitle to the cenvat credit availed during the period October, 2014 to June, 2017 as the completion certificate was issued on 20.12.2012 and by virtue thereof the transaction was out of the purview of service tax and was to be treated as mere sale of goods.
- The appellant was aware that after the issuance of the completion certificate, the immovable property is no longer treated as a service rather, it is a mere transfer of the title of goods or immovable property, and hence, for the period October 2014 to June 2017, the appellant was not entitle to avail the credit. The shelter sought to be taken by the appellant on the basis of the Explanation-3 inserted in Rule 6 is misconceived, as discussed above. In the circumstances, the Revenue has rightly invoked the period of limitation under Section 73(1) of the Act. On the same grounds, the imposition of penalty under Section 78 of the Act is justified and the levy of interest is upheld.

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## 3 *M/s Sashreek Constructors Pvt Ltd and Anr vs. The Customs, Excise and Service Tax Appellate Tribunal and Anr (Writ Petition) 2024-TIOL-1345-HC-KOL-ST*

**Backgrounds and facts of the case**

- The petitioner is a company engaged in the business of providing work contract services to the State Government, local authorities or Government Undertakings by way of construction of roads, bridges etc. During FY 2015-16, the petitioner was awarded work orders for construction of bailey bridges and accordingly contract agreements were executed on 24th March, 2015 and 19th January, 2016.
- It is the petitioners' contention that since the bailey bridges are used by the general public and are intended to be used as general road transportation, the construction of these bridges is not liable to service tax.
- SCN dated 23rd April, 2021 was issued to the petitioner by the department demanding service tax amounting to ₹ 2,17,50,747/- along with interest u/s 75 and penalties u/s 77 & 78 of the Finance Act, 1994. The petitioner submitted a reply to the impugned SCN; however, the O-I-O was passed confirming the demand along with consequential interest and penalties.
- Being aggrieved, he had filed a writ petition before the Hon'ble HC Guwahati, which was registered as WP(C) No. 3967 of 2022. By an order dated 22nd June, 2023, the Hon'ble HC at Guwahati was inter alia, pleased to dismiss the said petition with liberty to file statutory appeal. The petitioner has since filed a statutory appeal before the Tribunal.
- By an order dated 5th January, 2024, the Tribunal by condoning the delay in preferring the appeal had set forth the conditions such as payment of predeposit for maintaining such appeal.'
- Petitioner challenges the CESTAT order dated 5th January 2024 wherein the Tribunal having granted the petitioner 8 weeks' time to make the pre-deposit

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for maintaining the appeal, had made it clear if such condition of pre-deposit is not fulfilled, no further opportunity would be provided to the petitioner. Hence the present writ Petition.

**Arguments by Petitioner**

- It is within the competence of this Court to grant exemption in this case. The Ld. Counsel has placed reliance on the judgments delivered by the Hon'ble Delhi HC, in the case of ***Shubh Impex vs. UOI & Ors., 2018 SCC On Line Del 8793 = 2018-TIOL-968-HC-DEL-CUS*** and in the case of ***Pioneer Corporation vs. UOI, reported in 2016 SCC On Line Del 6758 = 2016-TIOL-1116-HC-DEL-CX***.

- By placing before this Court the judgment delivered in the case of ***Kusum Ingots & Alloys Ltd. vs. UOI & Anr., reported in (2004) 6 SCC 254 = 2004-TIOL-117-SC-CX-LB*** she submits that although, original authority had passed the order from outside the jurisdiction of this Court, however, the Tribunal being situated within the jurisdiction of this Court, there cannot be any impediment in this Court exercising jurisdiction.

- The order passed by the Tribunal is amenable to the jurisdiction of this Court as the same does not finally dispose of the case, nor can the order which is impugned can be said to be an adjudicating order and thus not appealable.

- Admittedly, in this case, the petitioner is facing serious financial constraints. By placing before this Court the affidavit of assets disclosed by the petitioners, it is submitted that from the aforesaid it would appear that the financial condition of the petitioner does not permit the petitioner to make payment of the mandatory pre-deposit as is required for maintaining the appeal and this Court in exercise of its discretion is competent to grant such exemption.

**Arguments by Respondent**

- Although, the Tribunal is situated within the jurisdiction of the HC, yet by reasons of Section 35G of the said Act, an appeal would lie to the HC, in this case. He further states that although the Tribunal was competent to dispense with the pre-deposit, prior to the amendment of Section 35F of the said Act, however, subsequent to the amendment of Section 35F of the said Act with effect from 6th August, 2014, the Tribunal is no longer competent to entertain an appeal unless the mandatory pre-deposit as required is paid in terms of Section 35F(i) of the said Act.

- It is submitted that the statute specifically provides that the Tribunal or the Commissioner (Appeals), as the case may be, shall not entertain any appeal under sub-section (1) of Section 35, unless the appellant has deposited seven and a half per cent of the duty in case where duty, or duty and penalty are in dispute, or penalty, where such penalty is in dispute, in pursuance of a decision or an order passed by an officer of Central Excise lower in rank than the Commissioner of Central Excise. As such in absence of the mandatory pre-deposit, the appeal itself cannot be entertained. In support of his aforesaid contention, he has placed reliance on the case of ***Diamond Entertainment Techno. Ltd. vs. Commr. of CGST, Dehradun,***

***reported in 2019 (368) E.L.T. 579 (Del.) =2019-TIOL-2290-HC-DEL-CUS***

- In the alternative that if the order impugned is held not to be an appealable order, although, ordinarily, the Hon'ble HC in terms of Clause (2) of Article 226 of the Constitution of India in such case, may have the jurisdiction to entertain the matter, however, by reasons of doctrine of forum convenience, this Court ought not to entertain the same.

**Decision of the Hon'ble HC**

- In the instant case, it may be noticed that by an order dated 5th January, 2024, the Tribunal has been, inter alia, pleased to direct the petitioner no.1 to make pre-deposit and fulfil the conditions within the time specified therein for maintaining the appeal. It has further been made clear in such order that if the condition is not fulfilled, no further opportunity would be given to the petitioner no.1 and the matter would be decided on the basis of the records available.

- Having regard to the aforesaid and taking note of Section 35G of the said Act, it would appear that an appeal shall lie to the High Court from "every order" passed in appeal by the Appellate Tribunal, though the maintainability thereof would be dependent on certain statutory limitations.

- Having regard to above, it cannot be said that the order passed by the Tribunal on 5th January, 2024 does not qualify as an order for preferring an appeal before the High Court, simply because the same does not seek to adjudicate the rights of the parties. It is a different question whether the High Court would admit the same having regard to the substantial questions of law involved. There are limitations imposed by the statute which are required to be followed. Such statutory limitations, in my view, do not make an appealable order, non-appealable, especially when there is no limitation on the nature of order or the decision to be appealed against, as in this case.

- I find that the learned advocate appearing on behalf of the petitioners, having regard to the judgment delivered in the case of ***Ambica Industries (supra)*** has candidly admitted that in case of an adjudication order an appeal would lie before the High Court within whose territorial jurisdiction the original adjudicating authority functions.

- It is not the case of the petitioners that the Tribunal lacked the jurisdiction to pass the order which is impugned or there has been violation of the principles of natural justice. As such, without going into the issue as to whether the petitioners are entitled to exemption, notwithstanding the mandate of Section 35F of the said Act, I am of the view that the present WP ought not to be entertained on the ground of alternative remedy as also on the ground of lack of territorial jurisdiction, having regard to the observations made in case of ***Raj Kumar Shivhare (supra)*** and case of ***Ambica Industries (supra)***. Allowing a petition of this nature would permit bypassing of statutory provision which is not ordinarily permissible. Hence, petition dismissed.

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# CORPORATE LAWS

## Case Law Update

CS Makarand Joshi

### IBC – Case 1

**In the matter of Shubham *Corporation Private Limited - Appellant vs. Mr. Kotoju Vasudeva Rao (IRP) and Ors.* (IRP for *M/s Navayuga Infotech Private Limited (Respondent) vs. Vajra IOT Private Limited at National Company Law Appellate Tribunal* dated 22 May 2024.**

**Facts of the Case:**

- Shubham Corporation Private Limited ("Appellant") had extended unsecured loans to Navayuga Infotech Private Limited ("Corporate Debtor" or "CD") from 2012 to 2020.
- Interest accrued on these loans annually, with tax deducted and paid to the Income Tax Department. However, the interest, except for small installments, remained unpaid. The total outstanding amount from the CD was approximately ₹ 110 crore, after accounting for a repayment of ₹ 82.5 lakhs.
- Due to its inability to repay the loan, the CD proposed to issue Compulsory Convertible Debentures ("CCDs") with 0% interest to the Appellant. The Appellant agreed, and a Debenture Subscription Agreement ("DSA") was executed on 2nd March 2020 between the parties. The CCDs could be converted into equity shares at any time within 10 years from the date of allotment. If the conversion option was not exercised, the CCDs would automatically convert into equity shares. Debenture certificates were issued to the Appellant on 31st March 2020.
- Meanwhile, Vajra IOT Private Limited, an operational creditor, filed an application under Section 9 of the Insolvency and Bankruptcy Code, 2016 ("IBC"), against the CD. The application was admitted on 16th September 2022, initiating the Corporate Insolvency Resolution Process ("CIRP").
- On 11th November 2022, the Appellant submitted a claim to the Interim Resolution Professional ("IRP"). After verification, the IRP recognized the claim as a financial debt and included the Appellant in the list of financial creditors.
- Consequently, the Committee of Creditors ("CoC") was reconstituted, including the Appellant as a member. The IRP then filed IA No. 1384/2022 before the National Company Law Tribunal ("NCLT"), Hyderabad, seeking to update the list of claims and the reconstituted CoC

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- Upon examining the DSA, the NCLT ruled that the inclusion of the Appellant in the list of financial creditors was not permissible under the law. As a result, the request to recognize the revised CoC was rejected. Consequently, IA No. 1384/2022 was dismissed, and the Appellant was not accepted as a financial creditor. The revised CoC was not taken on record. Aggrieved by the order of the NCLT – the appellant filed the appeal at NCLAT.

**Arguments of the Appellant**

- Following the execution of the DSA, the outstanding amount continued to be categorized in the final accounts under "long-term borrowings" within the sub-heading of CCDs, and not as share subscription money under the capital account.
- According to the "clean slate principle" under insolvency law, upon the resolution of the CD, all its liabilities and obligations are effectively erased if the CD is acquired by a resolution applicant. Therefore, the appellant's claim should be recognized as that of a financial creditor.
- The order was passed by the NCLT filed by the IRP based on objections raised by the operational creditor. Crucially, the appellant was not granted an opportunity to be heard, which constitutes a breach of the principles of natural justice.
- The appellant was issued a debenture certificate but was not granted any rights associated with being a shareholder. Thus, the appellant's rights and interests should be viewed from the perspective of a creditor.
- The CD did not contest the treatment of the CCDs as debt. Both parties to the DSA were in agreement regarding the unmatured CCDs' status as debt. The nature of the liability or debt does not change simply because the method of discharge involves conversion to equity. CCDs, akin to debentures, signify an acknowledgment of debt and remain a liability until they are converted into shares, making them distinct from equity shares.
- As per provisions of Section 5(8)(c)(f) of IBC the debentures are financial debt.
- The presence or absence of interest on the debt is not a precondition for the debt to qualify as "financial debt" under the IBC. Therefore, the claim qualifies as financial debt despite the CCDs carrying 0% interest.
- The CIRP initiation date serves as the cut-off for determining the CD's liabilities. On this date, the unmatured CCDs represent a debt, and the appellant does not hold the rights of a shareholder.
- The appellant, as a holder of CCDs, has no entitlement to repayment but only the right to redeem the CCDs. The terms of the DSA dated 2nd March 2020 explicitly stated that there was no repayment obligation; the appellant could either convert the CCDs within the 10-year period or have them automatically converted into shares after that period.
- The fact that the conversion to equity shares has not yet occurred does not alter the nature of the debentures. Given that the CCDs carry no repayment obligation, they continue to be regarded as debt instruments until conversion,

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and this status should not be altered merely due to the pending conversion.

- As the unmatured CCDs should be treated as financial debt, the appellant's claim was rightly admitted by the IRP as financial debt, and the appellant was appropriately given a seat in the CoC. This position should be restored.

**Arguments of the Respondent**

- The appellant, being a holder of Compulsory Convertible Debentures (CCDs), has no right to repayment. The only remedy available to the appellant is the redemption of these CCDs, as the Debenture Subscription Agreement (DSA) does not provide for repayment.
- The DSA, executed on 2nd March 2020, explicitly states that there is no repayment obligation associated with the CCDs. The appellant has the option to convert the CCDs into equity shares within 10 years. If the conversion option is not exercised within this period, the CCDs will automatically convert into shares.
- The fact that the conversion date to equity shares has not yet occurred does not alter the nature of the CCDs. Since these debentures carry no obligation of repayment, their character as financial instruments remains consistent, and the absence of a conversion date does not affect their classification.
- The appellant has relied on judgments from other statutes, which are not directly applicable to the issue of whether CCDs constitute financial debt under the IBC. The matter of CCDs as financial debt is directly addressed by the following judgments under the IBC:
  - — ***M/s IFCI Limited vs. Sutanu Sinha, Company Appeal***
  - — Affirmed in ***M/s IFCI Limited vs. Sutanu Sinha***
- The judgments cited by the appellant are distinguishable and do not apply to the current context under the IBC. Therefore, the present appeal lacks merit and is fit to be dismissed.

**Held**

- The CCDs issued to the appellant can be converted into equity shares at any time before the expiry of 10 years from the date of allotment. If the appellant does not exercise this option, the CCDs will automatically convert into equity shares. Upon conversion, the equity shares will entitle the appellant to receive dividends and other distributions, and these shares will rank pari passu with the existing equity shares of the company.
- Once the CCDs are converted into equity shares, the appellant will be entitled to rights proportional to its shareholding. These rights will be aligned with the existing shareholders and subject to mutual agreement with the Company.
- According to the terms of the DSA, the CCDs must be compulsorily converted into equity shares, and there is no obligation to repay the original debt. The CD was admitted into the CIRP on 16th September 2022, long after the appellant's right of repayment was extinguished under the DSA dated 2nd March 2020 and the issuance of the Debenture Certificate on 31st March 2020.
- A similar issue was examined by this Tribunal in the case of ***IFCI Ltd. vs.***

***Sutanu Sinha***. The said judgment has been upheld by the Hon'ble Supreme Court of India, reported vide judgment dated 9th November, 2023. The judgment established that a convertible debenture can be considered debt or equity based on the test of liability for repayment. If the terms of the convertible debentures provide for the repayment of the principal amount, they can be classified as debt instruments. However, if the debentures mandate compulsory conversion into equity shares and do not contemplate repayment of the principal, they are classified as equity instruments.

- In this case, the CCDs issued to the appellant do not provide for the repayment of the principal amount at any time, as they compulsorily convert into equity shares. Therefore, under the applicable legal framework and the precedent set by the IFCI Ltd. vs. Sutanu Sinha judgment, the CCDs should be regarded as equity instruments rather than debt. Accordingly, the appeal was dismissed.

## Companies Act – Case 2

**In the matter of *India Bulls Commercial Credit Limited vs. Koshika Bioscience Private Limited* NCLT Mumbai bench order dated 16th April 2024**

**Facts of the case**

- Indiabulls Commercial Credit Limited, (hereinafter called Financial Creditor /Petitioner), gave a loan amounting to ₹ 59,51,46,866/- to Pro Fin Capital Financial Services Limited (hereinafter called Principal Borrower).

- Koshika Bioscience Private Limited (hereinafter called Corporate Debtor/ Respondent), gave a corporate guarantee to the petitioner in favour of the Principal Borrower against the loan amount.

- As per the guarantee deed submitted by the petitioner before the tribunal, the corporate debtor irrevocably and unconditionally agreed that the corporate debtor shall pay the guaranteed amount stipulated in Schedule I of the guarantee deed without any delay or demur within three (3) days of demand by the Petitioner, as if the corporate debtor was a borrower.

- Owing to the failure of the Principal Borrower to repay the loan facility on time, an event of default occurred under the loan agreement.

- As a result, Petitioner issued a recall notice dated 19.09.2022 to the Principal Borrower and to the Corporate Debtor asking for repayment of the entire loan amount under the loan agreement along with interest within 1(one) day from the date of the receipt of the notice. This notice was neither responded to by the Borrower nor by the Corporate Debtor.

- Therefore, the Petitioner initiated the company petition under section 7 of the Insolvency and Bankruptcy Code 2016 for initiating a Corporate Insolvency Resolution Process (CIRP) against the Corporate Debtor.

**Petitioner's contentions**

- Under the Guarantee Deed, the obligation of the Corporate Debtor was joint and several and independent of the obligations of the Principal Borrower. On account of the default of the Principal Borrower, and on the invocation of

guarantee vide notice dated 19.09.2022, the Corporate Debtor failed to discharge it's liability. Therefore, there is a default on the account of the Corporate Debtor.

- The Petitioner had also filed an additional affidavit dated 08.11.2023 placing on record a copy of the board resolution passed in the meeting of the board of directors of Corporate Debtor held on Thursday, 31.12.2020 at the registered office of the Corporate Debtor.
- The said board resolution dated 31.12.2020 has been signed by Mr. Abhay Gupta authorizing Mr. Anupam Gupta to execute the guarantee on behalf of the Corporate Debtor. It is the same Mr. Abhay Gupta, who has signed the Affidavit in Reply also and the guarantee has been signed by Mr. Anupam Gupta hence the guarantee is valid.
- The Petitioner has relied on the board resolution dated 31.12.2020 and argued that there is no violation of section 186 of the Companies Act, 2013 ['the Act']. Even if it is so, it may, at best be the procedural violation by the Corporate Debtor which does not invalidate the guarantee issued by the Corporate Debtor.
- As per the board resolution, the Corporate Debtor itself refers to "the approval of the members accorded in the general meeting of the members of the Company held on 31.12.2020." Therefore, according to the doctrine of indoor management law presumes that the Corporate Debtor has complied with all the relevant requirements under the law.
- He relies on the cases of ***MRF Limited vs. Manohar Parrikar & Ors (2010) 11 SCC 374*** and ***Laxmi Ratan Cotton Mills Co. Ltd vs. J.K. Jute Mills Co. Ltd.***

**Respondent's contentions**

Learned Practising Company Secretary for the Corporate Debtor has not denied the existence of the corporate guarantee dated 19.01.2021 or the board resolution dated 31.12.2020 being signed by the director and having submitted to the Petitioner. However, he contends that,

- The guarantee issued by the Corporate Debtor is in violation of Section 186 of the Act and therefore cannot bind the Corporate Debtor.
- As per the balance sheet of the Corporate Debtor dated 31st March 2020, the paid-up share capital of the company was ₹ 1,00,000 and therefore it could give a guarantee of amount not exceeding ₹ 60,000 only.
- Corporate Debtor with a meagre paid-up share capital of ₹ 1,00,000 cannot issue a guarantee of ₹ 56 crores. unless it is previously approved by the members of the Corporate Debtor by way of special resolution under section 186 of the Companies Act 2013.
- The Financial Creditor also created security by way of a registered mortgage on the corporate debtor's property for the loan of ₹ 56.00 crore. Even in this case also, provisions of section 186(3) of the Act are not complied with.
- With respect to board resolution dt. 31.12.2020 relied upon by the Petitioner, the Respondent states that, the board resolution has a mention of the loan agreement dated 19.01.2021 which was not in existence on the date of passing board resolution.
- The board resolution mentions about the resolution purported to be passed

at the general meeting of shareholders about giving of guarantee but there is no mention of shareholders' approval for providing security by the Corporate Debtor to the Financial Creditor.

- One of the conditions for disbursement of the loan in the sanction letter dt. 19.01.2021 provides for the requirement of a certified true copy of the resolutions under all applicable laws including the Act for providing security and guarantee to the Financial Creditor. No such resolution is ever provided and there is no pleading by the Financial Creditor in the application to this effect.
- The directors as agents of the corporate debtor have acted in violation of sections 188 and 227 of the Contract Act 1872 by exceeding their authority as agents of the Corporate Debtor and therefore, the director/s has/have not acted lawfully and such an unlawful act does not bind the principal, i.e. the Corporate Debtor.
- A special resolution passed by the Corporate Debtor company's shareholders is required to be filed with the registrar of companies under section 117(1) read with section 117(3) of the Act in form MGT-14. It is available for public inspection under section 399 of the Companies Act 2013 at the portal of the Ministry of Corporate Affairs. The Financial Creditor failed to verify from records of Registrar of Companies ['ROC'] whether any such special resolution has been passed by the members of the Corporate Debtor and filed with the ROC
- The Financial Creditor has constructive notice of the requirement of the Act, namely, section 186(3) of the Act, more so when he knew that the Corporate Debtor with a meagre paid up capital of ₹ 1,00,000 cannot issue a guarantee of ₹ 56 crores unless it is previously approved by the members of the Corporate Debtor by way of special resolution.

**Held**

- Considering the rival contentions of the parties and the facts and circumstances we agree with the submission of the Petitioner that after receiving the board resolution from the Corporate Debtor, it was well within its rights to presume that all applicable provisions including approval by shareholders in the general meeting was obtained by the Corporate Debtor.
- The doctrine of indoor management implies that an outsider whose actions are in good faith and has entered into a transaction with a company can have a presumption that there are no irregularities internally and all the procedural requirements have been complied with by the company.
- Further, this Bench feels that non-compliance to provisions of section 186 of the Act is merely a procedural violation and does not prejudice the claim of the applicant Financial Creditor.
- Further, it is well well-settled legal principle based on the Latin maxim *commodum ex injuria sua nemo habere debet*, which means that 'no party can take undue advantage of his own wrong'. After signing and issuing of the guarantee on behalf of the Corporate Debtor and after handing over a duly signed board resolution, the same Director cannot wiggle out of it on any ground of anomaly or violation of

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provisions of the Act by the Corporate Debtor.

- For the purpose CIRP Petition, the Adjudicating Authority has to determine whether the "debt" was due and remained unpaid. Applying the doctrine of indoor management, we are of the view that the Corporate Guarantee issued by the Corporate Debtor is valid and enforceable. Relying on the record of default issued by NeSL, we conclude that default has occurred.

- We hereby admit this company petition and also looking at the consent given by the Insolvency Professional, we hereby appoint Mr. Nitin Om Kothari as an IRP, with a direction to the Financial Creditors to pay remuneration to the IRP and his expenses until the constitution of CoC.

- Accordingly, this Company Petition is admitted

## Companies Act – Case 3

**In the matter of *M/s. UKG Steel Private Limited vs. M/s. Erotic Buildcon Private Limited* NCLT Delhi bench order dated 31st May 2021.**

**Facts of the case**

- M/s. UKG Steel Private Limited (hereinafter called Financial Creditor/ Petitioner) advanced a loan of ₹ 3,76,45,000/- at an interest rate of 6.5% to Erotic Buildcon Private Limited (hereinafter called as Corporate Debtor/ respondent)

- The Corporate Debtor had assured and agreed to make the repayment, in 8 quarterly installments starting from 30.06 2019, and operative upto 31.03. 2021 i.e. till the validity of the loan agreement.

- After sending multiple reminders for repayment of the loan and interest, the financial creditor sent a letter demanding the repayment of the full loan amount. This demand notice was replied by the Corporate Debtor stating that, it is facing liquidity problems and hence is not in a position to repay the loan.

- Thereafter, the Financial Creditor sent 2 more demand notices to the debtor which did not receive any reply.

- As a result, the Financial Creditor filed this company petition under section 7 of the Insolvency and Bankruptcy Code 2016 ('the Code').

**Petitioner's contentions**

- The amount of ₹ 3.76 crores was disbursed by the Financial Creditor on different dates, in the 5 consecutive installments. The petitioner also submitted the bank account statements showing the said transfer of funds to the Corporate Debtor.

**Respondent's contentions:**

- The Corporate Debtor stated about their financial crisis, which occurred to their company, due to which they could not repay the loan installments on time. They also stated that they have the bonafide intention to repay the entire amount and sought some more time to allow their business operations to normalise, after improvement in the prevailing covid situation.

**Held**

- From a perusal of the bank statement and passbook, it is observed that ex-facie there is no evidence which reflects that the money was transferred from

the Petitioner-Financial Creditor to the Respondent-Corporate Debtor. The bank statement annexed by the Petitioner have a smudged visibility which gives a negligent impression about the Petitioner. Further, the balance sheet nowhere shows the disbursal of the principal amount from the Petitioner's account.

- The Corporate Debtor in its reply has not denied the disbursement of the loan. Assuming that the loan was disbursed, the question which still remains before us is, "whether the Financial Creditor, who is neither a Bank/NBFC nor a body corporate recognised by RBI for carrying out financial business, was authorised to give such loan amount or not?"
- To calculate whether the Financial Creditor has given a loan in terms of section 186 of the Act we refer to the balance sheet of the Financial Creditor which depicts that the paid-up share capital of the Financial Creditor is of ₹ 97,75,020 and reserves and surplus are of ₹ 66,58,072. The information of the security premium account has not been separately provided in the balance sheet. That the aggregate of paid-up share capital and reserves and surplus amounts to ₹ 1,64,33,092 and 60% of that amount is ₹ 98,59,855.2. If we compare both the amounts, then we observe that the loan amount disbursed by the Financial Creditor is more than 3 Crore which is much more than 60% of the aggregate of paid-up share capital and reserve and surplus.
- Petitioner has neither made the disclosure of such inter-corporate loan in its balance sheet nor it had produced the special resolution passed in the EGM of shareholders for the purpose of compliance of Section 186(3) of the Act. Further, the loan agreement does not speak about any such resolution passed by the shareholders.
- Therefore, the material available on the record suggests that the borrowing given by the Petitioner is contrary to the limit prescribed under the Act which amounts to an ultra vires act committed by the Petitioner. Hence the loan advanced by the Petitioner is not a legally enforceable debt.
- Therefore, the bench finds no merit in the petition and the same is hereby dismissed as misconceived.

## SEBI – Case 4

### Securities and Exchange Board of India's Adjudication Order in The Matter of Shalimar Paints Limited

#### Facts of The Order

- The Securities Exchange Board of India ('SEBI') had investigated in the matter of insider trading activity by certain entities in the scrip of Shalimar Paints Limited ('SPL/Company'), a company listed on the Bombay Stock Exchange Limited ('BSE') & National Stock Exchange of India Ltd ('NSE').
- The investigation was conducted to ascertain whether trading by certain entities in the scrip of SPL was in violation of the provisions of the SEBI Act, 1992 ("SEBI Act"), SEBI (Prohibition of Insider Trading) Regulation, 2015 ("PIT Regulations")
- The Investigation period was considered from March 18, 2021, to January 31, 2022 (hereinafter referred to as "Investigation period/IP").

- During the course of the investigation, it was observed by SEBI that Mr. Ashok Kumar Gupta ("Noticee") Managing director of SPL had not identified the event of raising funds by SPL through the issuance of equity shares and optionally convertible debentures as the Unpublished Price Sensitive Information ("UPSI") from the date of its existence.

- Hence it was alleged that Noticee had violated provisions of PIT regulations and accordingly Show Cause Notice ("SCN") was issued to the Noticee on February 28, 2024.

**Charges Levied**

Noticee was alleged for violations of the provisions of Regulations 9A(1) and 9A(2)(b) of PIT Regulations.

**Contentions by the Noticee**

**A. Date of commencement of UPSI with respect to the event of raising funds by SPL through issuance of equity shares and optionally convertible debentures was not when initial discussions were initiated but when investors got finalised**

1. Noticee submitted that the Company was considering raising funds either in the form of a Working Capital Term Loan, Long Term Loan/Equity infusion or a combination thereof either by a banking institution or private investors.

2. Accordingly, on May 18, 2021, the Company commenced discussions with Ernst & Young LLP ("E&Y") for the purpose of availing its assistance in finding and potentially inducting a financial/strategic investor for the Company. The assignment was named 'Project Bello'.

3. Thereafter between May 18, 2021, and June 26, 2021, the Company and E&Y were discussing the parameters of the engagement of E&Y and exchanging information relevant for the purposes of crystallizing the engagement letter.

4. Noticee contended that on September 01, 2021, the Company executed an Engagement Letter in favour of E&Y for Project Bello.

5. Pursuant to the aforesaid Engagement Letter dated September 01, 2021, E&Y introduced several potential investors to SPL who could have extended debt funding or equity funding or a combination thereof.

6. Thereafter, on October 04, 2021, SPL had signed a confidentiality agreement with Hella Infra Market Pvt. Ltd. ("Hella"), a prospective investor.

7. Though, a confidentiality agreement with Hella was signed on October 04, 2021, the engagement with E&Y continued for the induction of a financial/ strategic investor. This shows that Hella was not a focused, deliberate, and intended potential investor being pursued by the Company. The company continued discussions with other investors and the company entered into confidentiality agreements with nine potential investors.

8. Simultaneously, the Company executed a Non-Disclosure Agreement with another Consultant, Perigon Consilario LLP, on September 02, 2021, for the proposed fund-raising. Perigon Consilario LLP introduced a potential investor by the name of Avenue Asia Capital Management L.P. After a series of meetings, Avenue Asia Capital Management L.P. issued a non-binding

term sheet to the Company. However, the Management of the Company did not find this transaction suitable for its needs, and it was accordingly rejected.

9. Noticee contended that at this stage Company was still uncertain whether any of the investors was keen to extend any type of funding and it was only by end of October/November 2021, some potential investors began talking with the Company about the infusion of debt or equity.

10. Accordingly, on October 25, 2021, the Company began discussions with Deloitte Touche Tohmatsu India LLP ("Deloitte") for conducting financial and tax Vendor Due Diligence and on November 22, 2021, the Company signed an Engagement Letter with Lumiere Law Partners ("Lumiere") for conducting Legal Due Diligence.

11. Noticee contended that throughout the period between October and December 2021, the Company shared information and documents with Deloitte and Lumiere for the due diligence exercise and that even at this stage, no course of action had been finalized.

12. Thereafter, Noticee mentioned that till December 30, 2021, the potential investors did not had the due diligence reports. Also, in the mail dtd December 30, 2021, Deloitte also stated that the final report will be issued "once the Company finalizes the investor"

13. Further, the Legal, Financial and Tax Due Diligence exercise by the Consultants continued well into January 2022. The Company arranged for a meeting on January 07, 2022, to discuss the Due Diligence exercise.

14. Further, Noticee informed that on January 13, 2022, the Company notified that a Board Meeting was scheduled for January 18, 2022.

15. The intimation of this Board Meeting, along with the Agenda of the Meeting, was uploaded by the Company on the website of Stock Exchanges, which stated that the same was being held to "*consider and evaluate proposal for raising of funds by the Company through one or more permissible mechanisms as may be deemed appropriate by the Board, by way of issuance of equity shares and/or other securities including debenture and/or any other equity based instruments/securities including through preferential issue, private placement, or through any other permissible mode or any combination thereof, subject to receipt of regulatory/statutory/ shareholders approvals, as may be required.*"

16. Further on January 18, 2022, the Company held a Meeting of its Board of Directors where the proposed investment by Hella Infra Market Private Limited was discussed.

17. The Board resolved to grant permission to Hella Infra, subject to requisite approvals including approval of the shareholders of the Company, to invest in the Company through preferential issue and private placement.

18. The Noticee contended that the UPSI Period was not the same as alleged in the SCN i.e from September 1, 2021 to January 18, 2022 as UPSI never existed until January 13, 2022 i.e. the date on which SPL had notified exchanges that a board meeting would be held on January 18, 2022 to consider and evaluate the

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proposal for fundraising activity and therefore, that was the correct time when the decision to raise funds through a third-party investor attained a reasonably high degree of concreteness/ crystallization of transaction.

19. Hence Noticee was of the view that the UPSI period was from January 13, 2022, to January 18, 2022.

20. Noticee further submitted that Hella Infra was not the only investor with which the confidentiality agreement was signed rather there were many such potential investors with which SPL had signed the confidentiality agreement and at the stage of signing the confidentiality agreement, there exists an uncertainty w.r.t investor getting finalized.

21. Noticee contended that mere engagement of a Consultant cannot be understood as a UPSI; this would lead to an extreme scenario where any company, seized by the desperate need to explore fund-raising avenues, that hires a consultant for their expertise shall inadvertently trigger a UPSI period and shall be bound to keep their trading window closed in perpetuity.

22. Noticee submitted that for the period between June 2021 and January 12, 2022, it was still uncertain as to whether the Company could raise third-party investment.

23. Hence Noticee contended that the UPSI in the present case never concretized until January 13, 2022, when the decision to raise funds through a third-party investor attained a 'reasonably high degree of concreteness/ crystallisation/probability of transaction going through.

24. Noticee further submitted that the SCN lacked inherent jurisdiction in light of the letter of caution already issued by the Investigating Authority on January 15, 2024, wherein the said letter cautioned him to refrain from certain acts and warned that further action would be taken only if any new violations occurred.

25. Noticee also submitted that, no new infractions or violations of the provisions of PIT Regulations or Code of Conduct had occurred, nor has it had been alleged in the SCN and the SCN also did not allege that he did not pay heed to the warning letter. Hence, the issuance of the SCN was unwarranted and undermines the purpose and gravity of the initial warning.

**Submissions by the SEBI Adjudication Officer ('SEBI AO')**

**A. Date of commencement of UPSI with respect to the event of raising funds by SPL through issuance of equity shares and optionally convertible debentures was not when initial discussions were initiated but when investors got finalised**

1. Based on the investigations and findings, SEBI AO observed that SPL signed the engagement letter with E&Y on September 01, 2021 for the identification of potential investors for loan, equity, debt or a combination thereof.

2. In the engagement letter, it was stated that E&Y would approach on a "no-names" basis to the potential investors in order to establish the degree of interest from such parties and if the potential investors were interested, then it would obtain a confidentiality

letter from them. Additionally, it was stated that E&Y would mobilize their engagement team to commence work on the date of execution of the Engagement Agreement i.e. September 1,2021.

3. SEBI AO stated that, with the execution of the said engagement letter the information was born for the proposed fund-raising activity by SPL, which was a material information in terms of Regulation 2(1)(n) of PIT Regulations. In fact, the action of identifying the potential investors started right from September 2, 2021.

4. SEBI AO further stated that the UPSI relating to fundraising came into existence on September 01, 2021, as the said information of fundraising by the company was not generally available information at that point in time and if the same had become public at that moment, it would have impacted the price of the scrip.

5. SEBI AO further stated that the information about fundraising by the company was made available on the exchanges on January 18, 2022, by stating that its board of directors has considered and approved the raising of funds through the issuance of equity shares and optionally convertible debentures.

6. Further, on January 18, 2022, SPL had informed the stock exchanges about a press release with a subject 'Infra Market proposes to invest in Shalimar Paints Ltd.' The information was disseminated on the exchange after-market hours and the price of the scrip on NSE moved from the close price of ₹ 134.70 on January 18, 2022, to a close price of ₹ 140.75 (high price being ₹ 151.00) on January 19, 2022, while registering a price rise of 4.50% on January 19, 2022. SEBI AO concluded that the UPSI period thus started from September 01, 2021, to January 18, 2022.

7. SEBI AO stated that the information about fundraising was not dependent on the fact of the potential investors getting finalized as contended by the Noticee. SEBI AO further stated that in terms of Regulation 9A the responsibility of identifying the UPSI is placed on the CEO/ MD of the company, and in this case Noticee failed to identify the UPSI from the date of its existence i.e. from September 1, 2021.

8. Further, with respect to the issuance of a warning letter dtd January 15, 2024 to the Noticee, SEBI AO noted that SEBI would had initiated action only in case the violation appeared again. However, after the issuance of the said warning letter as rightly contended by the Noticee, no new infractions were observed as per records on the part of the Noticee.

**Order**

SEBI AO stated that, while there has been a violation by the Noticee as enumerated above, for the same set of violations for the same period Noticee has already been warned by SEBI.

Hence in view of the fact that no new infractions were observed, SEBI AO was of the view that no penalty is warranted in the instant case.

SCN dated February 28, 2024 was disposed of without imposing any penalty.

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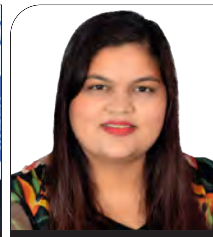
# OTHER LAWS

# FEMA – Updates and Analysis



CA Hardik Mehta CA Tanvi Vora

**In this article, we have discussed recent amendments made in FEMA through Notifications, Circulars, Master Directions, Press Notes & Press Releases.**

## Update through Amendment by Central Government

### 1. Amendment to Non-Debt Instrument Rules

The FEM (Non-Debt Instrument) Rules, 2019 have been amended w.e.f. 16 August 2024 with the following amendments explained below:

***a) Definition of "control" changed***

Previously the term "control" was defined specifically within the Downstream Investment (viz. Rule 23) although reference to 'control' was found in multiple rules. The amendment now moves the definition to Rule 2 of NDI Rules, 2019 which lists and defines all terms used in NDI. Moving the definition of "control" under Rule 2 has made it its applicability overarching. As a consequential amendment, (i) the definition of 'control' under Rule 23 has been omitted and (ii) the same definition in Schedule II dealing with FPI has also been omitted.

Further, the definition of "control" is two-fold – (1) applicable to companies and (2) applicable to LLPs. While the portion pertaining to LLP remains unchanged, the portion pertaining to companies has now been brought in line with Companies Act, 2013 by bringing in reference to the definition under Section 2(27) of the Companies Act, 2013.

**(*Comment*: The amendments explained above while are beneficially aligned to the definition of control under Companies Act, 2013, may overall be considered consequential amendments. They have been aligned to avoid any ambiguity in interpretation and to streamline the multiple places wherein the term 'control' was used and defined.)**

***b) Definition of "start-up" updated***

Previously, the term "start-up" was defined as "a private company incorporated under the Companies Act, 2013 and identified under G.S.R. 180(E), dated 17th February, 2016 issued by the Department of Industrial Policy and Promotion, Ministry of Commerce and Industry."

G.S.R. 180(E), dated 17th February, 2016 pertains to the "Startup India" initiative and was subsequently superseded by Gazette notifications issued by the Ministry of Commerce and Industry in 2017, 2018 and 2019. These amendments could not be read into the definition of "start-up" under the Non-

Debt Instrument Rules as reference to G.S.R. 180(E), dated 17th February, 2016 continued under NDI Rules, 2019.

The definition of "start-up" under Non-Debt Instrument Rules has now been amended to address this anomaly. The Gazette notification reference in the definition has now been updated to the latest notification of the Government of India viz. G.S.R. 127 (E), dated the 19 February 2019 issued by the Department for Promotion of Industry and Internal Trade, Ministry of Commerce and Industry. Further, the definition has also been amended to automatically include any future amendment to notification number G.S.R. 127 (E).

As a consequential amendment, the definition of 'start-up' in Schedule VII dealing with FVCI investments has also been updated.

**(*Comment*: The amendments mentioned above are undertaken in order to align the different laws in India)**

c) ***Swap of equity instruments of Indian Company now permitted for equity instruments of foreign equity capital between Person Resident in India and Person Resident Outside India***

The amendment allows the transfer of equity instruments of Indian companies between Persons Resident in India (PRII) and Persons Resident outside India (PROI), under automatic route, through the following modes:

- **Swap of Equity Instruments:** This involves exchanging shares of one Indian company for shares of another Indian company. Such transactions must adhere to rules set by the Central Government and RBI regulations, including sectoral caps, pricing guidelines, and other relevant norms.
- **Swap of Equity Capital of a Foreign Company:** This involves a cross-border swap where PRII and PROI exchange shares of foreign companies as consideration. These transactions must comply with the Foreign Direct Investment (FDI) rules, including sectoral caps, pricing guidelines, and the FEMA (Overseas Investment) Rules, 2022, regarding eligibility and other applicable regulations.

**(*Comment*: Prior to the amendment, the NDI Rules, 2019 permitted only 'issue' of shares against swap. The FEM (OI), Rules had been drafted to permit an Indian entity to make or hold overseas direction investment (ODI) by way of swap of securities; and (ii) a resident individual to hold overseas investment by way of swap of securities on account of a merger, demerger, amalgamation of liquidation, provided that both legs of the transaction complied with the provisions of the Foreign Exchange Management Act, 1999. However, since the NDI Rules 2019 did not have any enabling provision, the swap transactions continued to be difficult to undertake. Thus, the amendment now permits swap in case of issue as well as cases of transfer under automatic route. The above is, however, subject to prior Government approval for transfer in all cases wherever Government approval is applicable for e.g. sectoral caps.**

These amendments are incorporated keeping in mind the government's objective of simplifying cross-border transactions for ease of doing business as announced in the Union Budget of 2024-25. The amendment will surely provide significant options in structuring

cross border M&A deals in a more efficient manner.)

d) ***Sectoral Cap inserted for 'White Label ATM Operations'***

Under Schedule I, Sl.No. F. 11 has been inserted for foreign investment in new sector/activity - White Label ATM Operations (WLAO)[1]. Foreign investment in this sector/activity is now permitted under 100% Automatic route subject to following conditions:

i. Any non-bank entity intending to set up White Label ATMs (WLAs) should have a minimum net worth of ₹ 100 crore as per the latest financial year's audited balance sheet, to be maintained at all times.

ii. In case the entity is also engaged in any 'Other Financial Services', then the foreign investment in the company setting up WLA shall also comply with the minimum capitalization norms, if any, for foreign investments in such 'Other Financial Services'.

FDI in the WLAO will be subject to the specific criteria and guidelines issued by the Reserve Bank under the Payment and Settlement Systems Act, 2007.".

**(*Comment*: Over the years, regulations related to White Label ATMs have been developed and updated from time to time. In 2012 the government permitted operations by such White Label ATMs which until then was only permitted to banks. Since then, the Indian ATM industry has boomed. Currently, Non-bank ATM operators are authorized under the Payment & Settlement Systems Act, 2007 by the RBI.**

**Now, entry for FDI in entities engaged in setting up of WLAs has been provided by the Amendment. This amendment will broaden the set-up and business of ATMs around the country thereby ensuring access to money in every part of the country ensuring financial inclusion.)**

e) ***Requirement of government approval for transfer of equity instruments of an Indian company or units by Person Resident Outside India to any Person Resident Outside India***

Until now, prior government approval was to be obtained for transfer of equity instrument of an Indian company by a Person Resident Outside India (PROI) to another PROI, *in case the Indian company is engaged in a sector which requires government approval*. Since the words of this rule were being mis-interpreted, the rule has now been amended to ensure that its applicability is extended to all cases where government approval for FDI is needed, whether or not the company is engaged in a sector requiring government approval.

Accordingly, going forward government approval will have to be obtained for transfer of shares by one PROI to another PROI, if FDI in the Indian company is subject to government approval; irrespective of the reason for requirement for government approval.

**(*Comment*: The anomaly in wording of the NDI Rules, 2019 has now been corrected to ensure the correct interpretation. While the meaning and applicability is broadened, it has been considered as clarificatory since the intended interpretation was to cover all**

1. White Label ATMs (WLAs) are ATMs operated by non-banking companies.

**cases government approval; irrespective of the reason for requirement for government approval)**

f) ***The list of exclusions from definition of 'indirect foreign investment' expanded***

Currently, under Rule 23(7) of the NDI, an investment made by an Indian entity which is owned and controlled by Non Resident Indians on a non-repatriation basis is excluded for calculation of indirect foreign investment.

As per the amendment, exclusion to the definition of "indirect foreign investment" has been expanded to include investment by Indian entity owned and controlled by *Overseas Citizens of India (OCI)* as well on a non-repatriation basis including companies, trusts or partnerships incorporated outside India which are owned and controlled by NRI or OCI on a non-repatriation basis in compliance with Schedule IV.

The entities excluded from indirect foreign investment under Rule 23(7) (as per amendment to NDI) are now aligned to deemed domestic investments listed in Schedule IV of the NDI.

**(*Comment*: The amendment has brought on par the non repatriable investments by NRI as well as OCI. This was a logical amendment to ensure that the reference to Schedule IV (which includes non-repatriable investments by both NRIs and OCIs) is consistently applied.**

g) ***Limit of aggregate foreign portfolio investment in Indian entity by Person Resident Outside India amended***

Under Schedule I of the NDI, aggregate FPI upto 49% of the paid-up capital on a fully diluted basis or the sectoral or statutory cap (whichever is lower) does not require Government approval or compliance of sectoral conditions provided:

i. such investment does not result in transfer of ownership and control of the resident Indian company from resident Indian citizens; or

ii. such investment does not result in transfer of ownership or control to PROI and other investments by a PROI shall be subject to the conditions of Government approval and compliance of sectoral conditions as laid down in NDI

The condition of aggregate FPI being subject to maximum limit of 49% of paid-up capital of an Indian company has been done away with. Going forward, only the sectoral conditions have to be met.

**(*Comment*: Prior to the Amendment, government approval for an aggregate FPI up to 49% of the paid-up capital or the sectoral or statutory cap for the sector, whichever is lower, was not required.**

**Henceforth, the requirement of the government approval is pegged to the sectoral or statutory cap and is not limited to 49%, provided that such investment does not result in transfer of ownership and/or control of the resident Indian company from resident Indian citizens to non-residents. This would result in liberalization of FPI investment for sectors above 49% sectoral caps.)**

**Notification S.O.3492(E) dated 16 August 2024 – [F. No. 1/8/2024-EM] issued by the Department of Economic Affairs.**

■●■

ML-731

# THE CHAMBER NEWS

CA Mehul Sheth
Hon. Jt. Secretary

CA Neha Gada
Hon. Jt. Secretary

Important events and happenings that took place online/physical between **August 1, 2024 to August 31, 2024** 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 August 13, 2024 are as under:

| Type of Membership | No. of Members |
|---|---|
| Life Member | 9 |
| Ordinary Member | 18 |
| Student Member | 4 |
| Associate | 3 |
| **Total** | **34** |

## II. PAST PROGRAMMES

| ***Sr. No.*** | ***Date*** | | ***Topics*** | ***Speakers*** |
|---|---|---|---|---|
| **STUDENT** | | | | |
| 1 | E-Certificate course on Practical Income Tax & Litigation jointly with Government Law College | | | |
| | 1 | 2.8.2024 | Inaugural ceremony with Panel Discussions | *Panelist :*<br>Hon'ble Mr. Justice Abhay Ahuja,<br>Dr. K. Shivaram,<br>*Senior Advocate*<br>CA Jayant Gokhale<br>*Moderator:*<br>Mr. K. Gopal, Advocate |

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| Sr. No. | Date | | Topics | Speakers |
|---|---|---|---|---|
| | 2 | 2.8.2024 | Basic Concepts | Mr. Devendra Jain, Advocate |
| | 3 | 6.8.2024 | Residential Status and Scope of Total Income | CA Paresh P. Shah |
| | 4 | 8.8.2024 | Income from Capital Gains | Mr. Dharan Gandhi, Advocate |
| | 5 | 10.8.2024 | Income from Capital Gains (*contd.*) | Mr. Dharan Gandhi, Advocate |
| | 6 | 12.8.2024 | Income from House Property (including rules) | Ms. Jasmin Amalsadvala, Advocate |
| | 7 | 14.8.2024 | Profits and Gains from Business or Profession | CA Ronak Doshi |
| | 8 | 16.8.2024 | Profits and Gains from Business or Profession (*contd.*) | CA Ronak Doshi |
| | 9 | 20.8.2024 | Profits and Gains from Business or Profession (*contd.*) | CA Ronak Doshi |
| | 10 | 22.8.2024 | Income from Salaries (including Rules) | CA Akbarally Merchant |
| | 11 | 23.8.2024 | Income from Salaries (including Rules) (*contd,*) | CA Akbarally Merchant |
| | 12 | 26.8.2024 | Overview of International Taxation & Transfer Pricing | CA Naman Shrimal |
| | 13 | 28.8.2024 | Income from Capital Gains (*contd.*) | Mr. Dharan Gandhi, Advocate |
| | 15 | 30.8.2024 | Income from Other Sources (including rules 11UA & 11UB): | CA Abhitan Mehta |
| 2 | 9.8.2024 | | Comprehensive Session on Tax Audit | CA Ashok Mehta |
| **DIRECT TAXES** | | | | |
| 1. | 3.8.2024 | | Half Day Seminar on Clause-by-clause analysis of Direct Tax provisions of Finance Bill (No.2), 2024 | CA Yogesh Thar<br>CA Gautam Nayak |
| 2 | Webinar on Intricacies of critical clauses in Tax Audit, its Reporting, and the Impact of ICDS | | | |
| | a | 22.8.2024 | ICDS – Impact and disclosures | CA Anjali Agarwal |
| | b | | Critical Issues in Tax Audit – Key Clauses including 43B(h) | CA Chintan Gandhi |
| | c | | Qualifications, Disclosure and Representation from an Audit Report Quality perspective | CA Mahendra Sanghvi |

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| Sr. No. | Date | Topics | Speakers |
|---|---|---|---|
| 3 | 30.8.2024 | Recent Important Decisions Under Direct Tax | CA Heta Jhaveri |
| **ACCOUNTING & AUDITING** | | | |
| 1. | 5.8.2024 | Lecture meeting on Audit Trail – Practical aspects covering accounts tool and Learnings | CA Narasimhan Elangovan |
| 2 | 31.8.2024 | Preparation of Financial Statements and applicability of Accounting Standards on Non- Corporate Entities | Mrs. Padmashree Crasto |
| **INDIRECT TAXES** | | | |
| 1. | PHYSICAL WORKSHOP on Amendments made in GST Law in Union Budget 2024, Recent Notifications and Circulars issued by the Government | | |
| 1 | 7.8.2024 | - Amendments to Union Budget 2024<br>- Recent Notifications and Circulars issued in pursuance of 53rd GST Council Meeting | CA. Rajiv Luthia |
| | | Brain Trust Session and Panel Discussion on Practical issues on above amendments: | *Panelist:*<br>CA A. R. Krishnan,<br>CA Sunil Gabhawalla<br>*Moderator*:<br>Keval Shah, Advocate |
| 2 | 29.8.2024 | Issues in ISD v/s Cross Charge | *Group Leader*<br>Girish Raman<br>Advocate<br>*Chairman*<br>K Vaitheeswaran,<br>Advocate |
| **STUDY CIRCLE & STUDY GROUP** | | | |
| 1. | 14.8.2024 | Critical Analysis of Finance (No. 2) Bill, 2024 – As passed by Loksabha – Direct Tax | CA Praful Poladia |
| 2 | 28.8.2024 | Recent Judgements under Income Tax Act, 1961 | Mr. Prakash Sinha, Advocate |

| *Sr. No.* | *Date* | *Topics* | *Speakers* |
|---|---|---|---|
| **BENGALURU STUDY GROUP** | | | |
| 1. | 26.7.2024 | Analysis of select direct tax proposals in the Union Budget 2024-25 | CA PV Srinivasan |
| **PUNE STUDY GROUP** | | | |
| 1 | 17.8.2024 | Changed Dimensions of Assessments/ Reassessments in Search & Seizure Cases post 2021 Amendments | CA Neelesh Khandelwal |
| **INTERNATIONAL TAXATION** | | | |
| 1 | 26.8.2024 | International Tax Litigation Trends | CA Sunil Maloo |
| 2 | Online Transfer Pricing Master Class 2024 | | |
| | a 24.8.2024 | Concept of Transfer Pricing – arm's length principle | CA Vispi T. Patel |
| | b 24.8.2024 | Local File Documentation – alongwith importance of FAR and Economic Analysis (concept of Most Appropriate Method, Tested Party, Profit Level Indicators, Filters, Search Strategy, etc.) | CA Namrata Dedhia |
| | c 29.8.2024 | Master File Documentation and CbCR and impact of the same on the ongoing litigation | CA Sujit Thakar |
| | d 31.8.2024 | Benchmarking using Indian & Foreign database, with Economic Adjustments, (including demonstration of how the search is carried out practically using the databases) | CA Chaitanya Maheshwari, CA Kunal Sawardekar |
| | e 31.8.2024 | Form No. 3CEB – clause by clause analysis | CA Smita Patni |
| 3 | 26.8.2028 | International Tax Litigation Trends | CA Sunil Maloo |
| **COMMERCIAL & ALLIED LAWS** | | | |
| 1 | 30.8.2024 | The Framework of Adjudication under Companies Act, 2013 – RD and ROC Orders related Provisions, Amendments, E –Adjudication | CS Dr. S K Jain |

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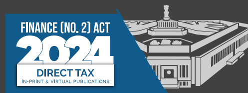


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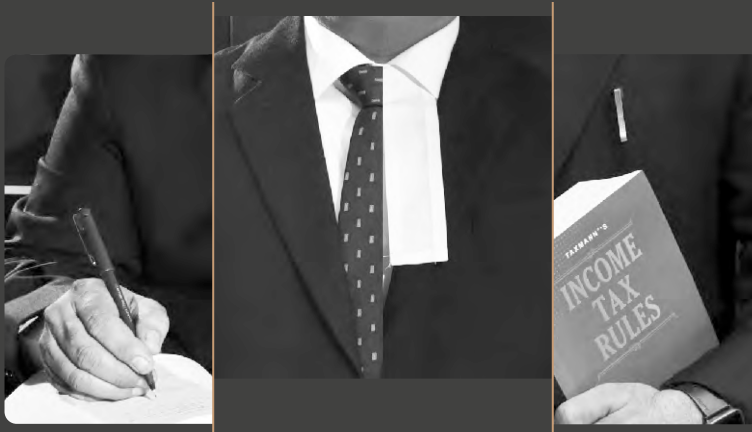


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