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THE CHAMBER'S JOURNAL

Vol. VI | No. 3 December 2017

YOUR MONTHLY COMPANION ON TAX & ALLIED SUBJECTS

Input Tax Credit Under GST – Flawless Credit or Mechanism of Flaw...?

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Editorial

Friends, year 2017 is coming to a close. This year had begun in the background of demonetisation and half way through saw the land breaking tax reform in the form of introduction of GST. It seems that the coming year is also going to be equally eventful for all of us. The Central Board of Direct Taxes *vide* press release dated 22nd November, 2017, has appointed one more Committee to propose new legislation which will replace the existing Income-tax Act, 1961. This news is important as well as strange because this Committee has been appointed in spite of the Hon'ble Finance Minister's statement on the floor of the Parliament that this Government may not consider re-writing of the Income-tax Act or try to implement the Direct Tax Code. The press release mentions that this is in response to the Hon'ble Prime Minister's comments in the Officers' conference held on 1st and 2nd September, 2017. It is important to note that the second report of the Justice R. V. Easwar Committee has not been made public. North Block always appoints a new Committee when it finds that earlier Committee's report is not convenient for them We expect the new Committee will give sufficient opportunity to the professional organisations and all the stakeholders to place on record their perspective.

The Hon'ble Bombay High Court in a recent decision in the case of Writ Petition No. 2737 of 2017 *Neelkamal Realtors Suburban Pvt. Ltd. and Anr vs. Union of India and Ors.* has upheld the Constitutional validity of RERA with the following observations:

> *"It is to be noted that the consequence of lapse or revocation of registration is that till remaining development work is pending, the promoter cannot sell, advertise or market in view of Section 3 of RERA. At the cost of repetition, we may say, what is registered under the provisions of RERA is a project and it is clearly mandated under Section 3 that no promoter shall advertise, market, book, sell or offer for sale, or invite persons to purchase in any manner any plot, apartment or building, as the case may be, in any real estate project or part of it, in any planning area, without registering the project under RERA. There is a limited*

> *restriction put on the promoter without divesting his right to property and his status as a promoter. This underlining feature is crucial for understanding the intent of RERA. Hence, there is no expropriation and/or acquisition of the promoter's rights and/or interest as pleaded on behalf of the petitioners. Under Section 17 it is the same promoter who has responsibility and right to convey the property to flat purchasers. Under the scheme of RERA, the authority merely takes over the obligation of the promoter of completion/facilitating the remaining development work."*

In the present issue of the Chamber's Journal, the Special Story is on Input Tax Credit under GST. Eminent professionals have contributed to this issue bringing out the practical and legal issues which are bothering the professionals as well the assessees. I wish the Finance Ministry looks into these articles keenly and considers them for providing relief to the assessee.

I thank all the contributors to this issue of the Chamber's Journal for sparing their valuable time from their busy professional schedule.

K. GOPAL
Editor

From the President

Namaskar,

Wish all our members and readers a very Happy Christmas. Christmas is a festival of great joy and sharing for people all over the world. Have fun, and spread love and joy on this great occasion.

Hon Justice Shri Dalveer Bhandari former Judge of Supreme Court and Chief Justice of Bombay High Court has been re-elected to the International Court of Justice at Hague. It is a proud moment for the legal fraternity.

The Constitutional validity of Real Estate (Regulation and Development) Act, 2016 was upheld by a Bench of Hon'ble Justice Shri Naresh Patil and Hon'ble Justice Shri Rajesh Ketkar of the Bombay High Court. The Act seeks to protect the home buyers by providing them the right to claim compensation from the builders for the delay in possession of flats. The Act also provides for a system of mandatory registration of the promoters and builders under the state level regulatory authority.

Several builders filed petitions before various High Courts of Bombay, Nagpur, Aurangabad, Bengaluru, and Jabalpur challenging the validity of the provisions of the RERA Act. The Government of India also filed a transfer petition in the Supreme Court, asking for clubbing of all such petitions filed in various High Courts to be heard by the Supreme Court. However, the Apex Court directed the matter to be heard only by the Bombay High Court and ordered for a stay of proceedings in other High Courts.

The Constitutional validity of proviso to sections 3(1), 3(2)(a), Explanation to section 3, sections 4(2)(I)(c), 4(2)(I)(d), 5(3), first proviso to section 6 and sections 7,8,18,22,38,40,59,60,61,63,64 of the Real Estate (Regulation and Development) Act, 2016 was upheld by the High Court.

The court also provided a sense of relief to the builders by granting them an additional extension period above the stipulated period of one year to complete the projects undertaken by them, however the extension shall be only in exceptional circumstances where the delay was for a reason beyond the control and such extension has to be granted on a 'case to case' basis.

The Bench also struck down section 46(1)(b) of the Act that laid down the conditions for the constitution of the Real Estate Appellant Tribunal.

The Court clarified that the Appellant Tribunal must have its members as judicial officers.

The High Court, while passing the order also stressed on the implementation of the Act and held that the main object of the Act is not just to regulate the acts of builders and promoters but also to develop the real estate sector by the completion of thousands of pending projects. This Act also aims to provide a relief to the plight of home buyers who have invested in these incomplete projects.

I believe RERA will be a game changer for Real estate industry in coming times to come.

A Bill was introduced in the Lok Sabha on Aug. 10, 2017 called The Financial Resolution and Depositor Insurance Bill , and is presently being considered by the 30-member Joint Committee of the Parliament. It is stated by the Ministry that The Financial Resolution and Depositor Insurance Bill is more "depositor friendly" as it provides additional protection in a more transparent manner compared to existing provisions. The Bill also seeks to deal with the insolvency of financial service providers. The larger question is required to be answered as to whether; the government can use taxpayers' money to bail out banks or whether such institutions should be merged with other banks.

At Chamber 3 Committees (Allied Laws, Direct Taxes and Accounting & Auditing) jointly had organized a unique programme on Real Estate laws for 3 days which was inaugurated by Hon'ble Justice Shri K. R. Shriram of Bombay High Court. The course covered almost all the laws related to real estate. It had 13 speakers and there was a panel discussion in the last session by 3 experts in respective fields.

The Accounts and Auditing Committee has organised 4 days workshop on Ind AS. A very well structured design covering all facets of Accounting Standards relating to financial services. We have received a good response from participants.

The International Taxation Committee has announced its FEMA Conference and it has a overwhelming response. The 12th International Residential Conference on International taxation, 2018 is announced in month of June from 21st to 24th June 2018 at The Grand Bhagwati, Indore.

The Special story for the month is on "Input Tax Credit under GST – Flawless Credit or Mechanism of Flaw". I thank all the authors for sparing valuable time and for their contribution to the Chamber's Journal for this month.

Jai Hind !

AJAY R. SINGH
President

Chairman's Communication

Dear Readers,

Yet another monetary policy of Reserve Bank of India was recently announced. As expected the interest rate is unchanged. However one of the significant highlights of the monetary policy is GDP growth for Q2 FY2018 at 6.3% YoY with GVA at 6.1% YoY. This is a welcome development after growth remaining stagnant for two consecutive quarters. Though, GDP projected is little better, there needs to be significant improvement in the economic growth to enable the Government to achieve its various targets. Hopefully 10 priority areas for reviving growth and employment in the next six months identified by the Prime Minister followed by recapitalisation package of ₹ 2.11 trillion for the public sector banks and investment of ₹ 6.92 trillion for construction of 8,367 kms. of roads will accelerate the much needed growth.

First phase of Gujarat Assembly election which just got over had 68% of voting which is phenomenal. The results after the second phase of election would be declared on 18th December. Whether measures of demonetisation and enactment of GST etc. have gone well with the general public would be the key factors of course besides other factors like reservations etc. in deciding the final outcome of the election results.

It is always the endeavour of the Journal Committee to add new features to the Journal and also bring Special Stories on topics which are of interest to all the members. With a view to deliberate on these aspects, recently the Journal Committee had held a marathon meeting. Worthwhile suggestions have been received during the meeting which would be implemented in due course of time for benefit of the members.

After the enactment of the GST Act, we have brought out three issues on GST which have been very well received. We have added new regular features as well on GST. However there are lot of areas in GST where there are a number of issues of interpretation and implementation. One such area is input credit and we therefore have dedicated this issue to Input Credit. I am sure members would find this issue useful. The design has been conceptualised and prepared by Asst Editor, CA Vikram Mehta. My sincere thanks and appreciation to him for designing this issue and overall co-ordination. My gratitude to all the learned authors for sparing their valuable time and sharing their knowledge.

As we bid adieu to the year 2017, wish you and your family a Merry Christmas and a very happy and prosperous New Year 2018 !

VIPUL K. CHOKSI
Chairman – Journal Committee

The Chamber of Tax Consultants

Vision Statement

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

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

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

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

Bharat Raichandani, *Advocate*

Overview of Input Tax Credit under GST Law

According to J. S. Mill's classic economic principles, an indirect tax is something where the person who actually pays the money over to the tax collecting authorities' shifts the burden and the real income of someone else is affected. This classic concept aptly describes this new levy called Goods and Services Tax (GST). It is an 'indirect tax', albeit from an economic point of view. From a legal standpoint, it is a tax on supply of goods and services in India. It is a value added tax. Conceptually and schematically, not a tax but a system where the tax is charged on the value addition. Our erstwhile sales tax levied by State Governments worked on clone principles. Likewise, CENVAT Credit Scheme shaped excise duty and service tax into value added tax levies. Thus, conceptually, not novel, but spruced and rejuvenated form of value added tax beholds us. Version 2.0, one might say.

Amongst many rationales for introduction of GST like simplifying the complex cobweb of multiple taxes spread over jurisdictions and to bring a unified tax structure in place, one of the paramount acumen is to avoid cascading effect of taxes i.e., 'tax on tax'. Under erstwhile tax regimes, though with introduction of CENVAT credit Rules in 2004, the cascading effect of central levies like central excise and service tax was mitigated to a large extent, the credit chain remained fragmented on account of state levies as the credit of Central taxes could not be set off against State taxes and *vice versa*. The credit chain further got distorted as ITC was not available on inter-state purchases.

"Uninterrupted and seamless chain of input tax credit or ITC is one of the key features of GST" claim the policymakers. To an extent this argument holds the crease and saves the wicket, however, to hit a ton there are far too many bouncers to be faced. In this opening stand taken by me, we would like to discuss a few, in order to give the readers a fair idea of what's in store for them.

'Migration' to be decoded after partition

For most of the migrated suppliers, the first face off is against the transitional provisions. An Act includes transitional provisions which regulate its coming into operation and effect. If they are missing, the Court must draw inferences. The interpreter must realise that what appears to be the

plain meaning of a substantive enactment is often modified by transitional provisions express or implied. The 'Cohen question' poses the question: what would an ordinary person think the enactment in question meant? What appears clear to the lay person may not be certain to the Courts or resistant to challenge. New legislative language must conform to existing law. Obscurity is often caused not by unnecessary complication of language but by complication (whether unnecessary or not) of thought. A Bill has to run the gauntlet of Parliamentary debate and amendment in both Houses of Parliament. Law like medicine is an expertise. Laws are meant to be read exclusively by experts, who must ensure the public have full explanations[1].

Chapter XX of the Act contains the said code. Section 140, principally, is a situation based transition. However, when encountered with practical realities, the section gives away. Whether credit of cesses like Krishi Kalyan Cess, Education cess, Secondary and Higher Education Cess etc. would be considered as "eligible duties" or not. Can the credit of the same be carried forward and utilised for purpose of payment of GST. The FAQ's deny. I, however, think otherwise.

Another area of concern is tax paid on goods prior to 1-7-2017, but received after introduction of GST, beyond the time limit specified under section 140(5). Due to some unavoidable reasons, say transportation issues, labour issues, contractual disputes etc., the supplier could deliver goods only after the due date, would credit be still available? To my mind, the answer to this question is in the affirmative. Host of other issues under transitional era are waiting to hatch out of shells of dispute and litigation.

Conditions or restrictions?

Section 16(2)(b) allows credit of goods and services received by the registered person. Does it mean "actual" or "physical" receipt? What if the goods are lost in transit? Partially destroyed? Short Landed? Leakage? In *Howard's case*[2], the European Court of Justice held that if goods listed on invoices do not exist when the goods are to be transferred under the sale agreement, there is no supply unless the goods later come into existence, and therefore no input VAT is creditable. However, the goods did exist. The same did not reach the destination. In *Dalmia Dadri Cement Case*[3], the Supreme Court held that even in case where the goods were damaged in transit, credit could not be denied. The Supreme Court held that there is no distinction to be drawn between loss on account of damage or leakage.

Similarly, agreement for supply of 100 boxes containing 10 pens each. The transporter, either due to a glitch (infuses with some other consignment) or a part of intended fraudulent activity, supplies 100 boxes containing 8 pens each, would credit be denied on the ground of purported fraud? The European Court of Justice in *Optigent Ltd's case*[4] held that: "The right to deduct input value added tax of a taxable person who carries out such transactions cannot be

1 Understanding of Common Law Legislation by Bennion

2 Howard vs. The Commissioner of Customs and Excise LON/80/457 (VATTR 1981)

3 State of Haryana vs. Dalmia Dadri Cement Ltd. 2004 (178) ELT 13 (SC)

4 Optingent Limited, Falcrum Electronics Ltd. and Bond House System Limitedvs. Commissioner of Customs and Excise 2006 ECR I

affected by the fact that the chain of supply of which those transactions form part another prior or subsequent transaction is vitiated by value added tax fraud, without that taxable person knowing or having any means of knowing". Would these principles apply for claim of credit? Of course, this would be also be subject to Section 17(5).

Tax must "actually" be paid

Section 16(2)(c) mandates that no registered supplier could claim ITC in case of goods or services where the supplier of such goods or service or both has failed, either deliberately or mistakenly, to pay the tax to the credit of the Government even though the claimant has already discharged his part of the obligation by paying the consideration amount including the GST to the supplier.

In Mahalakshmi Cotton Case[5], the Bombay High Court had upheld the validity of Section 48(5) of the Maharashtra Valued Added Tax Act containing analogous provision. This section, one could guess, draws lineage from where a draconian and stricter reading of the provision could lead to drastic results. Should the supplier not pay tax from "eligible" credit, credit can be denied to the receiver of the goods and services. It would not freeze there; the entire supply chain would get disturbed. To my mind, no such provision survives in any of the enduring jurisdictions imposing VAT across the globe. This is, truly, "Make in India". The intention of the Legislature seems to be like Mr. Amitabh Bachchan from famous movie "Deewar", when mouthing this acclaimed discourse .... "Jao pehle us aadmi ka sign leke aao..." ... And all of us, I am sure, know who was at the erring end between the belligerent brothers.

A seller paying GST on all its output supplies falls short in payment of tax for one consignment, could credit be denied to all purchasers as the same would be a shortfall reflected in his return? However, does one co-relate that payment of tax is for which supply? On revision of the return, would credit for all purchasers be affected? Supply by persons required to file quarterly returns? Tip of the iceberg.

"Other purpose"

Section 17 contains provisions relating to apportionment of credit and blocked credits. Sub-section (1) restricts credit for business purpose and denies for "other purposes". I, for one, was rattled to decipher the meaning of the term "other purposes". It would not mean exempted supplies as sub-section 2 deals with it. It would not mean "personal consumption" as sub-section 5 deals with it. Is it a residuary tool in the hands of the Tax officer for raising disputes and extraction of credit?

Old Legacy continues ...

Old habits die hard. An aphorism ingrained in the fashion of bureaucracy. Section 17(5) denies or restricts credit on supply of several goods and services. "Motor vehicle" credit is not allowed, with exceptions. The proponents of this stricture quote there is a thin line differentiating personal use and business use of motor vehicles, as they are not fixed in place like an office air conditioner, on which credit would be available. I, wholeheartedly, disagree. Hotels require motor vehicles for pick

5 Mahalakshmi Cotton Ginning Pressing and Oil Industries Kolhapur vs. State of Maharashtra 2012-TIOL-370-Bom

up and drop of guests and so do airlines, schools, colleges, manufacturers... the list is long. Another pompous, unsubstantiated and propounded philosophy seems to be subsidised rate for taxation of motor vehicles. I, yet again, do not subscribe to this view. Australia and Canada allow such credit.

Rent-a-cab services and insurance has been left out, except where it is under a statutory obligation. Rent-a-cab service is the need of the hour for most businesses. Credit on cab from Mumbai to Pune not allowed. However, credit on air travel from Mumbai to Pune allowed. Taxpayer cringes. Enter food for thought, rather food and beverages credit of which cannot be "eaten". Outdoor catering services, health services etc. yet again are not intended for business and hence, found guilty.

There is no room for credit on infrastructure. Last known, most essential for a developing economy. No credit on works contract services when supplied for construction of an immovable property (other than plant and machinery).

As an eye opener, I trust these issues give a "clear" picture of days to come and hence, I defy not to enter into arenas of credit on job work transactions, Bill to Ship to transactions, credit issues revolving around place of supply of goods or services, casual taxable persons, coupled with the blooper of credit mechanism being allowed or disallowed by "software engineers" in creating a system driven cycle.

In parting, I am reminded by words of former President of the United States of America Harry S. Truman who said: "It is amazing what you can accomplish; if you do not care who gets the credit". Literally implemented, no pun intended.

How accurately can the law fix the crime? There has to be a mechanism for very fast action. The law is like this: catch them and punish them.

— Dr. A. P. J. Abdul Kalam

Where there is righteousness in the heart, there is harmony in the house; when there is harmony in the house, there is order in the nation; when there is order in the nation, there is peace in the world.

— Dr. A. P. J. Abdul Kalam

CA Darshan Ranavat

Relevant and Important Definitions for ITC

In this article we intend to discuss and cull out some issues pertaining to definitions relevant to input tax credit. At this stage, there may not be one answer to all the doubts, in fact in some cases there may not be any answer at all. However, it is imperative that such issues add up as food for the mind to churn them until they get either digested or excreted.

1. Inward Supply – Section 2(67)[1]

'inward supply' in relation to a person, shall mean receipt of goods or services or both whether by purchase, acquisition or any other means with or without consideration

This definition starts with 'in relation to' giving it a wide scope to include indirect supplies as well supplies which are connected to a person. It focuses on the connect of the supply with a person rather than the business activity or the outward supply. Further, it means the receipt of goods or services by the person and does not emphasise on the use of goods or services.

The latter part of the definition talks about receipt of goods or services with or without consideration. This implies that (though academic) in case a person supplies any goods or services free of cost to the customer or any other recipient then it is considered as an inward supply for such recipient. A question arises that can such recipient claim any input tax credit of tax paid by supplier in situations where the law creates a deeming fiction for supplies without consideration?

2. Input Tax Credit – Section 2(63)

'input tax credit' means the credit of input tax

The definition of input tax credit in turn leads to the definition of input tax which is discussed below

3. Input Tax – Section 2(62)

"input tax" in relation to a registered person, means the Central tax, State tax, Integrated tax or Union territory tax charged on any supply of goods or services or both made to him and includes —

(a) the integrated goods and services tax charged on import of goods;

(b) the tax payable under the provisions of sub-sections (3) and (4) of section 9;

1 *Unless otherwise specified, sections refer to the relevant provisions of the CGST Act, 2017*

(c) the tax payable under the provisions of sub-sections (3) and (4) of section 5 of the Integrated Goods and Services Tax Act;

(d) the tax payable under the provisions of sub-section (3) and sub-section (4) of section 9 of the respective State Goods and Services Tax Act; or

(e) the tax payable under the provisions of sub-section (3) and sub-section (4) of section 7 of the Union Territory Goods and Services Tax Act,

but does not include the tax paid under the composition levy

The way of defining this term is conventional as it comprises of 'means and includes' thus providing for a very wide scope. When the definition of a word begins with 'means' it is indicative that the meaning of the word has been restricted. But, the word 'includes', when used, enlarges the meaning of the expression thus making the entire definition exhaustive. The principles of *noscitur a sociis* again play an important role contemplating that a statutory term is recognised by its associated words.

The opening paragraph of the definition emphasises on the word 'charged' instead of the words 'levied' or 'paid'. This means that input tax credit is the tax charged on a supply and not the tax leviable on a supply. The implication of using the word 'charged' is that even if a tax has been erroneously charged by the supplier, the recipient would be entitled for a credit of the same. For example, a supplier may inadvertently charge 28% tax instead of 18% and the transaction is settled. Subsequently, the Tax Officer cannot argue that recipient will get the credit to the tune of 18% only since the tax leviable was 18%. The recipient is eligible to claim full credit of 28% since the supplier has 'charged' 28%.

The inclusive part of the definition covers transactions where the tax is not charged by the supplier but is paid by the recipient himself. It accordingly considers the tax paid at the time of imports and the tax paid under reverse charge mechanism under the respective provisions.

Further the restrictive part of the definition specifically excludes the tax paid under composition levy from the scope of input tax.

4. Business – Section 2(17)

"business" includes––

(a) any trade, commerce, manufacture, profession, vocation, adventure, wager or any other similar activity, whether or not it is for a pecuniary benefit;

(b) any activity or transaction in connection with or incidental or ancillary to sub-clause (a);

(c) any activity or transaction in the nature of sub-clause (a), whether or not there is volume, frequency, continuity or regularity of such transaction;

(d) supply or acquisition of goods including capital goods and services in connection with commencement or closure of business;

(e) provision by a club, association, society, or any such body (for a subscription or any other consideration) of the facilities or benefits to its members;

(f) admission, for a consideration, of persons to any premises;

(g) services supplied by a person as the holder of an office which has been accepted by him in the course or furtherance of his trade, profession or vocation;

(h) services provided by a race club by way of totalisator or a licence to book maker in such club; and

(i) any activity or transaction undertaken by the Central Government, a State Government or any local authority in which they are engaged as public authorities

The primary eligibility for claiming any input tax credit under section 16(1) of CGST Act is that the supply made by the supplier is used or intended to be used in the course or furtherance of his business. Under the erstwhile CENVAT Credit Rules, 2004, a nexus of input was required with taxable output. This requirement of nexus has been shifted from taxable output to furtherance of business. This shift of requirement of nexus makes the definition of business vital. The consequent reverse effect being that any other procurement of supplies not satisfying the nexus with the definition of business will be considered as non-business and the corresponding input tax credit cannot be claimed. There could be many examples where the supplies procured may not fully satisfy the definition of business. A crude example will be a proprietor purchasing a motor car for business use from the business funds. However, incidentally the motor car is used partially for the personal travel of the proprietor. Here, fundamental condition that the supply procured is used in the course of either trade, commerce, profession, etc. is not satisfied. Quantification and identification of such input tax credit is a problem and will be governed by human bias. To partially address this issue, section 17(1) read with rule 42(j) prescribes an *ad hoc* disallowance of 5% for inputs used partially for business and partially for non-business use.

The definition of business is not only integral for the claim of credit but also for the purposes of taxability since the definition of supply under section 7 also is triggered only if the supply is in the course or furtherance of business. For some situations where input tax credit pertaining to employee consumption is not permitted by section 17 of CGST Act on the grounds that such procurements are not in the course of business, then on similar grounds if any amounts are recovered from the employees (like notice pay) such recoveries also should not be considered as supply in the course of business and no tax should be demanded on such recoveries.

5. Inputs – Section 2(59)

'input' means any goods other than capital goods used or intended to be used by a supplier in the course or furtherance of business

The word *'inputs'* is defined to begin with a restrictive term 'means' and is directly linked to goods. It does not include capital goods, since it is separately defined. The latter part of the definition accentuates the fact that the goods have to be used or intended to be used in the course or furtherance of business. This highlights the fact that the definition requires a nexus of the goods with the business activity but may not be direct. The phrase 'in the course' or 'furtherance' permits an indirect nexus as well. This is unlike the definition of 'inputs' under CENVAT Credit Rules, 2004 which required a direct nexus of the goods being used in the factory by the manufacturer of the final product. For example, even procurement of goods like stationery items which become a part of overhead cost will be eligible for credit.

6. Capital goods – Section 2(19)

'capital goods' means goods, the value of which is capitalised in the books of account of the person claiming the input tax credit and which are used or intended to be used in the course or furtherance of business.

Here, 'capital goods' is very lucidly defined to mean anything which is capitalized in the books of accounts, thus essentially relying upon the Accounting Standards and the general principles of accounting. Across the Act at many places the words 'goods', 'capital

goods' and 'inputs' are used. It is imperative to note that the term 'goods' is defined very widely to include anything which is movable and hence goods would include both 'capital goods' and 'inputs'. In the notifications where rates of services are prescribed, for certain services, there is restriction for claiming input tax credit of goods procured. Wherever such restriction is prescribed, it would mean that capital goods credit also cannot be claimed. Whereas in cases where the restriction is on inputs and input services, it can be argued that the credit of capital goods is eligible. This distinction between 'inputs' and 'goods' becomes crucial in such cases.

7. Input Service – Section 2(60)

'input service' means any service used or intended to be used by a supplier in the course or furtherance of business

This definition is worded similar to the definition of 'inputs' and is again wider than the definition under CENVAT Credit Rules, 2004. Under erstwhile definition, the exclusions were mentioned in the definition itself bringing a restrictive element. However, in the new law the exclusions are covered under section 17 of CGST Act. 'Input Service' is therefore very extensive as compared to erstwhile definition and just requires a connection with the business activity.

8. Exempt Supply – Section 2(47)

'exempt supply' means supply of any goods or services or both which attracts nil rate of tax or which may be <u>wholly exempt from tax</u> under section 11, or under section 6 of the Integrated Goods and Services Tax Act, and includes non-taxable supply

The importance of this definition is vis-à-vis the reversal of input tax credit. 'Exempt supply' means only those supplies on which tax is exempted wholly. It does not include partial exemption/abatement unlike the definition under CENVAT Credit Rules, 2004. Therefore, it implies that a concession in rate like the one granted to merchant exporter for procuring goods at 0.1% will not be considered as exempt for the supplier and therefore the supplier is not required to effect any reversal of input tax credit.

Further, it emphasises on supply of goods or services. What would be the situation for something which is neither a supply of goods nor services, like securities or land? Ideally, they are not covered by this definition of 'exempt supply'. However, Section 17(3) of CGST Act makes a deeming fiction to include supplies on which the recipient is liable to pay tax on reverse charge basis, transactions in securities and sale of land/building as exempt supplies. Whether the provisions of section 17(3) can override the basic fundamental definition of supply and exempt supply will need to be tested by the judiciary.

Further, for certain services like transportation of goods by vessel, input tax credit of goods is not permitted and by Explanation (iv) in Notification No. 11/2017-Central Tax (Rate), such services are deemed to be exempt for the purpose of reversal of common input tax credit of goods. Similar principles will apply for supplies made by restaurants at reduced rate of 5% with the condition that input tax credit of goods and services is not eligible.

9. Recipient – Section 2(93)

"recipient" of supply of goods or services or both, means—

(a) where a consideration is payable for the supply of goods or services or both, the person who is liable to pay that consideration;

(b) *where no consideration is payable for the supply of goods, the person to whom the goods are delivered or made available, or to whom possession or use of the goods is given or made available; and*

(c) *where no consideration is payable for the supply of a service, the person to whom the service is rendered,*

and any reference to a person to whom a supply is made shall be construed as a reference to the recipient of the supply and shall include an agent acting as such on behalf of the recipient in relation to the goods or services or both supplied

This definition is important from the perspective of the identification of the person eligible to claim the credit. There may be tri-partite transactions where goods or services are supplied to one person and consideration is paid by some other person. Who can claim the credit? A classic example, is the case of real estate agent who might arrange for the pick up and drop of prospective clients to the builders' site. Can the Department argue that the pick up and drop facility is used by third persons and therefore not received by the real estate agent? The answer would be in the negative. In such case, the person paying the consideration is the service receiver, i.e. the real estate agent. The prospective client at the most, is the beneficiary. This ideology is in conjunction with the above definition that the person 'liable' to pay the consideration as per the contractual terms is the recipient of goods or services and is the person who can claim input tax credit. Using clue from this definition, can it be argued that the employer should be eligible to claim credits of taxes embedded in employee reimbursement claims?

Clauses (b) and (c) of the definition if read with the definition of inward supply, it again brings us back to the same question as to whether a free supply recipient can claim any input tax credit, if at all any tax is paid by supplier on such free services?

10. Output tax – Section 2(82)

'output tax' in relation to a taxable person, means the tax chargeable under this Act on taxable supply of goods or services or both made by him or by his agent but excludes tax payable by him on reverse charge basis

The definition here again is similar to the definition of inward supply which starts with creating a bond with the 'person' making the supply. Here though, instead of using the word 'person', the words 'taxable person' are used. 'Output tax' here means the tax chargeable under the Act and not the tax actually charged by the supplier. In our earlier example where 28% was charged instead of 18% by the supplier, the additional 10% legally does not form part of the 'output tax' and hence refund can be claimed by the supplier for such additional 10% paid by him. This situation is identical to the legacy issue under Excise where refund has been granted by the Apex Court in various cases where tax was inadvertently paid when it was not payable at all without any constraint of time limit for filing refund application. Such refund will obviously be subject to satisfying the principles of unjust enrichment.

11. Outward Supply – Section 2(83)

'outward supply' in relation to a taxable person, means supply of goods or services or both, whether by sale, transfer, barter, exchange, licence, rental, lease or disposal or any other mode, made or agreed to be made by such person in the course or furtherance of business

Here the definition is similar to the charging provision section 7 of CGST Act with again bringing in the connection with the 'taxable person'. The term 'outward supply' is restrictively used under the entire Act dominantly in the provisions pertaining to

the return filing process. The term here means supply of goods or services and therefore as far as return filing process is concerned it should include any supply which is goods or services. Hence, does this imply that something which is neither a supply of goods or services, i.e. the items mentioned in Schedule III to CGST Act should not be a part of GST returns. However as discussed earlier, section 17(3) of CGST Act deems certain items listed in the said Schedule III as 'exempt supply'. This is a stark contrast, of course the context is different but all details are uploaded in the same return and therefore there appears some inconsistency as far as disclosure in returns in concerned.

12. Important definitions under section 16(2)

A. Receipt of Goods – Constructive delivery

Section 16(2) requires that the goods should be received before the input tax credit can be claimed.

Lets take an example where A has supplied goods to B who has in turn supplied those goods to C. Now, C undertakes transportation from the premises of A to his own factory after 5 days. B is not involved in the transportation activity. The question here is at what stage is the condition of receipt of goods satisfied for B and C, both?

Usually, in such type of transactions the title to the goods is transferred without actual physical delivery of goods by one person to another. Section 33 of The Sale of Goods Act, 1930 defines delivery of goods sold to be made by doing anything which the parties agree shall be treated as delivery or which has the effect of putting the goods in the possession of the buyer or of any person authorised to hold them on his behalf. In the above example A has made a constructive delivery to B by allowing B or his customer (i.e. C) to take the goods from A's premises and similarly the act of B allowing C to take delivery from A's premises entails constructive delivery by B to C. Hence, by effecting a constructive delivery, i.e. by transferring the title and also the risk and rewards in such goods the delivery has taken place.

Once, it is settled that the risk and reward has passed on to the customer one can apparently say that the customer has accepted the goods and which in turn would mean that the customer has received the goods. Hence, the condition of receipt of goods has to be applied in a way that does not require actual physical delivery of goods and it is adequate if constructive delivery has taken place.

B. Motor vehicles

Section 17(5) of CGST Act restricts the input tax credit <u>in respect of motor vehicles and conveyances</u>. Well without indulging in the length and breadth of 'in respect of', lets understand the coverage of motor vehicles and conveyances. The word motor vehicle is defined under Section 2(76) of CGST Act by giving reference to the definition under section 2(28) of Motor Vehicles Act, 1988 which is reproduced as under:

'motor vehicle or vehicle means <u>any mechanically propelled</u> vehicle adapted for use upon roads whether the power of propulsion is transmitted thereto from an external or internal source and includes a chassis to which a body has not been attached and a trailer; <u>but does not include</u> a vehicle running upon fixed rails or a vehicle of a special type adapted for use only in a factory or in any other enclosed premises or a vehicle having less than four wheels fitted with engine capacity of not exceeding twenty-five cubic centimetres.'

This definition would primarily include any machine which is used for transportation on roads subject to above mechanical requirement. Here, it includes a trailer as

well. The definition appears to be very wide only removing fixed rail and special type of vehicles used in an enclosed premise from its scope. The definition also excludes any vehicle which has less than four wheels, viz., autorickshaw, bicycle, motor cycle, scooter, hand-cart, etc.

The major concern from the above definition comes for the construction industry which has heavy usage for various types of motor vehicles. For certain types of vehicles like trucks, trailers, tankers, etc. there is no restriction for claiming input tax credit, since sub-clause (ii) of section 17(5)(a) permits credit if the vehicle is used for transportation of goods. But still there could be some dark cloud hovering over this because of the judgement of Hon'ble Supreme Court in the case of *Belani Ores Ltd. etc. vs. State of Orissa Etc. [1975 AIR 17, 1975 SCR (2) 138]* wherein it was held that the dumpers, rockers and tractors were exclusively used on the premises of the owner, i.e. in their respective mining areas and the mere fact that there is no fence or barbed wire around the leasehold premises would not mean that the premise was not enclosed. There was evidence to show that the public was not allowed to go inside without prior permission, there were gates and a check on ingress and egress is kept by guards who also ensure that unauthorised persons have access to the mining area.

Further, there are other types of vehicles like excavator, JCB, bulldozer, road-roller, paver, backhoe, trencher, etc. which may fall under the above definition of motor vehicles but are not as such used for transportation of goods. There is a big question mark with respect to the input tax credit pertaining to such vehicles. The industry is perplexed and despite representations being made there is no clarification issued by the Government as of now.

Further, the word conveyance is defined under section 2(34) of CGST Act to include a vessel, an aircraft and a vehicle. The word 'vehicle' is not defined under CGST Act. There are two ways to handle this, either giving a circular reference we again refer the Motor Vehicles Act, 1988 where motor vehicles and vehicles are defined simultaneously under the same provisions or we refer to the general definition of 'vehicle' which means a mode of carrying or transporting something. The latter definition would include then almost all modes of transport even those which are less than four wheeled. However, one can take a view that since motor vehicle is referred to Motor Vehicles Act, 1988 and this being a specific act more reliance is placed of the definition of vehicles under the said Act.

The inclusion of any of the modes of transport under 'Motor vehicles and other conveyances' would mean that input tax credit is going down the sink. Of course, the second option would be to capitalise the GST amount along with the cost of the asset and claim depreciation under income tax, but this would have a huge cashflow impact for organisations where capex is huge.

Well the issues are innumerable and the discussions are also enchanting. Looking at the proactiveness of GST Council and the Government, we hope that many such issues will be clarified over a period of time. The GST baby is born, but is still a crying infant which is being kept quiet through some procedural reliefs. There will be day when this baby stands strong and probably sprints to achieve the intended objectives.

'Whatever the mind of man can conceive and believe, it can achieve.'

— Napoleon Hill

CA Rajiv Luthia & CA Jinal Maru

Input Tax Credit – Eligibility & Conditions for taking ITC and utilization

The implementation of Goods and Services Tax from 1st July, 2017 has been a very significant step in the history of indirect tax reforms in India. By amalgamating a large number of Central and State taxes into a single tax, the aim was to mitigate cascading effect of double taxation and pave the way for a common national market. A well designed "input tax credit scheme (ITC)" is important pillar to minimise cascading effect of double taxation.

In this article, we have tried to analyse the provisions related to "Eligibility & conditions for taking ITC and utilisation thereof". We have also dealt with few issues related thereto. The term "the Act" refers to " the CGST Act, 2017" & the term "the Rules" refers to "the CGST Rules, 2017".

Conditions for entitlement of ITC →

Section 16 of Act lays down the conditions and eligibility criteria for taking ITC. Sub-clause (1) of said section, provides that every registered person subject to prescribed conditions and restrictions is entitled to take credit of input tax charged on supply of goods / services or both to him, and which are used or intended to be used in the course or furtherance of business. In nutshell, following are the criteria for eligibility of ITC:

- Person should be registered under GST
- There should be supply of goods / Services or both on which input tax is charged.
- The said goods / services or both are used or intended to be used in the course or furtherance of business.

In the erstwhile CENVAT Credit Rules, 2004 there was no such condition for an assessee to obtain registration before availing CENVAT credit of excise duty and service tax. This was followed in catena of judgments and various courts, wherein it was held that registration is not a pre-requisite for availment of CENVAT credit. To pen down a few:

- Hon'ble Karnataka High Court in the case of *M/s. Portal India Wireless Solutions (P) Ltd. vs. CST (2011) 9 TMI 450 Hon'ble Mumbai CESTAT* in the case of *CST, Mumbai vs. JP Morgan Services India Pvt. Ltd. (2015) 2 TMI 467*
- Hon'ble Mumbai CESTAT in the case of *M/s. Hutschion 3 Global Services Pvt. Ltd. vs. CST, Mumbai (2015) 10 TMI 2540*
- Hon'ble Mumbai CESTAT in the case of *CST, Mumbai vs. Lionbridge Technologies Pvt. Ltd. (2016) 3 TMI 204*

ITC can be availed by the registered person only on satisfaction of the following conditions as specified in sections 16(2), (3) and (4) of the Act:

a) Possession of tax invoice / debit note issued by registered supplier or bill of entry or such other tax paying document as prescribed under rule 36 of the Rules.

- *In case of payment made for goods or services in advance, the supplier will issue "RECEIPT VOUCHER" as per section 31(3)(d) of the Act and charge / collect GST thereon in view of sections 12 & 13 of the Act. The receiver will not be entitled for credit of this tax until there is corresponding supply of goods or services and issue of "TAX INVOICE" or "DEBIT NOTE".*

As a result, the Government is recovering the taxes based on advance for which credit is deferred till actual supply.

b) Receipt of Goods/Services or both by the registered person or any other person on his direction

- *There are various transactions of services such as Annual Maintenance Contract, Annual membership fees, Annual subscription for e-magazines, insurance premium, etc. wherein the consideration is paid in advance and corresponding invoice / debit note is raised by the supplier upfront. The actual supply is spread over a period. The issue herein is when credit for GST paid on such transactions can be availed? Is it proportionately on every supply or on completion of entire supply? Such transactions are continuous supply as defined in section 2(33) of the Act. The supplier in such cases has agreed to supply services on continuous and recurrent basis under a contract with payment obligation, which is generally not refundable.*

  The explanation to section 13(2) provides that "supply of service is deemed to have been provided to the extent it is covered by invoice or as the case may be, the payment". On cumulative reading of both the above provisions, we are of the view that the ITC can be availed on making payment and receiving invoice for GST paid on transactions of continuous service mentioned hereinabove.

- *In case where bulk order is placed for the goods for which deliveries are received in lots or instalments, the First Proviso to section 16(2) of the Act states that, ITC in such cases shall be availed on receipt of last lot or instalment. The businessmen should structure the transactions of bulk purchases keeping in mind this proviso and overcome the issue related to deferment of ITC. Alternatively, it is advisable to split the contracts of supply of goods in such a way that entire / all the lots are received in same tax period.*

c) Actual payment of the tax charged in respect of such supply, in cash or by utilisation of credit, subject to provisions of section 41 of the Act.

- *In case, where vendor has not made payment of GST by due date for particular tax period, the receiver of such supply will be entitled for ITC on said supply in the same period on provisional basis. The*

vendor thereafter, must discharge GST on such supplies before filing valid return for the month in which is discrepancy is communicated in view of rule 42(3) of the Rules. In such scenario, the ITC provisionally allowed to the buyer will not be recovered back.

d) Furnishing of return u/s. 39 of the CGST Act.

- Take a case where an assessee has gross GST liability of ₹ 10 lakh for the month of July, 2017. The assessee already has eligible ITC in electronic credit ledger of Rs. 8 lakh. Hence the net tax liability is ₹ 2 lakh. If this assessee does not make payment of ₹ 2 lakh before due date , the assessee will be in default in furnishing valid return u/s. 39 of the Act . In such cases, the interest will be leviable @ 18% on gross tax liability of ₹ 10 lakh for the period of delay and not on unpaid amount of ₹ 2 lakh. This is very harsh condition, as the credit balance available under electronic credit ledger cannot said to be utilised and appropriated towards the tax liability of particular tax period until the filing of its valid return. There was no such provision in erstwhile excise, service tax and VAT law.

e) Second Proviso to section 16(2) of the Act provides that the recipient is required to make payment towards value of supply along with tax payable thereon to the supplier (except in the case of supply where tax is payable under reverse charge basis) within 180 days of date of invoice, failing which the equal amount of ITC shall be added to the output tax liability of recipient and to be paid along with interest for the period starting from the date of availing credit on such supplies till the date when the amount added to the output tax liability on lapse of 180 days. Re-credit of such ITC is allowed only on payment to the supplier towards value of supply along with tax payable.

- *In case the assessee has availed and claimed ITC correctly, but could not make payment within time limit of 180 days as prescribed, he will have to not only reverse ITC but pay damages by way of interest on the amount of such ITC from the date of availment till date of payment. In fact this is very unjust on the part of government to recover interest on an amount of tax which they have already collected from the supplier, just because receiver has not made payment to the vendor towards value of supply and GST thereon, although the payment of tax on such supply has already been made to the Government by the vendor. Such provisions were not there in erstwhile CENVAT Credit Rules, 2004. In erstwhile provisions interest was payable in such case only for the period of delay in reversal and payment of such CENVAT credit by the assessee.*

f) No ITC shall be allowed, if the assessee has claimed depreciation on the tax component of the cost of capital goods and plant & machinery.

g) Maximum time limit to avail ITC is due date of furnishing return u/s. 39 for the month of September following the end of financial year or furnishing annual return, whichever is earlier.

- *In the erstwhile CENVAT credit rules, maximum time limit for taking credit of tax paid on input services was restricted to 1 year from the date of invoice. The said criteria of 1 year is not applicable now under GST era, instead date of filing annual return is relevant, as filing the annual return at earlier date may restrict the maximum time limit otherwise available to avail ITC.*

Date of Invoice	31st January, 2018
Due Date of filing of return for September of the next financial year	20th October, 2018
Date of filing of annual return	31st July, 2018
Maximum time limit to avail ITC of invoice dated 31st January, 2018	31st July, 2018

Utilisation of ITC →

The input tax credit on inputs, input services and capital goods shall be credited to the electronic credit ledger of the registered person after filing self assessed return in Form GSTR-2 on the GSTN portal.

The amount of ITC balance in electronic credit ledger can be utilised against the output tax liability in the following manner and order of priority as per provisions of section 49(5) of CGST Act:

Nature of tax	IGST	CGST	SGST/ UGST
IGST	1st	2nd	3rd
CGST	2nd	1st	x
SGST / UGST	2nd	x	1st

Wrapping up →

"Seamless Credit" was one of the most important pillars highlighted by the Government to propagate GST implementation in our country. GST regime covers many provisions for seamless credit of tax paid on inputs and input services as compared to the erstwhile indirect tax laws. However there are many issues which need to be looked into for flawless credit. Reduction in price of goods & services due to elimination of cascading effect & ease of doing business are ultimate objects of GST, that is why it is termed as "ONE NATION ONE TAX". Let us be on positive side of road and hope for suitable corrective steps from Government in near future to resolve obstacles in ITC.

When you look at the light bulb above you, you remember Thomas Alva Edison. When the telephone bell rings, you remember Alexander Graham Bell. Marie Curie was the first woman to win the Nobel Prize. When you see the blue sky, you think of Sir C.V. Raman

— A. P. J. Abdul Kalam

CA Naresh K. Sheth & CA Piyush Jain

Apportionment of Credit and Blocked Credit under Goods and Services Tax

I. Preamble

Goods and Services Tax ('GST') is a value added tax wherein every player in transaction chain pays tax on value added by him in the transaction. GST operates by levying tax on value of goods and/or services supplied by vendors at each stage in transaction chain and allowing credit of input tax paid by such vendors on procurement of goods and/or services for business or profession.

Input Tax Credit ('ITC') is the backbone of any value added taxation system and Goods and Services Tax is no exception to it. One of the fundamental features of GST is seamless flow of input tax credit across the transaction chain throughout the nation irrespective of State borders.

Chapter V of the Central Goods and Services Tax Act, 2017 ('CGST Act') and Chapter V of Central Goods and Services Tax Rules, 2017 ('CGST Rules') deals with ITC mechanism. It permits credit of Integrated GST / Central GST / State GST / Union Territory GST paid or payable by assessee on procurement of goods or services or both to be used or intended to be used in the course or furtherance of business subject to certain conditions and restrictions.

Section 17 of the CGST Act and Rules 42 & 43 of CGST Rules deals with:

a) Apportionment of credit related to non-business use and exempt supply;

b) Restriction on claim of input tax credit in respect of certain goods and services even though it is used in the course or furtherance of business. These are known as "blocked credits".

This article discusses apportionment of credit and blocked credits in detail.

II. Relevant legal provisions under CGST Act

Section 17 of CGST Act deals with the apportionment of credit and blocked credit.

Section 20 of Integrated Goods and Services Tax Act, 2017 ('IGST Act') and section 21 of Union Territory Goods and Services Tax Act, 2017 ('UTGST Act') mandate that above referred provisions of CGST Act are applicable to IGST Act and UTGST Act also.

Similarly, identical provisions are made in respective Goods and Services Tax Act (SGST Act) of all States.

In addition to above provisions, one has to refer to Rules 42 and 43 of CGST Rules to work out the credit attributable to non-business use or exempt supplies.

For the sake of brevity, above referred provisions and rules are not reproduced in this article.

III. Analysis, Interpretation and Views

Apportionment of Credit

1. In case goods or services or both are used partly for business purpose and partly for any other purpose, the input tax credit should be apportioned as under [section 17(1)]:

   - Amount of input tax credit as attributable to business is allowable.
   - Amount of input tax credit as attributable to any purpose other than business is not allowable. Classic examples of this would be as under:
     - Withdrawal of goods by proprietor or partner from firm can be regarded as goods used for non-business purpose. ITC pertaining to such goods is not allowable.
     - Proprietor of hotel allows free stay to his personal guests. This can be regarded as use of hotel rooms for non-business purpose. Corresponding ITC is not allowable.

2. Goods or services or both used partly for effecting taxable supplies including zero rated supplies and partly for effecting exempt supplies should be apportioned as under [section 17(2)]:

   - Amount of input tax credit as attributable to taxable supplies including zero rated supplies (export, supply to SEZ or SEZ developers) is allowable.
   - Amount of input tax credit as attributable to exempted supplies is not allowable.

   For the purpose of above, exempt supplies u/s. 17(3) includes:

   - Supplies on which recipient is liable to pay tax on reverse charge basis
   - Transaction in securities
   - Sale of land
   - Sale of building (other than sale of under-construction flats and units).

3. Summarised position of input tax credit eligibility:

Credit pertaining to	**Credit Admissible**
Wholly taxable supplies	Full Credit
Wholly zero-rated supplies	Full Credit
Both taxable and zero-rated supplies	Full Credit
Wholly non-taxable or exempt supplies	No Credit
Wholly for non-business purpose	No Credit
Both business and non-business purpose	Partial Credit as prescribed
Both taxable and non-taxable supplies	Proportionate credit as prescribed

4. Rule 42 of CGST Rules, 2017 read with section 17(6) of CGST Act, 2017 provides for manner of apportionment of credit and reversal of ITC of input and input services.

(a) Given below is an illustration for determining monthly common credit attributable to business purpose, non-business purpose, taxable supplies and exempt supplies:

Particulars		Amount ₹
Total input tax credit involved on input and input services (T)		1,00,000
Less:	Input tax attributable to input and input services used **exclusively for non-business purposes** (T1)	10,000
Less:	Input tax attributable to input and input services used **exclusively for effecting exempt supplies** (T2)	20,000
Less:	Input tax attributable to Input and input services on which **credit not available u/s. 17(5)** (blocked credits) (T3)	10,000
	Net Input tax credited to electronic credit ledger (C1)	60,000
Less:	Input tax attributable to Input and input services used **exclusively for effecting taxable & zero rated supplies** (T4)	40,000
	Common Credit for the month (C2)	20,000

Let's assume that total turnover of an assessee for the month is ₹ 50,00,000 consisting of taxable supply of ₹ 40,00,000 and exempt supply of ₹ 10,00,000.

Common credit attributable to exempt supplies for the month would be:

$$\frac{\text{Aggregate value of exempt supplies}}{\text{Total turnover of registered person}} \quad X \quad \text{Common Credit (C2)}$$

$$= \frac{₹\ 10,00,000}{₹\ 50,00,000} \quad X \quad ₹\ 20,000$$

= ₹ 4,000 (D1)

Common credit attributable to non-business purpose for the month would be:

Rule 42 of CGST Rules, 2017 presumes 5% of Common Credit (C2) to be for non-business purpose:

= 5% of ₹ 20,000

= ₹ 1,000 (D2)

Common Credit eligible for set-off for the month would be as under:

Particulars			Amount ₹
Common Credit for the month		(C2)	20,000
Less:	ITC attributable to exempt supplies	(D1)	4,000
Less:	ITC attributable to non-business purpose	(D2)	1,000
Eligible common input tax credit for the month		(C3)	15,000

Total eligible credit for set-off for the month would be as under:

Particulars	Amount ₹
Input tax attributable to Input and input services used **exclusively for effecting taxable & zero rated supplies** (T4)	40,000
Eligible common input tax credit (C3)	15,000
Total eligible credit for the month	**55,000**

(b) Monthly ITC claim on provisional basis and final eligibility thereof at year end:

- Calculation of provisional eligible credit is to be done on monthly basis as worked out in the manner stated above in point 4(a).
- Calculation of final ITC claim for financial year:
  - Final calculation of eligible ITC for entire financial year to be done on the basis of same formula as given in point 4(a) taking annual figures.
  - Final calculation needs to be done on or before the due date for furnishing of return for the month of September following the end of financial year to which the credit relates; i.e. 20th of October of following year.
  - Treatment of short reversal on monthly provisional basis:

    If aggregate of provisional ITC claimed for all months is more than final eligible ITC for financial year [as per point 4(b)], excess ITC claimed is to be added to output tax liability along with interest from 1st April of succeeding financial year till date of payment.
  - Treatment of excess reversal on monthly provisional basis:

    If aggregate of provisional ITC claimed for all months is less than final eligible ITC for financial year [as per point 4(b)], such short ITC is to be claimed as credit in return for a month not later than return for the month of September of succeeding financial year.

5. Rule 43 of CGST Rules, 2017 read with section 17(6) of CGST Act, 2017 provide for manner of apportionment of credit and reversal of ITC of capital goods:

- ITC in respect of capital goods used or intended to be used **exclusively for non-business purposes and exempt supplies** is not be credited to electronic credit ledger and be indicated in Form GSTR-2.
- ITC in respect of capital goods used or intended to be used **exclusively for taxable supplies and zero rated supplies** is to be credited to electronic credit ledger and indicated in Form GSTR-2.
- Common ITC in respect of capital goods is to be credited to electronic credit ledger and useful life of such goods shall be taken as 5 years.
- Common credit of all capital goods whose residual life remains for a tax period (1 month) is to be calculated as:

Total common credit of all capital goods / 60 months

= ₹ 1,20,000 / 60 months

= ₹ 2,000 per month

- Common credit attributable to exempted supplies shall be calculated as follows:

  Let us assume that total turnover of an assessee for the month is ₹ 50,00,000 consisting of taxable supply of ₹ 40,00,000 and exempt supply of ₹ 10,00,000.

$$\frac{\text{Aggregate value of Exempt supplies}}{\text{Total turnover during tax period}} \times \text{Common credit as calculated above}$$

$$= \frac{₹\ 10,00,000}{₹\ 50,00,000} \times ₹\ 2,000$$

= ₹ 400 per month

Above referred calculation is to be done for all months and amount representing ITC credit on exempt supplies needs to be reversed.

Blocked Credit

ITC is not allowable on following goods or services or both u/s. 17(5) of CGST Act even though same are used in the course or furtherance of business:

1. Motor Vehicle / other conveyance [section 17(5)(a)]:

ITC on purchase of motor vehicle or other conveyance is not eligible. Generally, input tax paid on motor car, trucks, buses, aircraft, ships, yacht, etc., is not allowable.

For example, a Charted Accountant buying a car is not entitled to ITC even when such car is used for his practice. Similarly manufacturing unit buying a bus for pick up and drop of its employees is not eligible for ITC in respect of such bus.

However, above referred restrictions of claiming ITC does not apply in certain cases. The assessee is eligible to ITC on purchase of motor vehicle and other conveyance in following cases:

Transaction / Activities	**ITC allowed in respect of**
Outward supply of vehicles or conveyances	Vehicle purchased by vehicle dealer for further sale to customers.
Transportation of passengers	Airlines purchasing aircraft used for passenger transportation services.
Transportation of goods	Manufacturer / dealer purchasing truck for outward transportation of goods to customers or for inward transportation of material procured.
Imparting training on driving, flying, navigating such vehicles or conveyances	Driving school purchasing motor car or truck for driving training services.

The question arises whether ITC in respect of insurance, servicing and repairs & maintenance of motor vehicle / conveyance is allowable? View can be taken that such ITC should be allowable for following reasons:

- If one refers to subsequent sub-clauses i.e., 17(5)(b), 17(5)(d), 17(5)(e), 17(5)(f), 17(5)(g), it is evident that these clauses stipulate ban on claiming ITC in respect of goods and / or services both.

  However, 17(5)(a) provides for ban on claiming ITC on motor vehicle and other conveyance only. Unlike above referred sub-clauses, there is no specific reference or express ban on claiming ITC in respect of services relating to motor vehicles or conveyance.

- Rule 2(l)(BA) of CENVAT Credit Rules, 2004 (earlier regime) specifically excluded insurance, servicing, repairs & maintenance in respect of motor vehicle from the definition of input services. However, no such prohibition is prescribed u/s. 17(5)(a) of CGST Act. Legislative intent appears to allow ITC in respect of such expenditure in GST regime.

2. **Specified goods and services [section 17(5)(b)]**

a. Food and beverages, Outdoor catering, Beauty treatment, Health services, Cosmetic and plastic surgery except when such goods and services are used as:

  - Inputs for providing output supply of same category of goods or services or both.

    An outdoor caterer availing services of another caterer will be eligible for credit of input tax charged by other caterer.

  - Inputs or input services as a part or element of taxable composite or mixed outward supply.

    An organiser of conference providing food to participants is entitled to credit of input tax paid to outdoor caterer / hotel supplying food.

b. Rent-a-cab, Life insurance and Health insurance

  - Input credit of above goods and services are not allowed except when:

    - Government notifies these services as obligatory for an employer to provide to its employees under any law for the time being in force; or
    - Such goods and services are used as inputs for providing output supply of same category of goods or service or both; or
    - Such goods and services are used as part or element of taxable composite or mixed outward supply.

c. Membership of a club, health and fitness centre

d. Travel benefits extended to employees on vacation such as leave or home travel concession

3. **Works Contract Services [section 17(5)(c)]:** ITC in respect of works contract service cannot be claimed when services are used for construction of immovable property.

Business entity constructing corporate house for its own use or constructing a mall / commercial complex for letting out is not entitled to ITC in respect of works contract service availed for such construction.

ITC in respect of works contract service can be claimed when such works contract service is used for:

- Construction of plant and machinery; or
- For providing works contract service.

ITC can be claimed in respect of input tax paid on works contract service for construction of civil foundation for installation of machinery except for telecommunication tower and pipeline laid outside factory.

Civil contractor (works contractor) sub-contracting part of its work is entitled to claim credit of input tax paid to sub-contractor.

A doubt is raised whether builder selling flats under construction is entitled to credit of input tax paid to works contractor engaged

for construction of building? View can be taken that builder is entitled to such credit as builder provides works contract services to flat purchasers for following reasons:

- Term 'works contract' is defined u/s. 2(119) of CGST Act to mean contract for building or construction of immovable property.
- Unlike Service Tax regime, there is no categorization or classification of services into two different categories i.e. 'works contract service' and 'construction services'.
- Honourable Supreme Court in case of *Larsen & Tubro Limited vs. State of Karnataka (2013-TIOL-46-SC-CT-LB)* held building contracts are species of works contract.

4. Construction of Immovable property for own use [section 17(5)(d)]

Assessee constructing immovable property for own use is not entitled to ITC in respect of goods and services used for construction of such property.

Business entity constructing corporate house for its own use or constructing a mall / commercial complex for letting out is not entitled to ITC in respect of input tax paid on construction material. It is not entitled to ITC in respect of services such as architect service, consulting engineer services, surveyor's services, etc., used for construction of such building.

ITC in respect of goods and services can be claimed when it is used for construction of plant and machinery.

ITC can be claimed in respect of input tax paid on material used for construction of civil foundation for installation of machinery except for telecommunication tower and pipeline laid outside factory.

5. Procurement from Composition Dealer [section 17(5)(e)]

Composition dealer is prohibited u/s. 10(4) of CGST Act to collect GST on supplies made by him. Moreover, composition dealer is not entitled to issue tax invoice u/s. 31(3)(c) of CGST Act. Input tax credit in respect of goods or services procured form composition dealer cannot be claimed.

Section 10(4) of CGST Act prohibits composition dealer to claim credit of input tax in respect of goods and services procured by him.

6. Procurement by non-resident taxable person [section 17(5)(f)]

Non-resident taxable person is not eligible to claim ITC in respect of goods or services or both procured by him. He is not entitled to ITC in respect of goods procured locally. However, he can claim ITC in respect of goods imported by him. He is also not entitled to ITC in respect of services procured locally or from outside India.

7. Goods or services or both used for personal consumption [section 17(5)(g)]

ITC in respect of goods or services used for personal consumption cannot be claimed.

8. Goods lost, stolen, destroyed, written off or disposed of by way of gift or free samples [section 17(5)(h)]

Assessee is not entitled to ITC in respect of goods lost, stolen, destroyed, written off or disposed of as gifts or free samples.

The issue arises whether ITC can be denied in respect of normal process loss or evaporation loss? One can rely on laid down jurisprudence under erstwhile Excise and VAT regime wherein ITC in respect of normal process loss, evaporation loss or transition loss was allowed.

9. Any tax paid in accordance with the provisions of sections 74, 129 and 130 [section 17(5)(i)]

Section	
74	Determination of tax not paid or short paid or erroneously refunded or ITC wrongly availed or utilised by reason of fraud or any wilful misstatement or suppression of facts
129	Detention, seizure and release of goods and conveyances in transit
130	Confiscation of goods and/or conveyances and levy of penalty

IV. Conclusion

In Business-to-Business (B2B) transactions, indirect taxes paid are taken as credit by business entity (recipient) and such transactions are just pass through for it. Business entity (recipient) is entitled to use such input tax credit for payment of future taxes.

GST is a consumption tax which is to be borne by customer. It is not a tax on business to be borne by business entity. Efficient input tax credit mechanism is a pre-requisite for sound indirect tax system as it ensures that tax incidence is not borne by business entity and cascading effect of tax is avoided.

Section 17(5) provides for presumptive and artificial ban on availment of input tax credit on *bona fide* business transactions. This is against true spirit and intention of GST legislation. Such artificial disallowance of input tax credit ultimately burdens business entities. It results into double taxation and cascading effect of tax. This might result into long drawn avoidable litigations. The Government should sincerely attempt to eliminate or minimise the presumptive and artificial ban on availment of input tax credit.

If a country is to be corruption free and become a nation of beautiful minds, I strongly feel there are three key societal members who can make a difference. They are the father, the mother and the teacher.

— Dr. A. P. J. Abdul Kalam

If four things are followed - having a great aim, acquiring knowledge, hard work, and perseverance - then anything can be achieved.

— Dr. A. P. J. Abdul Kalam

CA Rajat Talati

ITC under Special Circumstances

The scheme of GST is based on the concept of seemless transfer of credit from the supplier to the recipient so that the final consumer only bears the burden of taxation. Thus, the distribution channel acts as a 'pass through' mechanism as far as the taxation is concerned. Section 18 of CGST Act, deals with certain special circumstances in which transfer or, the allowance of input tax credit is dealt with. The State GST Act also provides provision on the similar lines.

Provisions discussed herein are with reference to the CGST Act and appropriate parallel provisions under the respective State GST Acts also needs to be considered.

1.1 Section 18 of the CGST Act deals with allowance of input tax credit (herein referred as 'ITC') in respect of stock of inputs held on the date precedings to on happening of certain events like obtaining registration, opting out from the composition scheme, restructuring of business by way of amalgamation, merger, demerger etc.

a. Obtaining registration [Section 18(1)(a)]

A person who has applied for registration within 30 days on the date on which he is liable for registration [i.e. exceeding the prescribed limit of supplies] is granted registration from the date liable to pay tax. Section 18(1)(a) provides that such a person is entitled to claim ITC in respect of inputs held in stock as also in respect of inputs contained in the semi-finished and finished goods held in stock on the day immediately precedings the date when he becomes liable for registration and payment of tax.

Inputs

Thus, a person applying for registration is entitled to claim input tax credit in respect of stock of inputs i.e. stock of goods lying in stock on the date on which is liable to pay tax. It may be mentioned that pure input services would have been consumed and would not remain in stock. Similarly, in the case of semi-finished and finished goods besides the value of goods, inputs may also include input services on which GST is paid. Such input services may constitute value of the semi-finished or finished stock held on the date of obtaining registration. However, the input tax credit is available only in respect of the input tax paid in respect of goods which are contained in the semi-finished or finished stock and not in respect of services. Please note that the section 18(1)(a) has used the term 'inputs'. Section 2(59) defines the term 'input' as 'goods' and not services. Thus, ITC in respect of services is not available for inputs, semi-finished and finished stock.

Contained in

The next issue to be examined is the term 'contained in' used in this section. There are

certain goods, such as consumables, catalyst, processing chemicals, etc. which are used in the manufacturing process. Such goods do not form part of/not contained in the semi-finished or finished goods which is manufactured. They get consumed away or are flushed out after the process is over. They are used in the process but do not form part of the end product. The term 'contained in' was also used in the erstwhile CENVAT rules, and the CENVAT credit rules have been interpreted and credits on inputs have also been allowed in respect of such consumables and processing chemicals etc. Readers may take a cautious view in this respect.

Capital goods

This clause is silent about the allowability/grant of ITC in respect of capital goods held on the date preceding the date on which the liability to pay arises u/s. 9. It is therefore, advisable, where possible to buy/purchase capital assets after obtaining the registration u/s. 22 or 24. Accordingly, if the prescribed limit of the aggregate turnover has not exceeded and the capital goods are needed to be purchased, it is advisable to obtain voluntary registration u/s. 25(3).

b. Obtaining voluntary registration [Section 18(1)(b)]

A person can apply for voluntary registration u/s. 25(3) of the CGST Act. Such a person is also entitled to claim ITC in respect of inputs held in stock as also in respect of inputs contained in the semi-finished and finished goods held in stock on a day immediately precedings the date of Registration Certificate.

c. Opting out of composition scheme [Section 18(1)(c)]

A person who has opted for composition scheme as per section 10 and decides to opt out of the composition scheme, is entitled claim ITC in respect of **inputs** held in stock as also in respect of **inputs** contained in the semi-finished and finished goods held in stock on the day immediately precedings the date from which he is liable to pay tax u/s. 9. Moreover, such a person is also entitled to ITC in respect of the **capital goods** on the day immediately precedings the date from which he is liable to pay tax u/s. 9. However, the ITC in respect of such capital goods would be reduced by 5% points for each quarter of a year or part thereof [refer Rule 40(1)] from the date of invoice or such other documents under which such capital goods were received. E.g. if the asset is 1 year and 2 months old when such change takes place; 5% * 5 Quarters = 25% of the ITC will have to be reduced.

d. Where exempt supplies become taxable supplies [Section 18(1)(d)]

Where an exempt supply of goods or services or both by a registered person becomes taxable supplies, such person is entitled to claim ITC in respect of **inputs** held in stock as also in respect of inputs contained in the semi-finished and finished goods held in stock **relatable to such exempt supplies** and on **capital goods exclusively used for such exempt supply** on the day immediately precedings the day when such supply became taxable. However, the ITC in respect of such capital goods would be reduced by 5% points for each quarter of a year or part thereof [refer Rule 40(1)] from the date of invoice or such other documents under which such capital goods were received.

Relatable

It may be noted that ITC will be available in respect of input which are relatable to such exempt supplies. The term 'relatable', is broad term, it requires the registered person to first identify the 'inputs etc which were meant for the 'exempt supplies' then and the same are now eligible for ITC as these inputs are now for effecting taxable supplies.

Capital goods

The ITC in respect of capital goods which is **exclusively used** for such an exempt supply would also eligible for ITC when such change takes place. It may be mentioned that if capital goods are used exclusively for effecting exempt supply, the ITC in respect of such capital goods is not allowable. Moreover, such ITC in respect of the **capital goods** would be reduced by 5% points for each quarter of a year or part thereof [refer Rule 40(1)] from the date of invoice or such other documents under which such capital goods were received. E.g. if the asset is 1 year and 2 months old when such change takes place; 5% * 5 Quarters = 25% of the ITC will have to be reduced.

1.2 Section 18(2) – The provisions discussed hereinabove are contained in section 18(1) of the CGST Act. section 18(2) categorically provides that no ITC u/s. 18(1) for goods in respect of supply of goods or services or both is allowable to such person after the expiry of one year from the date of issue of tax invoice relating to such supply. i.e. to say, ITC in respect of input tax invoice older than one year is not allowable for situations covered under sec. 18(1). To reiterate, please note that this restriction is in respect of situations discussed hereinabove covered by section 18(1) of the CGST Act only.

Certificate from CA /Cost Accountant

An application for such refund u/s. 18(1) is to be made in Form GST ITC-01 within 30 days of the event. Moreover, a certificate, from a practising Chartered Accountant or a cost accountant is required to be furnished where the value on the claim on account of CGST, SGST, UTGST or IGST exceeds ₹ 2 lakhs.

1.3 Merger, demerger, amalgamation, etc. [Section 18(3)]

In a case where there is change in the constitution of the registered person on account of sale, merger, demerger, amalgamation, lease or transfer of the business with a specific provision for transfer of property, such registered person shall be allowed to transfer the ITC which remains unutilised in his electronic credit ledger to such sold, merged, demerged, amalgamated, leased or transferred business.

It may be noted that in such a situation the resulting transferee/entity will transfer only **the unutilised credit into its electronic credit ledger.**

Rule 41 provides that Form GST ITC-02 is to be filed by the transferor with the request for transfer of the unutilised ITC lying in his Electronic Credit Ledger to the transferee. The transferee shall accept the details so furnished by the transferer on the common portal and its acceptance of the unutilised credit specified in Form GST ITC -02.

However, in case of demerger the input tax credit shall be apportioned in the ratio of value of asset of the new assets as specified in the demerger scheme.

Some likely issues that may arise requires our attention

a. In case of corporate entities an order from appropriate court is required accepting the scheme of arrangement of merger, demerger etc. placed by the applicant company before the Hon'ble court. This typically takes at least 6 to 8 months and where more than one high courts are involved, it may take more than a year. However, the 'appointed date' as per the scheme of arrangement is generally much earlier than the date of the High Court order. When the scheme of arrangement approved by HC provides that the appointed date is earlier than the date of High Court order, the merging company or as the case the may be, amalgamating company or demerged unit continue to function and the profit and loss arising from its activities is for and on behalf of the transferee entity. It is likely that there could be transactions between the two companies which are getting amalgamated or two units getting demerged. The issue may arise about the the treatment to be given in respect of transactions *inter se*' between

such transferor and transferee entity / unit. If the transactions are inter-state, it may not pose much difficulties as it could be stated as 'distinct entity'. However, if these transactions are 'within the State', it could be argued as 'local branch transfer' not attracting GST. Here, the returns would have been filed treating these two entities as separate entities and the recipient of the supplies would have claimed ITC wherever claimable. This is very practical and likely situation. To address this kind of situation Maharashtra VAT Laws provides that for such intervening period, the transaction *inter se*' between two entities involved in business restructuring could be 'deemed' as between two separate entities for the purposes of the taxation. Similar provisions may be brought in under the GST Act.

b. The above situation may have additional complexity when the period involved are pre-GST & post-GST i.e. the order of the HC passed after the introduction of GST but has 'appointed date' covered by pre-GST era. It is likely that the transferor entity could have filed TRAN-1 before the order of the HC to meet the timeline then prescribed for filing TRAN-1. Further, there could be practical difficulties in filing TRAN-2. How should the situation be tackled is anybody's guess?

1.4 Opting for composition u/s.10 [Section 18(4)]

Section 18(1)(c) provides for situation where registered person opts for composition. However, section 18(4) provides for situation where a registered dealer chooses to opt for composition u/s 10 at a later date. In such a case, such a registered person has to pay by way of debit in the electronic credit ledger or electronic cash ledger an amount equivalent to the credit of input tax in respect of input, semi-finished or finished goods held in stock on a day precedings to the opting for the composition. However, ITC to be repaid in respect of capital goods would be reduced by such percentage points from the date of purchase/ acquisition of the capital goods. [For every quarter of the year or part thereof; 5% is to be reduced].

Moreover, in a case where after payment of such amount there remains balance in the electronic credit ledger, such credit shall lapse.

1.5 Sale of capital goods / plant & machinery – Where ITC taken [Section 18(6)]

In case of supply of capital goods or plant and machinery on which ITC has been taken the registered person **shall pay**

– An amount equal to the ITC claimed [as reduced by % as per date of purchase / acquisition of capital goods – refer rule 40(2)]

OR

– Transaction value of such capital goods or plant & machinery as per section 15

Whichever is higher

This clause provides for mechanism to compute the GST liability in case of sale/supply of capital goods or plant & machinery on which ITC is taken earlier. The term used here is 'taken' instead of the ITC 'claimed' and /or 'availed'. The term 'taken' may be interpreted as 'availed and utilized' in the context in which it is used.

Further, section 18(6) has used the word 'supply of capital goods….'. The meaning of expression 'supply' as defined in section 7 is very broad and besides sale also includes transfer and barter, rental and lease. Does that mean that if an asset (on which ITC is claimed) even it is given on lease or rental, the GST computation will have to be made based on the methodology provided u/s 18(6)? This doesn't seem to be objective of the section and possibly a representation to the GST Council may address this issue.

In spite of some judicial pronouncements [may be under the other Indirect Tax laws] available to us to guide us to interpret certain situation for purpose of the taxation, GST Law has used several new terminologies while blending the taxation on goods and services. This may pose challenges in times to come.

CA Mandar Telang

Input Service Distributor

1. Concept of Input Service Distributor

Input Service Distributor (ISD) is an office of the supplier of goods or services or both which receives tax invoices issued under section 31 towards the receipt of input services and issues a prescribed document for the purposes of distributing the credit of Central tax, State tax, Integrated tax or Union territory tax paid on the said services, to a supplier of taxable goods or services or both having the same Permanent Account Number as that of the said office.

As per Section 24 of the CGST Act (read with Rule 8 of CGST Rules, 2017) a registration number of an establishment as an ISD is different from the registration number of such establishment u/s. 22 of the Act. The prescribed document on the basis of which ISD is entitled to distribute the credit is given in section 54 of the CGST Rules. Section 20 of the CGST Act (read with Rule 39 of GST Rules), contains provisions relating to manner of distributing the credit by ISD. Section 39(4) of the CGST Act read with Rule 65 of the CGST Rules, provides for filing of return by ISD, for every calendar month, within 13 days after the end of such month.

<u>ISD is applicable only in respect of input services and not in respect of goods (inputs/ capital goods).</u> The concept of ISD was introduced in Central Excise regime, in order to enable the corporates to avail the service tax CENVAT credit at Central location and distribute the same to various factories which are registered under separate registration numbers under Central Excise Act. In the absence of this facility, if the bill for services rendered at factories was raised not in the name and address of the factory, but in the name of headoffice, the factories were finding it difficult to avail the CENVAT credit. Especially in cases where the assessee was having more than one factory, department was not allowing CENVAT credit on the basis of document by service provider issued in the name of HO due to apprehension that there was no mechanism to check that same credit had not been claimed at multiple locations. With an intention to bring in a control mechanism in such cases, the concept of ISD was introduced.

Under the scheme of ISD, Rule 36 of the CGST Rules permits such ISD to avail the credit on the basis of invoices issued to it. Further, it also permits, other establishments (having same PAN) of the said supplier, to avail the credit, on the basis of an Input Service Distributor invoice in accordance

with the provisions of sub-rule (1) of rule 54 of CGST Rules

Ex: ABC Ltd. may have headoffice in Mumbai and establishments in Delhi, Chennai and Kolkata. Although certain services are received at Delhi, an invoice may be issued in the name and address of Mumbai headoffice. Let's say a supplier P in Delhi makes an intra-State supply (CGST+SGST) and supplier Q of Gujarat makes an inter-State supply (IGST) to Delhi establishment, however, invoices are raised in the name of corporate office at Mumbai. In this case, ABC's headoffice at Maharashtra if obtains registration as ISD, it will be allowed to take credit on the basis of invoices issued by P and Q and immediately distribute such credit to Delhi establishment, by issuing ISD invoice to Delhi. Delhi can thereafter be able to claim credit on the basis of ISD invoices issued by headoffice.

2. The manner of distribution of credit through ISD mechanism – Section 20 of CGST Act and Rule 39 of CGST Rules, 2017

– ISD shall distribute the credit available for distribution in the same month and details of such distribution shall be furnished in Form GSTR-6.

– The invoice issued in terms of Rule 54 for the purpose of distribution of ITC, clearly indicate that it is issued only for distribution of input tax credit.

– The amount of credit shall not exceed the amount available for distribution.

– The ISD shall first identify the credit which is not allowed in terms of section 17(5) or otherwise and distribute the ineligible credit and eligible credit separately. Author is of the view that the requirement of distributing ineligible credit is unnecessary and should be legally dispensed with.

– The credit of tax paid on input services attributable to a specific recipient of credit shall be distributed only to that recipient only. Thus, in the above example, since P and Q have provided services to Delhi establishments, the credit in respect of services received from them shall be distributed to Delhi unit only and not to any other establishment. The author is of the view that considering the compliance requirements suggested in ISD, in GST regime, it's advisable that invoices in respect of services availed at a particular location should be raised in that location only.

– The credit of tax paid on input services attributable to more than one recipient of credit shall be distributed amongst such recipients to whom the input service is attributable and such distribution shall be *pro rata* on the basis of the turnover in a State or turnover in a Union Territory of such recipient, during the relevant period, to the aggregate of the turnover of all such recipients to whom such input service is attributable and which are operational in the current year, during the said relevant period. Thus, if a particular unit is not in operation in the current year, turnover of the said unit during the relevant period shall not be considered, even if such unit was operational in the said relevant period. Similarly, the credit of tax paid on input services attributable to all recipients of credit shall be distributed amongst such recipients and such distribution shall be *pro rata* on the basis of the turnover in a State or turnover in a Union Territory of such recipient, during the relevant period, to the aggregate of the

turnover of all recipients and which are operational in the current year, during the said relevant period. Author is of the view that in GST, ISD facility may be used only in such cases, if it's not possible to obtain individual location specific invoices from the provider of services.

– The term 'relevant period' is defined as under:

Situation	What is relevant period
If the recipients of credit have turnover in their States or Union Territories in the financial year preceding the year during which credit is to be distributed	The said preceding financial year
If some or all recipients of the credit do not have any turnover in their States or Union Territories in the financial year preceding the year during which the credit is to be distributed	The last quarter for which details of such turnover of all the recipients are available, previous to the month during which credit is to be distributed

– What would constitute "turnover" for the purpose of above computation has not been defined in the Act/rules. As mentioned above, the "relevant period" would be the preceding financial year, if recipient has turnover in the said preceding financial year. Hence, if credit is to be distributed in FY 2017-18 (post 1-7-2012), the turnover of preceding year i.e., FY 2016-17 will be required to be considered. However, it's worthwhile to note that the concept of turnover was different under different laws. Ex: Under Central Excise Act, the excise duty was payable on transaction value. Under VAT, the State VAT was payable on sale price. There was no tax payable on stock transfers under State Acts. It's therefore difficult to compute a comparable "turnover" of FY 2016-17 for the purposes of above distribution. Author is of the view that necessary clarification may be inserted in the law explaining how to compute turnover during transition period. In the absence of any such clarification, parties may distribute the credit pertaining to July 2017 to September 2017 (including opening balance of ITC if any) only in the month of October 2017, on the basis of turnover (as disclosed in GST returns for the period July 2017 to September 2017) on the ground that the "comparable turnover" did not exist in FY 2016-17.

– For the purpose of computing "turnover", the turnover of goods not taxable under this Act shall also be included. However, while computing such turnover, the amount of any duty or tax levied under Entry 84 of List I of the Seventh Schedule to the Constitution and Entries 51 and 54 of List II of the said Schedule, shall be excluded.

– The credit that qualifies for distribution is to be computed using the formula given in Rule 39(1)(d) which is given below:

$C1 = (t1 / T) \times C$

C = amount of total credit to be distributed.

t1 = turnover of recipient R1 during relevant period.

T = the aggregate of the turnover, during the relevant period, of all

recipients to whom the input service is attributable

C1 = the input tax credit that is required to be distributed to recipient R1 (whether registered or not).

The above formula should be applied for every type of tax viz., Central tax, State tax, Union Territory tax and Integrated tax.

The ISD shall be required to distribute the credit as under:

Credit available with ISD	Recipient unit is located in same state as that of ISD	Recipient unit is located in different States than that of ISD
Central Tax	CGST	IGST
State Tax	SGST	IGST
UT Tax	UTGST	IGST
Integrated Tax	IGST	IGST

*It's important to note that section 20 permits distribution of Integrated tax either as IGST or CGST or SGST. However, Rule 39(1)(e) permits distribution of ITC of integrated tax as IGST only.

– From accounting perspective, an ISD may be required to maintain account of CGST+SGST credit Statewise.

– It may be noted that, Rule 39 that mandates distribution of the credit to all the recipients to whom credit is attributable, although such units are not registered under the Act, in spite of the fact that registration under the Act is a condition for availment of ITC u/s. 16.

3. Credit Notes / Debit Notes to be issued by ISD

Any input tax credit required to be reduced on account of issuance of a credit note to the Input Service Distributor by the supplier shall be apportioned to each recipient in the same ratio in which the input tax credit contained in the original invoice was distributed. This appears to be a very cumbersome provision. For this purpose, the ISD shall also be required to issue an "ISD credit note" to other establishments, in the same month in which the credit note issued to ISD by any supplier is included in GSTR-6 return of the ISD. Where the amount so apportioned is in the negative by virtue of the amount of credit under distribution being less than the amount to be adjusted, such amount is added to the output tax liability of the recipient. Where the amount of input tax credit distributed by an ISD is reduced later on for any other reason for any of the recipients, the same process shall be followed.

If any credit is distributed to a wrong establishment, it can be rectified by issuing ISD credit note to the recipient to which it was wrongly issued and issuing an ISD invoice for the said amount to the recipient which is correctly entitled for such credit. Both the documents should be reflected in GSTR-6 of the ISD in the same month

Any additional amount of input tax credit on account of issuance of a debit note to an ISD by the supplier shall also be distributed to the recipients in the month in which the debit note issued to ISD-office is included in the return in FORM GSTR-6. In this case, unlike in the case of credit notes, it is not necessary to distribute the credit to other establishments in the same portion to which credit pertaining to original invoice was distributed.

Section 21 provides that where the Input Service Distributor distributes the credit in contravention of the provisions contained in section 20 resulting in excess distribution of credit to one or more recipients of credit, the excess credit so distributed shall be recovered from such recipients along with interest.

4. Filing of Return by ISD

As per Rule 65 of the CGST Rules 2017, every ISD shall, on the basis of details contained in Form GSTR-6A, and where required, after adding, correcting or deleting the details, furnish electronically the return in Form GSTR-6, containing the details of tax invoices on which credit has been received and those issued under section 20. The said return shall be filed on monthly basis on or before 13th of the next month. *However, as per Notification No.62/2017-Central Tax, the due date of filing of GSTR-6A for the month of July 2017 is extended to 31st December 2017. The due dates for the months of August to November 2017 are yet to be notified.*

5. Can ISD registered in one State be entitled to take ITC of CGST + SGST of another State?

It's not necessary to have registration as ISD in all the States. There can be just one ISD registration for all units located across India. Hence, although ISD is registered in the State of Maharashtra, it can avail the ITC of CGST+SGST of Delhi (i.e. intra-state supply received in Delhi). If this ITC is in respect of common services (i.e., ITC attributable to all units including unit in Delhi), the Delhi unit will be able to avail the proportionate ITC, however the remaining ITC may be lost (such ITC would be distributed to other units but the said units may not be able to avail the ITC in its return). Author belives that, ISD is only an administrative mechanism and it cannot permit availment of ITC which is otherwise not permissible in law. However, in such cases cross-charging methodology may be used so as to avail the maximum ITC benefit.

6. What's the concept of Cross-Charge?

Generally, ISD is a concept used for 'distribution' of ITC to one or more supplying units, whereas cross-charge is the concept for 'accumulation' of ITC scattered at different locations to a central location. The concept of cross-charge enables the assessee to use the ITC effectively.

Example of ISD: ABC India has three supplying units at Delhi, Chennai and Kolkata, and headoffice at Maharashtra. In such case, ABC India can avail all the services at Maharashtra as ISD, and distribute the same to its various supplying units using ISD mechanism

Example of Cross-Charge: ABC India has a plant at Maharashtra, but representative offices at Delhi, Chennai, Kolkata and Tamil Nadu which is only engaged in marketing activities. All supplies are happening directly from plant at Maharashtra to customers across India. In this case, ITC of local taxes (CGST+SGST) in respect of services obtained at local offices at Delhi, Chennai and Kolkata shall be accumulated at those respective offices unless the cross charging is not adopted. If cross-charging is adopted, then such offices will do cross-charge on their plant at Maharashtra for business support services and consequently, accumulated ITC at those offices will be used effectively.

7. How to distribute ITC of RCM

Input Service Distributor is not a supplier of service, but is only a distributor of service. Instructions appended to Form GSTR-6 provides that ISD cannot make any payment under RCM and that if it has to make payment under RCM, it will be required to obtain a regular registration. GSTR-6 also does not provide for showing any particulars for reflecting details of inward supplies on which payment is made under RCM. It therefore, appears that merely obtaining registration as ISD in a State would not make the assessee "registered person" under that State for the purposes of payment of GST under section 9(3) or 9(4) of the CGST/SGST

Act or as the case may be sections 5(3) or 5(4) of the IGST Act. Therefore in such case, an assessee shall neither be entitled to any ITC nor shall be liable to pay any tax under RCM in respect of any local supplies (CGST+SGST) in that State.

As regards IGST, the assessee shall be first required to issue invoice u/s. 31(3)(f) from any of its registered offices to its ISD office and pay tax under RCM from such registered office. On the basis of such invoice, ISD shall avail the ITC and distribute the ITC to the concerned unit/s.

Example 1. ABC India has three supplying units namely at Delhi, Chennai and Kolkata, and headoffice at Maharashtra. ABC India received an intra-state service from a dealer in Tamil Nadu. In this case, in the absence of any registration in Tamil Nadu, ABC may not be entitled to ITC of CGST+SGST(TN). Consequently a view can be taken that there is no need for any RCM payment on any RCM services by ABC India in TN.

However, if a dealer from Tamil Nadu makes an inter-state supply of service (which is liable for reverse charge), such supply will attract IGST. ABC-India, in such case shall be required to issue invoice for such service from any of its registered units namely, Delhi, Chennai and Kolkata and pay IGST under reverse charge. Suppose invoice is raised from Chennai office, then in such invoice "ABC-Chennai" will be shown as 'person liable to pay tax' and ABC-ISD will be regarded as "receiver" of such service. ABC-ISD will take ITC on the basis of such invoice and then distribute the same to the concerned units or all units as per provisions of Section 20.

8. Sum up

Input Service Distributor is merely a facility given to the dealers, especially for those who have multi-state presence but a centralised procurement unit. In such case, combination of ISD and cross-charge mechanism will enable the dealer to efficiently use the ITC credits in respect of procurements happening at various places. The manner of distribution of ITC through ISD is very much rigid, especially the condition that, ISD is required to distribute the ITC in the same month or that, credit note of ITC should be given in the same proportion in which original ITC was distributed. An ISD is required to file the return on 13th of the next month, hence he will be required to undertake the reconciliation of ITC in respect of inward supplies between 11th to 13th. Unless, ISD files its return, other units will not be able to get the ITC. These rigidities contained in the Act, make the concept of ISD prone to implementation challenges. Hence, wherever possible, it's advisable to raise the invoice directly on the concerned unit, than on ISD, for routing every transaction through ISD will certainly increase the cost of compliance. Last, but not the least, ISD is applicable only in respect of input services, and hence, as regards procurement of goods, business entities will have to follow a disintegrated model in order to reduce the cost of compliance. Therefore, business entities dealing in goods may prefer to shift from centralised to decentralised model, in respect of services also, and in that case, concept of ISD may not be really useful to them, except for distribution of common credits pertaining to more than one unit.

Let us sacrifice our today so that our children can have a better tomorrow.

— A. P. J. Abdul Kalam

Shailesh Sheth, *Advocate*

"Penalty and Interest relating to ITC under GST"

"Only the Rule of Law can guarantee security of life and the welfare of the people".
[Kautilya in "The Arthashastra"]

Introduction

India has embraced GST on July 1, 2017 and with that, has ambitiously embarked upon a fascinating journey of the most fundamental Indirect tax reform which is unprecedented in its scale and impact post-independence. GST is the current favoured name for 'Value Added Tax' (VAT) and therefore, the reader would find the use of both the expressions VAT & GST throughout this article as synonymous.

VAT is the 'consumption tax' of choice of some 160 countries today. VAT is called *'unquestionably the most successful innovation of the last half-century ….. perhaps the most economically efficient way in which countries can raise significant tax revenue'. (Bird, 2010). It is also passionately argued that 'purely from a revenue point of view, VAT is probably the best tax ever invented'* (Cnossen, 1990).

The Rudiments of VAT/GST

International Tax Dialogue, 2005 defines 'VAT' as *"a broad based tax levied at multiple stages of production (and distribution) with – crucially – taxes on inputs credited against taxes on output. That is, while sellers are required to charge the tax on all their sales, they can also claim a credit for taxes that they have been charged on their inputs. The advantage is that revenue is secured by being collected throughout the process of production (unlike a retail sales tax) but without distorting production decisions (as turnover tax does)".*

Under the 'destination principle' – which is the international norm – commodities or services are taxed by the jurisdiction in which they are consumed. This is generally implemented under the VAT by zero rating exports and charging VAT on imports.

VAT as defined above can be implemented in the following three main ways viz.:

a. Subtraction method (also known as Accounts method) under which each dealer is taxed on the difference between his purchases and sales.

b. Addition method under which tax is levied on an estimate of 'value added' calculated by summing and adjusting, as needed, the 'factor incomes'. In nutshell, under this method, the tax is levied on the sum of wages and profits.

c. Invoice credit method under which the registered traders charge tax on their sales and issue corresponding invoices to their customers, who, if also registered, can use these invoices to establish a right to credit or refund against their own output VAT liability.

Except Japan that applies a 'subtraction method' of VAT, all the countries, including India, who have adopted VAT/GST, have applied 'invoice credit method' for the implementation of VAT.

Self-enforcing feature of VAT/GST

The advocates of the VAT/GST suggest that VAT is **'self-enforcing'** in the sense that each trader has an incentive to ensure that its suppliers have themselves properly paid VAT, in order that they themselves can claim an appropriate credit. As VAT/GST is paid at each stage of production, in order to claim credit for the VAT/GST paid on its inputs against the VAT/GST received on its outputs, a taxpayer would need to show, if required, that the VAT/GST had been paid by its suppliers. ***"One man's proof of purchases is evidence of another man's sales."*** **[National Economic Development Office, Value Added Tax (2nd Ed. 1971 HMSO, London)].** It is argued that there would be no incentive for two traders to fail to invoice a transaction between them, since the purchaser's liability for VAT would be increased by the amount the supplier had not been recorded as paying. With an indirect tax levied at only one stage of production, the whole of the tax is potentially at risk at that stage, whereas, with VAT, theoretically at least, it is only the tax added at that stage that is at risk. ***["VAT/GST: The UK Experience Revisited"* - by Simon James].** It is further suggested that there is an important sense in which the VAT is self-correcting, if not self-enforcing: If for some reason a supply to some registered trader escapes VAT, that missing VAT will be recovered at the next stage in the VAT charged by that trader on their own sales, since there will, in that case, be no credit to offset against their liability.

Enforcement, evasion and VAT/GST

As observed by Michael Keen and Stephen Smith (2007), *"The implementation of a VAT involves the same core elements as does any other self-assessed tax; the identification and registration of those required (or choosing) to pay the tax; collection and processing of amounts spontaneously remitted with periodical returns; audit to ensure accuracy of returns; and enforcement action on delinquent payers."* Like any tax, VAT (or GST) is also vulnerable to evasion or fraud. At the heart of VAT/GST is the credit mechanism, with tax charged by a seller available to the buyer as a credit against his (buyer's) liability on his own sales and, if in excess of the output tax due, refunded to him (buyer), [Keen and Smith (2007)]. This credit and refund mechanism does offer unique opportunity for abuse and gives rise to several types of fraud characteristic of VAT/GST.

The critics often stress that the case for these 'self-enforcing' or 'self-policing' or 'self-correcting' features of the VAT cannot be overstated. It had been recognised that there was scope for evasion, in spite of these intrinsic features of the VAT. For instance, while traders have an incentive to ensure that their suppliers provide them with invoices that the authorities will accept as establishing a right to refund or credit, they have no incentive - unless specific requirements of this end are imposed - to ensure that tax has actually been paid. As Hemming and Kay (1981) stress, the notion that the VAT is self-enforcing is ultimately 'illusory'.

As noted by Richard M. Bird in his Paper *"Review of 'Principles and Practice of Value Added Taxation: Lessons for Developing Countries'"*(1993): *"A VAT invoice is a cheque written on the Government."* Needless to say, in a country like India, it is a cakewalk for the tax evaders to encash such cheques i.e. VAT invoice and encashing they have been and how! In fact, the credit and refund mechanism of the VAT/GST creates its own opportunities for fraud.

A typology of VAT/GST fraud and evasion

There are many ways in which VAT/GST can be evaded or fraudulently exploited. To derive a sense of the main risks, it is useful to distinguish between those that also arise under other forms

of Sales Tax, Retail Sales Tax (RST) being an area of focus, and those reflecting distinctive features of the invoice credit VAT.

a. **Frauds that can arise under both, a VAT and other forms of Sales Tax e.g., RST**

Following are the types of fraud that are generally attributed to or observed as arising under both, VAT/GST and other forms of Sales Tax including RST:

- Under-reported sales
- Failure to register
- Misclassification of commodities or services
- Omission of self-deliveries
- Tax collected but not remitted
- Imported goods not brought into tax

b. Frauds distinct to the VAT/GST

At the heart of the VAT/GST is the credit mechanism, with tax charged by a seller available to the buyer as a credit against their liability on their own sales and, if in excess of the output tax due, refunded to them. This creates opportunities for several types of fraud which are distinct to the VAT/GST. VAT fraud comes in various guises, but the following main types deserve mention:

- False claims for credit or refund
- Credit claimed for VAT on purchases that are not creditable
- Bogus traders or "Invoice mills"
- Shadow economy fraud
- Suppression fraud
- Insolvency fraud
- Carousel fraud

Given the susceptibility of VAT/GST to evasion and fraud, particularly the Input Tax Credit (ITC) related frauds, the legislators and tax administrators all over the world, have been constantly devising the 'ways and means' to check the tax evasion, promote tax compliance and in turn, enhance revenue collection.

Determining which regulatory enforcement strategy will be the most effective in gaining long-term voluntary compliance from taxpayers is a challenge for all tax authorities around the world. A long-standing debate in the regulatory literature has been between those who think that individuals will comply with rules and regulations only when confronted with harsh sanctions and penalties, and those who believe that gentle persuasion and co-operation works in securing compliance. These two alternative approaches to enforcement have been termed the 'deterrence' and 'accommodative' models of regulation, respectively. Yet another model of regulation, amongst other varied models, that is being seriously discussed is the 'norms model' of regulation.

Tax Penalties – Deterrence versus Accommodative versus Norms Models

The use of penalties and detection is a common approach used by tax administrators to combat tax evasion and avoidance in order to enhance efficient revenue collection. The increased reliance on penalties has been based on the relationships specified in the 'deterrence theory'. The 'standard deterrence model' holds that the taxpayers comply with their tax obligations to avoid legal sanctions (such as penalties and incarceration) whenever those sanctions are expected to be more costly than compliance. This model, following the familiar economic analysis of punishment, implies that tax penalties should be severe enough that taxpayers expect that the cost of non-compliance to exceed the costs of compliance. On the other hand, the advocates of the 'accommodative model' of regulation tend to view individuals not as 'rational actors' but as 'social actors' who are ordinarily inclined to comply with the law,

partly because of the belief in the rule of law, and partly as a matter of long-term self-interest. **[Kagan and Scholz, 1984].** Regulatory authorities adopting the 'accommodative model' tend to be more oriented toward seeking results through co-operation rather than by coercion, and prefer to see themselves as service providers rather than as a strict law enforcers. An important aspect of this approach is that it aims to establish a collaborative relationship between the regulator and regulatee **(Grabosky and Braithwaite, 1986).** The 'norms model' maintains that many taxpayers satisfy their tax obligations because they want to adhere to specific social or personal norms, such as reciprocating co-operation of others or respecting legal obligations. This model implies that harsh tax penalties may undermine compliance and argues for deemphasising tax penalties in favour of other Government actions that enhance trust in Government and respect for legal obligations.

However, while the debate over the most effective model of regulation to ensure the tax compliance on part of the taxpayers continues unabated, the deterrence model has tended to dominate policy making and enforcement approaches in taxation and continues to do so even in the present era.

In fact, the highly centralised Kautilyan state was regulated by an elaborate system of penalties. That is why the ***'Arthashastra'*** (Economics) is also called '***Dandaniti***' *(the science of punishment). Chanakya puts it succinctly when he says, "the maintenance of law and order by the use of punishment is the science of Government."*

I. Penalty under GST Laws

A quick glance at the penal provisions, particularly those relating to ITC, of GST laws would reveal two things, viz.:

- that, the legislators are conscious of the evasion-prone, fraud-inducing nature of GST as an indirect tax policy; and
- that they believe that the elaborate and effective penal provisions based on 'deterrence theory' would control the tax evasion and credit frauds and ensure tax compliance.

The provisions relating to penalty are contained in Sections 73 and 74 of Chapter XV (Demands and Recovery) of the Central Goods and Services Tax Act, 2017 ('the CGST Act'). Aside from this, Sections 122 to 138 of Chapter XIX ('Offence and Penalties') contain elaborate provisions relating to offences, penalties, prosecution and compounding.

Those provisions shall apply *mutatis mutandis*, so far as may be, in relation to Integrated Tax, Union Territory Tax and State GST as provided under the IGST Act, 2017, UTGST Act, 2017 and the respective SGST Acts of 2017.

Penalty – Meaning of

It is interesting to note here that in spite of elaborate and substantive penal provisions it contains, the CGST Act does not provide any definition of the term 'penalty'. It will, therefore, be advantageous to refer to the dictionary meaning of the term and a few judicial pronouncements that have explained this term.

a. Dictionary meaning

P. Ramanathan Aiyar's Advanced Law Lexicon defines the term 'penalty' as follows:

"A penalty is a sum which a party agrees to pay or forfeit in the event of a breach, but which is fixed, not as pre-estimate of probable actual damages, but as a punishment, the threat of which is designed to prevent the breach, or as security, where the sum is deposited or the covenant to pay is joined in by one or more sureties, to ensure that the person injured shall collect his actual damages. Penalties are not recoverable or retainable as such by the person in whose favour they are framed. Charles T. McCormick, Handbook on the Law of Damages Section 146, at 666 (1935).

b. Judicial pronouncements

"The term 'penalty' is an elastic term with many different shades of meaning, mainly involving the idea of punishment, corporeal or pecuniary or civil or criminal, although its meaning is generally confined to pecuniary punishment. [Allied vs. Graves 261 NC 31, 134].

A penalty is a sum of money which the law exacts payment of by way of punishment for doing some act which is prohibited or for not doing some act which is required to be done. [Hidden Hollow Ranch vs. Collins, 146 Mont. 321, 406 P.2d 365 368].

"The sum a party agrees to pay in the event of a contract breach, but which is fixed, not as a pre-estimate of probable actual damages, but as a punishment, the threat of which is designed to prevent the breach." [Westmount Country Club vs. Kameny, 82 N.J. Super.200, 197 A.2d 379, 382].

'Penalty', 'Tax' and 'Interest' – Difference

Here, it would be interesting to understand the difference between three terms viz., 'penalty', 'tax' and 'interest', which are commonly used in the fiscal statutes. This has been explained by the Supreme Court in the case of *Pratibha Processors vs. Union of India – 1996 (88) ELT 12 (SC)* as under:

" 'Tax' is an amount payable as a result of the charging provision and it is a compulsory extraction of money by a public authority for public purposes, the payment of which is endorsed by law. 'Penalty' is ordinarily levied for some contumacious conduct or for a deliberate violation of the provisions of the particular statute. 'Interest' is compensatory in character and is imposed on an assessee who has withheld payment of any tax as and when it is due and payable. The levy of interest is geared to the actual amount of tax withheld and the extent of the delay in paying the tax on the due date. Essentially, it is compensatory and different from penalty, – which is penal in character."

Keeping in mind the meanings attributed to the term 'penalty' as above, let us now briefly study and analyse the penal provisions of CGST Act. However, considering the specific subject of this article, the penal provisions relating to ITC are only referred to and discussed here.

Penal provisions of CGST Act relating to ITC

The penal provisions of the CGST Act can broadly be divided into the following broad categories, viz:

a. Penalty for wrong availment or utilisation of ITC [S.73 or S. 74 read with S.122(2)]

b. Penalty for the specified offences [S.122(1)]

c. Penalty for offences by any person who aids or abets the specified offences [S.122(3)]

d. Penalty for failure to furnish information return or statistics [S.123 & S.124]

e. General i.e. residual penalty [S.125]

f. General penalty in certain cases [S.127]

g. General disciplines related to penalty [S.126]

h. Waiver of penalty in certain circumstances [S.73(8) read with Explanation 1 to S.74]

A close look at the aforesaid penal provisions would reveal that the same are, by and large, patterned on the penal provisions prevalent in the erstwhile Central Excise and Service Tax regime. The principles of law laid down on various aspects of the penal provisions existing in the erstwhile tax regime may, therefore, become quite important and relevant while analysing and understanding the penal provisions of GST laws.

In the ensuing paragraphs, the above provisions are briefly discussed in the context of and to the extent the same relate to ITC. Certain important judicial pronouncements rendered in the context of the penal provisions and the provisions related to CENVAT Credit of the

erstwhile tax regime are also referred to for better understanding.

a. Penalty for wrong availment or utilisation of ITC [S.73 or S.74 read with S. 122(2)]

i. Demand towards ITC wrongly availed or utilised for the reason other than fraud, etc. [S.73(1)]

Section 73(1), *inter alia*, empowers the proper officer to issue a show cause notice to the person chargeable to tax when it appears to the proper officer that there has been a wrong availment or utilisation of ITC by such person for any reason, other than the reason of fraud or any wilful misstatement or suppression of facts to evade tax. The provision also provides for the recovery of the amount specified in the notice along with interest payable thereon under Section 50 and a penalty leviable under the provisions of the Act or the Rules made thereunder.

Sub-section (3) of Section 73, *inter alia*, provides for the issue of a statement by the proper officer, instead of show cause notice, containing the details of the ITC wrongly availed or utilised for the subsequent periods when a show cause notice, in terms of sub-section (1) has already been issued for an earlier period. Such statement shall be deemed to be the service of notice if the grounds relied upon for the demand for the subsequent tax periods are the same as mentioned in the earlier notice.[S.73(4) refers].

It will be interesting to note here that the provisions relating to demand and recovery of the ITC wrongly availed or utilised along with interest thereon and imposition of penalty in such cases are incorporated in the parent Act i.e., CGST Act only. This is unlike the erstwhile Central Excise & Service Tax regime, where the analogous provisions were contained in the CENVAT Credit Rules, 2004 ('CCR') and to which, the provisions relating to demand, interest and penalty of the parent Acts i.e.,. Central Excise Act, 1944 ('CEA') or Finance Act, 1994 ('FA') were made *mutatis mutandis* applicable. This is one of the striking features of the GST related enactments where quite a few important provisions which were contained in the Rules in the erstwhile tax regime, have been incorporated in the parent Act itself. This imparts a stability and certainty to the operation of the provisions since the frequent amendments of the Rules resorted to under the delegated legislation, would not be possible.

ii. Demand towards ITC wrongly availed or utilised by way of fraud, etc. [S.74(1)]

Section 74(1) provides for the issue of the show cause notice by the proper officer to the person chargeable with tax where the ITC has been wrongly availed or utilised by reason of fraud or any wilful misstatement or suppression of facts to evade tax. The provision also provides for the recovery of such amount along with interest in terms of Section 50 and a penalty equivalent to the tax specified in the notice.

Sub-sections (3) & (4) of Section 74 further provides for the issue of the statement, instead of a show cause notice, by the proper officer containing the details of the ITC wrongly availed or utilised in case of recurring demands for the subsequent period where the notice for the earlier period has already been issued and such statement shall be deemed to be a service of notice under Section 73(1) subject to the condition that the grounds relied upon in the said statement, **except the ground of fraud, or any wilful misstatement or suppression of facts to evade tax,** are the same as mentioned in the earlier notice. It will thus be seen that a specific exception has been carved out so as to provide that once a show cause notice alleging wilful suppression or misstatement of facts, etc. with intent to evade tax has been issued, such allegations cannot be repeatedly made for the subsequent period for which the statement of demand is being issued even if the issue under dispute remains the same.

Explanation 2 to Section 74 states that the expression "suppression" shall mean non-declaration of facts or information which a

taxable person is required to declare in the return, statement, report or any other document furnished under the Act or the Rules made thereunder or failure to furnish any information on being asked for by the proper officer.

iii. Penalties in respect of the demands under Section 73 or Section 74

Where the demand towards ITC wrongly availed or utilised other than by reason of fraud, etc., is raised under Section 73(1), the person chargeable with tax will also be liable to penalty equivalent to 10% of tax or ₹ 10,000/-, whichever is higher, due from such person. [S. 73(9) refers]. It will thus be seen that the quantum of penalty prescribed under Section 73(9) is mandatory in nature and a lower penalty cannot be imposed. This is despite the fact that the wrong availment or utilisation of ITC is not due to any fraud or wilful suppression of facts, etc. with intent to evade tax.

On the other hand, where the demand towards ITC wrongly availed or utilised is raised under Section 74(1), *inter alia,* alleging fraud or wilful suppression of facts, etc., with intent to evade tax against the person chargeable with tax, such person shall be liable for penalty equal to tax as provided under Section 74(9) of the CGST Act. It is pertinent to note here that once the elements of fraud, etc., are established, there is no discretion left with any authority to reduce the quantum of penalty prescribed.

iv. Penalties under Section 73 or Section 74 *vis-à-vis* Section 122(2):

It will be observed that sub-section (9) of Section 73 or sub-section (1) read with sub-section (9) of Section 74 of the CGST Act prescribes the quantum of penalty to be levied on a person chargeable with tax and against whom the demand, *inter alia*, towards ITC wrongly availed or utilised has been raised and upheld under the respective provisions.

At the same time, Section 122(2) of the CGST Act also deals with the similar situations and provides for the imposition of the same quantum of penalty on any registered person in case of omission or commission of any act resulting into the non-payment or short payment of tax or erroneous refund or wrong availment or utilisation of ITC, whether by reason of fraud, etc. or otherwise.

At first glance, there appears to be the 'double jeopardy' in so far as the penal action provided under Section 73 or Section 74 *vis-à-vis* Section 122(2) is concerned. However, clause (ii) of *Explanation* 1 to Section 74 provides that once penalty under provisions of Section 73 or Section 74 are paid, all proceedings are concluded and penalty cannot be imposed separately under Sections 122, 125, 129 and 130 of the CGST Act. No doubt, clause (ii) is not very happily worded and needs further refinement to put the matter beyond any doubt.

Judicial pronouncements

1. Issue of show cause notice is mandatory before levying penalty

In a customs case, the CESTAT held that penalty under sections 112 and 114 of the Customs Act, 1962 cannot be imposed without show cause notice.

[Henkel India Ltd. vs. CC – 2007 (217) ELT 61 (Tri-Chennai)]

2. *Mens rea* i.e., guilty mind – Is it an essential element for imposing penalty?

i. *Mens rea* is not an essential element for breach of civil obligations

It has been consistently held by the Supreme Court, High Courts and the Tribunal that *mens rea* is not an essential ingredient for imposing a penalty unless statute specifically prescribes so. In *R.S. Joshi vs. Ajit Mills Ltd. – AIR 1977 SC 2279,* the Supreme Court observed:

"The classical view that 'no mens rea, no crime' has long ago been eroded and several

laws in India and abroad, especially regarding economic crimes and departmental penalties, have created severe punishments even where the offences have been defined to exclude mens rea. Therefore, the contention that Section 37(1) fastens a heavy liability regardless of fault has no force in depriving the forfeiture of the character of penalty."

ii. ***Mens rea* is mandatory when the statutory provision provides so**

In the case of *CCE vs. Pepsi Foods Ltd. – 2010 (260) ELT 481 (SC)*, the Supreme Court dealt with the applicability of *mens rea* for imposition of mandatory penalty under Section 11AC of the CEA. It was held that when the statute creates an offence and an ingredient of that offence is a deliberate attempt to evade duty either by fraud or misrepresentation, *mens rea* would be a necessary constituent of such offence and therefore, the imposition of penalty under Section 11AC of the CEA would be wholly impermissible when no fraud, suppression or misstatement was alleged in the show cause notice. Therefore, criminal intent or *'mens rea'* would be necessary in order to attract the penalty provisions under Section 11AC of the CEA.

iii. **Maximum penalty – whether discretionary powers exist ?**

In *UOI vs. Dharmendra Textile Processors – 2008 (231) ELT 3 (SC)*, the Supreme Court, *inter alia,* held that lesser penalty was not imposable in the cases inviting imposition of mandatory penalty under Section 11AC of the CEA as there was no discretion available regarding the quantum of penalty under the said provision.

The judgment in Dharmendra Textile's case (supra) was later clarified by the Supreme Court in the case of *UOI vs. Rajasthan Spinning & Weaving Mills Ltd. – 2009 (238) ELT 3 (SC).*

In *CCE vs. Illpea Paramount Pvt. Ltd. – 2006 (202) ELT 744 (SC)*, the Supreme Court held that once the levy of penalty is found to be warranted having regard to the requirements of statute under Section 11AC of the CEA, the quantum of penalty is not at the discretion of authority and the same has to be equal to the amount of duty.

iv. **Penalty not imposable if the demand of duty/tax is not sustainable**

In *CCE vs. HMM Ltd. 1995 (76) ELT 497 (SC)*, the Supreme Court held that the penalty under Rule 9 (2) and 173Q of the Central Excise Rules, 1944 would not be imposable unless the department was able to sustain the demand under challenge on the grounds of limitation. It was held that the question of penalty would arise only if the department was able to sustain its demand and where demand failed, the penalty would follow suit.

See, *Pahwa Chemicals P. Ltd. vs. CCE – 2005 (189) ELT 257 (SC).*

v. **No repeated allegations of wilful suppression of facts, etc.**

In *Nizam Sugar Factory vs. CCE – 2006 (197) ELT 465 (SC)*, the Supreme Court held as follows:

"9. Allegation of suppression of fact against the appellant cannot be sustained. When the first SCN was issued, all the relevant facts were in the knowledge of the authorities. Later on, while issuing the second and third show cause notices, the same/similar facts could not be taken as suppression of facts on the part of the assessee as these facts were already in the knowledge of the authorities. We agree with the view taken in the aforesaid judgment and respectfully following the same, hold that there was no suppression of facts on the part of the assessee/appellant."

In this case, the Supreme Court had referred to and followed its earlier judgments in the case of *P&B Pharmaceuticals (P) Ltd. vs. CCE – 2003 (153) ELT 14 (SC); ECE Industries Ltd. vs. CCE – 2004 (164) ELT 236 (SC)* and *Hyderabad Polymers (P) Ltd. vs. CCE – 2004 (166) ELT 151 (SC).*

Comment: The principle laid down in these judgments stand embodied in Section 74(4) of the CGST Act.

vi. No suppression of facts not required to be disclosed

In *Smt. Shirishti Dhawan vs. Shaw Brothers – AIR 1992 SC 1555,* the Supreme Court held that there can be no suppression of facts if facts which are not required to be disclosed are not disclosed.

See *Apex Electricals (P) Ltd. vs. UOI – 1992 (61) ELT 413 (Guj.)*

Comment: This principle of law is explicitly recognised in Explanation 2 to Section 74 of the CGST Act.

vii. Revenue Neutrality

In *Jay Yushin Ltd. vs. CCE – 2000 (119) ELT 718 (Tri.-LB),* the Larger Bench of the CESTAT held as under:

"a. Revenue neutrality, being a question of fact, the same is to be established in the facts of each case and not merely by showing the availability of an alternate scheme.

b. Where the scheme opted for by the assessee is found to have been misused (in contradistinction to mere deviation or failure to observe all the conditions), the existence of an alternate scheme would not be an acceptable defence.

c. With particular reference to MODVAT Scheme (which has occasioned this reference), it has to be shown that the revenue neutral situation comes about in relation to the credit available to the assessee himself and not by way of availability of credit to the buyer of the assessee's manufactured goods."

See also, *Nirlon Ltd. vs. CCE – 2015 (320) ELT 22 (SC).*

In *CCE vs. Mahindra & Mahindra Ltd. – 2005 (179) ELT 21 (SC)*, it was, however, held by the Supreme Court that the judgment rendered by it in another case of *Amco Batteries vs. CCE – 2003 (153) ELT 7 (SC)* where the argument of revenue neutrality was accepted on the ground of the availability of credit to the assessee himself, has to be read in the context of the facts. It was held that availability of CENVAT Credit to assessee by itself is not conclusive or decisive consideration. It may be one of the relevant considerations. How much weight is to be attached thereto would depend upon facts of each case.

In *Essar Steel vs. CCE – 2009 (19) STT 42 (CESTAT)*, it was held that if the assessee was eligible for CENVAT Credit on payment of tax (under reverse charge method), there cannot be intention to evade payment of tax and hence, penalty is not imposable.

viii. Denial of CENVAT Credit when activity considered non-dutiable/non-taxable

In *CCE vs. Narmada Chematur Pharmaceuticals Ltd. – 2005 (179) ELT 276 (SC)*, the Supreme Court has held that when an optional exemption is not availed so as to avail CENVAT Credit and such CENVAT credit held to be wrongly availed is exactly equivalent to the amount of excise duty paid by not availing the exemption, the consequence is revenue neutral and hence, demand for wrong availment of credit is not sustainable.

In *CCE vs. Creative Enterprises – 2009 (235) ELT 785 (Guj.),* the Gujarat High Court upheld the Order of the Tribunal holding that if the activity of the respondent-assessee does not amount to manufacture, there can be no question of levy of duty and if the duty is levied, MODVAT Credit cannot be denied by holding that there was no manufacture. *[Affirmed in 2009 (243) ELT A 120 (SC)].*

ix. Retrospective amendment – Whether penalty is imposable?

In one of its historic judgments rendered in the case of *J.K. Spinning and Weaving Mills Ltd. vs. UOI – 1987 (32) ELT 234 (SC),* the Supreme Court dealt with the challenge made to the retrospective operation of amendment of Rules 9 and 49 (of Central Excise Rules, 1944) wherein, under the Explanation, the said amendments to the Rules had been given retrospective effect. In this context, the Supreme Court held that it would be against all principles of legal jurisprudence to impose a penalty on a person or to confiscate his goods for an act or omission which was lawful at the time when such act was performed or omission made, but subsequently made unlawful by virtue of any provision of law.

In the case of *P. V. Mohammad Barmay Sons vs. Director of Enforcement - 1992 (61) ELT 337,* the Supreme Court held that penal provisions could neither have retrospective applicability nor could a greater penalty than the one in force at the time of commission of the offence be imposed in view of the provisions of Article 20(1) of the Constitution of India. It was held that Article 20(1) of the Constitution of India provides that no person could be convicted of any offence except for a violation of the law in force at the time of commission of the act charged as an offence, nor be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of commission of the offence.

In the case of *Commissioner of Central Excise, Coimbatore vs. Elgi Equipments Ltd. 2001 (128) ELT 52 (SC),* in the context of mandatory penalty stipulated under Section 11AC of Central Excise Act, 1944, the Supreme Court held that such penal provisions would be prospective in operation since the illegality committed prior to the insertion of the said section in the Act could not be the subject matter of penalty under the said provision. Further, it was held that the presumption against retrospective operation was strong in cases in which the statute, if operated retrospectively, would prejudicially affect the vested rights or the illegality of the past transactions, or impair contracts, or impose a new duty or attach new disability in respect of past transactions or consideration already passed.

x. Penalty is not imposable when issue relates to the statutory interpretation

In the case of *Uniflex Cables Ltd. vs. CCE – 2011 (271) ELT 161 (SC),* the Supreme Court dealt with the issue with regard to the imposition of penalty where the issue involved was of interpretational nature. Taking note of the fact that the Commissioner himself had found that it was only a case of interpretational nature, the Supreme Court quashed the order of the Commissioner imposing the penalty as also the order of the Tribunal so far as it confirmed the imposition of penalty on the appellant.

b. Penalty for the specified offences [S.122 (1)]

Section 122(1) of the CGST Act enumerates the offences, other than those covered *vide* Sections 73 and 74 of the Act, which invite penal

consequences for the person committing such offence.

Section 122(1) lists total 21 offences including the specific offences relating to ITC which are as under:

i. Supply of any goods or services or both without issue of any invoice or issue of an incorrect or false invoice with regard to any such supply [S.122(1)(i) refers]

ii. Issue of any invoice or bill without supply of goods or services or both in violation of the provisions of the Act i.e., CGST Act or the rules made thereunder [S.122(1)(ii) refers];

iii. Collection of any amount as tax but fails to pay the same to the Government beyond a period of three months from the date on which such payment becomes due [S.122(1)(iii) refers];

iv. Taking or utilising input tax credit without actual receipt of goods or services or both either fully or partially, in contravention of the provisions of the Act i.e. CGST Act or the rules made thereunder [S.122(1)(vii) refers]

v. Obtaining refund of tax under the CGST Act fraudulently [S.122 (1)(viii) refers];

vi. Taking or distributing ITC in violation of Section 20 (Input Service Distributor) or the rules made thereunder (S.122 (1)(ix) refers];

vii. Falsification or substitution of financial records or production of fake accounts or documents or furnishing of any false information or return with an intent to evade payment of tax due under the CGST Act [S.122(1)(x) refers];

viii. Obstructing or preventing any officer in discharge of his duties under the CGST Act [S.122(1)(xiii) refers];

ix. Failure to keep, maintain or retain books of account and other documents in accordance with the provisions of the CGST Act or the rules made thereunder [S.122 (1) (xvi) refers];

x. Failure to furnish information or documents called for by an officer in accordance with the provisions of the CGST Act or the rules made thereunder or furnishing false information or documents during any proceedings under the Act [S.122(1)(xvii) refers];

xi. Issue of any invoice or document by using the registration number of another registered person [S.122(1)(xix) refers];

xii. Tampering with, or destroying any material evidence or documents [S.122(1)(xx) refers];

The penalty, in case of any of the aforesaid offences committed by a taxable person, shall be ₹ 10,000/- or an amount equivalent to the tax evaded or ITC availed of or passed on or distributed irregularly, or the refund claimed fraudulently, as the case may be, whichever is higher.

From the careful study of Section 122(1) and the offences listed therein as also the quantum of penalty prescribed, it will be observed that the *'mens rea'* is presumed to be existing in case of any of such offences if committed by the taxable person though it is not prescribed as an essential element. The stringent penalty, equivalent to the amount of tax or ITC involved, is a pointer to this fact.

In the case of *Chirag Gosalia vs. CC – 2008 (230) ELT 224 (Bom.),* the Bombay High Court considered whether the imposition of penalty under Section 112 of the Customs Act, 1962 was mandatory in nature. It was held that on a reading of the section, it was clear that the legislature had used the term 'shall be liable'. In other words, it was a mandatory provision. Therefore, the High Court agreed with the order of the CESTAT and held that no question of law would arise and dismissed the appeal of the assessee.

It is significant to note that a few of the offences listed in sub-section (1) of Section 122 were also earlier covered by Section 77 of the erstwhile FA for which the penalty prescribed under the said Section was **'maximum ₹ 10,000/-'.** As against this, the penalty prescribed for the similar offences under Section 122(1) is **'₹ 10,000/- or equivalent to tax or credit involved, whichever is higher'** and the same is 'mandatory' in nature. This marks a quantum jump in the penalty imposable and appears to be based on the 'standard deterrence model'.

The penal consequences of Section 122(1) will be attracted only when any of the offences listed therein is committed by a **'taxable person'** and not by **'any person'**. The term 'taxable person' is defined *vide* Section 2(107) of the CGST Act so as to mean 'a person who is registered or liable to be registered under Section 22 or Section 24'.

c. Penalty for offences by any person who aids or abets the specified offences [S.122(3)]

Sub-section (3) of Section 122 provides for the penal action against any person who is guilty of omission or commission of any specified act and in the manner specified therein. Clause (a) of sub-section (3) provides that any person who aids or abets any of the offences specified in Section 122(1) of the Act shall be liable to a penalty prescribed thereunder.

The quantum of penalty prescribed under Section 122(3) is maximum ₹ 25,000/-. Since the words used in the provision are 'may extend to Rupees twenty five thousand', it is clear that the quantum of penalty prescribed is 'maximum' and not 'mandatory'.

It is interesting to note that the quantum of penalty prescribed under Section 122(3) appears to be quite low when compared to the quantum prescribed in Rule 26 of the erstwhile Central Excise Rules, 2002 or Section 78A of the erstwhile FA or Section 112 of the Customs Act, 1962 in similar circumstances.

d. Penalty for failure to furnish information return or statistics [S.123 & S.124]

Section 123 of the CGST Act provides that if a person who is required to furnish an information return under Section 150 fails to do so within the period specified in the notice under Section 150(3), the proper officer may direct that such person shall be liable to pay a penalty of ₹ 100/- for each day during which the default continues, subject to maximum ₹ 5,000/-.

Section 150 of the CGST Act requires the persons specified therein to file an information return as prescribed therein.

Section 124 of the CGST Act provides that any person required to furnish any information or return under Section 151, – (a) without reasonable cause, fails to furnish such information or return; or (b) wilfully furnishes or causes to furnish any false information or return, shall be punishable with fine which may extend to ₹ 10,000/- and in case of continuing offence, to a further fine which may extend to ₹ 100/- for each day of default subject to maximum ₹ 20,000/-.

Section 151 of the CGST Act empowers the Commissioner to collect the statistics relating to any matter dealt with by or in connection with the Act.

e. General i.e., residual penalty [S.125]

The provisions of Section 125 are residual in nature and provides for the imposition of maximum penalty up to ₹ 25,000/- in a case where no penalty is separately provided for in the CGST Act for the contravention of any of the provisions of the Act or any rules made thereunder by any person.

In the erstwhile Service Tax regime, the residual penalty prescribed was maximum ₹ 10,000/- *vide* Section 77(2) of the FA.

f. General penalty in certain cases [S.127]

Section 127 of the CGST Act provides that where the proper officer is of the view that a person is liable to a penalty and the same is not covered under any proceedings.

- Section 62 (assessment of non-filers of returns) or
- Section 63 (assessment of unregistered persons) or
- Section 64 (summary assessment in certain special cases) or
- Section 73 (determination of tax not paid or short paid or erroneously refunded or ITC wrongly availed or utilised for any reason other than fraud, etc.)
- Section 74 (determination of tax not paid or short paid or erroneously refunded or ITC wrongly availed or utilised by reason of fraud, etc.)
- Section 129 (detention, seizure and release of goods and conveyances in transit) or
- Section 130 (confiscation of goods or conveyances and levy of penalty),

he may issue an order levying such penalty after giving a reasonable opportunity of being heard to such person.

g. General Disciplines related to penalty [S.126]

Section 126 of the CGST Act contains 'general disciplines related to penalty'. The provision is a beneficial piece of legislation and embodies certain sound principles of law laid down in the matter of imposition of penalty on a person for commission of any offence under the relevant statute. However, unfortunately, the principles are rarely followed in practice by the authorities.

The 'general disciplines' enshrined in Section 126 are as follows:

- No penalty shall be levied for minor breaches of tax regulations or procedural requirements and in particular, any omission or mistake in documentation which is easily rectifiable and made without fraudulent intent or gross negligence [S. 126(1) refers].

  The *Explanation* to sub-section (1) states that 'for the purpose of this sub-section,

  a) a breach shall be considered a 'minor breach' if the amount of tax involved is less than five thousand rupees;

  b) an omission or mistake in documentation shall be considered to be easily rectifiable if the same is an error apparent on the face of record.

- Penalty shall depend upon the facts and circumstances of each case and shall be commensurate with the degree and severity of the breach [S. 126 (2) refers].
- Penalty shall not be imposed on any person without granting personal hearing [S.126(3) refers].
- The nature of the breach and the applicable law, regulation or procedure under which the amount of penalty for the breach has been specified, shall be mentioned in his order by the officer while imposing a penalty for any such breach on any person. [S. 126 (4) refers].
- Voluntary disclosure by a person before the officer of the circumstances of a breach of the tax law, regulation or procedural requirement prior to the discovery of the breach by the officer shall be considered as a mitigating factor when quantifying a penalty for that person. [S.126(5) refers].

Finally, as a rider, it is provided, *vide* sub-section (6) that the provisions of the Section 126 shall not apply in such cases where the penalty specified under this Act is either a fixed sum or expressed as a fixed percentage. This effectively means that the above disciplines would come into play only where 'maximum' penalty is prescribed under the relevant provision and the discretion is vested in the proper officer to impose a lesser penalty under such provision.

h. Waiver of and/or lower penalty in certain circumstances [S.73 and S.74]

a. Waiver of penalty [S.73]

As discussed above, sub-section (1) and sub-section (3) of Section 73 provides for the issue of show cause notice or the statement of demand, as the case may be, in case of the wrong availment and utilisation of ITC by any person chargeable with tax. The demand raised under this provision also entails interest as well as penalty as prescribed.

However, sub-sections (5) and (6) of Section 73 provides an 'escape route' to such person. It is provided that a person chargeable with tax may pay the amount of tax (or ITC) along with interest payable thereon, on the basis of his own ascertainment of tax (or ITC) or the tax (or ITC) as ascertained by the proper officer before service of notice or the statement under sub-section (1) or sub-section (3), as the case may be and inform the proper officer in writing of such payment. Sub-section (6) provides that on receipt of such information regarding payment made in terms of sub-section (5), the proper officer shall not serve any notice or statement under sub-section (1) or sub-section (3), as the case may be, in respect of tax (or ITC) so paid or any penalty payable under the provisions of the Act or the rules made thereunder.

Sub-section (6) of Section 73 uses the phrase **'shall not serve any notice.... or the statement....'** and it means that once a person chargeable with tax pays the appropriate amount of ITC wrongly availed or utilised along with interest on his own ascertainment or as ascertained by the proper officer but before issue of the show cause notice or statement, the issue of any such notice or statement, whether for recovery of the amount of ITC or for penalty payable under any provisions of the Act or the rules made thereunder is prohibited.

Judicial pronouncements

In *Mannalal Khetan vs. Kedar Nath Khetan – AIR 1977 SC 536*, it was held that if wording is negative i.e., 'shall not register', it will be mandatory provision, as negative words are clearly prohibitory.

See also, *UOI vs. A. K. Pandey – (2009) 10 SCC 522;*

Prakash Kumar vs. State of Gujarat – AIR 2005 SC 1075

Lower penalty [S. 73(8)]

In case a person chargeable with tax has already been served with a show cause notice or the statement under sub-section (1) or sub-section (3), as the case may be, of Section 73 in respect of ITC wrongly availed or utilised, he has been given an option *vide* sub-section (8) of Section 73 to pay the said amount of credit along with interest thereon within 30 days of issue of the show cause notice and if so paid, no penalty shall be payable by such person and all proceedings in respect of the said notice will be deemed to be concluded.

Lower penalty in cases involving fraud, etc. [S.74(5) & (8)]

As explained above, Section 74 of the CGST Act provides for the issue of show cause notice, *inter alia,* in respect of the ITC wrongly availed or utilised by reason of fraud or wilful misstatement or suppression of facts with intent to evade tax. Such amount would be recoverable with interest as prescribed and the person is also exposed to the penalty equivalent to the amount of ITC involved.

However, as a relief measure, it is provided *vide* sub-section (5) of Section 74 that the person chargeable with tax may pay the amount of tax (or ITC) along with interest thereon and a penalty equivalent to 15% of such tax (or ITC) on the basis of his own ascertainment of such tax (or ITC) or the tax (or ITC) as ascertained by the proper officer before issue of the notice under sub-section (1) and inform the payment particulars to the proper officer. In other words, a person who has fraudulently or by resorting

to wilful suppression of facts, etc. availed or utilised ITC, may take the benefit of reduced penalty of 15% of the amount of ITC involved by making the payment of the entire amount of ITC involved along with interest and such reduced quantum of penalty on his own before issue of the show cause notice to him. Once, the payment is made in this manner as prescribed, the issue of notice under Section 74(1) in respect of the tax (or ITC) so paid or any penalty payable under the Act or the rules made thereunder is prohibited.

However, in case a person has already been served with a show cause notice in terms of sub-section (1) of Section 74, he still has the option to pay the amount of tax (or ITC) with interest thereon and a penalty equivalent to 25% of such tax (or ITC) within 30 days of issue of the notice and in that case, all the proceedings in respect of the said notice shall be deemed to be concluded.

Yet one more opportunity is provided to the defaulting person who has missed to avail the opportunity provided under sub-section (5) or sub-section (8) of Section 74 of a reduced penalty. Any such person against whom an adjudication order has been passed consequent upon the proceedings held on the show cause notice issued under Section 74(1), may, within 30 days of the communication of the order, pay the amount of tax (or ITC) determined as payable along with interest thereon and a penalty equivalent to 50% of such tax (or ITC) and if so paid, all proceedings in respect of the said notice shall be deemed to be concluded.

Judicial pronouncement

In the case of *CCE vs. Viraj Alloys Ltd. – 2017 (346) ELT 192 (Bom.)*, the Bombay High Court has, *inter alia*, held that the benefit of reduced penalty will not be available if the payment of duty along with interest is not made within the stipulated period of 30 days.

II. Provisions relating to 'Interest' under GST laws

The provisions relating to 'interest on delayed payment of tax' are contained in Section 50 of the CGST Act.

Interest – Meaning of

The term 'interest' is not defined in the GST laws. However, it generally connotes the compensation payable for usage of other's money usually computed on a percentage basis. Here, it will be advantageous to refer to a few dictionary meanings of the term 'interest'.

Black's Law Dictionary: *"Interest in the context of usage of money is the compensation allowed by law or fixed by the parties for the use or forbearance of borrowed money."*

Corpus Juris Secondum, Vol.47: *"Interest is a compensation allowed by law, or fixed by the parties for the use or forbearance of money, or for detention."*

Interest – Statutory provisions [S.50]

As discussed hereinabove, in case of non-payment or short payment of tax or erroneous refund or wrong availment or utilisation of ITC by a person chargeable with tax, the proper officer is empowered to issue a show cause notice to such person in terms of Section 73(1) or Section 74(1) of the CGST Act, depending upon the existence or otherwise of the element of fraud or wilful misstatement or suppression of facts with intent to evade tax. The notice shall contain the amount of tax (or ITC) and shall call upon the person why the said amount should not be recovered from him along with interest payable thereon under Section 50 and penalty should not be imposed on him as prescribed in law.

Section 50 provides for the recovery of 'interest on delayed payment of tax' in two circumstances viz.:

i. levy of interest in case of a failure of a person to pay the tax or any part thereof

within the prescribed period [S.50(1) refers]; and

ii. levy of interest in case of an undue or excess claim of ITC or undue or excess reduction in output tax liability [S.50(3) refers].

For the purpose of the present article, the provisions of Section 50(3) are only briefly discussed hereinafter.

Interest on undue or excess claim of ITC [S.50 (3)]

Sub-section (3) of Section 50 provides that if a taxable person makes undue or excess claim of ITC under Section 42(10) or undue or excess reduction in output tax liability under Section 43(10), he shall pay interest on such undue or excess claim or on such undue or excess reduction, as the case may be, as such rate not exceeding 24% as may be notified by the Government on the recommendations of the Council.

Vide Notification No. 13/2017-CT dt. 28-6-2017 (parallel Notification No. 6/2017-IT dt. 28-6-2017), the Government had notified **'24%'** as the rate of interest for the purpose of Section 50(3) of the Act.

It may be noted here that in case of failure of a person to pay tax or any part thereof within the prescribed period, the rate of interest leviable under Section 50 (1) has been notified at '18%' *vide* the aforesaid Notifications.

Judicial pronouncements

i. **Provisions relating to interest are the provisions of substantive law:**

In *J. K. Synthetics Ltd. vs. CTO – AIR 1994 SC 2393*, the Constitutional Bench of the Supreme Court held that the provisions relating to the charging and levying of interest in a statute are provisions of substantive law.

In the case of *CCE vs. Ukai Pradesh Sahakari Khand Udyog Mandali Ltd. – 2011 (271) ELT 32 (Guj.)*, the Gujarat High Court held that interest can be levied and charged on delayed payment of tax only if the statute that levies and charges the tax makes a substantive provision in this regard.

In a significant judgment recently delivered by the Guwahati High Court on 24th November, 2017 in the case of *ONGC Ltd. vs. UOI TS-357-HC-2017 (Gauh)*-EXC, it is held that in absence of any substantive provision in the Oil Industry (Development) Act, 1974 which obliged the assessees to pay interest on delayed payment of cess, the interest is not leviable on the delayed payment of cess. The High Court rejected the contention of the Revenue that interest was applicable in terms of Section 15(4) of the said Act which adopts the provisions of Central Excise Act and rules made thereunder in relation to levy and collection of excise duties. The High Court, while upholding the decision of the CESTAT, referred to the decision of the *Supreme Court in India Carbon Ltd. vs. The State of Assam – AIR 1977 SC 3054*, wherein the Apex Court, after considering an identical provision of the Central Sales Tax Act, had held that interest on tax due could be charged only when the taxing statute made a substantive provision to pay interest for delayed payment of tax and not otherwise.

See also, *VVS Sugar vs. Govt. of AP - AIR 1999 SC 2124 (SC 5 Member Bench)."*

ii. **Whether the discretionary powers exist in case of levy of interest?**

In *CCE vs. Padmavati V.V. Patil SSK Ltd.- 2007 (215) ELT 23 (Bom.)*, the Bombay High Court held that interest is a civil liability of assessee who has retained amount of public money. Interest is mandatory, even if evasion of duty is not *mala fide* or intentional.

In *Futnani Steels v. CCE – 2009 (235) ELT 869 (Trib.)*, the CESTAT held that interest for delayed payment is a statutory liability and accrues automatically. It is payable even if there was a *bona fide* doubt or mistake. It was further held that the Tribunal cannot set aside the interest.

iii. **Interest is payable even if duty/tax is paid before issue of show cause notice**

In *CCE vs. Karnataka Soaps – 2011 (267) ELT 593 (Kar.)*, the Karnataka High Court held that interest is payable even if duty is paid before issue of show cause notice.

See also, *CC vs. Toyota Kirloskar Motors – 2015 (324) ELT 636 (SC)*

iv. **Interest is not payable when a time-barred demand is voluntarily honoured**

In an interesting case, the Gujarat High Court held that interest is not payable if excise duty is paid voluntarily by assessee before show cause notice even when demand was time-barred – *CCE vs. Gujarat Narmada Fertilizers Co. Ltd. – 2012 (285) ELT 336 (Guj.).*

v. **Interest is payable even if CENVAT Credit was available to the recipient unit of the same assessee**

in the case of *Bayers ABS Ltd. vs. CCE – 2012 (281) ELT 296 (Tri.)*, assesse paid the duty without contesting and took CENVAT credit in its other unit where goods were sent. It was argued by the assessee that if duty was paid earlier, the recipient unit could have taken CENVAT credit earlier and hence interest is not payable. However, the CESTAT, by a majority order (2 vs.1) held that interest is still payable. (Minority view was that it was a revenue neutral exercise and hence interest is not payable).

vi. **Interest is not payable when CENVAT Credit was available to other company, or for captive consumption**

In *Paper Products Ltd. vs. CCE – 2013 (292) ELT 389 (CESTAT)*, it was held that interest is not payable when CENVAT Credit was available to other company (sister unit in this case).

In *Reliance Industries Ltd. vs. CCE – 2013 (292) ELT 378 (CESTAT)*, it was held that interest is not payable on captive consumption when CENVAT Credit was available.

vii. **Whether interest is automatic or a demand is necessary?**

In *Haji Lal Mohd. Biri Works vs. State of UP – AIR 1973 SC 2226*, the Supreme Court held that when liability to pay interest is automatic and arises by operation of law, it is not necessary to make an assessment in respect of interest or issue notice of demand in respect of interest.

A similar view was expressed in *Royal Boot House vs. State of J & K – (1984) 56 STC 21 SC; CST vs. Qureshi Crucible Centre – AIR 1994 SC 25; Prahlad Rai vs. STO – AIR 1991 SC 1737; CCE vs. K.L. Concast – 2007 (209) ELT 425 (Tri.-SMB); CST vs. Pepsi Cola – 2007 (8) STR 246 (Tri.-SMB).*

viii. **Whether the period of limitation is invokable for the demand of interest?**

However, though as per the aforesaid judgments, a formal demand is not required for recovery of interest and therefore, the time limit for raising demand for interest would also not apply as a corollary, the issue is debatable. It has been held that when a specific provision for demand of interest is made in the statute like excise law, the time limit for raising the demand of duty will also apply to interest also. Nonetheless, even on this aspect, there are divergent views expressed by the differential judicial forums.

In *ANS Steel Tubes Ltd. vs. CCE – 2011 (265) ELT 127 (Tri-Del.)*, the Single Member Bench of the CESTAT held

that the asssessee by not informing the department regarding non-payment of interest on differed payment of duty on supplementary invoices, had kept it in dark regarding the same and therefore, the extended period was invokable for demand of interest.

However, the judgment of the Tribunal was reversed by the Punjab & Haryana High Court in *ANS Steel Tubes Ltd. vs. CCE – 2015 (318) ELT A 160 (P&H)* where the High Court answered the substantial questions of law as framed therein in favour of the appellant-company. The High Court took due note of the judgment of the Delhi High Court in the case of *Hindustan Insecticides Ltd. vs. CCE – 2013 (297) ELT 332 (Del.)* in which case, the Delhi High Court, relying upon the judgments in *Kwality Ice Cream Co. vs. UOI – 2012 (281) ELT 507 (Del.)* and *CCE vs. TVS Whirlpool Ltd. – 2000 (119) ELT A 177 (SC),* held that as the period of limitation that applies to recovery of the principal amount shall also apply to the claim for interest thereon, the demand is time-barred and had reversed the judgment of the CESTAT under challenge before it.

A similar view is expressed in *CCE vs. VAE VKN Industries Pvt. Ltd. – 2015 (332) ELT 269 (P&H).*

ix. Whether interest liability arises even if ITC is not utilised?

Section 73 and 74 of the CGST Act, *inter alia*, provides for the issue of demand in case of ITC has been wrongly availed or utilised, depending upon the existence or otherwise of the element of fraud, etc. The use of the disjunctive word 'or' in the provision gives rise to an important issue as to whether the interest will still be payable even if the taxable person has not utilised the ITC claimed by the department as wrongly availed?

A similar question had arisen in the context of the Rule 14 of the erstwhile CCR as in force prior to its amendment w.e.f. 17-3-2012 *vide* Notification No. 18/2012-CE (NT) dt. 17-3-2012. Rule 14, *inter alia,* providing for the recovery of CENVAT Credit wrongly taken/utilised and as was in force prior to 17-3-2012 also employed the disjunctive word 'or' with the opening part of the Rule reading as 'where the CENVAT Credit has been taken or utilised wrongly……'.

The question that had arisen before the Supreme Court in the case of *UOI vs. Ind-Swift Laboratories Ltd.- 2011(265) ELT 3 (SC)* wherein the Supreme Court held that once the credit is taken, the beneficiary is at liberty to utilise the same, immediately thereafter, subject to the Credit rules. Relying on its own judgment in *CST, UP vs. Modi Sugar Mills Ltd. – AIR 1961 SC 1047*, it was observed by the Court that taxing statute shall not be interpreted on any presumptions or assumptions and the Court must look squarely at the words of the statute to interpret them. Therefore, there is no necessity of reading the word 'OR' as 'AND'.

It appears that this judgment was rendered considering the antecedents of the case regarding false claim of MODVAT Credit at the availment stage itself.

Subsequently, in an interesting development, the Karnataka High Court in the case of *CCE vs. Bill Forge Pvt. Ltd. – 2012 (279) ELT 209 (Kar.)* very succinctly brought out the effect of the aforesaid judgment of the Supreme Court and held that credit availment is only a book entry and actual utilisation happens when the excise duty payable is short paid to the extent of credit availed. Interest, being compensatory, can be calculated only when these set off happens and payment is withheld to that extent. If the assessee reversed the credit and did not use the

credit for setting off, the question of payment of interest does not arise.

Mercifully, the CBEC took note of the consternation created by the aforesaid judgment of the Supreme Court and promptly substituted the word 'or' by 'and' *vide* Notification dated 17-3-2012. Subsequently, entire Rule 14 was substituted by Notification No. 06/2015-CE (NT) dt. 1-3-2015 explicitly reflecting the nature of interest, the trigger point for the levy of interest and the legal position as amplified with regard the liability to interest by the Karnataka High Court in the case of Bill Forge Pvt. Ltd. (supra).

However, for some inexplicable reason, Sections 73 and 74 of the CGST Act has once again used the same disjunctive word 'or' in 'where input tax credit has been wrongly availed or utilised.....'. Consequently, the issue as to whether interest liability would arise even when ITC is merely availed but not utilised, may raise its ugly head again! One can only fervently hope that the GST Council will take note of this issue and a suitable corrective measure will be taken for the amendment of the provision by the Parliament so as to avoid any unpleasant dispute on this issue!

Conclusions

From the close study of the various offences listed in Section 122 and in particular, those relating to ITC, it will be observed that the same closely resemble to the frauds distinct to the VAT/GST like false claims for credit or refund, bogus traders or 'invoice mills', shadow economy fraud, carousel fraud, etc. The legislature, with a view to check the tax evasion and frauds, foster tax compliance and enhance revenue collection, has made the provisions for the stringent penalties which follow the 'standard deterrence model' of regulation.

However, even if one accepts the inevitability of such harsh penalty measures considering the rampant tax frauds, particularly relating to ITC, being witnessed in the country, it is essential that the penal provisions are clear and unambiguous. Unfortunately, the penal provisions of the GST laws leave much to be desired on this count.

The larger and the important question, however, is how far and to what extent the tax penalties encourage the tax compliance? The various findings suggest that the penalties *per se* are generally viewed as being limited in influencing compliance behaviour. As a matter of fact, the relationship between tax penalties and tax compliance needs serious examination. **[Doran, 2009].**

Regulatory/administrative policies based only on enforcement may well be a reasonable starting point but not a good ending point for increasing tax compliance. Indeed, what is needed is a multifaceted policy approach that includes enforcement, but one that also emphasises such things as service, especially trust. People exhibit a remarkable diversity in their behaviour. There are individuals who always cheat and those who always comply, some who behave as if they maximise the expected utility of the tax evasion gamble, others who seem to overweigh law probabilities, individuals who respond in different ways to changes in their tax burden, some who are at times co-operative and at other times free-riders, and many who seem to be guided by such things as social norms or moral sentiments. Any Government approach toward tax compliance must address this "full house" of behaviours by devising a comparable "full house" of policies to combat tax evasion. **[Alm, 2013].**

"A severe king (meting out unjust punishment) is hated by the people he terrorises, while one who is too lenient is held in contempt by his own people. Whoever imposes just and deserved punishment is respected and honoured".

[Kautilya in "The Arthashastra"]

CA Jinit R. Shah

Matching Concept under ITC

Introduction

It is the best of times, it is the worst of times, it is the age of wisdom, it is the age of craziness…

The above phrase perfectly suits the current scenario of the GST and GST compliance system, which has both the elements of positives and negatives. GST is a good law with humongous compliances to follow.

The current Government's main contention for introduction of GST was that with GST there would be seamless flow of credit. However, for taking the Input Tax Credit (ITC) the onus has been completely placed on the assessee to keep the tab as to whether the supplier has paid the tax to the credit of the Government and filed its valid returns. The process through which the onus is shifted on the assessees for claiming ITC is the "Concept of Matching of ITC" under GST and **it is the heart and soul of the GST structure of India**.

The matching concept under ITC is divided into 2 parts, viz.

1. **Matching, reversal and reclaim of ITC,** wherein the details of inward supply furnished by the recipient will be matched -
   - with the corresponding outward supply made by the supplier,
   - with imports of goods, and
   - for duplication of claims of ITC.
2. **Matching, reversal and reclaim of reduction in output tax liability,** wherein the details of **credit note** relating to outward supply furnished by the supplier will be matched -
   - with the corresponding reduction in the claim of ITC by the recipient, and
   - for duplication of claims for reduction by supplier.

   Credit notes can be issued by the supplier for any of the following reasons

   - taxable value or tax charged in the tax invoice issued is found to exceed the taxable value or tax payable, or
   - goods supplied are returned, or
   - goods or services supplied are found to be deficient

Caution

The system followed in the erstwhile laws of taking only the eligible credits and not taking ineligible credits at all has changed in GST. Under GST, tax charged on all inputs, input

services and capital goods has to be taken at first stage and to be disclosed in the returns, thereafter the ineligible and the blocked credits are to be reversed.

The bird's eye view of compliances, before matching of ITC

Various forms are required to be furnished online on the GSTN in a month by all registered persons. The gist of the relevant compliances, before actual matching of ITC starts, is tabulated as under:

Forms	To be furnished by	Details
GSTR-1	Supplier	All outward supply details, as prescribed are required to be disclosed.
GSTR-2A	Auto-populated for the recipient	On the basis of details furnished by the supplier in GSTR-1 this form will be auto-populated for the recipient.
GSTR-2	Recipient	Recipient can accept, reject or modify the details of inward supplies which are auto-populated in GSTR-2A and furnish the final details of inward supplies. The recipient is also required to additionally furnish the details of inward supplies on which the recipient is liable to pay GST under reverse charge, import details, supplies from composition taxable person and exempted inward supplies, HSN summary, etc.
GSTR-1A	Auto-populated for the supplier	On the basis of Form GSTR-2 of recipient, the particulars of outward supply as validated by the recipient would be made available for the supplier. He has to accept or reject the recipient's validations which will eventually finalise his GSTR-1.
GSTR-3	Auto-populated for recipient and supplier	Based on the above process, all details in this form will be auto populated. The tax payable or its refund is auto calculated. Accordingly, tax has to be paid or refund has to be claimed. Matching of ITC will then happen after filing of monthly return.

The matching concept and its process

The matching of ITC is an extended version of the current structure being followed for Value Added Tax by some of the States. Matching will start only after the registered persons have filed the GSTR-3. As explained earlier, the concept of matching under GST is divided into 2 parts i.e., the **matching of ITC** and the matching of claim for reduction in output tax liability.

The process of matching, reversal and reclaim of ITC

Step 1 – Claim of ITC on provisional basis: The recipient shall be entitled to take eligible ITC in his return and the same will be credited on provisional basis to his electronic credit ledger.

Step 2 – Process of Matching

1. **Inward supplies to be matched for**

1.1 Every inward supply of the recipient shall be matched

- (a) with the corresponding outward supply in the valid return filed by the supplier,
- (b) with the integrated tax paid in respect of imported goods, and
- (c) for duplication of claims of ITC.

2. Details to be matched for

2.1 After the due date of furnishing the return in GSTR-3, the claim of ITC on inward supplies including imports shall be matched for

(a) GSTIN of supplier,

(b) GSTIN of recipient,

(c) Invoice / Debit note number and date, and

(d) Tax amount.

3. ITC to be treated as matched

3.1 In the following two situations the ITC shall be considered / treated as matched

(a) Recipient accepting the invoices / debit notes without amending shall be treated as matched **if the corresponding supplier has furnished a valid return.**

(b) Where the amount of ITC claimed is equal to or less than the **output tax paid** on such invoice / debit note by the corresponding supplier.

3.2 Here, the ITC shall be treated as matched only when the supplier has furnished the valid return and paid the tax on such invoice / debit note on which the recipient has taken the ITC.

3.3 A big question here is how the system / portal (GSTN) will correlate if a supplier has not paid part of his tax liability and which of the invoices/debit notes are outstanding and not paid, so technically even if the part of the tax is not paid or a valid return is not filed by the supplier then ITC to all the recipient from that particular supplier will be disallowed.

3.4 Consider a scenario wherein a particular supplier has issued 15 tax invoices of ₹ 1 lakh each with GST @ 18% and due to some error of supplier he did not pay GST relating to only 1 invoice or say out of the total liability of ₹ 90,000/- could not pay ₹ 10,000/- then the ITC to all the 15 recipients will be disallowed.

4. ITC matched, its acceptance and its communication thereof:

4.1 The claim of ITC in respect of invoices / debit notes relating to inward supply that matches with

(a) the details of corresponding outward supply, or

(b) the integrated tax paid on import of goods

shall be finally accepted and communicated to the recipient in Form GST MIS-1.

5. Mismatch, for reasons other than duplication of claim of ITC, its communication thereof and rectification

5.1 The **mismatch may occur** on account of following two reasons:

(a) ITC claimed by the recipient is in excess of the tax declared by the supplier for the same supply, or

(b) Supplier has not declared the outward supply at all in its valid returns.

5.2 The aforesaid mismatch on account of its continuation shall be **communicated to**

(a) the recipient in form GST MIS-1, and

(b) the supplier in form GST MIS-2

on or before the last date of the month in which the matching has been carried out.

5.3 On receipt of communication of mismatch, the supplier may make required **rectification** in his outward supplies (GSTR-1) or the recipient may make required rectification in his inward supplies (GSTR-2) to be furnished for the month in which the discrepancy is communicated.

5.4 However, if the discrepancy is not rectified either by the supplier or by the recipient the amount equivalent to the mismatch shall be added to the output tax liability of the recipient in his return in GSTR-3 for the month succeeding the month in which the mismatch is communicated.

6. Mismatch on account of duplication of claims of ITC by the recipient:

6.1 The duplication of claim of ITC by the recipient shall be communicated to the recipient electronically in Form GST MIS-1 and the ITC that is found to be taken on account of such duplication shall be added to the output tax liability of the recipient in his return for the month in which the duplication is communicated.

7. Interest on account of mismatch and duplication:

7.1 The recipient, in whose account any amount has been added on account of mismatch or duplication, shall be liable to pay interest on the amount so added **from the date of availing the credit** till the corresponding additions are made.

8. Reduction of amount added on account of mismatch of ITC, from the output tax liability of the recipient:

8.1 The recipient would be able to reduce from its output tax liability the amount added based on the mismatch in claim of ITC, where the supplier declares the details of the invoice / debit note in his valid return within the permitted time.

8.2 The permitted time for supplier to make the declaration is earlier of the following dates:

- Due date for furnishing GSTR for the month of September or second quarter following the end of the financial year, or
- Actual date of furnishing annual return relevant to the said financial year.

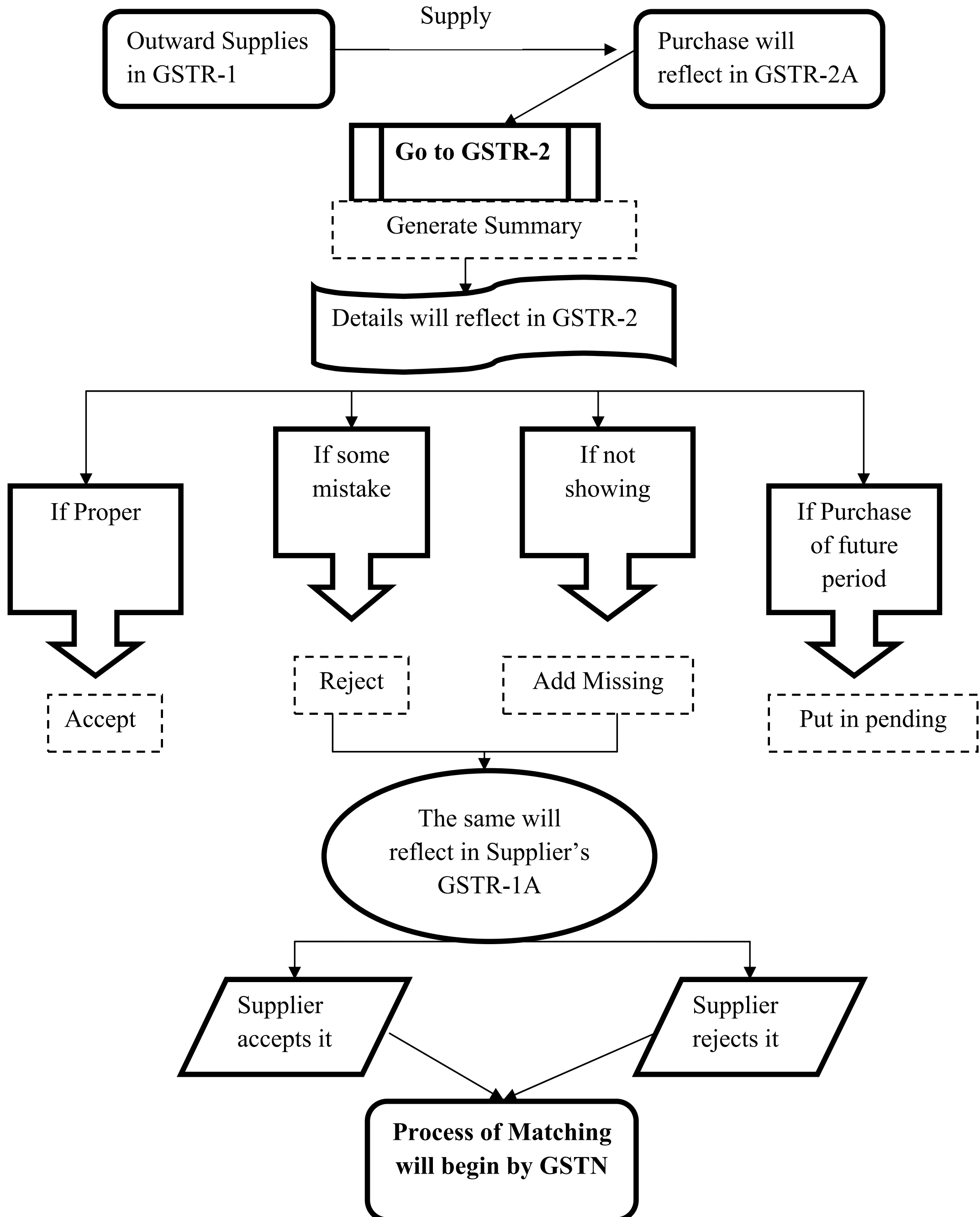
8.3 The recipient would also be eligible for the refund of interest paid on the mismatched amount added earlier, which would now stand reduced.

The process of matching, reversal and reclaim of reduction in output tax liability

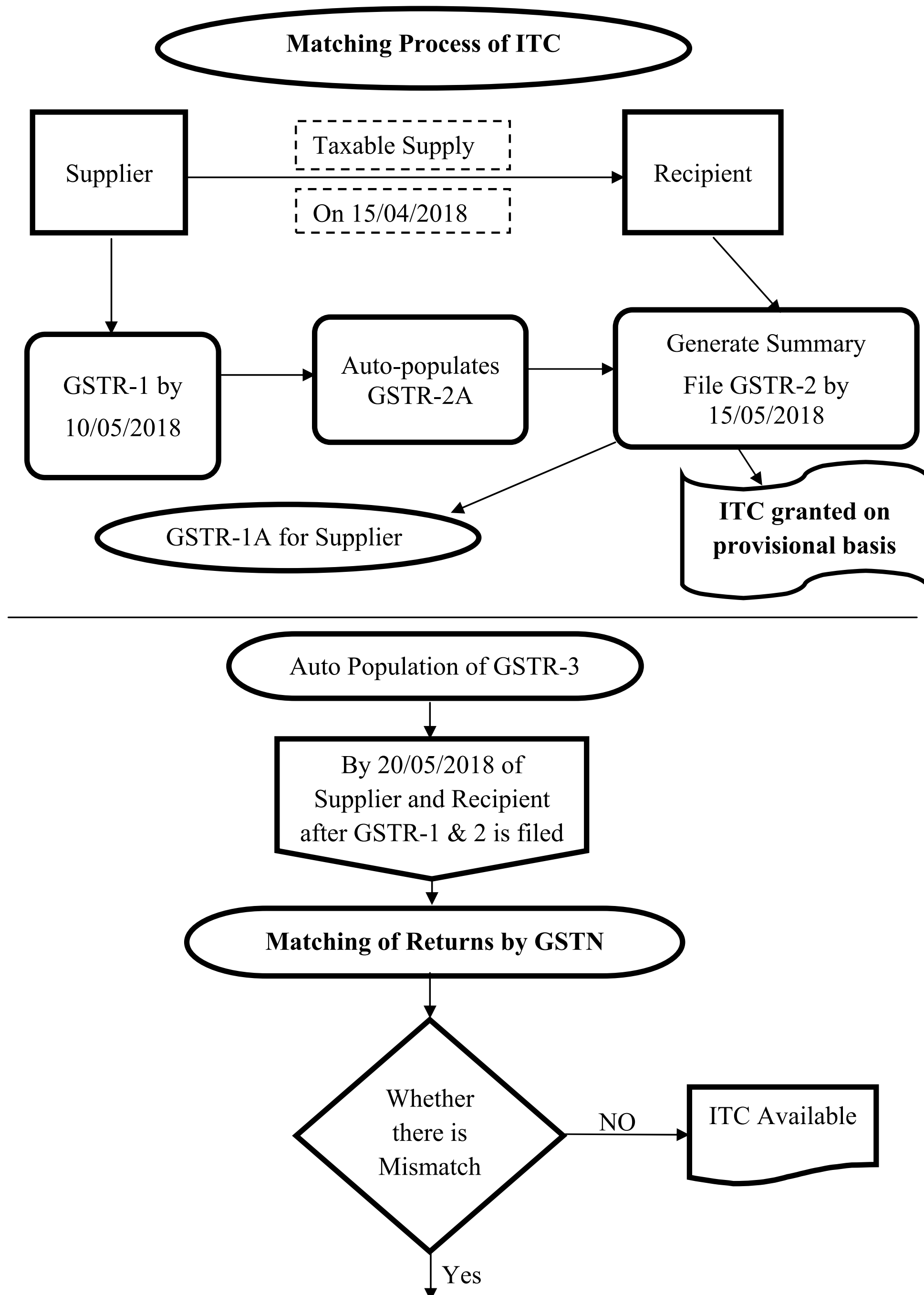
The process of matching, reversal and reclaim of reduction in output tax liability is in similar lines with the process of matching of ITC as explained above; hence the same is not repeated.

Matching will start only after the registered persons have filed the GSTR-3. Hence, the assessees would be required to file their GSTR-1 and GSTR-2 first and at the time of filing of GSTR-2 also the recipient has to carry out the pre-matching process.

The same is explained with the help of the flowchart below:



The process of matching to be carried out by GSTN will be as under:



NOTE: The above flowchart depicts what is provided in the law. However, in actual how the system functions and how the process will work can be experienced only after all relevant returns are filed for the month and the communication starts between the GSTN and the assessees.

The flaws involved in filing of GSTR-2 and matching of ITC, and snags in the GSTN

1. A supply was made by the supplier to the recipient and an invoice was issued. However, GSTR-1 was not filed by the supplier. Accordingly, it didn't auto-populate in the recipient's GSTR 2A and the recipient also forgot to show it in missing invoices and files his GSTR-2. Now, subsequently the date of filing GSTR-1 is extended, the supplier files his GSTR-1. However, as the recipient has already filed the GSTR-2, where will that invoice be shown? Whether it will auto-populate in the GSTR 2A of the recipient of next month or will it lapse? It is not yet clear.

2. A supplier has made B2B supply, but erroneously has disclosed the same under the column B2C (Others) in GSTR-1 for the month of July 2017. Tax was also paid by the supplier, but since it was shown in B2C (Others), it didn't auto-populate in the GSTR-2A of the recipient and hence recipient could not claim ITC. Now, the following actions are possible in such a case:-

- The recipient shows it in missing invoices and it is accepted by the supplier. However, once it is accepted, the tax will be again payable by the supplier on the same.
- The supplier, in the subsequent month, discloses such July month invoice under 'Amendments to taxable outward supply details furnished in returns for earlier tax period' and simultaneously issues credit note for the invoice disclosed in B2C (Others). However, once the invoices are disclosed in B2C (Others) there is no disclosure option for credit notes issued against such invoices.
- Another option for supplier is to disclose net amount under B2C (Others) in subsequent month i.e., net of taxable value of supply to unregistered recipients and credit notes. However, if there are no taxable supply for B2C (Others) in subsequent month then this option also does not work.

Therefore, all the options are practically not workable. In such case also, there seems to be the possibility of supplier becoming liable to pay tax twice or recipient losing the ITC. If not, how it will be made workable by GSTN, is not clear.

3. Cross utilization of credit: As per the law, IGST credit is to be utilised against IGST first and then against CGST and CGST credit first against CGST and then against IGST. Consider the following scenario:

3.1 A Travel Agent is providing Tour Operator Services taxable at 5% with no ITC and other services taxable at 18% with full ITC available.

3.2 He has provided Tour Operator services within the State so he has the liability of 5% of CGST plus SGST and provided other taxable services of 18% outside his registered State hence he has the liability of 18% IGST.

3.3 Now, he has locally procured some input services with CGST and SGST to provide its fully taxable inter-State services.

3.4 To summarize, he has output liability of CGST plus SGST of 5% and of IGST of 18% and has ITC of CGST and SGST of 18%.

3.5 While filing GSTR-3B the GSTN is not allowing to utilise CGST ITC against his IGST liability and if he tries to offset the liability an error message shows that 'CGST ITC should be first utilize against CGST liability and then if any balance remaining should be utilized against IGST liability'. Whereas, legally he is not allowed to utilize any ITC for making payment of his CGST liability as it is at 5% with no ITC.

Though the above issue is not relating to matching of ITC, but it is part of the system (GSTN) which will be carrying out the matching process, so only time will tell how it will work.

4. Invoice level matching: At the time of filing GSTR-2, the GSTR-2A of the recipient gets auto-populated and on generation of summary GSTR-2 gets auto-filed. However, when the recipient goes into the individual invoice entry it is found in many cases that by default all entries shows as "input" even if the entry is an "input service", thus the recipient has to manually change the same to "input service" if the recipient has received some services. Therefore, if one does not verify in detail the entries in GSTR-2 then the chances are that ITC on input services may get reflected as ITC on inputs.

5. GSTR-1 filled and submitted but not filed: In few cases it has been observed that the assessees have **filled and submitted** their GSTR-1 but could not file it due to system error as there were many transactions. However, the recipients of such supplier added the missing invoice and filed their GSTR-2.

Now, by default the system is adding these invoices (uploaded by recipients) also in GSTR-1 of the supplier thereby doubling the output liability of the supplier. Currently, as on date the system is not allowing the supplier to delete the invoices entered by him and if the supplier rejects the invoices uploaded by the recipient the credit will be disallowed to the recipient.

This seems to be probably the system snag and the same may be rectified in the coming times, we hope so!

There may be number of similar problems that the assessees may be facing everyday while filing the various returns on GSTN. There seems no solution to such problems as of now and assessees have a fear that the ITC involved in such cases may lapse. But whether the substantial right in the form of ITC can lapse on account of technical faults at the site?

Before concluding

It is to be noted that all this process of matching of ITC only ensures mathematical and documentary accuracy. This does not guarantee eligibility under ITC, the eligibility as per ITC provisions may still be adjudicated.

Further, care has to be taken that there are two levels of matching which are as under:

1st level matching is GSTR-1, GSTR-2A, GSTR-2 and GSTR-1A. Government has delegated this work to businesses, and

2nd level matching is done by the system i.e. GSTN, this is the further chance given to the businesses to rectify the mismatch and this needs co-ordination amongst businessmen.

Conclusion

Though time and again it has been told to the assessees that they have to file only GSTR-1, thereafter GSTR-2 and GSTR-3 will be auto-populated but we have already seen that GSTR-2 also requires lots of information to be provided from recipient's end. Furthermore, if tax is not paid by the supplier, the recipient's ITC will be automatically reversed. Hence, recipients will play the role of recovery officers for the Government. This demands a lot of discipline from assessees and meeting deadlines to file their returns considering that at a single point of time only 80,000 taxpayers are allowed to file their returns.

The Finance Minister had commented in his budget speech this year "India is largely a non-compliant society". However, under GST, it seems the businesses will do only compliance, compliance and compliance.

CA Ashit Shah

Refund of Input Tax Credits

Refund of Input Tax Credits (ITC) arises under a scenario when the taxes paid on inputs are more than the taxes paid on the outward supplies. Such accumulated unutilized input tax credit either has to be carried forward to next financial year, till such time as it can be utilised by the taxpayers for payment of taxes on his/her outward supplies or can apply for refund of such ITC subject to fulfilment of conditions. In this article an attempt had been made to analyse the whole refund mechanism of ITC under GST regime and taxpayers have to look into Section s54 & 55 of CGST Act, 2017 and Chapter X of CGST Rules while interpreting provisions of refund mechanism of Input Tax Credits.

Who can claim refund of Input Tax Credits?

1. **Specified persons**

   A specialised agency of the United Nations Organizations (UNO) or any Multilateral Financial Institution (MFI) and Organization, Consulates or Embassy of the foreign countries or any other person or class of persons, as may be notified under section 55 of CGST Act, 2017 and subject to conditions notified under N. No. 16/2017 – dated 28-6-2017.

2. **Registered persons**

   A registered person may claim the refund of accumulated unutilised input tax credits arising on account of –

   (a) Exports of goods or services or both; or

   (b) Supply of goods or services or both to a developer of Special Economic Zone (SEZ) or a unit located in SEZ; or

   (c) Rate of tax on inputs being higher than the tax on output supplies i.e., inverted duty structure. However such output supplies do not include nil rated or fully exempt supplies.

3. **International Tourist**

   Any person not normally resident in India, who enters India for stay of not more than 6 months for legitimate non-immigrant purposes, leaving India, can claim the taxes (Integrated Tax) paid on any supply of goods taken out of India by himself.

Time limit for claiming refund

Sr. No.	Categories	Time Period
1	Specialised agency of UNO, MFI, Consulates or Embassy of foreign countries etc.	Before expiry of 6 months from the last day of the quarter in which supply was received.
2	Registered persons exports goods or services or supplies to developer of SEZ or unit located in SEZ	At the end of tax period – period for which return is required to be furnished.
3	Deemed Exporter	At the end of tax period – period for which return is required to be furnished.
4	International Tourist	Leaves or Departs from India

Deemed Exporter: Following registered persons would be deemed exporters [N. No. 48/2017 – Central Tax dated 13-10-2017]

a. Supply of goods by a registered person against Advance Authorization Scheme of DGFT;

b. Supply of Capital Goods by a registered person against Export Promotion Capital Goods Authorisation Scheme of DGFT;

c. Supply by registered person to Export Oriented Units (EOU), Unit at Electronic Hardware Technology Park (EHTP) or Software Technology Park (STP) or Bio-Technology Park (BTP);

d. Supply of gold by a bank or PSU against Advance Authorization.

Input Tax Credits ineligible for refund

a. Accumulated unutilised input tax credit not eligible when goods exported out of India are subject to export duty;

b. Supplier of goods or services or both avails drawback in respect of central tax or claims refund of integrated tax (IGST) paid on such supplies;

c. Accumulated unutilised input tax credit in Electronic Credit Ledger (ECL) when goods or services or both are supplied within India.

d. No refund of unutilised input tax credits shall be allowed where the credits has accumulated on account of inverted duty structure in respect of items covered under chapter Headings 5007, 5111 to 5113, 5208 to 5212, 5309 to 5311, 5407 & 5408, 5512 to 5516, 5608, 5801, 5806, 60, 8601 to 8608 [N. No. 5/2017 – dated 28-6-2017 & N. No. 44/2017 – dated 14-11-2017]. However, it has been clarified that manufacturer of fabrics falling under above chapter Headings will be eligible for refund of unutilised input tax credit of GST paid on inputs (other than the input tax credit of GST paid on capital goods) in respect of fabrics manufactured and exported by him. [Circular No. 18/18/2017 – GST – dated 16-11-2017]

e. No refund of unutilised input tax credits shall be allowed in case of supply of services specified in sub item (b) of item 5 of Schedule II of CGST Act, 2017 viz., construction of complex, building, civil structure including under construction building. [N. No. 15/2017 – dated 28-6-2017].

Application for Refund and documents required for claiming refund

Application for refund has to be filed in Form GST RFD-01 through the common portal of GSTIN. It has to be accompanied by following

documentary evidence in Annexure – 1, to establish that a refund is due to the applicant.

a. Shipping bills or Bills of export and export invoices, in cases where refund is on account of export of goods;

b. Export invoices and the Bank Realisation Certificates (BRC) or Foreign Inward Remittance Certificate (FIRC), as the case may be where the refund is on account of export of services;

c. Export invoices and evidence regarding endorsement by specified officer of the zone that goods have been admitted in full in SEZ for authorised operations;

d. Export invoices, evidence regarding endorsement by a specified officer of the zone that receipt of services for authorized operations and details of payment in case where the refund is on account of supply of services to developer of SEZ or unit located in SEZ;

e. Declaration that developer of SEZ or unit located in SEZ has not availed the ITC of the tax paid by the supplier of goods or services or both;

f. Statement containing details of invoices received and issued during a tax period in cases where the claim of refund pertains to refund of any unutilised ITC which is accumulated on account of the rate of tax on the inputs being higher than the rate of tax on output supplies, other than nil rated or fully exempt supplies.

Taxpayer has to obtain a certificate in Annexure – 2 of Form GST RFD-01, from a Chartered accountant or a Cost accountant to the effect that the incidence of tax, interest or any other amount claimed as refund has not been passed to any other person if refund amount exceed INR 2.00 lakhs under cases where tax and interest, if any, or any other amount paid by the applicant if he had not passed on the incidence of such tax and interest to any other person. If refund amount does not exceeds INR 2.00 Lakhs, it shall not be necessary to furnish any documentary and other evidences but taxpayer has to file a declaration certifying that the incidence of such tax and interest had not been padded on to any other person.

Due to non-availability of the refund module on the common portal, it has been decided by the competent authority, on the recommendation of Council, that application / documents / forms pertaining to refund claims shall be filed and processed manually till further orders and detailed procedure is prescribed by issuance of Circular No. 17/17/2017 – GST - dated 15-11-2017.

The application for refund of unutilised ITC on inputs or input services used in making such zero rated supplies shall be filed in Form GST RFD-01A on the common portal and the amount claimed as refund shall get debited in accordance with Rule 86(3) of CGST Rules from the amount in the electronic credit ledger to the extent of the claim. The common portal shall generate a proof of debit (ARN – Acknowledge Receipt Number) which would be mentioned in the Form GST RFD-01A submitted manually, along with the printout of Form GST RFD-01A to the jurisdictional proper officer, and with all necessary documentary evidence as applicable (as per details in statement 3 or 5 of Annexure to Form GST RFD -01) within the time stipulated for filing of such refund under CGST Act.

The registered person needs to file the refund claim with the jurisdictional tax authority to which the tax payer has been assigned as per administrative order issued in this regard by the Chief Commissioner of Central Tax and the Commissioner of State Tax. List of division of taxpayers in Maharashtra between Central and State Government of Maharashtra can be obtained from website www.mahavat.gov.in.

Steps to be followed for processing of refund claims

Three different refund registers are to be maintained for record keeping of the manually sanctioned refunds – for receipts, sanction of provisional refunds and sanction of final refunds. The steps are as follows:

Steps	Action
1	Entry to be made in the Refund register for receipt of refund applications
2	Check for completeness of application as well as availability of the supporting documents in totality. Once completeness in all respects is ascertained, acknowledgement in FORM GST RFD-02 shall be issued within 15 days from the date of filing of the application and entry shall be made in the Refund register for receipt of refund applications
3	• All communications (issuance of deficiency memo, issuance of provisional and final refund orders, payment advice etc.) shall be done in the format prescribed in the Forms appended to the CGST Rules, and shall be done manually (i.e., not on the common portal) within the timelines prescribed in the rules; • Processing for grant of provisional refund shall be completed within 7 days as per the CGST Rules and details to be maintained in the register for provisional refunds. Bifurcation of the taxes to be refunded under CGST (CT)/SGST (ST)/UTGST (UT) /IGST (IT) /Cess shall be maintained in the register mandatorily; • After the sanction of the provisional refund, final order is to be issued within sixty days (after due verification of the documentary evidences) of the date of receipt of the complete application form. The details of the finally sanctioned refund and rejected portion of the refund along with the breakup (CT/ST/UT/ IT/Cess) to be maintained in the final refund register; • The amount not sanctioned and eligible for recredit is to be recredited to the electronic credit ledger by an order made in FORM GST PMT-03. The actual credit of this amount will be done by the proper officer in FORM GST RFD-01B

The refund application for various taxes i.e. CT/ST/UT/IT/Cess can be filed with any one of the tax authorities and shall be processed by the said authority, however the payment of the sanctioned refund amount shall be made only by the respective tax authority of the Central or State government. In other words, the payment of the sanctioned refund amount in relation to CT/IT/ Cess shall be made by the Central tax authority while payment of the sanctioned refund amount in relation to ST/UT would be made by the State tax/Union Territory tax authority. It therefore becomes necessary that the refund order issued either by the Central tax authority or the State tax/ UT tax authority is communicated to the concerned counter-part tax authority within three days for the purpose of payment of the relevant sanctioned refund amount of tax or cess, as the case may be.

Deemed exporters have to submit following documents at the time of filing refund application

a. Acknowledgment by the jurisdictional Tax officer of the –

- Advance Authorisation (AA) holder or

- Export Promotion Capital Goods (EPCG) Authorisation holder, as the case may be, that the said deemed export supplies have been received by the said AA or EPCG Authorisation holder, or
- Copy of the tax invoice under which such supplies have been made by the supplier, duly signed by the recipient Export Oriented Unit (EOU) that said deemed export supplies have been received by it.

b. An undertaking by the recipient of deemed export supplies that no input tax credit (ITC) on such supplies has been availed of by him.

c. An undertaking by the recipient of deemed export supplies that he shall not claim the refund in respect of such supplies and the supplier may claim the refund.

Determination of quantum of refund amount

a. **In cases of zero rated supplies:**

$$\text{Refund amount} = \frac{\text{Turnover of zero rated supply of goods and services}}{\text{Adjusted total turnover}} \times \text{Net ITC}$$

Refund amount = maximum refund that is admissible

Net ITC = ITC availed on inputs and input services during the relevant period

Turnover of zero rated supply of goods = value of zero rated supply of goods made during the relevant period without payment of tax under letter of undertaking (LUT).

Turnover of zero rated supply of services = value of zero rated supply of services made without payment of tax under letter of undertaking (LUT) to be calculated in following manner –

	Payment received during the relevant period	Xxxxx
Add :	Advance payment received for zero rated supply where supply has been completed, in any period prior to the relevant period	Xxxxx
Less :	Advance received for zero rated supply of services for which the supply of service has not been completed during the relevant period.	Xxxxx
	Turnover of zero rated supply of services	Xxxxx

Adjusted total turnover = Turnover in a State or Union Territory excluding the value of exempt supplies other than zero rated supplies, during the relevant period.

Relevant period = period for which the claim has been filed.

b. **In case of inverted duty structure**

$$\text{Refund amount} = \frac{\text{Turnover of inverted rated supply of goods}}{\text{Adjusted total turnover}} \times \text{Net ITC - tax payable on such inverted rated supply of goods}$$

Grant of provisional refund

On receipt of application of refund by a registered person which is on account of zero-rated supply of goods or services or both, proper officer may grant refund equivalent to 90% of the refund claim, on provisional basis and balance amount of refund after due verification of documents furnished by the applicant. However, if such person during any period of 5 years immediately preceding the tax period to which the claim for refund relates, not being prosecuted for any offence under the GST Act or under any earlier law where the tax evaded exceeds INR 250 lakhs, would not be granted provisional refund. If proper officer is satisfied, he will make an order in Form GST RFD-04 sanctioning provisional refund within a period of 7 days from the date of acknowledgment of application and such refund amount would be credited to the bank account of the applicant mentioned in his registration particulars and as specified in the application of refund.

Grant of Refund

Refund application other than on account of zero rated supply of goods or services or both, would be forwarded to the proper officer, who shall, within a period of 15 days of filing of the application, scrutinise the application for its completeness and where it is found proper, an acknowledgment in Form GST RFD-02 shall be made available to the applicant and within a period of 60 days thereafter, proper officer has to pass the order of accepting or rejecting the refund application. Such orders have to be passed in Form RFD-06 sanctioning the amount of refund to which the applicant is eligible or entitled. Refund would not be granted if the amount of refund claim is less than INR 1,000.

Interest on delayed refund

If any tax ordered to be refunded is not refunded within a period of 60 days from the date of receipt of application, applicant would be eligible for interest not exceeding 6% shall be payable in respect of such amount from the date immediately after the expiry of 60 days from the date of receipt of application till the date of refund of such tax.

Processing of Refund Claims

Powers have been delegated to grant the refund claims to the officers of State and Union Territory GST for sanctioning of refund. However, these officers would not be authorised to sanction refund claims on account of IGST paid on export of goods or services and such powers are vested with Central GST officers.

Power to withhold refund

GST law provides that where an order giving rise to a refund is the subject matter of an appeal or further proceedings or where any other proceedings under this Act is pending and the Commissioner is of the opinion that grant of such refund is likely to adversely affect the revenue in the said appeal or other proceedings on account of malfeasance or fraud committed, he may, after giving the taxable person an opportunity of being heard, withhold the refund till such time as he may determine. But it has been adequately safeguarded by provision for payment of interest @ 9% if, as a result of appeal, or further proceedings, the applicant becomes eligible for refund.

Conclusion

It is expected that the process of sanctioning of refund application would be faster and hassle free process, since all the data are uploaded on GSTIN portal electronically and hence verification, scrutinisation and validation of data would be simpler.

Harsh Shah, *Advocate*

Landmark decisions for ITC – Fate under GST regime

Taxation of value addition is at the core of an efficient value added tax ('VAT') system, which is achieved by ensuring free flow of input tax credit across the supply chain.

In the context of Indirect tax scenario in India, the value addition based system of Indirect taxation was so far incorporated in the tax credit related provisions under the multiple State and Central level laws. In terms of State laws, the VAT laws of respective States contained detailed provisions on availment and utilisation of input tax credit and under the Central laws, tax credit was mainly governed by the CENVAT Credit Rules, 2004 ('CCR'). Accordingly, the concept of input tax credit is not a novel one for Indian Indirect tax system.

While the erstwhile Indirect tax regime also represented a value addition based taxation system, the concept of taxing only value addition was executed only in a fractured manner. This was due to various reasons, including non-fungibility of credits of various taxes due to separate administration of Central and States taxes, State level pool of VAT credits, etc. The concept of input tax credit, being the key determinant of net tax outflow, has been a subject manner of considerable litigation with disputes around scope of credit eligibility, compliance of procedural requirements, etc.

Ensuring the free flow of input tax credit and taxation of only the value additional have been the key touchstones for introduction of Goods and Services Tax ('GST') regime in India. A continuous chain of tax credit from the stage of producer till retailer has been the foremost vision behind introduction of GST. The same was also manifest in the FAQs on GST contained in the First Discussion Paper on GST issued by the Empowered Committee of the State Finance Ministers in November 2009.

In comparison to the erstwhile credit related provisions of the VAT laws and CCR, the input tax credit related provisions under the GST law are significantly wider in scope. The widened scope of input tax credit related provisions is definitely a firm step toward achieving the objective of 'free flow of credits' sought to be fulfilled with introduction of GST regime. However, at the same time, there are certain lose ends in the credit related provisions of the Central Goods and Services Tax Act, 2017 ('CGST Act').

While a lot of the controversies of input tax credit have already been considered while drafting these provisions and hence resolved in the law itself, some of the issues of the past are expected to continue under the GST regime as well. We have hereby analysed some landmark

decisions on input tax credit under the erstwhile law, some of which are losing relevance under the transformed legislative scenario whereas some others would still continue to be relevant.

(A) Judicial precedents and corresponding controversies which continue to be relevant

i. *Credit is indefensible – CCE vs. Dai Ichi Karkaria Ltd.*[1]; *Eicher Motors Limited vs. Union of India*[2]

The decision of the Hon'ble Apex Court in the case of Eicher Motors laid down the fundamental principles as regards crystallisation of the right to avail credit and analysed the nature of a right to avail credit in terms of the then applicable MODVAT scheme. It held that provision for facility of credit is as good as tax paid, till such tax has been adjusted by the assessee against future goods. This decision pioneered the principle that a right to avail credit is accrued as soon as duty paid inputs were received by the assessee as per the then existent MODVAT scheme, and such an accrued right cannot be modified subsequently.

Similar principle was also reiterated by the Hon'ble Apex Court in its subsequent decision in the case of Dai Ichi Karkaria Limited wherein it was remarked that a credit under the MODAVT scheme was 'as good as tax paid'.

These two landmark pronouncements of the Hon'ble Supreme Court analysed the very nature of a right to avail credit and limitations that could be subsequently imposed against such right. The principle that a tax credit once availed is 'indefensible' was propounded in these precedents. While the same were delivered in the context of MODVAT scheme, the principles laid down therein go to the root of a value added tax system and hence would be of continued relevance even under the GST regime as regards the nature of right to avail tax credit. Considering the same, these decisions would continue to be of relevance in the context of any future disputes under the GST regime as regards the right to avail credit as per the CGST Act, any limitation that could be attached to such right, validity of any retrospective amendment to credit provisions, etc.

ii. *Eligibility to avail tax credits only if tax is actually paid by the supplier – Mahalaxmi Cotton Ginning Pressing and Oil Industries*[3], *Gheru Lal Bal Chand vs. State of Haryana*[4], *Arise India Limited vs. Commissioner of Trade & Taxes*[5]

Section 16(2) of the CGST Act lays down various conditions for availment of credit by a registered person, which *inter-alia* covers the flowing:

"(c) subject to the provisions of section 41, the ***tax charged in respect of such supply has been actually paid*** *to the Government, either in cash or through utilisation of input tax credit admissible in respect of the said supply;"*

In effect, such a provision would mean that credit of tax charged on a supply would be ultimately eligible to the recipient, only if the supplier has paid the amount of tax to the Government. In case of default of the supplier to deposit such tax into the Government treasury, credit of the tax amount (which would have already been paid by the recipient to the supplier) would not be eligible.

This sort of a condition for availing tax credit is not unknown to the Indirect tax system in India, and was in fact already operative in VAT laws of various States. The *vires* of such a condition

1 1999 (112) ELT 353 (SC)
2 1999 (106) ELT 3 (SC)
3 2012 (051) VST 0001 Bom
4 2011 (045) VST 0195 P&H
5 TS-314-HC-2017(Del)-VAT

in terms of its Constitutional validity came to be examined by the Courts of the country in various cases.

The Hon'ble Bombay High Court in the case of Mahalaxmi Cotton examined the Constitutional validity of a similar condition contained in the Maharashtra VAT legislation, in light of the following key arguments put forth by the Petitioner:

- Such a provision constitutes an unreasonable classification between the seller and purchaser, in as much as the purchaser is not protected in respect of non-payment of tax by the seller;
- Such a condition is arbitrary especially in the absence of any provision allowing refund thereof to the assessee if the tax amount is recovered from the seller in future;
- Denying set-off to the purchaser on account of non-compliance of the seller is a condition impossible to perform; etc.

While analysing these arguments in light of jurisprudence on the subject and concepts *qua* sales tax legislations, the Hon'ble Bombay High Court held that the legislature is competent to enact a condition of this sort to protect the revenues of the Government and the same is not violative of Articles 14 and 19(1)(g) of the Constitution of India. It was remarked that:

"the right to obtain set-off is a right conferred by the statute and the legislature while recognising an entitlement to a set-off in certain circumstances is lawfully entitled to prescribe the conditions subject to which a set-off can be obtained."

A similar issue also came to be examined by the Hon'ble Punjab & Haryana High Court in the case of Gheru Lal Bal Chand, wherein *vires* of similar provisions of the Haryana VAT law were challenged. While the Hon'ble High Court in this case agreed to the contention of the Petitioner in this case, it held that the word 'paid' in the relevant provision should be read down as 'ought to have been paid' so as to save the provision from being pronounced unconstitutional. It was remarked that:

"no liability can be fastened on the purchasing registered dealer on account of non-payment of tax by the selling registered dealer in the treasury unless it is fraudulent… …"

On a similar issue, the Hon'ble Delhi High Court recently in the case of Arise India struck down a similar provision under the Delhi VAT law to the extent the purchaser has entered into *bona fide* purchasing transactions with a validly registered dealer.

Considering the divergent judicial precedents and that the provisions of the CGST Act in this context are *pari materia* to the corresponding provisions under various erstwhile State VAT laws, these decisions would play an important role in ultimate determination on the issue; which may have to come from the Hon'ble Supreme Court considering the divergent views of various High Courts.

iii. *Qualification of plant and structures embedded to earth as Capital goods – Vandana Global Limited vs. CCE*[6]

Under the erstwhile CCR, the term 'Capital Goods' was defined to include goods of specified tariff classification within its perspective. The Larger Bench of CESTAT in the case of Vandana Global analysed the said term in the context of foundations and supporting structures, in the course of which, the distinction between 'Capital Goods' and 'Capital Assets' was highlighted.

The Larger Bench held that the terms 'Capital Goods' and 'Capital Assets' are not synonymous. It observed that 'Capital Assets' is a wider expression, which would cover 'Capital Goods' as well as other immovable structures within its purview. It was observed that in order to

6 2010 (253) ELT 440 (Tri.-LB)

qualify as Capital Goods, the foundations and structure have to be treated as goods in the first place. With these observations, it was held that foundations and supporting structures of machinery embedded to earth would not qualify to be Capital Goods (although the same could be treated as Capital Assets).

Under the CGST Act, the definition of 'Capital Goods' provides as under:

"(19) "Capital Goods" ***means goods****, the value of which is capitalised in the books of account of the person claiming the input tax credit and which are used or intended to be used in the course or furtherance of business."*

It may be observed that qualification of an item as 'goods' is pre-requisite under this definition. It may be noted that Section 17(5) of the CGST Act prescribing the list of blocked credits *inter-alia* covers the following:

"(d) Goods or services or both received by a taxable person for construction of an immovable property (other than plant or machinery) on his own account including when such goods or services or both are used in the course or furtherance of business.

… …

Explanation.— For the purposes of this Chapter and Chapter VI, the expression "plant and machinery" means apparatus, equipment, and machinery fixed to earth by foundation or structural support that are used for making outward supply of goods or services or both and includes such foundation and structural supports but excludes… …"

Considering the above, it is likely that the controversy for availment of credit considering the distinction between 'Capital Goods' and 'Capital Assets' enunciated by the Larger Bench of CESTAT may continue to be relevant even under the GST regime.

iv. *Transit losses and short receipt of inputs – Union of India vs. Hindustan Zinc Limited*[7]

Under the erstwhile CCR as well as the CGST Act, receipt of goods is one of the key conditions for availing tax credit on Inputs or Capital Goods.

In the case of Hindustan Zinc, the question of law as to whether credit should be allowed in respect of the quantity of raw material which was not received in the factory (and hence not used for manufacture of goods) came up for examination before the Hon'ble Rajasthan High Court.

The inputs procured by the assessee in this case were short received, which were written off as transit losses. The assessee attributed the short receipt of about 0.05% to dryage of moisture content and some possible difference in weighment. Upholding the claim of credit in respect of such short receipts, the Hon'ble High Court observed that it would be too impractical and unrealistic to ignore such ground realities and possibility of some error in recording of measurements. It held that in the absence of any evidence suggesting diversion of inputs with intent to evade duty, claim of credit in respect of such inputs ought to be allowed.

Considering the condition of receipt of goods for availment of credit (as per Section 16(2)(b) of the CGST Act), the law laid down by the Hon'ble High Court in this case would continue to be relevant even under the GST regime.

v. *Goods lost in storage or manufacturing process – CCE vs. Hindustan Zinc Limited*[8]*, CCE vs. Associated Cements Co. Ltd.*[9]

The issue involved in these cases pertained to eligibility of CENVAT credit in respect of loss of inputs occurred during storage or in the course of manufacturing process. Upholding the

7 2013 (294) ELT 378 (Raj.)

8 2014 (307) ELT 273 (AP)

9 2006 (197) ELT 215 (Tri. – LB)

eligibility of credit in respect of the inputs so lost, these two decisions laid down the principle that credit cannot be *variated* on account of subsequent loss of inputs (post receipt) due to loss of moisture content, handling loss, etc.

Section 17(5) of the CGST Act enlisting the blocked credits *inter-alia* covers 'goods lost' within its purview (clause h). Considering this restriction on credits, the law laid down in these judicial precedents would be important to take note of in respect of any future disputes of credit on goods lost under the GST regime.

(B) Judicial precedents and corresponding controversies losing relevance

i. *Accounting treatment and tax credits – Honda Siel Cars (I) Ltd. vs. CCE[10], Bajaj Auto Limited vs. CCE[11]*

Under the CCR, the definition of Capital Goods covered specified goods (depending on chapter classification) within its purview. As per these judicial precedents and settled position, the goods specified in the definition of Capital goods were to be treated as such, irrespective of the accounting treatment adopted for the same. Accordingly, accounting treatment of the Goods held no significance in determination of the goods as inputs or Capital Goods for credit availment purpose (i.e., goods could be treated as Capital Goods even if the same were not capitalised in books of account).

Under the GST regime, in terms of Section 2(19) of the CGST Act, the definition of Capital Goods is specifically linked to the accounting treatment of an expense and provides for treating goods as Capital Goods if procurement thereof is capitalised in books of account. This altered statutory definition exactly goes against these decisions and hence puts an end to their relevance *qua* transactions post GST implementation.

ii. *Correlation between manufacture and use of goods and services – Maruti Suzuki Limited vs. CCE[12], KCP Limited vs. CCE[13]*

Under the CENVAT and MODVAT regime, the taxable event *qua* goods was manufacture of goods (liable to Excise duty), whereas sale of goods was taxed under separate State level VAT / Sales tax legislations. On account of this, the definition of input under the earlier regime linked credit eligibility to use of goods 'in or in relation to manufacture of final product'. This linkage of goods to manufacturing process has been subject matter of considerable litigation, with this decision of the Hon'ble Supreme Court in Maruti Suzuki case being a landmark one.

The Hon'ble Apex Court in this case held that in order to be eligible for credit, the goods must be used in relation to manufacture of final product and nexus between manufacturing process and use of goods ought to be established in order to be eligible for credit availment.

The linking of 'manufacture' to credit eligibility was also enunciated by the Hon'ble Supreme Court in the case of KCP Limited, wherein it was held that manufacture was pre-requisite for availing MODVAT credit and a mere trader or exporter could not claim such credit.

With the shift from multiple taxable events such as manufacture and sale to a single taxable event in form of supply, the concept of 'manufacture' loses its relevance (except for a few situations). Consequently, the primary functionality and nexus *qua* manufacture tests laid down by the Hon'ble Supreme Court in these decisions turn out to be matters of only historical significance.

10 2004 (163) ELT 344 (Tri. – Del.)

11 2009 (247) ELT 749 (Tri. – Mumbai)]

12 2009 (240) ELT 641 (SC)

13 2013 (295) ELT 353 (SC)

iii. *Interpretation of inclusive parts of Input and Input services definition – Maruti Suzuki Limited vs. CCE*[14], *Coca Cola India Pvt. Ltd. vs. CCE*[15]

The 'means and includes' definitions of input and input services under the CCR generated a plethora of disputes. In the context of definition of inputs, the Hon'ble Supreme Court in the case of Maruti Suzuki expressed a view that the nexus and functional test must also be satisfied by the goods covered in the inclusive portion of the definition.

However, a divergent view was expressed by the Hon'ble Bombay High Court in the case of Coca Cola wherein a widened interpretation of such definition was canvassed on the premise that:

"By the word "includes" services which may otherwise have not come within the ambit of the definition clause are included and by the word "means" these are made exhaustive."

The present decision of the Hon'ble Bombay High Court permitted lenient interpretation of the definition of input service on the ground that the intention of the Government under the CENVAT scheme was to collect tax on value addition and ensure that burden of the tax must be borne by the ultimate consumer.

The definitions of input and input services under the CGST Act are significantly simplified and require compliance with the only condition of use in the course of or furtherance of business (subject to certain exceptions). The evolution of the concept of granting all business related tax credits under the GST regime will hopefully leave the controversies discussed in these decisions behind.

iv. *Place of removal and CENVAT credit on outward freight – Escorts JCB Limited vs. CCE*[16], *CCE vs. Ispat Industries Limited*[17]

Under the CCR, a manufacturer was entitled to CENVAT credit on services used in relation to manufacture of final products and clearance of final products 'upto the place of removal'. In this context, the interpretation of the phrase 'place of removal' assumed importance (defined under Section 4(3)(c) of the Central Excise Act, 1944 and Rule 2(qa) of the CCR[18]). Having dual impact on valuation of goods for payment of Excise duty and eligibility of CENVAT credit on outward freight, interpretation of the said expression came to be examined in various landmark decisions that analysed the concept of ex-factory sales and meaning of place of removal.

The Hon'ble Supreme Court's decision in the case of Escorts JCB Limited was a landmark one and provided for treating the factory gate as the place of removal in cases of ex-factory sales (even if transit insurance cost was separately recovered from the buyers). The concept was endorsed in various subsequent decisions including the recent decision in the case of Ispat Industries, wherein the Hon'ble Apex Court held that place of removal from where excisable goods are to be sold can only be a place or premises of the manufacture.

These views expressed in the recent case of Ispat Industries created significant implications on eligibility of CENVAT credit on services such as outward freight, transit insurance, etc. While the amounts recovered on such charges from customers continued to attract Indirect tax (in the form of State VAT), the taxes paid on the relevant procurement (viz., input services charged to Service tax, being

14 2009 (240) ELT 641 (SC)

15 2009 (15) STR 657 (Bom.)

16 2002 (146) ELT 31 (SC)

17 2015 (324) ELT 670 (SC)

18 Definition under the CCR introduced with effect from 11th July 2014

a Central levy) became a cost in hands of the manufacturer; becoming one more example of cascading effect of taxes under pre-GST era due to non-fungibility of credit between Central and State levies.

With abolition of the concept of manufacture, the corresponding Central Excise concepts like place of removal are also now a thing of the past, not likely to haunt the taxpayers in future! The unification of multiple taxable events into a single taxable event being supply ensures free flow of credit of such services to suppliers, making businesses more tax efficient.

v. *Relevant date for eligibility of CENVAT credit on Capital Goods – Spenta International Ltd. vs.CCE[19], CCE vs. Pepsico India Holdings Ltd.[20]*

Under the erstwhile CCR, CENVAT credit on Capital Goods used in the factory of manufacturer of final products or for providing taxable services was allowed to be availed in two instalments – up to 50% in the year of receipt of such goods and the balance credit in the next financial year. Considering that Capital Goods in most cases were items in the nature of plant and machinery that could be used over a period of time, the issue arose as regards eligibility of CENVAT credit on goods (otherwise eligible for credit as Capital Goods) which were although initially used for exempted goods or services, but subsequently used for taxable activities.

The Larger Bench of the CESTAT in the case of Spenta International examined the relevant date for determining the credit eligibility on Capital Goods. It was held that credit eligibly on Capital Goods needs to be determined on the date of receipt thereof and any subsequent change in use of goods would not create a fresh credit entitlement. Accordingly, it was held that goods used exclusively in connection with exempted activities would not be subsequently entitled to credit as Capital Goods if diverted for taxable activities. The same view was further endorsed by the CESTAT in the case of Pepsico India Holdings.

However, with the revamped credit scheme under the GST regime, the relevance of positon laid down in these decisions fades. One of the key conceptual change under the GST regime *qua* Capital goods credit is to allow credit thereon only to the extent of use in taxable supplies, and proportionate reversal of credit to the extent of use in respect of exempt supplies. Under this scheme where the credit of Capital Goods is divided into 60 blocks (one pertaining to each month, presuming useful life of 5 years), the supplier is allowed to avail credit of such goods in respect of any tax period wherein the same are used for making taxable supplies. The proviso to Rule 43(1)(c) of the Central Goods and Services Tax Rules, 2017 ('CGST Rules') specifically permits this and states that:

"Provided that where any Capital Goods earlier covered under clause (a) is subsequently covered under this clause, the value of 'A' shall be arrived at by reducing the input tax at the rate of five percentage points for every quarter or part thereof and the amount 'A' shall be credited to the electronic credit ledger;"

With this, the long drawn controversies as regards relevant date for determining credit eligibility comes to rest.

vi. *Requirement to have registration for tax credits – Imagination Technologies India P. Ltd. vs. CCE[21]*

Under the CCR, this decision in the case of Imagination Technologies and various other decisions permitted availment of credit even if the person availing credit was not registered at the time of availing credit. These decisions were mainly issued on the ground that there was no requirement under the CCR to obtain mandatory registration.

19 2007 (216) ELT 133 (Tri. – LB)

20 2015 (324) ELT 175 (Tri. – Mumbai)

21 2011 (23) STR 661 (Tri. – Mumbai)

However, in terms of Section 16 of the CGST Act, credit entitlement of GST paid on procurement is bestowed only upon registered persons, especially since the credit needs to be reflected in the electronic credit ledger of the recipient and the tax invoice needs to mention the GST registration number of the buyer of goods or services.

vii. *Computation of credit reduction for branch transfer and fuel – State of Gujarat vs. Reliance Industries Limited*[22]

Under the erstwhile regime, VAT laws of various States provided for reduction of input tax credit in respect of fuel and branch transfer transactions. The manner of computing such credit reductions has been subject matter of considerable litigation.

In this case of Reliance Industries, the issue before the Hon'ble Supreme Court was to determine the required reduction of tax credit in respect of fuel used as inputs for manufacture of goods in Gujarat, which were transferred to various branches of the assessee located outside the State of Gujarat. The relevant provisions of the Gujarat VAT law provided for 4% reversal of credit in respect of inputs used in manufacture of branch transferred goods and 4% reversal on purchases of fuels used for manufacture of goods; leading to question as regards applicability of total 4% or 8% reversal requirement for fuel used in manufacture of branch transferred goods. Deciding the matter in favour of revenue, the Hon'ble Supreme Court in this case held that the relevant provisions of the Gujarat VAT law providing for such credit reductions were two independent provisions, and hence reduction as per both the provisions would apply in respect of fuels used for branch transferred goods (subject to condition that total reduction cannot be more than the credit availed).

With the introduction of GST regime, the credit burnouts in respect of fuel, inter-State sales, branch transfers, etc., as applicable under the erstwhile VAT laws would no longer be required. While the present decision in the case of Reliance Industries and various other decisions on these issues have had a significant impact on tax liabilities, the relevance of positions laid down therein is largely lost due to change in the scheme of taxation.

In light of the foregoing analysis, it emanates that while a lot of principles in respect of credit availment and corresponding controversies fade out upon introduction of the GST, some of the concepts still continue to be relevant. Accordingly, while the law on indirect taxation front has evolved, a lot of the jurisprudence under the erstwhile law would continue to be the guiding force for interpretation and determination on the tax controversies under the new law. At the same, we would witness development of jurisprudence on a plethora of new concepts, which have surfaced in the Indian indirect tax scenario for the first time.

To sum it up, there is some unlearning, some revision of old learning and a lot of new learning on cards! That's what it means to be a part of any radical change!

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

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L. Badrinarayan, *Advocate*

Landmark decisions relevant to Input Tax Credit: An International Perspective

The Goods and Services Tax (GST) is often referred as a destination based consumption tax. Our Supreme Court described service tax imposed under the Finance Act, 1994 as being a 'destination based consumption tax'[1]. But a description of GST as a destination based consumption tax is merely that of an economist's description; it does not describe the tax as understood legally by practitioners and courts. The taxable event is supply. The law does not use the words destination or consumption. Rather it describes the levy in the form of supply, place of supply, time of supply, value of supply and input tax credit. The effect of these different legal concepts has the desired economic effect of the tax being a destination based consumption tax.

A destination based consumption tax can be achieved in many ways. It can be implemented as a last point tax – where only the transaction between the business and consumer is taxed. This tax is also referred to as retail sales tax. Such a system is adequate in some limited cases. The practical system of GST taxation is a multi-stage value added tax. In such a system, every registered person pays tax on its output supplies. If the supply is to another registered person, the recipient can take credit. If the supply is to an unregistered person the chain is snapped and the tax gets subsumed. The input tax credit scheme in such cases performs dual function. The first, and popular, reason is that it ensures that there is no cascading effect of taxes. The second, and more subtle, reason is that it ensures fiscal neutrality. Underlying fiscal neutrality is the fact that regardless of the length of the supply chain, the incidence of tax on the goods remains the same. Businesses therefore are free to arrange their business affairs on their optimal business model rather than on taxes.

The courts in European Union ('EU'), United Kingdom ('UK') and other countries provide a lot of emphasis on tax neutrality on business arrangements. The conclusions reached by the courts must be read in this context when applied to the Indian context. The principle of tax neutrality, being a central tenet of any GST regime, must be applicable to the Indian GST law. However, competing principles may be at play (mainly tax evasion and tax abuse) and the International cases must be applied keeping all these considerations in mind. Some of the relevant cases of input tax credit internationally are discussed below.

1 *All India Federation of Tax Practitioners vs. Union of India [2007] 10 STT 166*

Used for Business Purpose: Race horses, shirts and real estate agents

Section 16 of the Central Goods and Services Tax Act, 2017, ('CGST Act') provides as follows:

> **"16. Eligibility and conditions for taking input tax credit**
>
> (1) Every registered person shall, subject to such conditions and restrictions as may be prescribed and in the manner specified in section 49, be entitled to take credit of input tax charged on any supply of goods or services or both to him which are used or intended to be used in the course or furtherance of his business and the said amount shall be credited to the electronic credit ledger of such person."

The enabling provision under CGST Act allows a registered person to take credit of input tax credit ('ITC') charged on supply of goods or services which are used (or intended to be used) for his business.

In the EU and the UK, similar provisions allowing credit of input taxes have been enacted. The Sixth Directive in the EU provides for input credit for tax on purchase of goods or services, import of goods, certain self-supplies if the items are for the purposes of taxable transactions. The UK enacted the EU Sixth Directive to allow for input tax credit when such supplies are used for the purposes of business. While both EU and the UK provide for a liberal scheme of input tax credit, disputes still arise over whether a particular expenditure incurred was for the 'purpose' of business.

Two interesting cases to highlight the issue between creditable and non-creditable cases are *Ian Flockton Developments vs. Commissioner of Customs and Excise*[2] and *Edmond Michael Alexander vs. Commissioner of Customs and Excise*[3]. In the case of Ian Flockton (supra), the taxpayer was a company that sold goods to customers who were project engineers in chemical factories. The sales were by reference and direct communication. The company engaged in very little marketing. In order to increase its business, the taxpayer sought to purchase and run race horses to promote its business. It took input tax credit of supplies required for the upkeep of the race horses. This input tax credit was denied as not being for the purposes of business. On appeal, the appellate court held that determining whether a particular supply was for business purpose or not is not an objective test but a subjective test to be decided in the individual facts and circumstances. Merely because there was no obvious connection between an ordinary taxpayer business and the activity in question does not allow the courts to outrightly reject the contention of the taxpayer in question. The court then held that once it is established that the object of the taxpayer was to use the race horse for the purpose of business, input tax credit cannot be denied. Accordingly, the court allowed the taxpayer's appeal.

Further, in the case of Edmond Michael Alexander (supra), the taxpayer was a barrister just starting his practice. The rules of the bar required every barrister to wear appropriate clothing including dark suit with a waistcoat, white shirt, butterfly collars, bands, wigs, etc. The taxpayer purchased these goods and claimed input tax credit on such purchases as being necessary for performing his profession (business). The Department disallowed the credit and the matter was appealed. On appeal, the Tribunal agreed that whether a supply was received for business purpose was a subjective test. However, the Tribunal held that main reason for the taxpayer was to purchase clothes to clothe himself decently and disallowed input tax credit.

How can these two cases be explained. The first case allows input tax credit for purchases for a race horse while the second case disallows input

2 1987 STC 394 (QB)

3 1976 VATTR 107

tax credit on purchases of clothes necessary for the profession. If anything, the expectation would have been for the decisions to be the other way round. The distinction lies between what constitutes a purchase for business purpose and business benefit. A supply for business purpose will certainly benefit but a supply that benefits the business does not necessarily be for a business purpose. For something to be for a business purpose there must be a nexus between the supply and the business itself. Mere benefit is not sufficient by itself. In *CCE vs. Rosner*[4], the taxpayer company incurred legal expenses for defending a criminal case initiated against its sole trade. The prosecution of the sole trader would have affected the business. The expenses were not for business purpose; it was for a private purpose. Accordingly, input tax credit was not found recoverable. Applying this principle to the above cases, shirts and clothes benefited the business but were really for a private purpose while race horses were solely bought and maintained to promote the business purpose. Hence, the outcome of these interesting cases.

An acquisition of supply wholly for business purpose cannot be denied credit merely because it benefits third parties. One of the landmark decision in the area of input tax credit is the case of *Commissioner of Customs & Excise vs. Redrow Group plc*[5]. In this case, a group of building companies came up with a scheme for inducing prospective purchasers to purchase their properties. Prospective purchasers were already property owners and were not willing to own multiple properties. In order to induce them to purchase new properties, the taxpayer nominated estate agents to help the purchasers to sell their current properties. The agent's fees were paid by the taxpayer and claimed input tax credit on such supplies. The Tax Department disputed the credit on the basis that the estate agent services were rendered to the purchasers and not taxpayers. The taxpayer appealed, succeeded at the Tribunal and failed at the Court of Appeal. The appeal finally travelled to the House of Lords.

The House of Lords reversed the decision of the Court of Appeal and restored the decision of the Tribunal. The House of Lords held that the supplies were 'received in connection with the business activities of the taxable person, for the purpose of being incorporated within its economic activities.' The fact that 'someone else also received the service as part of the same transaction does not deprive the person who instructed the service and who has had to pay for it of the benefit of the deduction.'

The Redrow decision (supra) has been approved by the Bombay High Court in the case of *Coca Cola India Pvt. Ltd. vs. CCE*[6]. This case is very relevant for determining who is the recipient of the supply and who can take credit especially in tripartite transactions. Since Redrow (supra) there are several cases decided by the UK courts in cases involving tripartite transactions where the principle of Redrow is acknowledged as the established principle but with varying conclusions when applied to the individual facts. The Redrow principle is very relevant in the Indian context and must be considered closely in the applicable situations.

Share acquisition: Holding Companies, Initial Public Offering, Transactions

The underlying principle of GST is to increase the tax base by taxing most transactions and providing credit with minimum restrictions. However, GST is a consumption based tax and where the purchase is for investment and not for consumption, doubts may arise over the availability of credit. The earliest case where eligibility of credit was doubted was the case of *Polysar Investments Netherlands BV vs. Inspecteur*[7].

4 1994 STC 228

5 1999 STC 161 , HL

6 2009 (15) S.T.R. 657 (Bom.)

7 C-60/90 [1993] STC 222, ECJ

In this case, Polysar Investments Netherlands BV (Polysar) held shares in several foreign companies from which it received dividend income. Polysar was a pure investment company and was not involved in the management of the companies in which it held shares. It received various services and claimed input tax credit on the supplies on the basis that it exploited intangible property in the form of shares to earn income. The European Court of Justice held that the mere acquisition of shares did not amount to exploitation of property. The dividend income earned was due to the ownership of shares and not by means of any other activity. Therefore, input tax credit was denied to Polysar. In contrast to Polysar (supra), the *ECJ in Cibo Participations SA vs. Directeur*[8], allowed input tax credit to be claimed where the holding company also provided management services. In this case, the Cibo was a holding company and acquired significant shareholding in companies involved in the cycle business. After acquisition of shares, Cibo provided management services to the acquired companies. For the acquisition of the shares in these companies, Cibo incurred various expenses on which it sought to take input tax credit. These expenses were mainly investment banking, legal and accounting services. The Tax Department denied input tax credit to Cibo on the basis that the purchases incurred had no connection with the management services provided by Cibo. The ECJ, however, allowed the input tax credit in this case. The Court reiterated the legal position of Polysar. Nevertheless, it observed that the expenses incurred became part of the general cost of the company and formed a component of the cost of the services provided by Cibo to the subsidiaries. To the extent of these costs being attributed to the management services, it allowed the input tax credit. In such a way, the ECJ allowed the input tax credit to be available to Cibo even though it pertained to the acquisition of shares in the companies.

The other issue that relates to input tax credit in the area of share acquisition is when the company in question incurs expenses toward issuance of share to prospective shareholders. In the case of *Kretztechnik AG vs. Finanzamt Linz*[9], the taxpayer company was in the medical devices business. In order to expand its business, it wished to raise capital from the public and applied for admission to the Frankfurt Stock Exchange. Since the issuance of shares is an exempt supply, the tax authorities denied input tax credit to the taxpayer company. The ECJ allowed the credit of the input tax. It distinguished between two types. It held that in the facts of the case, the expenses were incurred for raising capital that ultimately was to be used to increase the business of the taxpayer. Accordingly, these expenses formed the general costs of the company as overhead costs and were allowed to be deducted. The Court allowed the entire input tax credit to the taxpayer without any reversal.

Conclusion

The area of input tax credit internationally has a rich history. There are several cases that have decided a variety of issues. There are a large number of caselaws in the area of supplies excluded from input tax credit. These include categories of supplies such as motor vehicles, business entertainment, etc. All these categories revolve around the nature of the supply and its propensity to be used for business and private use. In the area of input tax credit, the cases have evolved around two broad themes – whether for business purpose and who is the recipient of the supply. It is in these two aspects that disputes in input tax credit arises. Broad principles in input tax credit are easy to comprehend but difficult to apply. It is here that the Indian administration and practitioners can take help from the experiences internationally.

8 C-16/00 [2002] STC 460, ECJ

9 C-465/03 ECJ

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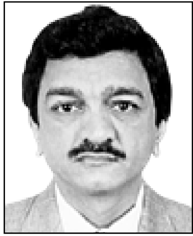

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DIRECT TAXES
Supreme Court

Law on the valuation of immovable properties under the 'Rent capitalisation' method versus the 'Land and building' method explained in the context of s. 7 of the Wealth-tax Act, 1957.

Bimal Kishore Paliwal & Ors. vs. Commissioner of Wealth Tax [Civil Appeal No. 3836 of 2011, dated 13th October, 2017]

(i) In the present case, the assessee individual was a partner in a partnership firm. The said firm purchased land along with building in semi-constructed condition in the year 1965 for a certain sum of money. The construction was completed and cinema theatre started running in the premises. On pending assessment of Wealth-tax of one of the partners in the firm, the Wealth-tax Officer made a reference to the Department Valuation Officer ('DVO'). The assessee got the property valued by the approved Valuer adopting 'Income capitalisation method'. The Assessing Officer ('AO'), however, relied on the Valuation Report of the DVO who had valued the asset under 'Land and building method'.

(ii) Aggrieved by the order of the AO, the assessee filed appeal before the Appellate Assistant Commissioner who upheld the order passed by AO.

(iii) Thereafter, the assessee filed appeal before the Appellate Tribunal ('ITAT'), Delhi. The ITAT held in favour of the assessee by accepting that the proper basis for valuing the cinema building would be capitalisation of income. The reasoning upheld by the ITAT was that since the building could be used only for film exhibition and could not be used for any other purpose, the method of valuation has necessarily to be different from the one used for assessing normal commercial buildings.

(iv) Aggrieved by the order of the ITAT, the Revenue preferred an appeal before the Delhi High Court ('HC'). The HC held in favour of the Revenue while holding that the yield/rent/income capitalisation method would not be correct method of valuation of the property in question. The HC also relied on its decision in the case of *CWT (Central) Kanpur vs. Bankey Lal and Others* decided on the same day, i.e. on 21st October, 2005.

(v) The assessee preferred an appeal to the Hon'ble Supreme Court ('SC').

(vi) The SC in its order discussed the provisions of sections 7 and 16A of the Wealth-tax Act, 1957 and held as under:

"14. It is true that sub-section (2) of section 7 begins with non obstante clause which enables the Wealth Tax Officer to determine the net value of the assets of the business as a whole instead of determining separately the value of each asset held by the assessee in such business. The language of sub-section (2) which provides overriding power to the Wealth-tax Officer to adopt and determining the net value of the business having regard to the balance sheet of such business. The enabling power has been given to Wealth-tax Officer to override the normal rule of valuation of the properties that is the value which it may fetch in open market (under sub-section (1) of section 7), Wealth-tax Officer can adopt in a case where he may think it fit to adopt such methodology. The appellants' submission is that the provision of section 7(2)(a) is a standalone provision and is to be applied in all cases where assessee is carrying on a business. We do not agree with the above submission."

"15. Overriding power has been provided to override the normal method of valuation of property as given by sub-section 7(1) to arm the Wealth-tax Officer to adopt the method of valuation as given in subsection (2)(a). The purpose and object of giving overriding power is not to fetter the discretion. The Wealth-tax Officer is not obliged to mandatorily adopt the method provided in Section 7(2)(a) in all cases where assessee is carrying on a business. The language of sub-section (2)(a) does not indicate that the provisions mandate the Wealth-tax Officer to adopt the method in all cases of running business. Section 7 of the Act has also come for interpretation before this Court in large number of cases. .... ."

(vii) The SC relied on the judgment of *Juggilal Kamlapat Bankers and another vs. Wealth Tax Officer, Special Circle, C Ward, Kanpur and Others, [(1984) 145 ITR 485]* where the Court had occasion to consider and interpret the provisions of section 7 and held that building forming part of the assets could be valued by the AO as per section 7(1) and valuation under section 7(2)(a) is not mandatory as the same is discretionary in nature.

(viii) The decision further states that:

"23. Further it was laid down by this Court that "this is apart from the position that the resort to section 7(2) itself is discretionary and optional, the provision being an enabling one". This Court thus has categorically laid down that resort to Section 7(2)(a) is discretionary and enabling provision to Wealth-tax Officer to adopt the method as laid down in section 7(2)(a) for a running business but the above enabling power cannot be held as obligation or shackles on right of Assessing Officer to adopt an appropriate method. In the present case reference was made to the Departmental Valuer by Assessing Officer under section 7(3). Thus there is a conscious decision of the Assessing Officer to obtain the report from the Departmental Valuer. The above conscious decision itself contains the decision of Assessing Officer not to resort to Section 7(2)(a). The Valuation report of Departmental Valuer has been received which has been relied by the Assessing Officer for assessing the assessee in the relevant year. We, thus, do not find any error in the order of the Assessing Officer in adopting the land and building method by making a reference to Departmental Valuer to value the property on the said method. ….. ."

"24. ….. We have perused the order of the Tribunal. The Tribunal has observed that once it is accepted that the property is

useable only as Cinema building then its method of valuation has to be necessarily different from the one normally adopted in the case of buildings which are capable of being used for other commercial purposes. The mere fact that the building is only for the use of Cinema exhibition does not in any manner diminish the marketable price. At the relevant period uses of building as running Cinema were no less valuable. The finding has been returned by the Appellate Authority that it has not been further challenged that the building was self occupied and in possession of assessee with no encumbrances.

"25. It is true that the High Court in so many words had not adverted to the reasons given by the ITAT. However, the High Court has expressed opinion that Wealth-tax Officer was justified in adopting the land and building method. One of the reasons given by the High Court is that if there is loss in the business or in other words there is negative income, it cannot be possible to say that the property in question has no marketable value. Learned counsel for the appellants has submitted that in the relevant year the income was earned. ….. ."

(ix) The assessee through his counsel had also further submitted that in the event there are more than one methods of valuation of an asset, the method under which the valuation is in favour of assessee has to be accepted. He has relied on the judgment of *The Commissioner of Income Tax, West Bengal, Calcutta vs. M/s. Vegetables Products Ltd., (1973) 1 SCC 442* where it was held that if two reasonable constructions of taxing statute are possible, that construction which favours the assessee must be adopted. However, the SC did not accede to the proposition of the assessee and commented as under:

"29. ….. The above proposition cannot be read to mean that under two methods of valuation if the value which is favourable to assessee should be adopted. Here in the present case, the provisions of Section 7 are neither unambiguous nor lead to two constructions. The construction of Section 7 is clear as has already been elaborately considered by this Court in the judgment of this Court in Juggilal Kamlapat Bankers (supra)."

(x) Therefore, the SC did not find any fault in the assessment made by the WTO and dismissed the appeals of the assessees.

S.43B : Advance deposit of Central excise duty in the Personal Ledger Account (PLA) constitutes actual payment of duty within the meaning of s. 43B and the assessee is entitled to the benefit of deduction of the said amount

CIT vs. Modipon Ltd. Civil Appeal No. 19763 of 2017 (Arising out of S.L.P. (C) No.29816 of 2011, dated 24th November, 2017)

The assessee company had been claiming deduction u/s. 43B of the Income-tax Act, 1961 in respect of excise duty paid in advance in the Personal Ledger Account ('PLA'). The assessee had been adding back the same amount as part of taxable income in the immediately succeeding year in order to avoid double deduction. This practice was followed by the assessee consistently and was accepted by the Revenue for all the Assessment Years, i.e., A.Ys. 1984-85 to 1998-99 except four years under consideration namely, A.Ys.1993-94, 1996-97, 1997-98 and 1998-99. The A.Y.1984-85 was the first year where the provisions of section 43B were introduced.

The Hon'ble Supreme Court had to consider the following question of law in the present case:

"Whether the assessee is entitled to claim deduction under section 43B of the Income-tax Act, 1961 in respect of the excise duty paid in advance in the Personal Ledger Account?"

The Supreme Court held as under:

"Notwithstanding the acceptance by the Revenue of the practice adopted by the assessee – Modipon Ltd. in all the assessment years except for the ones under dispute as enumerated above and the absence of any challenge to the decisions of the Delhi and the Punjab & Haryana High Courts, the present challenge would still be entertainable so long as it discloses a substantial question of law or an issue impacting public interest or the same has the potential of recurrence in future. The Revenue cannot be shut out from the present proceedings merely because of its acceptance of the practice of accounting adopted by the assessee or its acceptance of the decision of the two High Courts in question. An adjudication of the question(s) arising cannot be refused merely on the above basis. We will, therefore, have to proceed to answer the merits of the challenge made by the Revenue in the present appeals."

"Deposit of Central Excise Duty in the PLA is a statutory requirement. The Central Excise Rules, 1944, specify a distinct procedure for payment of excise duty leviable on manufactured goods. It is a procedure designed to bring in orderly conduct in the matter of levy and collection of excise duty when both manufacture and clearances are a continuous process. Debits against the advance deposit in the PLA have to be made of amounts of excise duty payable on excisable goods cleared during the previous fortnight. The deposit once made is adjusted against the duty payable on removal and the balance is kept in the account for future clearances/removal. No withdrawal from the account is permissible except on an application to be filed before the Commissioner who is required to record reasons for permitting an assessee to withdraw any amount from the PLA. Sub-rules (3), (4), (5) and (6) of Rule 173G indicates a strict and vigorous scrutiny to be exercised by the central excise authorities with regard to manufacture and removal of excisable goods by an assessee. The self removal scheme and payment of duty under the Act and the Rules clearly shows that upon deposit in the PLA the amount of such deposit stands credited to the Revenue with the assessee having no domain over the amount(s) deposited."

"In *CIT vs. Pandavapura Sahakara Sakkare Karkhane Ltd.7 and CIT vs. Nizam Sugar Factory Ltd. 253 ITR 68 (AP) cited at the Bar, the High Courts of Karnataka and Andhra Pradesh 198 ITR 690 (Kar.)* respectively had occasion to consider as to whether the amounts credited to the Molasses Storage Fund out of the sale proceeds of molasses received by the assessee constitute taxable income of the assessee. Under the scheme, the assessee had no control over the amounts deposited in the fund and the assessee was also not entitled to withdraw any amount therefrom without the approval of the authorities. Further the amount deposited could be utilized only for the purpose specified. In those circumstances, the High Court held and **in our view correctly**, that the deposits made, though a part of the sale proceeds of the assessee, did not constitute taxable income at the hands of the assessee. We do not see why the same analogy would not be applicable to the case in hand."

"The Delhi High Court in the appeals arising from the orders passed by it has also taken the view that the purpose of introduction of Section 43B of the Central Excise Act was to plug a loophole in the statute which permitted deductions on an accrual basis without the requisite obligation to deposit the tax with the State. Resultantly, on the basis of mere book entries an assessee was entitled to claim deduction without actually paying the tax to the State. **Having regard to the object behind the enactment of Section 43B and the preceding discussions, it would be consistent to hold that the legislative intent would be achieved by giving benefit of deduction to an assessee upon advance deposit of Central excise duty notwithstanding the fact that adjustments from such deposit are made on subsequent clearances/ removal effected from time-to-time.**"

The SC further held that:

" ….. coupled with the peculiar features of the case, noticed above i.e. **consistent practice followed by the assessee and accepted by the Revenue; the decisions of the two High Courts in favour of**

the assessee which have attained finality in law; and no contrary view of any other High Court being brought to our notice, should lead us to the conclusion that the High Courts were justified in taking the view that the advance deposit of central excise duty constitutes actual payment of duty within the meaning of Section 43B of the Central Excise Act and, therefore, the assessee is entitled to the benefit of deduction of the said amount."

S.44BB : Amounts received as "mobilisation fee" on account of provision of services and facilities in connection with the extraction, etc., of mineral oil in India attracts S. 44BB and have to be assessed as business income/profits. S. 44BB has to be read in conjunction with Ss. 5 and 9 of the Act. Ss. 5 and 9 cannot be read in isolation. The argument that the mobilisation fee is "reimbursement of expenses" and therefore, not assessable as income is not tenable if it is a fixed amount paid and if the same does not have any correlation with the actual expenses incurred.

SEDCO Forex International Inc. through its constituted attorney Mr. Navin Sarda vs. Commissioner of Income Tax, Meerut & Anr – [Civil Appeal No. 4906 of 2010, dated 30th November, 2017]

(i) The assessee, a foreign company, had entered into indivisible contract with Oil and Natural Gas Commission ('ONGC'), a public sector company, for hire of their rig for carrying out oil exploration activities in India. For this purpose it was paid mobilisation fee for and on account of mobilisation/movements of rig from foreign soil/country to the off-shore side India. In the contract the said fee was separately indicated however, at the time of payment ONGC paid the amount inclusive of the said fees for the mobilisation of the rig.

(ii) The issue arose as to whether the said mobilisation fee received by the assessee is to be included for computation of deemed profit and gains of the business or the same could be considered as reimbursement of expenses.

(iii) Right from the Assessing Officer ('AO') till the High Court, all the fora had affirmed that the mobilisation fees was to be included for computing profit and gains of the business of the assessee. Thereafter the matter reached the Hon'ble Supreme Court ('SC').

(iv) The arguments forwarded by the assessee before the Hon'ble Apex Court in nutshell were as under:

- Principle of apportionment between India and outside India was a basic principle of income tax law.
- Section 44B was a machinery section and cannot be had a recourse to unless the chargeability under the charging provisions contained under sections 4, 5 and 9 of the Act was examined. In other words, normal concept of income could not be taken away by the presumptive provision of the Act.
- Reimbursement of actual expenses did not represent income and cannot be taxed as CBDT circular was binding on the tax authorities.
- The charges were reimbursed for services outside India and there should be sufficient territorial nexus for services to be taxable in India.
- Actual expenses incurred were higher than the amount reimbursed and hence there cannot be any income chargeable to tax.
- Obligation of the operator/company cannot be included in the receipts of the assessee.

(v) The SC thereafter held as under:

"47. The Section 44BB begins with non-obstante clause and is a special section, and the formula contained therein for computation of income is to be applied to the exclusion of the provisions of sections 28 to 41 and sections 43 and 43A of the Act, being normal provisions of the Act. In order to attract the provisions of the Section 44BB twin conditions were required to be satisfied namely, i) assessee has to be a non-resident and ii) assessee should be engaged in the business of exploration, etc., in mineral oils of the nature specifically spelled in the section. The assessee has a choice either to be governed by the section 44BB or to be covered by normal provisions of the Act."

(vi) It was also held that section 44BB(2)(a) stood attracted in the present case. The decision also continued as under:

"49. The Tribunal has rightly commented that Section 44BB of the Act is a special provision for computing profits and gains in connection with the business of exploration of mineral oils. Its purpose was explained by the Department *vide* its Circular No. 495 dated September 22, 1987, namely, to simplify the computation of taxable income as number of complications were involved for those engaged in the business of providing services and facilities in connection with, or supply of plant and machinery on hire used or to be used in the prospecting for, or extraction or production of, mineral etc. Instead of going into the nitty-gritty of such computation as per the normal provisions contained in Sections 28 to 41 and Sections 43 and 43A of the Act, the Legislature has simplified the procedure by providing that tax shall be paid @10% of the 'aggregate of the amounts specified in sub-section (2)' and those amounts are 'deemed to be the profits and gains of such business chargeable to tax…'. It is a matter of record that when income is computed under the head 'profits and gains of business or profession', rate of tax payable on the said income is much higher. However, the Legislature provided a simple formula, namely, treating the amounts paid or payable (whether in or out of India) and amount received or deemed to be received in India as mentioned in sub-section (2) of section 44BB as the deemed profits and gains. Thereafter, on such deemed profits and gains (treating the same as income), a concessional flat rate of 10% is charged to tax. In these circumstances, the AO is supposed to apply the provisions of section 44BB of the Act, in order to find out as to whether a particular amount is deemed income or not. When it is found that the amount paid or payable (whether in or out of India), or amount received or deemed to be received in India is covered by sub-section (2) of Section 44BB of the Act, by fiction created under section 44BB of the Act, it becomes 'income' under sections 5 and 9 of the Act as well."

"50. ….. In the instant case, the amount which is paid to the assessees is towards mobilisation 'fee'. It (the contract) does not mention that the same is for reimbursement of expenses. In fact, it is a fixed amount paid which may be less or more than the expenses incurred. Incurring of expenses, therefore, would be immaterial. It is also to be borne in mind that the contract in question was indivisible. Having regard to these facts in the present case as per which the case of the assessees get covered under the aforesaid provisions, we do not find any merit in any of the contentions raised by the assessees. Therefore, the ultimate conclusion drawn by the AO, which was upheld by all other Authorities is correct. ….. ."

(vii) For the aforesaid reasons, the SC upheld the conclusion and resultantly, the appeal of the assessees was dismissed.

Paras S. Savla, Jitendra Singh, Nishit Gandhi
Advocates

DIRECT TAXES
High Court

1. Depreciation u/s. 32 – Rejection of depreciation on the ground that only trial run has been undertaken and no commercial production has yet commenced – Unjustified

Pr. CIT vs. Larson and Toubro Ltd. [ITXA No. 421 of 2015 (Bom.) order dated 6-11-2017]

The assessee was engaged in the business of clinker/cement. During the impugned assessment year assessee started new manufacturing unit for production of clinker/cement in the State of Gujarat. The assessee claimed depreciation in respect of the machineries which were installed and put to use in the production of clinker which was an intermediary stage for production of cement. The AO disallowed the claim of depreciation by observing that the assessee had produced 100 MT of clinker during the trial run for one day and this quantity was minuscule compared to the intended production capacity and that the assessee was not able to prove that after the trial run, commercial production of clinker was initiated within reasonable time. The Ld. CIT(A) upheld the action of the AO. and held that there was a long gap between the first trial run, subsequent trial runs and commercial production. The Ld. CIT(A) further confirmed the disallowance by concluding that the user of the assets during the year should be actual, effective and real user in the commercial sense and that some technical snag had developed in the plant and therefore the trial run was stopped. On further appeal the Tribunal allowed the claim of the assessee by observing that there is no merit in the action of the lower authorities for denial of claim of depreciation in respect of plant and machinery which has been put to use even for trial production, which is also for the purpose of assessee's business of manufacture of clinker. Even use of machine for one day will entitle the assessee for claim of depreciation.

The department preferred an appeal before the Hon'ble Bombay High Court. The High court dismissed the appeal by observing that once plant commences operation and even if product is substantial and not marketable, the business can be said to have been set up. Mere breakdown of machinery or technical snags that may have developed after the trial run which had interrupted the continuation of further production for a period of time cannot be held ground to deprive the assessee of the benefit of depreciation claimed.

2. Cash Credit u/s. 68 of the Income Tax Act, 1961 – Advances repaid without any interest – confirmations were filed before the AO – addition unjustified

Pr. CIT vs. Satish Chander Sikka [ITA 948 of 2017 (Delhi HC) order dated 8-1-2017

The assessee before the Hon'ble Court was an individual. During the assessment year i.e., A.Y. 2008-09, the assessee had borrowed certain funds in cash from five companies/entities for purchase of house property. During the course of assessment proceedings, the assessee has furnished all the relevant details before the AO The AO while finalising the assessment order, added the cash received by the assessee treating it as unexplained cash credit u/s. 68. The AO doubted the genuineness of the transactions since the advances were made "not through" regular documents but on plain paper and there was no interest charged. The matter was carried up to Appellate Tribunal. The Appellate Tribunal held that a proper appreciation of the circumstances especially the fact that the credits were confirmed by the entities who advanced them, could not have led to the conclusion that the income could be brought to tax under Section 68.

The department being aggrieved by the impugned order, approached the Hon'ble Delhi High Court to set aside the order passed by the Appellate Tribunal. Hon'ble Court dismissed the appeal observing that the conclusions and findings of the Appellate Tribunal are truly factual. A re-appreciation of the evidence, unless it is shown that the findings of the Tribunal are unreasonable was not warranted under Section 260A. Further, High Court relied on the decision of the Supreme Court in *CIT vs. Lovely Exports, (2008) 216 CTR 195 (SC)* is an authority for the proposition that the assessee is not under any obligation to prove the source of the credit or the share application money it receives.

3. Free trade zone – Deduction u/s. 10A/10B from total income – interest on bank deposit and staff loans – allowable under section 10A/10B of the Act

CIT vs. Hewlett Packard Global Soft Ltd. [2017] 87 taxmann.com 182 (Karnataka) (FB)

The assessee was a company having four 100 per cent Export Oriented Units set up under the Software Technology Park of India (STPI) Scheme. It had no other units from which it carried on any other activity other than the 100 per cent export of software projects. For A.Y. 2001-02 assessee earned interest income on the Short Term Deposits made by it out of its surplus funds temporarily parked in the current account held in Bank, and also earned interest from the advances of loans to its staff members. The assessee while filing the return of income claimed deduction in respect of both interest income under section 10A as income from 'Profits and Gains' of export business. The AO while finalising the assessment disallowed the claim of the assessee by observing that such interest income was not entitled to 100 per cent deduction under section 10A, but such interest income was taxable under section 56, as 'Income from Other Sources'. The matter was travelled up to Hon'ble Karnataka High Court. The First Division Bench of High Court held that the assessee which invested its surplus funds in banks and received interest thereon and also interest on the staff loans, such interest earned by the undertaking/assessee had no direct nexus with the business of the undertaking. Thus, the matter was referred to the Full Bench for its opinion. The Full Bench of Hon'ble Court held that exemption under sections 10-A and 10-B encompasses the entire income derived from the business of export of such eligible undertakings including interest income derived from the temporary parking of funds by such undertakings in Banks or even Staff loans. The dedicated nature of business or their special geographical locations in STPI or SEZs. etc., makes them a special category of assessees entitled to the incentive in the form of 100 per cent deduction under sections 10-A or 10-B. The computation of income entitled to exemption under section 10-A or 10-B is done at the prior stage of computation of Income from profits and gains of business as per sections 28 to 44 under Part-D of Chapter IV before 'Gross Total Income' as defined under section 80-B(5) is computed and after which the consideration of various deductions under Chapter VI-A in

section 80HH etc. comes into picture. Therefore, all profits and gains of the 100 per cent EOU including the incidental income by way of interest on bank deposits or staff loans would be entitled to 100 per cent exemption or deduction under section 10-A and 10-B. Such interest income arises in the ordinary course of export business of the undertaking even though not as a direct result of export but from the bank deposits etc., and is therefore eligible for 100 per cent deduction. The High Court thus allowed the claim of the assessee by observing that assessee was entitled to 100 per cent exemption or deduction under section 10A in respect of the interest income earned by it on the deposits made by it with the Banks in the ordinary course of its business and also interest earned by it from the staff loans and such interest income would not be taxable as 'Income from Other Sources' under section 56. The incidental activity of parking of surplus funds with the banks or advancing of staff loans by such special category of assessees covered under section 10A or 10B was integral part of their export business activity and a business decision taken in view of the commercial expediency and the interest income earned incidentally could not be de-linked from its profits and gains derived by the undertaking engaged in the export of articles as envisaged under section 10B and could not be taxed separately under section 56.

4. Appeal before High Court u/s. 260A – Whether addition or exclusion of comparable amount to substantial question of law – Held No.

Pr. CIT vs. WSP Consultants India (P.) Ltd. – [2017] 87 taxmann.com 266 (Delhi)

The Department filed an appeal against Tribunal order challenging exclusion of 3 comparables by the ITAT while determining the arm's length price in the case of the assessee. The exclusion was based on consideration of various factual details and analysis of the same. The Department's appeal against the said exclusion was dismissed by the Hon'ble High Court holding that there was a reasonable basis for exclusion of the said comparables by the ITAT. The High Court further held that any inclusion or exclusion of comparables *per se* cannot be treated as a question of law unless it is demonstrated to the Court that the Tribunal or any other lower authority took into account irrelevant consideration or excluded relevant factors in the ALP determination that impact significantly.

5. Duty of the Tribunal – Order u/s. 254 – Whether Tribunal can set aside the issues to TPO for *de novo* consideration when all facts were before it – Held No

Bechtel India (P.) Ltd. vs. ACIT – (IT Appeal No. 97 of 2017, Delhi High Court)

The ITAT remanded the issue of determination of Arms' Length Price to the TPO for a *de novo* consideration, despite the fact that all the details pertaining to various comparables, various segments and various international transactions were already furnished before it by the Assessee. Before the Hon'ble High Court the Assessee filed a chart showing as to how the Tribunal had not rendered a finding on various issues cited before it. On these facts the Hon'ble High Court held that the chart produced by the Assessee indicated with regard to each of the segments as to the manner in which the ITAT failed to render a finding, even though, the facts were available on record before it. The Hon'ble High Court further held that it would be more appropriate for the ITAT itself to decide the said issues without remanding the matter to the TPO. Consequently, it was held that the ITAT ought not have remanded the matter to the TPO for the *de novo* determination of the ALP of the international transactions in the various segments. This exercise should be performed by the ITAT itself. This is on the basis of the submission of the Assessee that all the details relevant for such determination are already available on record. Accordingly, the order of the ITAT was set aside.

Neelam Jadhav, Keerthiga Sharma &
Neha Paranjpe, *Advocates*

DIGEST OF CASE LAWS
Tribunal

Section 92 : Trade receivables and payables were closely linked to each other, and hence, they should be benchmarked together, after setting off the closing balances. Corporate Bond rates cannot be used to benchmark the net trade balance.

AVL India Private Limited vs. DCIT (ITA No. 4529/Del/2014 & 4275/Del/2016 dated November 7, 2017)

Assessment Years: 2009-10 & 2010-11

Facts

The Assessee was engaged in manufacturing, trading, marketing and also providing after-sales service for vehicles pollution monitoring equipments, instruction and test systems for engines/vehicles etc. The Transfer Pricing Officer ('TPO') held that receivables due from associated enterprises beyond a period of 30 days was an international transaction. Since interest was not charged by the Assessee, the TPO applied Comparable Uncontrolled Price ('CUP') method, and considered Prime Lending Rate of RBI plus 500 basis points as the arm's length price ('ALP'). For AY 2010-11, the TPO had considered interest rate on BB Grade Corporate Bonds for 5 years or more, as theALP. On appeal before the Commissioner of Income-tax (Appeals) ('CIT(A)'), it was held that credit period of 180 days should be allowed to compute the adjustment, and the benefit of netting off receivables against the payables was to be allowed only for transactions with the same party. The Assessee filed an appeal before the Income-tax Appellate Tribunal ('ITAT' / 'Tribunal')

Held

Relying on Explanation to section 92B of the Income-tax Act, 1961 ('Act'), which was inserted retrospectively w.e.f. April 1, 2002, the Tribunal held that receivables due from an AE was an international transaction.

Further, considering section 92C(1) of the Act as well as Rule 10A(d) of the Income-tax Rules, 1962, the Tribunal held that international transactions of the same nature or the same class were to be aggregated for the purpose of determining their ALP as a single transaction and such 'closely linked transactions' could not be benchmarked independent of each other. On perusal of the facts of the case, the ITAT held that trade receivables and payables were all closely linked to each other and hence, they had to be aggregated for the purpose of benchmarking. If the trade payables and receivables were benchmarked, the ITAT observed that the Assessee would have been liable to pay a higher amount of interest to its AEs.

However, the ITAT disregarded the use of Corporate Bonds to determine the ALP for AY 2010-11. The ITAT held that for applying CUP, one had to compare the international transaction with similar

uncontrolled transactions and consequently, the international transactions in the nature of 'interest on trade receivables' could be compared only with interest on trade receivables in uncontrolled transactions. Comparing the same with corporate bonds, would result in re-characterisation of interest on trade receivables as a transaction of interest on bonds, which was not permissible as per the provisions of the Act. It was held that for the application of CUP suitable comparable transactions were to be selected, and hence, internal comparable transactions of trade receivables from unrelated parties, would be more suitable than external comparable transaction. The matter was set aside to the TPO to determine the ALP after considering the internal uncontrolled comparable transactions.

On another note, the ITAT also deleted the addition u/s. 14A of the Act, since the Assessee had not received any exempt income during the year.

Section 32 : Depreciation allowable on Customer Contracts and Customer Relationships, Assembled Workforce, and Leasehold benefits based on the principle laid down by the Hon'ble Supreme Court in Smifs Securities Pvt. Ltd.

ACIT vs. Lafarge Aggregates & Concrete Pvt. Ltd. (ITA No. 2783/Mum/2015 dated November 15, 2017)

Assessment Year: 2009-10

Facts

The Assessee company was engaged in the business of manufacturing and supply of ready mix concrete and aggregates. In its return of income, it had claimed depreciation on goodwill on purchase of a business of Larsen & Tubro. The RMC business of Larsen & Tubro was purchased on a slump sale basis, pursuant to which the entire plans across India along with batching plants and all current assets were acquired by the Assessee. The allocation of purchase price in the books of account was based on valuation report obtained from independent valuers and the intangible assets were recorded in the books as Trademark and Non-Compete Agreement. During the course of assessment, the Assessee made an additional claim of depreciation on various intangible assets, including Customer Contracts and Customer Relationships, Assembled Workforce, and Leasehold benefits, based on the decision of the Hon'ble Supreme Court in the case of Smifs Securities Pvt. Ltd. The AO did not allow the claim on the basis that a fresh claim can be made only by way of a revised return and not at the time of assessment. The CIT(A) allowed the claim of the Assessee and the aggrieved Department, filed an appeal before the Tribunal.

Held

The Tribunal held that the CIT(A) had correctly allowed the claim of the Assessee at the time of appellate proceedings, as held by the decision of Bombay High Court in the case of Pruthvi Brokers and Shareholders Pvt. Ltd. Regarding depreciation on Customer Contracts and Customer Relationships, Assembled Workforce, and Leasehold benefits, the ITAT held that following the principle laid down by the Hon'ble Apex Court in the case of Smifs Securities Pvt. Ltd., the claim of the Assessee was correctly allowed by the CIT(A).

On another ground, the ITAT had upheld the deletion of *ad hoc* disallowance of miscellaneous expenditure, in the nature of security expenses, meeting and conference expenses, postage and courier expenses, etc., since the AO had made the disallowance without any basis on how they were capital in nature. The ITAT observed that they were routine expenses incurred for running the business of the Assessee and cannot be held to be capital in nature.

The AO had also disallowed IT support expenses reimbursed by the Assessee to its holding company. The ITAT upheld the deletion of disallowance since the reimbursements were on a cost-to-cost basis and did not have any element of income.

Section 263 : Revision – CIT(A) could not ask for revision in price for reason that in any possibility, AO had to adopt either

Stamp Duty Valuation or value estimated by DVO u/s. 50C(2), which was lower price

Nusrat Mustafa Rasiwala vs. Pr. CIT (ITA No.3596/ Mum/2011 dated October 25, 2017)

Assessment Year: 2011-12

Facts

The Appellant during the year, sold a long term capital asset in form of gala and invested capital gains arising out of sale of these gala and claimed exemption u/s. 54EC of the Act. The AO from the sale agreement, noted that the sale consideration received was as it against the value estimated by the Stamp Duty Authorities for the purpose of calculation of stamp duty. The AO took the sale consideration of sale of gala without referring it to the DVO as has been objected by the assessee u/s. 50C(2) of the Act. The CIT, after going through the case records, issued show cause notice for revision of assessment u/s. 263 stating that "perusal of the sale agreement, it was noticed by the AO that the said sale has been made, whereas the valuation of this gala as per stamp duty authorities was more. The AO applied the provisions of S. 50C resulting taxable LTCG. The CIT noted that the matter should have been referred to the DVO u/s. 50C(2).

Held

The ITAT held that CIT(A) could not disturb the assessment order, wherein no reference was made to DVO u/s. 50C(2) because AO had adopted value/sale consideration of sale of gala as determined by Stamp Duty Valuation Authorities. CIT(A) could not ask for revision in price for reason that in any eventuality, AO had to adopt either Stamp Duty Valuation or value estimated by DVO u/s. 50C(2), which was lower price.

Section 28 : Rental receipts on property purchased for setting up of project could not be brought to tax as 'income from house property' and receipts to be considered as capital receipts only.

DSL Infrastructure and Space Developers P. Ltd. vs. ITO (ITA Nos. 319 to 322/Hyd/2017 dated November 17, 2017)

Assessment Year 2008-09 to 2011-12

Facts

Appellant company was incorporated for purpose of development and construction of commercial complex. AO held that rentals received from various parties were taxable, as it had no relation with project being set up. AO was of opinion that rents received should be assessed as 'income from other sources' and accordingly he assessed as income from other sources. The CIT(A) upheld order of AO.

Held

Before the Tribunal, the dispute was whether rentals received during period of project completion was taxable or not. The ITAT held that rents were received on property purchased for setting up of project and was inextricably linked to completion of project. Rental receipts during period had to be set off to cost of project and said amounts could not be brought to tax as 'income from house property' and the assessee had correctly treated as 'capital receipts' and set it off against the work-in-progress.

Penalty – Section 271(1)(c) of the Act – No penalty is warranted on disallowance of claim of interest under section 43B(e) of the Act

M/s. Maharashtra Hardware Stores vs. DCIT (ITA No. 2840/Mum/2010 dated August 16, 2017)

Assessment Year: 2004-05

Facts

The Assessee was conducting its business through Madhavpura Co-operative Bank Ltd., from which it had obtained loans. The said bank was stopped functioning in the year 2001. The Assessee filed its returns for the relevant assessment year declaring loss of ₹ 26,93,202 after claiming the interest payable of ₹ 38,56,748 to co-operative bank. The assessment order was passed u/s. 143(3) of the Act, wherein

the AO disallowed the claim of interest payable by invoking the provisions of section 43B(e) of the Act. The AO observed that the no deduction is allowable as section 43B(e) was amended to provide interest payable on loans and advances from scheduled bank in respect of the previous year in which liability to pay had arisen and in the year in which the sum is actually paid. In the present case the provision for interest was made *suo motu* and the interest was actually settled in AY 2005-06. The AO, therefore, levied the penalty on account of disallowance made under section 43B(e) of the Act for filing inaccurate particulars of income. On appeal, the CIT(A) confirmed the penalty levied by the AO. The Assessee being aggrieved by the appellate order preferred the appeal before Appellate Tribunal.

Held

The Appellate Tribunal held that the disallowance made u/s. 43B(e) of the Act does not amount to concealment within the meaning of section 271(1)(c) of the Act. The Assessee has disclosed the interest amount in the books of account and Profit & Loss account. The claim was made in the return of income based on the developments taken place for settlement of dues to the bank. This showed that the conduct of the assessee to provide interest on the loan outstanding to the bank was a *bona fide* act. Therefore, the provision was made in the books of account and claimed as expenditure. Thus, mere making of claim which was not sustainable in law by itself will not amount to furnishing of inaccurate particulars of income. Therefore, the penalty levied under section 271(1)(c) of the Act was to be deleted in the present case.

Penalty – Under section 271C of the Act – no penalty can be levied merely because the tax was deducted as per section 194C under the *bona fide* belief as against 194J of the Act

ACIT (TDS) vs. Nexgen Educational Trust (ITA Nos. 1148, 1149, 1150, 1151/Hyd/2016 dated October 31, 2017)

Assessment Years: 2012-13, 2013-14, 2014-15 & 2015-16

Facts

The Assessee was a Trust, running educational institutions. A survey was conducted in the Asssessee's premises. During the course of survey the AO noticed that the services provided by the service providers were in the nature of technical services as contemplated u/s. 194J of the Act. Hence, the Assessee was required to deduct tax at the rate of 10% instead of 2% deducted u/s. 194C of the Act. The AO, therefore, passed the order raising demand u/s. 201(1A) for the A.Ys. 2012-13 and 2014-15 and demand u/s. 201(1) and 201(1A) for the A.Y. 2013-14 & 2015-16. The AO also initiated the penalty proceedings u/ss. 271C of the Act and levied penalty for the impugned years. On appeal, the CIT(A) after considering the facts and the principles laid down by the higher judicial authorities deleted the penalty levied u/s.271C of the Act. Aggrieved by the appellate order, the department preferred an appeal before the Appellate Tribunal.

Held

The Appellate Tribunal observed that to invoke the provisions of section 271C, there should be a failure on the part of the assessee to deduct tax or remit tax. In this case the assessee deducted tax at the rate of 2% under the provisions of section 194C on the reason that the agreements entered were 'contractual in nature' and not for providing technical services. By virtue of the amendment to section 201(1) by insertion of proviso w.e.f. 1-7-2012, demand u/s. 201(1) could not be raised if the deductee had satisfied that it had included the income and remitted the taxes. Therefore, whether it was deduction u/s 194C or 194J, since the deductee has admitted the incomes and paid the taxes thereon, the question of short deduction or non-remittance of taxes did not arise in this case. The provisions of section 273B were applicable as the Assessee has a reasonable cause for non-deduction of tax at the rate 10% as against 2% it has deducted. Thus, the penalty u/s. 271C of the Act was correctly deleted by the CIT(A).

CA Tarunkumar Singhal & Sunil Moti Lala, *Advocate*

INTERNATIONAL TAXATION
Case Law Update

A. SUPREME COURT

I. The Apex Court dismissed the SLP filed by the Revenue against order of the High Court wherein it was held that where TNMM has been accepted as the most appropriate method to benchmark the assessee's transactions barring payment of technical fee, the adoption of a different method viz., CUP would lead to chaos in benchmarking as it could lead to adoption of 2 or more methods for determination of ALP within a single year

DCIT vs. Magnetti Marelli Powertrain India Pvt Ltd. – TS-860-SC-2017 – TP - SLP No. 15244 / 2017

Facts

1. The assessee, a Joint Venture Company (JV) of Magnetti Marelli Powertrain SPA Italy, Maruti Suzuki India Ltd. and Suzuki Motor Corporation, Japan was incorporated in India to manufacture and sell Engine Control Units (ECUs). During the impugned year, it reported six international transactions viz., import of raw materials, sub-assemblies and components, payment of technical assistance fees, payment of royalty, payment of software and purchase of fixed assets, which it aggregated under one 'Manufacturing of automotive components' and benchmarked the same under TNMM.

2. Without disturbing the ALP of the other transactions, the TPO rejected the assessee's 'entity level approach' and applied the CUP method to determine ALP of technical service fee at Nil and made adjustment of ₹ 38.58 crore.

3. Aggrieved, the assessee filed an appeal before the Tribunal wherein the Tribunal rejected the assessee's entity level approach stating that combining of all international transactions for benchmarking was not as per law and that the mere fact that the overall profit earned by the assessee was more, would not *ipso facto* lead to the interference then all the international transactions were at ALP. Accordingly, it restored the matter of ALP determination back to the TPO.

4. On further appeal to the Hon'ble High Court, the Court upheld the Tribunal's remand to the TPO noting that assessee had been unable to substantiate the need for payment of technical assistance fees to its foreign AE. It held that the TPO rightly rejected the assessee's contentions that since its profit margin exceeded that of the comparables, the payment of technical fee was justified. However, it accepted the assessee's argument that TNMM had to be applied by the TPO/AO in respect of the technical fee payment,

noting that the TPO had accepted the TNMM as the most appropriate method for all the other transactions. It held that it was not open to TPO to subject only one element, i.e., payment of technical assistance fee, to an entirely different (CUP) method and that the approach of the TPO could result in adoption of two or even five methods within one ALP determination for a year, which would spell chaos and be detrimental to the interests of both the assessee and the revenue. Accordingly, it upheld the remand directing the TPO to benchmark the transaction under TNMM.

5. Consequently, the Revenue filed an SLP before the Hon'ble Supreme Court.

Held

1. The Hon'ble Supreme Court dismissed the SLP filed by the Revenue.

B. HIGH COURT

II. The issue of aggregation or segregation of two transactions was entirely a fact dependent exercise and could not be treated as a question of law

CIT (LTU) vs. M/s. ESPN Software India Ltd. – TS-873-HC-2017 (Del.) – TP – ITA Nos. 882, 890 & 891 of 2017

Facts

1. The assessee clubbed its revenue from sale of airtime along with its revenue from distribution / advertisement / sale business while benchmarking its international transactions on the ground that there were common features in both the streams of revenue viz. sale of airtime involved bulk sale of product / service to the customer and distribution too involved sale of product / service through a network.

2. The TPO rejected the aggregation of revenue from sale of airtime and revenue from distribution contending that both the sets of businesses were distinct and could not be clubbed.

3. Aggrieved, the assessee filed an appeal before the CIT(A) wherein it was held that the assessee had appropriately clubbed the revenues from both streams viz., sale of air time and distribution as a) they were closely related and mutually reinforced each other as the popularity of a channel had a bearing on both its subscription as well as sale of airtime for advertisement and b) the assessee employed the same set of assets to earn income from both revenue streams.

4. Consequently, the Revenue filed an appeal before the Hon'ble Income-tax Appellate Tribunal ('Tribunal') contending that aggregation of revenues was not permissible on account of two reasons viz. a) In the earlier years the advertisement sales segment had reflected a profit but for the year under consideration the assessee had declared a loss and b) the assessee had overstated the purchase price of its advertisement inventory which it adjusted against the profit from its distribution business. The Tribunal, noted the assessee's submission that there was a change in its business strategy as in the earlier years it was acting as a mere commission agent but since the RBI *vide* Circular No. 76 had relaxed the condition of export earnings by advertisers in Foreign Television Channels it could now purchase airtime on a bulk basis and allot the same to third parties in India without prior approval of the RBI, as a result of which it shifted to the distribution model. Further, the Tribunal also observed that as per the guidelines laid down by the Ministry of Information and Broadcasting, the assessee was required to aggregate both activities i.e. distribution and sale of airtime. Accordingly, placing reliance on the OECD guidelines and observing the direct correlation between the revenues earned from both streams it upheld the order of the CIT(A).

5. Aggrieved, Revenue filed an appeal before the Hon'ble High Court.

Held

1. The Court held that the decision of the Tribunal could not be faulted with and dismissed the appeal of the Revenue further holding that the issue of aggregation or segregation of two transactions was entirely a fact dependent exercise and could be treated as a question of law.

III. Court dismissed the appeal of the Revenue on whether repair and maintenance, electricity, insurance and depreciation on assets was to be included in the computation of PLI, noting that the assessee's transactions were at ALP irrespective of aforesaid inclusion / exclusion

Pr. CIT vs. Swarovski India Pvt. Ltd. – TS-874-HC-2017 (Del.) – TP – ITA No. 419 / 2017

Facts

1. While deciding the appeal of the assessee, the Tribunal held that expenses such as repair and maintenance, electricity, insurance and depreciation on assets were not to be included in the cost base while computing the Profit Level Indicator.

2. Aggrieved, the department filed an appeal before the Hon'ble Court raising the following 2 questions / contention viz. i) That the exclusion of such costs by the Tribunal was incorrect and ii) That the Tribunal failed to appreciate the provisions of Rule 10B which specifically included both direct and indirect costs of production incurred by the assessee in respect of property transferred / services provided to an AE, while computing PLI.

Held

1. The Court noted the assessee's submission that as per the order of the TPO giving effect to the Tribunal's order even if the impugned costs were included in the cost base there would be no transfer pricing adjustment and therefore dismissed the appeal of the Revenue.

2. However, the Court left the second question viz. whether Rule 10B included both direct and indirect costs incurred for production of property transferred to the AE in the cost base, open for consideration in an appropriate case.

IV. Where the assessee provided services to its AE in the capacity of a sub-agent and benchmarked its transactions under TNMM, the TPO erred in adopting RPM and benchmarking the transactions with end-customers as the two sets of transactions were materially different.

Pr. CIT vs. MakemyTrip India Pvt. Ltd. – TS-HC-871-HC-2017 (DEL) – TP – ITA 881 / 2017

Facts

1. The assessee, engaged in the business of travel and tourism, provided online solutions for travel product and other comprehensive services to its AE (in the capacity of a sub-agent) and adopted TNMM as the most appropriate method for benchmarking its international transactions.

2. The TPO contended that the Resale Price Method was the most appropriate method and rejecting the benchmarking carried on by the assessee made an addition adopting the gross profit margin earned by the assessee from its direct customers as comparable.

3. Aggrieved, the assessee filed an appeal before the CIT(A), wherein the CIT(A) held that the services provided in the two segments viz. direct customers and sub-agent were not comparable and since RPM required a high degree of functional congruence, it could not be considered as the most appropriate method.

4. Aggrieved by the order of the CIT(A), the Revenue preferred an appeal before the Hon'ble Tribunal wherein the Tribunal affirmed the CIT(A)'s findings and held that the assessee, a back office service provider was justified in

benchmarking its international transactions under TNMM. It held that the TPO failed to appreciate that the AE was not the customer of the assessee as the assessee was acting in the capacity of a sub-agent and therefore the profit earned from the impugned transaction could not be compared to the profits from the direct customer segment.

5. Aggrieved, the Revenue filed an appeal before the Hon'ble High Court.

Held

1. The Court upheld the order of the Tribunal and held that no substantial question of law arose. Accordingly, it dismissed the appeal of the Revenue.

V. The issue of inclusion / exclusion of comparables could not be treated as a question of law unless it is demonstrated that the Tribunal / lower authorities took into account irrelevant considerations or excluded relevant factors which impacted the ALP determination significantly. Companies having different functions, undergoing extraordinary events impacting profitability, Government companies or companies not satisfying the service filter could not be considered as comparable

Pr CIT vs. WSP Consultants India Pvt. Ltd. – TS – 861-HC-2017 (Del.) – TP – ITA No. 935 / 2017

Facts

1. The assessee, a subsidiary of a Cyprus based company was engaged in the business of providing design, engineering and management consultancy services in the field of transformation of built environment and restoration of natural environment to its AE, which it benchmarked under TNMM.

2. The TPO rejected the benchmarking conducted by the assessee and conducted his independent benchmarking arriving at a final set of 16 comparables made an addition of ₹ 6.55 crore.

3. On appeal to the DRP, the DRP excluded 7 comparables but at the same time included 7 more companies which *inter alia* included Ashok Leyland Project Services Ltd, Kitco Ltd. and Mitcon Consultancy & Engineering Services Ltd.

4. Aggrieved, the assessee filed an appeal before the Hon'ble Tribunal challenging the inclusion of the aforesaid 3 companies wherein the Tribunal held that:

i. Ashok Leyland was not comparable as a major part of its revenue was derived from the wind energy segment and also that there was a merger (extra ordinary event) which affected its profitability

ii. Kitco Ltd. was a Government undertaking having prominent business from Government entities rendering it functionally dissimilar to the assessee

iii. Mitcon Consultancy & Engineering Servcies Ltd. was not comparable as it was engaged in diversified activities such as training and research and less than 75 per cent of its revenues were from consultancy services.

5. Aggrieved, the Revenue filed an appeal with the Hon'ble High Court.

Held

1. The Court held that the basis for exclusion of the aforesaid companies adopted by the Tribunal was reasonable and further held that the issue of inclusion / exclusion of comparables could not be treated as a question of law unless it is demonstrated that the Tribunal / lower authorities took into account irrelevant considerations or excluded relevant factors which impacted the ALP determination significantly.

2. Accordingly, it dismissed the appeal of the Revenue.

VI. The Court held that the issue of whether the Tribunal was justified in excluding Moldtek Technologies Ltd. on the ground that it was engaged in providing engineering design, detailing services, website design services which could not be compared to the assessee providing backoffice research services, being a question of fact could not be looked into under Section 260A of the Act.

Pr. CIT vs. Evalueserve.com Pvt Ltd.-TS-859-HC-2017 (Del.)-TP – ITA No 921 / 2017,

VII. Merely because the shareholder of an enterprise was a sister-in-law of the director of the assessee, the assessee and the aforesaid enterprise would not constitute AEs as sister-in-law is not covered under the definition of relative under Section 2(41) of the Act

CIT vs. Jaipur Silver Jewels P Ltd – TS-854-HC-2017 (Raj)- TP – ITA No 600 / 2011

Facts

1. The AO had concluded that the assessee and a company viz., India Gems & Beads Inc., USA ('India Gems') were AE as specified under Section 92A(2)(m) (which provides that two enterprises would be considered as AEs if there exists any relationship of mutual interest) or 92A(2)(j) (which provides that two enterprises would be considered as associated enterprises where one enterprise is controlled by an individual or relative of such individual controlling the other enterprise) on the ground that i) the sole shareholder of India Gems viz. Anupama Singh was the sister-in-law of the director of the assessee viz. Vinay Pratap Singh and ii) that the premises occupied by India Gems was owned by Dharam Pal Singh who was the brother of Vinay Pratap Singh for which India Gems made no payment of rent. Accordingly, the AO proceeded to benchmark the sale of material by the assessee to its AE by adopting the CUP method and observed that the average sale price of stones studded in the jewellery to Non-AEs was much higher than the price charged to AEs. Accordingly, he made an upward adjustment of ₹ 1.67 crore.

2. Aggrieved, the assessee filed an appeal before the CIT(A) wherein the CIT(A) deleted the addition made by the TPO on the ground that the assessee and India Gems were not covered under Section 92A and therefore the transactions were not to be benchmarked.

3. Aggrieved, the Revenue filed an appeal before the Hon'ble Tribunal, wherein the Tribunal upholding the order of the CIT(A) held that Anupama Singh could not be considered as a relative of the director of the assessee under Section 2(41) of the Act and therefore could not be considered as AEs under Section 92A(2)(j) of the Act.

4. Aggrieved, the Revenue filed an appeal before the Hon'ble High Court.

Held

1. The Court upheld the order of the Tribunal holding that a sister-in-law is not a relative under the Act. Further, it held the provisions of Section 92A(2)(m) were wrongly interpreted by the AO. Accordingly, it dismissed the appeal of the Revenue.

***Note**: In the aforesaid case, though it seems like the Tribunal's findings were restricted to Section 92A(2)(j) of the Act and that did not render any finding vis-à-vis Section 92A(2)(m) of the Act, the Court held that neither of the provisions would apply to the case of the assessee.*

VIII. Mere disagreement between the assessee and Revenue or amongst the Revenue authorities *vis-à-vis* application of a method for determining ALP would not constitute a question of law and unless the aggrieved party is able to demonstrate that application of a certain method had led to distortion or prejudice. Further, noting that the TPO in the subsequent year had accepted assessee's method (RPM) as the most appropriate method, it dismissed the Revenue's appeal

Pr. CIT vs. McCain Foods India Pvt. Ltd. – TS – 885-HC-2017 (Del.) – TP – ITA No 965 / 2017

IX. Computation of PLI, being a factual issue would not constitute a question of law. Court upheld the decision of the Tribunal accepting allocation of costs on the basis of manpower and turnover

Pr. CIT vs. Network Programs India Ltd – TS-883-HC-2017 (Del.) – TP – ITA No 883 / 2017

Facts

1. The assessee, engaged in providing software development services, benchmarking the international transactions undertaken by it during the year under TNMM. For the purpose of benchmarking, the assessee had allocated indirect costs to its software development segment based on the manpower and turnover employed in the impugned segment.

2. The TPO, without disturbing the set of comparables selected by the assessee and without rejecting the benchmarking analysis conducted by the assessee, contended that the allocation of costs to the software development segment of the assessee required adjustment. The TPO adopting the data of the prior years, benchmarked the transactions based on the gross profit margins of the assessee *vis-à-vis* the gross profit margin of the comparables.

3. Aggrieved, the assessee filed an appeal before the CIT(A), wherein the CIT(A) held that the allocation key adopted by the assessee was the most acceptable way of allocation expenses and that the TPO erred in rejecting the same. It further held that the TPO was not justified in using the prior years data as it was in contravention of Rule 10B. Accordingly, it upheld the PLI computation done by the assessee.

4. On further appeal by the Revenue, the Tribunal upheld the order of the CIT(A).

5. Aggrieved, the Revenue filed an appeal before the Hon'ble High Court.

Held

1. The Court held that issue before it was a factual issue which had already been adjudicated upon by the Tribunal and CIT(A) and therefore held that no substantial question of law arose. Accordingly, it dismissed the Revenue's appeal.

C. Tribunal Decisions

X. India-USA DTAA – Sections 90 and 91 of the Income-tax Act, 1961-Whether State taxes paid in the United States of America (USA) eligible for foreign tax credit in India – Held: Yes, in favour of the assessee

Dr. Rajiv I. Modi vs. DCIT 2017 (11) TMI 207 - ITAT Ahmedabad (ITA No. 1285 [Ahd.] 2014, dated 21st September 2017)

Facts

1. The taxpayer was a director in a pharmaceutical company and had received a salary of INR6.21 million from a US based entity, during the relevant tax year 2009-10, which was doubly taxed both in India and the USA.

2. On such taxable income, the taxpayer had *inter alia* claimed a credit of state taxes paid in the USA amounting to INR 0.53 million while filing his income tax return in India.

3. The Assessing Officer (AO) rejected the claim on the ground that Article 2 of the India-USA tax treaty (the tax treaty) covers only federal income tax in the USA.

4. On appeal, the Commissioner of Income Tax (Appeals) [CIT(A)] observed that there was a Mumbai Tribunal decision in the case of *Tata Sons Ltd. vs. DCIT (ITA No 3461 of 2009,* dated 28 January 2011) on the same issue, in favour of the taxpayer, but declined to follow the said decision on the ground that it had been challenged before the High Court, and thereby upholding the order of the AO. Aggrieved by the order passed by the CIT(A).

Tribunal's decision

1. The Tribunal relied extensively on the Mumbai Tribunal decision which was disregarded by the CIT(A).

2. The Mumbai Tribunal decision had upheld foreign tax credit in respect of State income taxes paid in the USA, on the following basis:

- Section 90 of the Act deals with relief of taxes paid in a country with which India has entered into an agreement, and Section 91 of the Act deals with relief of taxes paid in any country with which there is no agreement under Section 90 of the Act;
- Section 90(2) of the Act provides that the provisions of the Act shall apply only to the extent they are more beneficial to that taxpayer;
- Circular 621 dated 19th December 1991 issued by the Central Board of Direct Taxes (CBDT) specifically clarifies that any beneficial provision in the law would not be denied merely because a corresponding provision in the tax treaty is less beneficial;
- In view of the above, it is possible to treat Section 91 as having general application, even in a case where Section 90 would typically apply;
- In the instant case, the tax treaty provides that tax credits are admissible only in respect of Federal taxes and not state taxes. Conversely, provisions of Section 91 of the Act permits credit for all income taxes paid abroad – whether state or Federal;
- Therefore, even in a case covered by the tax treaty, the provisions of Section 91 of the Act would be applicable to the extent it is more beneficial to the taxpayer;
- As Section 91 does not discriminate between State and Federal taxes and in effect, provides for both these income-taxes to be taken into account for the purpose of tax credit in India, the taxpayer would be entitled in principle, to such tax credits in India.

4. Relying on the above, the Ahmedabad Tribunal held that the taxpayer is entitled to credits on both Federal (under Section 90 of the Act) and State taxes (under Section 91 of the Act) paid in the USA. However, tax credit would need to be restricted to actual income tax liability in India, in respect of such doubly taxed income.

XI. India-Italy DTAA – Payment for purchase of Software Licences-Whether Royalty – Whether the payer-assessee liable to deduct TDS – Held: No, in favour of the assessee

Saipem India Projects Pvt. Ltd. [TS-484-ITAT-2017(CHNY)] Assessment Years: 2009-10 to 2015-16

Facts

1. Saipem India Projects Pvt. Ltd. (assessee) is engaged in the business of providing engineering & procurement assistance services, construction supervision and commissioning assistance in the design and execution of large scale oil and gas onshore and offshore projects, cryogenic tanks, etc. Assessee is a wholly owned subsidiary of Saipem SA, France who in turn was a wholly owned subsidiary of Saipem SPS, Italy.

2. During the relevant AY's 2009-10 to 2015-16, the assessee had purchased operational and administrative software licences from Saipem SPA, Italy against which remittance were made without deduction of tax. Operational/ engineering software licences were used in the course of business of rendering services while administrative software were used for its own purpose like accounting, reporting, etc.

3. During assessment, the AO held that the software licence agreements were for limited fixed term, and they were not off the shelf software, but were licences for which annual fees was paid. Thus, AO held that assessee should have deducted tax on the same and considered assessee in default u/s. 201(1).

4. Assessee contended that the licences were non-exclusive and non transferable with no right to revise or edit the content. Further assessee contended that, under the terms of the agreement it could not sell or rent out such license. Assessee relied on 'copyright' definition under Copyright Act, 1957 and contended that there was no exclusive right assigned to it, moreover there was no infringement of copyright vested with principal. Thus, assessee argued that Sec.9(1)(vi) Explanation 2 would not apply.

5. Assessee also relied on Article 13(3) of DTAA between India and Italy which provides that payment for right to use copyright alone could be treated as Royalty. Relying on the narrower definition of 'Royalty' provided in DTAA, assessee contended that, DTAA provisions would apply since they were more beneficial than the provisions of Income-tax Act, 1961.

6. Rejecting these arguments, the AO held assessee's payments were covered under 'royalty' definition under DTAA as well as Sec.9(1)(vi). On appeal, CIT(A) upheld AO's order. Aggrieved, assessee filed an appeal before Chennai.

Decision

The Tribunal held in favour of the assessee as follows:

1. ITAT noted that CIT(A) had relied on Karnataka HC ruling in Synopsis International Old Ltd. wherein after referring to DTAA provisions it was held that, grant of non-exclusive, non-transferable license was taxable as 'Royalty'. Further ITAT noted Delhi HC ruling in Infrasoft Ltd. wherein it was held that receipts for licensing software could not be considered as royalty. Thus ITAT took note of the contradiction and remarked that "assessee ..in our opinion could always fall back on the judgment in their favour , so long as there is no jurisdictional High Court judgement on the issue."

2. Referring to the agreement with the Italian parent company, ITAT clarified that though assessee and its principal could make unlimited copies of the licensed software it could be used only for assessees internal business use. ITAT stated that, since it was a non-exclusive and non-transferable licence assessee could not sub-licence, assign or transfer such software. ITAT observed that only assessee had the right to use the copyrighted software which continued with the owner Intergraph, Italy. Thus, the assessee was given only right to use the copyrighted software for a limited term.

3. ITAT held that, copyright is an intangible incorporeal right the nature of a privilege, independent from any material substance. ITAT remarked that, "Copyright or even right to use copyright is distinguishable from the sale consideration paid for a "copyrighted" article. " ITAT stated that, enjoyment of some or all the right which the copyright owner has are necessary to invoke royalty provisions. Thus ITAT remarked that "The parting of intellectual property rights inherent in and attached to the software product in favour of the customer triggers Royalty characterisation under the treaty." ITAT stated that merely authorising a customer to have the benefit of data contained in software without any further right would not amount to transfer of rights in copyright.

4. ITAT noted Explanations 4 to 6 to Sec.9(1)(vi) were amended retrospectively from

June 1976 to widen the definition of the term 'Royalty'. However ITAT stated that there was no amendment in royalty definition in India-Italy DTAA. In view of the above ITAT relied on Co-ordinate Bench ruling in Systemes Simulia and stated that assessee could fall back on Royalty definition as given in DTAA if it was more beneficial to it. ITAT referred to definition of Royalty in India-Italy DTAA and stated that Delhi HC ruling in Infrasoft Ltd squarely applied to the assessees case. ITAT relied upon Co-ordinate Bench ruling in case of Dassault Systems Simulia Corporation [TS-5023-ITAT-2014 (Chennai)-O]

5. ITAT thus held that, assessee was justified by relying on DTAA and not deducting tax u/s. 195. ITAT remarked that, "assessee was justified in harbouring a view that payments made by it did not fall within the meaning of the term "Royalty" as used in DTAA….thus assessee could not be saddled with a liability for failure to deduct tax at source."

XII. Disallowance u/s. 40(a)(ia) - Routing expenditure as reimbursement cannot absolve withholding tax liability – Held : against the assessee.

Tungabhadra Steel Products Ltd. [TS-485-ITAT-2017 (Bang.)] Assessment Year : 2006-07

1. The taxpayer made certain payments towards management charges as reimbursement to its holding company without withholding tax.

2. The Tax Officer (TO) disallowed the amount of reimbursement towards management charges to the holding company under section 40(a)(ia) of the Act, as no tax was withheld under section 194J of the Act.

3. The Commissioner of Income-tax (Appeals) [CIT(A)] deleted the addition made by the TO, holding that the payment was in the nature of 1 I.T.A. No. 984/Bang/ 2017 reimbursement of expenses incurred by the holding company on behalf of the taxpayer and withholding tax was not applicable on the same.

Decision

The issue before the Tribunal was

1. Whether management charges paid as reimbursement by the taxpayer to its holding company was disallowable under section 40(a)(ia) of the Act on account of non-withholding of taxes under section 194J of the Act?

2. The Revenue contended that :

- Withholding tax was applicable on payment towards management charges to holding company under section 194J of the Act.
- Merely because the payment was routed through the holding company, taxpayer would not be relieved from the liability to withhold tax at source.

3. The taxpayer contended that the order of the Tribunal was an ex parte order, no one appeared on behalf of the taxpayer.

4. The Tribunal observed and held as under:

- The Tribunal observed that the payment was towards management charges to the holding company.
- Even if the said payment was on account of reimbursement of expenses incurred by the holding company, the provisions of section 194J of the Act could not be circumvented by the *modus operandi* of payment routed through a holding company.
- If the nature of payment attracted withholding tax provisions, the mode of payment would not change the obligation to withhold tax at source.

Comment*: On facts, this decision emphasises that withholding tax obligations are with reference to nature of payment and not manner of routing payments.*

CA Rajkamal Shah

INDIRECT TAXES
GST Gyan

GST impact on Charitable Trusts running educational institutions and hospitals – Part – II

In the last month we have dealt with GST impact on charitable and religious trusts including co-operative housing societies. In the said article, we have discussed the frame work of GST law (CGST Act, IGST Act, UTGST Act and various State GST laws) and in particular S.9 (charging section), S.7 definition of supply, and S.2(17) definition of business call of (GST Act corresponding section of States and UTGST laws and certain Supreme Court judgements. What is made out that supply of goods or services by a charitable trusts, NGOs, religious trusts and co-operative housing societies cannot be regarded as being made in the course or in furtherance of business and therefore outside the scope of GST.

In this article we shall examine applicability of GST to the educational institutions and health care sector denoted as hospitals. It is necessary to mention that certain exemptions are provided under the law to the education and health care service which is generally applicable to them whether provided by charitable trust or otherwise.

GST on educational service

Taxing education sector is always a sensitive issue as education is more of social activity. Right to elementary education is a fundamental right under the Constitution of India and that the Government has to provide free to every child exemption to education service is thus a necessity. With advent of time, commercialisation of education has become reality and education has emerged as an organised industry. The private players (business entities) provide many more services along with education. The pre-school education and education up to higher secondary school or equivalent, education is part of a curriculum for obtaining a qualification recognised by law for the time being in force and education as part of approved vocational education course is exempt[1] however, other than these core education services are being taxed @18%[2] .

The term, 'education' is not defined under the GST law. As per the Hon'ble Supreme Court in the context of definition of 'charitable purpose' u/s.2(15) of the Income-tax Act in *Sole Trustee of Loka Shikshana Trust vs. CIT [(1976) AIR 10 (SC)]*, held that **education is process of training and developing knowledge, skills and character of students by normal schooling.**

1 Notification No.12/2017 – CT (Rate) dtd. 28-6-2017
2 Notification No.11/2017 – CT (Rate) dtd. 28-6-2017

Under the GST law 'education services' are classified under heading 9992 and further divided into six groups comprising of pre-primary, primary secondary, higher secondary, specialised and other educational support services.

Exemption to 'Educational Institution' and the scope thereof

Notification No. 12/2017-CT (Rate) *ibid, inter alia,* exempts the services provided by an educational institution to its students, faculty and staff from whole of the tax leviable thereon. The term 'educational institution' is defined *vide* clause (y) of para 2 i.e. definitions of the Notification as under:

"(y) "educational institution" means an institution providing services by way of, –

(i) pre-school education and education up to higher secondary school or equivalent;

(ii) education as a part of a curriculum for obtaining a qualification recognized by any law for the time being in force;

(iii) education as a part of an approved vocational education course;".

The Government has issued a Guidance Note on 'GST on educational services' on 6-11-2017.

The Note acknowledges the fact that there have been persistent doubts as to what would be the meaning of 'education as a part of curriculum for obtaining qualification recognised by law', a phrase used in clause (ii) above. However, it is explained that since GST on services being a legacy carried forward from the service tax regime, the explanation given in the Education Guide can be gainfully referred to understand the meaning of the term. The Note, thereafter, reproduces the relevant abstracts of the Education Guide of 2012.

Sub-clause (iii) covers institutions providing services by way of education as a part of approved vocational course and such institutions is entitled for the exemption. 'Approved Vocational Education Course' is defined *vide* clause (h) of para 2 of the Notification as,

A course run by an industrial training institute or an industrial training centre affiliated to the National Council for Vocational Training or State Council for Vocational Training offering courses in designated trades notified under the Apprentices Act, 1961 (52 of 1961); or (ii) A Modular Employable Skill Course, approved by the National Council of Vocational Training, run by a person registered with the Directorate General of Training, Ministry of Skill Development and Entrepreneurship.

It is explained that only those institutions whose operations conform to the specifics given in the definition of the term 'Educational Institution' would be entitled for the exemption. Conduct of degree courses by colleges, universities or institutions which lead grant of qualifications recognised by law would be covered. **Therefore, private coaching centers or other unrecognised institutions will not be entitled for the exemption.**

Similarly, output services related to the specified course provided by IIMs are exempt, but Executive Development Programmes run by such IIMs would be subject to GST.

The output services of lodging/boarding in hostels provided by the educational institutions providing pre-school education and education up to higher secondary school or equivalent or education leading to a qualification recognised by law are fully exempt from GST under the said notification. Annual subscription/fees charged as lodging/boarding charges by such educational institutions shall therefore be exempt from tax.

Services provided – (a) by an educational institution to its students, faculty and staff; (b) to an educational institution, by way of, – (i) transportation of students, faculty and staff; (ii) catering, including any mid-day meals scheme sponsored by the Central Government, State Government or Union Territory; (iii) security or cleaning or housekeeping services performed in such educational institution; (iv) services relating to admission to, or conduct of examination by, such institution; up to higher secondary. However, this exemption to an educational institution other than an institution providing services by way of pre-school education and education up to higher secondary school or equivalent.

Services provided by the Indian Institutes of Management, as per the guidelines of the Central Government, to their students, by way of the following educational programmes, is exempt. Executive Development Programme: - (a) two year full time Post Graduate Programmes in Management for the Post Graduate Diploma in Management, to which admissions are made on the basis of Common Admission Test (CAT) conducted by the Indian Institute of Management; (b) fellow programme in Management; (c) five year integrated programme in Management. However, Executive Development Programme is not exempt.

Place of Supply of Educational Services

The place of supply of educational services where the location of the supplier of services and the location of the recipient of services is in India shall be determined in terms of Section 12(6) or 12 (7), as the case may be, of the Integrated Goods & Services Tax Act, 2017 ('IGST Act').

In case, the location of the supplier of services or the location of the recipient of services is outside India, the place of supply of services shall be determined in terms of Section 13(5) of the IGST Act.

As per Section 13(5) of the IGST Act, 2017, the place of supply of services supplied by way of admission to, or organization of a cultural, artistic, sporting, scientific, educational or entertainment event, or a celebration, conference, fair, exhibition or similar events, and of services ancillary to such admission or organisation, shall be the place where the event is actually held.

Composite and Mixed Supply

The Guidance Notes explains, by way of an example, that in case of Boarding Schools providing services of education coupled with other services like providing dwelling units for residence and food, it would be a case of bundled services if the charges of education and lodging and boarding are inseparable. Since the predominant nature is determined by the service of education (in terms of Section 2(30) read with Section 8 of the CGST Act), the other service of providing residential dwelling and food will not be considered for the purpose of determining the tax liability and the entire consideration for the supply will be exempt.

In yet another example, the Guidance Notes explains that where a course in a college leads to a dual qualification only one of which is recognised by law, service in respect of each qualification would be assessed separately taking into account the fact that the curriculum and fees for each of such qualifications are prescribed separately.

However, if an artificial bundle of service is created by clubbing two courses together, only one of which leads to a qualification recognised by law, then it shall be treated as a 'mixed supply' and the taxability will be determined by the supply attracting highest rate of GST in terms of Section 2 (74) read with Section 8 of the CGST Act.

The Guidance Note goes on to explain that incidental auxiliary courses provided by way of hobby classes or extra-curricular activities in furtherance of overall well being will be an example of naturally bundled course and will be treated as composite supply. One relevant consideration in such cases will be the amount of extra billing being done for the unrecognised component vis-à-vis the recognised course.

Finally, the Guidance Note suggests the reference to the clarification given by the Education Guide of 2012 in case of fees charged by the Educational Institutions such as IITs, IIMs for the campus recruitment and in effect, clarifies that the same would be liable to GST just as were considered liable to service tax in the erstwhile service tax regime.

Regarding, input services, it may be noted that where output services are exempted, the Educational institutions may not be able to avail credit of tax paid on the input side. The four categories of services known as Auxiliary Education services, which educational institutions ordinarily carry out themselves but may obtain as outsourced services from any other person, have been exempted (as per Notification No. 12/2017 – Central Tax (Rate)). Auxiliary education services other than what is specified above would not be entitled to any exemption. The exemption also comes with a

rider. Such services are exempt only for educational institutions providing services by way of education up to colleges in case of educational institutions are providing qualification recognised by law for the time being in force shall not be liable to GST.

Let's take another example where a course in a college leads to dual qualification only one of which is recognised by law. Would service provided by the college by way of such education be covered by the exemption notification? Provision of dual qualifications is in the nature of two separate services as the curriculum and fees for each of such qualifications are prescribed separately. Service in respect of each qualification would, therefore, be assessed separately.

If an artificial bundle of service is created by clubbing two courses together, only one of which leads to a qualification recognised by law, then by application of the rule of determination of taxability of a supply which is not bundled in the ordinary course of business, it shall be treated as a mixed supply as per provisions contained in section 2(74) read with section 8 of the CGST Act, 2017. The taxability will be determined by the supply which attracts highest rate of GST.

However incidental auxiliary courses provided by way of hobby classes or extra-curricular activities in furtherance of overall well-being will be an example of naturally bundled course, and therefore treated as composite supply. One relevant consideration in such cases will be the amount of extra billing being done for the unrecognised component vis-a-vis the recognised course. If extra billing is being done, it may be a case of artificial bundling of two different supplies, not supplied together in the ordinary course of business, and therefore will be treated as a mixed supply, attracting the rate of the higher taxed component for the entire consideration.

Based on above discussion let's try to examine pertinent questions about education service:

1) When the certification issued to the students is merely for participation and the course is not recognised by the law for the time being in force, then GST is applicable?

   If the course is recognised under the law, then only exemption under GST is available. If not then the course is taxable. Merely issue of certificate of participations does not make the course recognised under the law.

2) Honorarium paid to guest faculty and visiting faculty – whether liable?

   In case of guest faculty there is no quid-quo-pro and no agreement to provide service hence, not liable.

   The case of visiting faculty is different as the visiting faculty may be receiving remuneration and there may be continuity in this case GST may be liable to be paid.

3) GST on application fee/prospectus received from students?

   If application fees or charges for prospectus can be treated as part of the composite supply to students, then there is no GST applicability.

   But since applicant may or may not become a student, any sale of application form and prospectus fees received therefrom may be liable to GST as supply of goods.

   Since the address of the applicant is available on records, as per the general rule, place of supply will be the recipient address and accordingly transaction will be treated as interstate/intrastate.

4) Applicability on music/dance/martial arts / gymnasium fees received by school?

   This is a gray area. In the opinion of the writer music, dance, martial art, gymnasium is for overall development in training of student which may or may not be a part of curriculum but a part of education as defined by the Hon'ble Supreme Court (supra). No GST should be applicable on such activity. The Guidance Note clarify that if extra billing is done for unrecognised component, the same would be taxable.

5) Canteen / catering services provided to students in school?

Generally, canteen / catering services is provided by a independent contractor under tri-patriate agreement. Under Entry 66 of Notification No. 12/2017 – CT(Rate) service provided to an educational institution by way of canteen / catering is exempt.

6) Fees received for seminars /workshops organised for students, faculty or students from other schools?

If the seminar / workshop is a part of the course or curriculum which is exempt, no GST is payable, otherwise liable to GST. Such seminars and workshops for own faculty will not be liable but outside faculty GST is applicable.

7) Payment to foreign institution for running course in India?

If the course is recognised by the law in India, such payment is not taxable in India. Otherwise it will be regarded as import of service and liable to GST. If the fees is recovered from the student and certain percentage is remitted outside India, for non-recognised course in India the same will be liable to tax as import of service.

8) If there is an educational institution which has a mix of courses some of whose curriculum lead to recognised qualification, can the income from all the courses of that institution be treated as exempt from GST?

No. This will be a case of mixed supply if a composite fees is charged for recognised as well as unrecognised course and GST shall be applicable @18%.

9) If old furniture, computers etc. is sold as scrap, whether GST is applicable?

Yes, GST is applicable at the rate applicable to such goods.

10) If a college runs management development programme for various corporates for which certificate is issued which is not approved under the UGC Act. Whether GST is payable?

Yes, GST is payable.

11) Any deduction or forfeiture of fees for cancellation of admission, whether liable to GST?

Yes.

12) Grant received from Govt./UGC/ Corporations for research work/specific purpose – are there any GST implications, and if yes, in what manner?

No. such subsidy is out of valuation S. 15.

13) Payment made outside India for Subscription for journals/magazines – hard copy as well as electronic or online, and for editing of Indian magazines by an overseas editor stationed in USA/UK – are there any GST implications and, if yes, in what manner?

Yes, as import of service / goods as the case may be.

14) Donations are received from individuals/ trusts for instituting awards, out of interest on the amounts to deserving students. Is there any GST implications, and if yes, in what manner?

No donation is taxable unless there is no quid-quo-pro benefit to the donor.

Activities by a hospitals run by charitable trusts: Entry 74 of Notification No12/2017 – CT(Rate) exempt health care services by clinical establishments, authorised medical professional or paramedics. This exemption applies to all persons including charitable trusts. Health care service is defined in clause 2(zg) of the said notification as,

"health care services" means any service by way of diagnosis or treatment or care for illness, injury, deformity, abnormality or pregnancy in any recognized system of medicines in India and includes services by way of transportation of the patient to and from a clinical establishment, but does not include hair transplant or cosmetic or plastic surgery, except when undertaken to restore or to reconstruct anatomy or functions of body affected due to congenital defects, developmental abnormalities, injury or trauma."

Clinical establishment is defined in clause 2(s) of the said notification as,

"clinical establishment" means a hospital, nursing home, clinic, sanatorium or any other institution by, whatever name called, that offers services or facilities requiring diagnosis or treatment or care for illness, injury, deformity, abnormality or pregnancy in any recognized system of medicines in India, or a place established as an independent entity or a part of an establishment to carry out diagnostic or investigative services of diseases".

The Guidance Note on GST on Charitable and Religious Trusts clarifies that all treatment or diagnosis or care for illness, injury, deformity, abnormality or pregnancy by a clinical establishment is covered. Such services provided by doctors and paramedics either provided as an employee (clinical establishment) or in their individual capacity is exempt. It further clarifies that charitable trusts run a hospital and appoint specialist doctors, nurses and provide medical services to patients at a concessional rate, such services are not liable to GST. If hospitals hire visiting doctors / specialists and these deduct some money from consultation / visit fees payable to doctors and the agreement between hospital and consultant doctors is such that some money is charged for providing services to doctors, there may be GST on such amount deducted from fees paid to doctors. The Guidance Note purport to state that the hospital provide support service to the doctors in form of infrastructure etc. This is a bone of contention in present service tax regime wherein notices have been issued to many hospitals for charging (deducting) money from doctors for providing them support services post negative list regime. It is possible that this kind of contention may be raised under GST regime by the department which is not correct in view of the writer.

Based on above discussion let's try to examine pertinent questions about health care service:

1) Taxability in the event a doctor charge fees to the patient and some part is given to the clinical establishment?

   A doctor charges fees for health care services and gives a portion to charitable institution. This kind of situations may happen in case of private nursing homes. It is advisable to avoid such kind of arrangements as it would lead to disputes and litigation.

2) Implant of stent, valve or some other device in the body of the patient?

   This is covered as a composite supply under health care and therefore may not be liable to GST. Though disputes arisen in current VAT regime that such implants may be regarded as works contract. However, the writer does not subscribe to this views.

3) Medical shops in hospitals?

   Selling of medicines is liable to GST. Hospitals charge rent as compensation to use their premises. This may be covered as lease or letting out of building as service. Sometimes, the shop gives some percentage of sale price to the hospital as compensation to use the premises. A question may arise about liability of GST. Though not free from doubt, it cannot be said that the charitable trust receive such amount in furtherance of or in the course of business.

Conclusion

In case of activities of charitable trust or NGO including that of education and health care service, the moot question would be that the receipts can be said to be in the course or furtherance of business. Going by the past experience, the revenue would always try to negate this proposition. GST is a new law in the country and has to be tested in the court of law for its implication on different sectors including charitable trust, NGO etc. The purpose of the article is to lay down certain proposition based on the law. Attempt has been made to throw light on the applicable provisions of the present GST law in the country. The reader would take a considered decision based on the facts and circumstance applying the judicial precedents including that of other countries.

CA Rajkamal Shah & CA Bharat Vasani

INDIRECT TAXES
GST – Legal Update

NOTIFICATIONS

Central Goods & Services Tax (CGST)

Twelfth amendment to CGST Rules, 2017 ***(Notification No. 55/2017 dt. 15-11-2017)***
Explanation inserted after Rule 43(2) - For the purpose of Input Tax Credit (ITC) reversal, exempt supplies will not include supply of service where place of supply is Nepal or Bhutan against payment in INR.

Under CGST Rules Chapter X relating to refund and Chapter XII relating to advance ruling, rules 97A and 107A are inserted to include manual filing and processing. Form GST RFD-01 A is inserted to apply for manual refunds.

Rule 109A inserted for Appointment of Appellate Authority.

FORM GSTR 3B to continue till March, 2018 ***(Notification No. 56/2017 dt. 15-11-2017)***
FORM GSTR 3B to be filed every month by all taxpayers for period up to March, 2018 and tax liability to be discharged in the said returns. Due date will be 20th of the next month.

Quarterly filing of FORM GSTR 1 for taxpayers with aggregate turnover up to ₹ 1.5 crore ***(Notification No. 57/2017 dt. 15-11-2017)***
Periodicity of filing FORM GSTR 1 for registered persons having aggregate turnover of up to ₹ 1.5 crore in the preceding FY or the current FY will be quarterly and the due dates are as under:

Period	Due Date
July – September, 2017	31st December, 2017
October – December, 2017	15th February, 2018
January – March, 2018	30th April, 2018

Extension of due date for filing of FORM GSTR 1 for taxpayers with aggregate turnover exceeding ₹ 1.5 crore ***(Notification No 58/2017 dt. 15-11-2017)***
Extended due dates for filing FORM GSTR 1 for registered persons whose turnover in the preceding FY or current FY exceeds ₹ 1.5 crore are as under:

Months	Due Date
July – October, 2017	31st December, 2017
November, 2017	10th January, 2018
December, 2017	10th February, 2018
January, 2018	10th March, 2018
February, 2018	10th April, 2018
March, 2018	10th May, 2018

Extension of time limit for filing of FORM GSTR-4 ***(Notification No. 59/2017 dt. 15-11-2017)***
Due date for filing of FORM GSTR 4 by a composition dealer for the period July –

September, 2017 extended up to 24th December, 2017.

Extension of time limit for furnishing the return in FORM GSTR-5, for the months July to October, 2017 *(Notification No. 60/2017 dt. 15-11-2017)*

Due date for filing of FORM GSTR 5 by non-resident taxable person for the months July to October, 2017 extended up to 11th December, 2017.

Extension of time limit for furnishing the return in FORM GSTR-5A for the months July to October, 2017 *(Notification No. 61/2017 dt. 15-11-2017)*

Due date for filing of FORM GSTR 5A by a person supplying online information and database access or retrieval services for the months July to October, 2017 extended up to 15th December, 2017.

Extension of time limit for furnishing the return in FORM GSTR-6 for the month of July, 2017 *(Notification No. 62/2017 dt. 15-11-2017)*

Due date for filing of FORM GSTR 6 by an Input Service Distributor for the month of July, 2017 extended up to 31st December, 2017.

Extension of time limit for furnishing the return in FORM GST ITC-04 for the period July to September, 2017 *(Notification No. 63/2017 dt. 15-11-2017)*

Due date for filing of FORM GSTR ITC 04 for goods dispatched to or received from a job worker for the period July to September, 2017 extended up to 31st December, 2017.

Late filing fees reduced for FORM GSTR 3B *(Notification No. 64/2017 dt. 15-11-2017)*

For the period of October, 2017 onwards, the late filing fee for FORM GSTR 3B is reduced to ₹ 25 per day under CGST (i.e. total ₹ 50 per day). Where GST payable is nil, the fee is reduced to ₹ 10 per day under CGST (i.e. ₹ 20 per day).

Exemption from compulsory registration for supplier of services through an e-commerce platform *(Notification No. 65/2017 dt. 15-11-2017)*

Persons making supplies through an electronic commerce operator other than those covered u/s 9(5) whose turnover does not exceed ₹ 20 lakhs (₹ 10 lakhs in case of special category states) are exempted from mandatory registration.

Exemption from tax payment on advance received for supply of goods *(Notification No. 66/2017 dt. 15-11-2017)*

Notification No. 40/2017 dt. 13-10-2017 exempting payment of tax on receipt of advance for supply of goods for taxpayers whose turnover does not exceed ₹ 1.5 crore now extended to all taxpayers who receive advances for supply of goods without any limit.

Central Goods & Services Tax (CGST) Rates

Amendment to rates of goods (Notification No. 41/2017 dt. 14-11-2017) and

Amendment to exemption of goods (Notification No. 42/2017 dt. 14-11-2017)

Illustrative list of goods whose rates are reduced, is as under:

No. of Items (Approx)	Items	Old Rate	New Rate
174	Wires, cables, electrical items, electrical boards etc., plywood, wooden frame and articles, paving blocks, furniture, mattress etc., detergents etc., shampoo, hair creams, perfumes and beauty preparations, slabs of marble and granite, ceramic tiles etc., wallpaper, chocolates, goggles etc.	28%	18%

No. of Items (Approx)	Items	Old Rate	New Rate
2	Wet grinders, tanks and other armoured fighting vehicles	28%	12%
13	Condensed milk, refined sugar, pasta, mayonnaise, diabetic food, medicated oxygen, printing ink, jute and cotton made hand/shopping bags, hats, parts of specified machineries for agriculture etc., specified parts of sewing machine, spectacles frames and bamboo or canned furniture.	18%	12%
6	Specified chikkis, chutney powder, fly ash, sulphur recovered in refining of crude	18%	5%
8	Idli and dosa batter, desiccated coconut, narrow woven fabric, finished and composition leather, coir cordage and rope, jute twine, coir products, fishing nets and hooks, worn clothing, fly ash bricks	12%	5%
6	Guar meal, hop cone, certain dried vegetables, unworked coconut shell, fish frozen or dried, khandsari sugar	5%	Nil
1	Bangles made of lacquer shellac	3%	Nil
1	Aircraft engines, tyres and seats	28%/18%	5%

Reverse Charge on raw cotton *(Notification No. 43/2017 dt. 14-11-2017)*
Entry 4A inserted to include supply of raw cotton by agriculturist under reverse charge.

Restriction on refund of excess ITC on certain fabrics *(Notification No. 44/2017 dt. 14-11-2017)*
Entry 6A of Notification No. 5/2017 containing corduroy fabrics substituted for Entry 6A, 6B and 6C to include knotted netting of twine, cordage or rope, made up nets, of textile materials, narrow woven fabrics other than goods of Heading 5807.

Concessional rate for specified scientific and technical equipments supplied to public funded research institute *(Notification No. 45/2017 dt. 14-11-2017)*
Rate on such supply is reduced to 5%.

Rates amended for restaurants, job work on "handicraft goods" etc. *(Notification No. 46/2017 dt. 14-11-2017)*

Entry No. 3 relating to works contract provided to Government is amended to substitute words "Composite supply of works contract as defined in clause (119) of section 2 of the Central Goods and Services Tax Act, 2017, provided" in place of "Service provided".

Entry No. 7 relating to supply of food and drinks etc by restaurants, CGST rate is reduced to 2.5% (i.e. 5%) with no ITC. However, for hotels where declared tariff is ₹ 7,500 and above CGST rate will be 9% (i.e. 18%)

Amendment to exempted services *(Notification No. 47/2017 dt. 14-11-2017)*
Entry No. 11A – Exemption to service provided by Fair Price Shops to Government for commission is amended to cover Central Government also.

Entry No. 79A inserted to exempt admission to protected monuments so declared under the Ancient Monuments and Archaeological Sites and Remains Act 1958.

Integrated Goods & Services Tax (IGST)

Apportionment of IGST with respect to advertisement services under section 12 (14) of the IGST Act, 2017 *(Notification No. 12/2017 dt. 15-11-2017)*

Rule 3 is inserted in IGST Rules to provide mechanism for apportionment of value attributable to different States or Union Territories of IGST with respect to advertisement services through various modes like newspaper, printed material, hoardings, on railway tickets, radio stations, television channels, cinema halls, internet etc.

Integrated Goods & Services Tax (IGST) Rates

Exemption extended to supply of Skimmed milk powder, or concentrated milk for use in the production of milk distributed through dairy co-operatives to the companies that are registered under the Companies Act, 2013 (Notification No. 50/2017 dt. 14-11-2017)

CIRCULARS & ORDERS

Central Goods & Services Tax (CGST)

Circular No. 14/2017 dt. 06-11-2017

Prescribes procedure for procurement of goods, as deemed exports, from DTA by EOU/ EHTP Unit/ STP Unit/ BTP Unit through the use of Form – A and Form – B.

Circular No. 16/2017 dt. 15-11-2017

It clarifies that GST will be applicable on warehousing of tea, processed coffee, beans or powder, pulses (de-husked or split), jaggery, processed spices, dry fruits, cashew nuts etc as these processed goods do not fall in definition of Agriculture Produce.

It clarifies that inter-state transfer of aircraft engines, parts and accessories for use by their own airlines as distinct person is chargeable to IGST, however ITC of GST paid on these goods will be allowed notwithstanding the condition that ITC of such inputs consumed is not allowed for supply of services of transport of passengers by air in economy class at GST rate of 5%.

It clarifies that General Insurance Policies provided by a State Government to employees of State Government, Police personnel, employees of Electricity Department or students of colleges/private schools etc., irrespective of whether premium is paid by State Government or employees or students etc. will be exempt under Notification No.12/2017.

Circular No. 18/2017 dt. 16-11-2017

Clarified that manufacturer of fabrics will be eligible for refund of unutilised ITC of GST paid on inputs (other than capital goods) in respect of fabrics manufactured and exported by him.

Circular No. 19/2017 dt. 20-11-2017

Clarifies that milling of paddy into rice is not an intermediate process in relation to cultivation of plants for food, fibre or other similar products or agricultural produce and hence not exempt but liable to tax as Job work @ GST 5%.

Circular No. 20/2017 dt. 22-11-2017

Clarified that terracotta being clay based, terracotta idols will be eligible for nil rate.

Circular No. 21/2017 dt. 22-11-2017

It says that the circular 1/1/2017-IGST shall *mutatis mutandis* apply to inter-state movement of rigs, tools and spares, and all goods on wheels [like cranes] between distinct persons, except in cases where movement of such goods is for further supply of the same goods, such inter-State movement shall be treated 'neither as a supply of goods or supply of service,' and consequently no IGST would be applicable on such movements.

[Contd. on page 131]

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Order No. 9/2017 and 10/2017 dt. 15-11-2017
Due date for FORM GST TRAN 1 & its revision is extended till 27th December, 2017.

PRESS RELEASES

The following changes are recommended by GST Council -

Composition Scheme dt. 10-11-2017
Uniform rate of tax @ 1% is proposed for both manufacturers and dealers. Supply of services up to ₹ 5 lakhs shall deemed to be exempt. Annual turnover eligibility under the law to be increased to ₹ 2 crore and thereafter eligibility to opt for composition scheme to be increased to ₹ 1.5 crore per annum.

However, these proposals shall be given effect only after the necessary statutory amendments.

Accepting of UIN of Foreign Diplomatic Missions dt. 13-11-2017:
Clarified that supplies made to Foreign Diplomatic Missions / UN Organisations is like any other B2C sales and will not have any additional effect on the supplier's tax liability. It is advised that under no circumstance any supplier should decline to record the UIN (Unique Identification Number) of the diplomat / official on the tax invoice so that such Organizations can claim refund based on UIN.

Appeal to industry leaders to pass the benefit of GST rate reduction to the consumers dt. 20-11-2017
In view of reduction of GST rates on many items, the suppliers have to pass on the benefit by way of commensurate reduction in prices. Also, the FMCG companies are advised to immediately revise the MRP on all the products in which reduction of GST rate is done. Such companies are also requested to give wide publicity of the revised MRP of products.

CA Naresh Sheth

INDIRECT TAXES
GST – Recent Judgments

1. Dr. Kanagasabapathy Sundaram Pillai vs. Union of India (2017-TIOL-01-HC-MUM-GST)

Facts, Issue involved and Contention of Petitioner

Petitioner filed PIL challenging implementation of the GST Act on grounds of lack of preparedness of several States and public at large. Petitioner expressed concern with respect to smooth implementation of GST due to legal hurdles like implementation in midst of financial year, compensation for first quarter not paid apart from arrears of many schemes and the States and Union Territories will become financially critical and unstable.

Contention of Respondent

Union of India pleaded that petitioner cannot urge or seek directions to respondents to postpone decision to implement GST since levy and collection of taxes on goods and services has sanction of law, over 65 lakhs taxpayers had migrated to GST network, rates and rules have also been notified and publicised widely in public domain.

Held

In view of above facts, Hon'ble High Court was not inclined to entertain PIL and dismissed the PIL.

2. Narendra Plastic Pvt. Ltd. vs. Union of India (2017-TIOL-15-HC-DEL-GST)

Facts, Issue involved and Contention of Petitioner

Petitioner had pending export orders placed on it prior to 1st July, 2017. It needs to import inputs for fulfilment of pending export orders. Petitioner would have no option but to pay IGST on such imports which would cause working capital blockage. Petitioner sought relief in relation to applicability of additional levy of IGST on imports made to fulfil export orders which were placed prior to 1st July, 2017.

Petitioner prayed that it should not be asked to pay additional IGST on such imports as that would make levy arbitrary and unreasonable.

Held

Hon'ble High Court held that Petitioner-Exporter is not questioning legislative competence to levy additional IGST but is only questioning applicability of such levy on imports that are made for fulfilment of export orders that have been placed on and accepted by Petitioner prior to 1st July, 2017. Petitioner is seeking to avail credit outstanding in respect of Advance

Authorisations issued to the Petitioner prior to 1st July, 2017.

Hon'ble High Court has given following interim directions:

- The Petitioner will be permitted to clear the consignments of imports constituting inputs for the fulfilment of its export orders placed on it prior to 1st July, 2017 without any additional levies, and subject to the quantity and value as specified in the Advance authorisation licences issued to it prior to 1st July, 2017.
- The above clearance would be subject to
  - a) verification by the Customs Department that it is in conformity with the quantity and value as mentioned in the Advance Authorisation licence and
  - b) ensuring that the extent of credit is available vis-a-vis such Advance Authorisation licences issued prior to 1st July 2017.
- The above interim direction is further subject to the Petitioner furnishing an undertaking by way of an affidavit filed in this Court within one week from today to the effect that in the case of the Petitioner ultimately not succeeding in this writ petition, or failing to fulfil its export obligations, it is liable to pay the entire IGST as was leviable, together with whatever interest as the Court may determine at the time of final disposal of the writ petition.
- The Petitioner will furnish to the Customs Department the entire list of its Advance Authorisations that are valid as on 1st July 2017 and a list of the export orders placed on the Petitioner prior to 1st July, 2017.
- It is made clear that the above interim direction will only apply to those imports which are made by the Petitioner for fulfilment of its export orders placed with it prior to 1st July, 2017 and not to any export order thereafter.

3. Chemico Synthetics Ltd., India Glycols Ltd., Shree Renuka Sugars Ltd. vs. Union of India (2017-TIOL-19-HC-DEL-GST)

Facts, Issue involved and Contention of Petitioner

Writ petitions were filed by Petitioners praying to make duty free imports against the Advance Authorisation ('AA') licences issued to it prior to 1st July, 2017 where the period of validity of licences remain unexpired. Petitioners drawn attention of the Court to their order dated 11th September, 2017 in case of *Narendra Plastic Pvt. Ltd. [W.P.(C) 6534/2017 - 2017-TIOL-15-HC-DEL-GST]* where, in similar circumstances, the Court, as an interim measure, permitted to import raw material against Advance Authorisation issued subject to certain conditions.

Held

Hon'ble High Court has given following interim directions:

- Each Petitioner will be permitted to clear the consignments of imports constituting inputs for the fulfilment of export orders placed on it prior to 1st July, 2017 without any additional levies, and subject to the quantity and value as specified in the AA licences issued to it prior to 1st July, 2017.
- The above clearance would be subject to
  - a) verification by the Customs Department that it is in conformity with the quantity and

value as mentioned in the AA licence and

b) ensuring that the extent of credit is available vis-a-vis such AA licenses issued prior to 1st July, 2017.

- The above interim direction is further subject to the Petitioner furnishing an undertaking by way of an affidavit filed in this Court within one week from today to the effect that in the case of the Petitioner ultimately not succeeding in the writ petition, or failing to fulfil its export obligations, it is liable to pay the entire IGST as was leviable, together with whatever interest as the Court may determine at the time of final disposal of the writ petition.
- The Petitioner will furnish to the Customs Department the entire list of its AAs that are valid as on 1st July, 2017 and a list of the export orders placed on the Petitioner prior to 1st July, 2017.
- It is made clear that the above interim direction will only apply to those imports which are made by the Petitioner for fulfilment of its export orders placed with it prior to 1st July, 2017 and not to any export order thereafter.
- A copy of this order will be delivered to the CBEC forthwith for further communication by the CBEC to all the Commissionerates with the clear direction that it should be complied with.

4. Ascics Trading Company vs. Assistant State Tax Officer (2017-TIOL-23-HC-KERALA-GST)

Facts, Issue involved and Contention of Petitioner

The Petitioner's vehicle and goods were seized by the revenue authorities for not carrying prescribed documents. Issue in present case pertains to power of the State Government to detain goods for not carrying prescribed documents under the IGST Act.

Held

Considering provisions of Section 4 and Section 20 of the IGST Act and Section 6 of the CGST Act read with Rule 138 of the CGST Rules as amended by Notification No. 27/2017-Central Tax, the Central Government had power to prescribe necessary documents to be carried while transportation of goods during inter-state trade. However, till date the Central Government had not notified list of such documents.

Moreover the State Government was not vested with power to legislate upon inter-state movement of goods in course of trade.

Hence detention of goods for not carrying the requisite documents was unsustainable in law.

5. Metro Institutes of Medical Sciences Pvt. Ltd. vs. State of Uttar Pradesh (2017-TIOL-26-HC-ALL-GST)

Facts, Issue involved and Contention of Petitioner

Petitioner was unable to complete process of migration under the GST Act and CGST Rules since they were without a provisional ID and a Password corresponding to correct PAN of Petitioner Company.

Petitioner contended that in absence of migration, petitioner cannot file returns or pay taxes and discharge its GST liability from July 2017 onwards or for that matter

also cannot generate the E-way bill which are required for importing goods from outside State of U.P. into the State.

In spite of petitioner approaching appropriate authorities by requesting and writing letters for supplying of password well within due date for filing its return but no heed has been paid by authority concerned.

Petitioner contended that there was no fault on their part but on account of laches at hands of competent authority, Petitioner company may suffer adverse financial consequences which may be arbitrary.

Held

Hon'ble High Court directed respondent authority concerned to immediately issue a password to petitioner company for completing migration process on GST Portal for uploading its returns and to deposit due tax. It was further directed that respondent authority will allow petitioner to complete migration to GST upon receipt of such password as such issued to the petitioner company, in accordance with law.

6. J. K. Mittal & Company vs. Union of India & Others (2017-TIOL-02-HC-DEL-GST)

Facts, Issue involved and Contention of Petitioner

A writ petition was filed by a lawyer firm challenging that Notification No. 13/2017-Central Tax (Rate) dated 28th June, 2017 prescribing reverse charge on legal services is contrary to recommendations of the GST Council at its 14th meeting held on 19th May, 2017 and 16th meeting held on 11th June, 2017.

Petitioner also challenged constitutional validity of Section 9(4) of CGST Act, Section 5(4) of Integrated Goods and Services Tax Act, 2017 (IGST Act) and Section 9(4) of DGST Act. It was pointed out that this provision was not to be found in the model laws prepared by the GST Council. It seeks to collect GST on 'reverse charge' basis from a person registered under the CGST Act, IGST Act or DGST Act in respect of goods supplied and services received by such person from a person who has not been so registered. This provision lacks a proper corresponding machinery provision to facilitate its implementation, and is therefore *ultra vires* the statute. This provision is incapable of being complied with and is bound to cause undue hardship to the persons registered under GST Law.

Held

There is no clarity on whether all legal services (not restricted to representational services) provided by legal practitioners and firms would be governed by reverse charge mechanism. If in fact all legal services are to be governed by the reverse charge mechanism then there would be no purpose in requiring legal practitioners and law firms to compulsorily get registered under the CGST, IGST and/or DGST Acts.

Those seeking voluntary registration would anyway avail of the facility under Section 25(3) of the CGST Act (and the corresponding provision of the other two statutes). There is therefore *prima facie* merit in the contention that legal practitioners are under a genuine doubt whether they require to get themselves registered under the statutes. In the circumstances, the Court directs that no coercive action be taken against any lawyer or law firms for non-compliance with any legal requirement under the CGST Act, the IGST Act or the DGST Act till a clarification is issued by the Central Government and the GNCTD and till further orders in that regard by this Court.

It is clarified that any lawyer or law firm that has been registered under the CGST Act,

or the IGST Act or the DGST Act from 1st July, 2017 onwards will not be denied the benefit of such clarification as and when it is issued.

It is further clarified that if an appropriate clarification is not able to be issued by the Respondents by next date, the Court will proceed to consider passing appropriate interim directions.

7. M/s. M J S Enterprises & 10 Others vs. State of Karnataka & Others [2017-TIOL-17-HC-KAR-GST]

Facts, Issue involved and Contention of Petitioner

Petitioner prayed that scrap buses which cannot be plied on road as normal buses and being certified by concerned RTO Authorities as scrap not fit to be plied on road should not attract 28% rate of GST under the new GST regime. This Court may direct the Respondents – KSRTC to collect the GST Tax only at the rate of 18% under Schedule-III Heading No.7204 "Ferrous waste and scrap; re-melting scrap ingots of iron or steel" or under Residuary Entry No.453 of the same Schedule-III, in which, "Goods which are not specified in Schedules I, II, IV, V or VI" of the KGST Act.

Held

Hon'ble High Court held that it would be premature for it to decide such academic questions at this stage, when the very foundation of such a dispute itself is not even available for this Court to decide. Petition was dismissed as premature.

8. Coimbatore Road Contractors Welfare Association vs. State of Tamil Nadu & Others [2017-TIOL-24-HC-MAD-GST]

Facts, Issue involved and Contention of Petitioner

Petitioner is an association of road contractors. Petitioner contended that for the works contract for which the agreements were executed prior to 1-7-2017, GST could not be imposed and 2% VAT (which was applicable prior to 30th June, 2017) alone was applicable.

Held

Hon'ble Court directed the Commissioner of Commercial Taxes to consider the representations given by the petitioner and pass orders on merits and in accordance with law, within a period of 4 weeks from the date of receipt of a copy of this order. Authorised representative of the petitioner may be afforded an opportunity of personal hearing by the Commissioner. The petitioner was directed to communicate the copies of the representations along with a copy of this order to the Commissioner of Commercial Taxes for due and effective compliance of the above directions.

Writ Petition was disposed of with above directions.

> Life is a difficult game. You can win it only by retaining your birthright to be a person.
>
> — *A. P. J. Abdul Kalam*

Janak C. Pandya, *Company Secretary*

CORPORATE LAWS
Company Law Update

Case Law No. 1

[2017] 205-Comp Cas 119 (SC)

[In the Supreme Court of India]

Surendra Trading Co. vs. Juggilal Kamlapat Jute Mills Co. Ltd. and Others

Where Adjudicating Authority has to perform statutory functions like admitting or rejecting an application within the time period prescribed, the time period would have to held to be directory and not mandatory.

Brief facts

The appellant, who is "operational creditor" under the Insolvency and Bankruptcy Code, 2016 ("Code") has supplied the material to the respondent ("operational debtor"). The respondent failed to pay the money. Subsequently the operational debtor became a sick company under the Sick industrial Companies (Special Provisions) Act, ("SICA"). The operational creditor was not paid dues in spite of issue of certificate acknowledging the debt. Subsequently, there has been a change in management of the operational debtor. The operational creditor has also sent a notice to new management about the debt due. While matter was pending before Board for Industrial and Financial Reconstruction ("BIFR") under SICA, SICA, was repealed upon the enactment of Code. Thus, all proceedings before BIFR and Appellate Authority for Industrial and Financial Reconstruction ("AAIFR") under SICA stood abated.

The operational creditor then served another demand notice in the statutory format to operational debtor as prescribed under the Code. Since, operational debtor did not pay, the operational creditor filing application before the National Company Law Tribunal ("NCLT") under section of the Code for initiating the corporate insolvency resolution. The NCLT has raised certain objections within 4 days from the date of filing the application and listed matter for hearing within 6 days of application.

On hearing day, the adjudicating authority granted 12 days to operational creditor to remove the defects and ask for status before BIFR. Subsequently, the defects were removed and operational creditor also provided status updated on BIFR application.

This time, the objections were raised by the operational debtor on maintainability of the application and subsequently filed the written objection. The grounds of objections are time barred debt; the defective demand notice; civil suit filed against the appellant etc.

Meanwhile, the Labour union also filed an application seeking intervention on various issues related to labour and non-payment of due of workers. Due to this, the adjudicating

authority had passed an order asking the respondent to maintain status quo in respect of its immovable properties.

The respondent challenged the above order before the National Company Law Appellate Tribunal ("NCLAT") raising several questions of law and directing the adjudicating authority as not to admit the application filed by the operational creditor. The NCLAT has allowed the petition and held that the application and the petition filed under section 9 by the operational creditor was incomplete, defected and was fit to be rejected.

Aggrieved by the above, the operational creditor has filed this application.

The application is against the order passed by the NCLAT under the Code. In the said order, NCLAT held as follows.

a. The time of 7 (seven) days prescribed in proviso to sub-section (5) of section 9 of the Code is mandatory in nature.

b. Within above time limit, if objection raised for defect in application made by the "operational creditor" for initiating the insolvency resolution against "corporate debtor" are not removed, then such application filed under section 9 of the Code is liable to be rejected.

The question before the Hon. Supreme Court is as follows.

"Whether the time limit prescribed under the Code for admitting or rejecting a petition for initiation of insolvency resolution process is mandatory?

The submission made by the appellant is as follows:

1. The defects as mentioned is not in the Code, but in terms of the Companies Act, 2013 ("Act").

2. The reference was made to the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 ("Rules").

3. There is a difference between "defective" application and "incomplete" application. Thus, section 9(5) of the Code did not apply in the present case.

4. The operational debtor has been violating the BIFR interim order too.

Judgment

The Hon'ble Supreme Court has allowed the application. It has set aside the part of the impugned of NCLAT which holds that proviso to sub-section (5) of section 7 or proviso to sub-section (5) of section 9 or proviso to sub-section (4) of section 10 to remove defects within seven days as mandatory.

The Hon'ble Court has pronounce the above judgment based on the following analysis and observation:

1. The provisions of Code suggests, that there are three stages (1) First stage is to file an application and its scrutiny by the registry of the adjudicating authority. If it is complete, then date for preliminary hearing may be fixed. If there is any defects, the applicant would be notified and for its removal, seven days is given. (2) Second stage is upon listing of matter, adjudicating authority has to either admit it or reject it. The time given is fourteen days. If the matter is admitted, then only third stage come. (3) Upon admission, insolvency resolution process commences. This process is to be completed within 180 days, which is extendable, up to 90 days.

2. Thus, first stage has no bearing on the insolvency process and that only upon findings, application is completed in all respects that in second stage, authority has to apply its mind and to take a decision, for which fourteen days' time has been given, which is directory, however

there is no reason to make first stage as "mandatory".

3. Till the objections raised are removed, the application is not to be treated as validly filed and thus only when application is complete in every respect it is required to be entrained. Thus, making a period of seven days contained in the proviso as mandatory is not correct.

4. It has referred its own judgment in *P.T. Rajan vs. T. P. M. Sahir [2003] 8 SCC 498*, observing that where the Adjudicating Authority has to perform statutory functions like admitting or rejecting an application within a time period prescribed, the time period would have to held to be directory and not mandatory. The judgments of similar nature in *"Shiveshwar Prasad Sinha vs. District Magistrate of Monghyr, AIR 1966 Patna 144, Momita Chowdhury vs. State of west Bengal [1999] 2 Cal. LJ 2Q* and *Garbari Union Co-operative Agricultural Credit Society Ltd. vs. Swapna Kumar Jana [1997] 1 CHN 189.*

5. A provision in a statute which is procedural in nature although employees the word "shall" may not be held to be mandatory, if thereby no prejudice is caused.

[Contd. from page 123]

Order No. 9/2017 and 10/2017 dt. 15-11-2017
Due date for FORM GST TRAN 1 & its revision is extended till 27th December, 2017.

PRESS RELEASES

The following changes are recommended by GST Council -

Composition Scheme dt. 10-11-2017
Uniform rate of tax @ 1% is proposed for both manufacturers and dealers. Supply of services up to ₹ 5 lakhs shall deemed to be exempt. Annual turnover eligibility under the law to be increased to ₹ 2 crore and thereafter eligibility to opt for composition scheme to be increased to ₹ 1.5 crore per annum.

However, these proposals shall be given effect only after the necessary statutory amendments.

Accepting of UIN of Foreign Diplomatic Missions dt. 13-11-2017:
Clarified that supplies made to Foreign Diplomatic Missions / UN Organisations is like any other B2C sales and will not have any additional effect on the supplier's tax liability. It is advised that under no circumstance any supplier should decline to record the UIN (Unique Identification Number) of the diplomat / official on the tax invoice so that such Organizations can claim refund based on UIN.

Appeal to industry leaders to pass the benefit of GST rate reduction to the consumers dt. 20-11-2017
In view of reduction of GST rates on many items, the suppliers have to pass on the benefit by way of commensurate reduction in prices. Also, the FMCG companies are advised to immediately revise the MRP on all the products in which reduction of GST rate is done. Such companies are also requested to give wide publicity of the revised MRP of products.

CA Bhakti Shah

CORPORATE LAWS – RECENT DEVELOPMENTS

Registered Valuer – New Rules of the game!!

Off late both valuations and valuers have been into the limelight due to greater emphasis on the need for independent, bias-free and reliable valuations. Valuation is essential to understand the worth of a business, obtain bank financing or alternative funding, evaluate offers to negotiate strategic sale of a business or plan an exit strategy. With increasing interests demonstrated by domestic and foreign investors in listed as well as unlisted Indian companies and various M&A deals, valuations have gained importance both from commercial and regulatory perspective in recent times. Various Indian regulations such as Companies Act, Income-tax Act, FEMA, SEBI, Insolvency and Bankruptcy Code, Indian Accounting Standards, etc. require independent valuations to be carried out.

Up till now there were no regulations specifically governing valuers and valuations. Valuations however, have been challenged many times in the courts and by regulatory authorities; and the valuers have been called upon to explain the valuations and rationale for various parameters being used in valuations. With an intent to make this process more formal, the Ministry of Corporate Affairs ('MCA') notified section 247 of the Companies Act, 2013 ('Co Act, 2013') along with the Companies (Registered Valuers and Valuation) Rules, 2017 with effect from 18th October, 2017.

As per section 247(1) of the Co Act, 2013, a valuation is required to be carried out by a Registered Valuer ('RV') to be appointed by the Board of Directors or Audit Committee, if any, of the company. Further, section 247 also contains penal provisions in case the valuer contravenes these provisions with an intent to defraud the company or its members. Therefore, needless to say, the valuers should carry out the valuation more diligently and ensure that the valuation reports disclose a true and fair view on valuation of the assets.

Following sections under the Co Act, 2013, requires valuation to be carried out by a Registered Valuer.

Section	Valuation Requirement
54(1)(d)	Issue of Sweat Equity Shares by an Unlisted Company to its directors / employees, wherein the price of such sweat equity shares and the value of intellectual property rights / knowhow / value additions (for which such sweat equity shares are to be issued) needs to be determined by the RV.

Section	Valuation Requirement
62(1)(c)	Issue of shares / convertible securities on preferential basis by an Unlisted Company for cash or for consideration other than cash, wherein the price for issue of such shares / convertible securities cannot be less that the price determined by the RV. In case of issue of shares / convertible securities is for consideration other than cash, valuation of such non-cash consideration needs to be determined by the RV.
67(3)(b)	Provision of money by company for purchase / subscription of its own or its holding company's shares by the trustees for the benefit of employees, wherein the price at which such shares can be purchased / subscribed needs to be determined by the RV.
192(2)	Director of a company or its holding, subsidiary or associate company or any person connected with him acquires or wants to acquire assets from the company for consideration other than cash, or vice versa, wherein the assets to be acquired needs to be valued by the RV.
230, 232 & 233	In case of: – any scheme for the reconstruction of the company or companies involving merger /amalgamation or demerger; or – any scheme of corporate debt restructuring, a valuation in respect of shares, property or assets (tangible and intangible, movable and immovable) of the company or a share exchange ratio, as the case may be, by a RV is required.
234	Section 234 read with Rule 25A of Companies (Compromises, Arrangements and Amalgamations) Rules, 2016 provides for cross-border merger of an Indian Company into Foreign Company or vice versa. RBI has also notified draft rules in this regard. As per the draft Foreign Exchange Management (Cross Border Merger) Regulations, 2017, valuation of both the companies needs to be done as per internationally accepted valuation methodologies on an arm's length basis, duly certified by a chartered accountant / public accountant / merchant banker authorised to do so in either jurisdiction. Rule 25A specifies that in case of outbound mergers, valuation needs to be conducted by members of a recognised professional body in the jurisdiction of the foreign company. However, no such specific mention has been made in respect of inbound mergers. In my view, since the inbound merger would be governed by the provisions of sections 230 to 232, the RV would be eligible to do the valuation.
236	Any person or group of persons (including acquirer) holding or on becoming holder of 90% stake in a company, can offer the balance minority shareholders to purchase their shares. Alternatively, even the minority shareholders can offer to the majority shareholder to sell their shares. The price at which such shares of minority shareholders can be purchased needs to be determined by the RV.
281	In case of winding up of a company, the Company Liquidator needs to indicate in his report, the value of the assets of the company as determined by the RV.

The Companies (Registered Valuers and Valuation) Rules, 2017 ('Rules') lays down an entire gamut of provisions dealing with various aspects *inter alia*; eligibility and registration of registered valuers, the authority that would regulate these valuers, code of conduct, etc. Broadly, it lays down guidance in respect of the following:

– Role and functions of Registering Authority;

– Role and functions of Registered Valuer Organisation ('RVO');

– Process of becoming a Registered Valuer;

– Conduct of Valuation

– Model Code of Conduct for Registered Valuers;

– Governance Structure and Model Bye-laws to be adopted by RVO;

– Forms for application for registration by RV and RVO.

Valuation is currently required to be done by the Registered Valuers under the Companies Act, 2013, Insolvency and Bankruptcy Code, 2016 and SEBI REIT & InvIT Regulations, 2016. Under other regulations viz. Income Tax, FEMA, SEBI Regulations (other than REIT and InvIT) etc., presently valuations are not required to be performed in accordance with these Rules. However, it may not be long before these regulations would also be amended to provide for valuations to be conducted by a Registered Valuer in accordance with these Rules.

This article discusses in brief the provisions laid down in these Rules.

I. Governance Structure

The Central Government has appointed the Insolvency and Bankruptcy Board of India ('IBBI') as the authority to regulate the compliance with these Rules and perform various functions as required under the Rules. Every Registered Valuer is required to be registered with the IBBI, which shall grant certificate of registration to the former. Further, the Registered Valuer is also required to be a member of a Registered Valuer Organisation (RVO), which in turn needs to register with IBBI.

II. Registered Valuers Organisations ('RVO')

Eligibility

Following organizations are eligible to be registered with IBBI as RVO for valuation of specific asset class(es)[1]:

(i) Organisation registered under section 25 of Co Act, 1956 or under section 8 of Co Act, 2013 with the sole object of dealing with matters relating to regulation of valuers and its bye-laws are in accordance with the requirements specified in the Rules;

(ii) Professional institute established by an Act of Parliament enacted for regulating a profession;

(iii) Organisation registered as a society under the Societies Registration Act, 1860 or set up as a trust governed by the Indian Trust Act, 1882, if it converts itself into a company under section 8 of Co Act, 2013 and its bye-laws are in accordance with the requirements specified in the Rules.

1 "asset class" means a distinct group of assets, such as land and building, machinery and equipment, displaying similar characteristics, that can be classified and requires separate set of valuers for valuation.

Additional criteria

Further, the afore-mentioned organisations also need to comply with the following requirements:

a) conducts educational courses in valuation for its valuer members in accordance with the syllabus determined by IBBI;

b) grants membership / certificate of practice (CoP) to individuals eligible to be RV, for the asset class for which the organisation is recognised as RVO;

c) conducts training for individual members before CoP is issued to them;

d) lays down and enforces a Code of Conduct for its valuer members in accordance with the Rules;

e) provides continuing education to its members;

f) monitors and reviews the functioning and quality of service of its valuer members; and

g) has a mechanism to address grievances and conduct disciplinary proceedings against its valuer members.

Duties:

The duties of RVO includes *inter alia:*

– ensuring compliance with Co Act, 2013 and rules / guidelines issued thereunder governing the conduct of RVO and RV;

– employing fair, reasonable, just, and non-discriminatory practices for the enrolment and regulation of its members;

– develop the profession of RV;

– promote continuous professional development of its members;

– ensure high standards of professional and ethical conduct are maintained by its members;

– maintain register of its valuer members;

- provide information about its members to IBBI as required under the Rules.

III. Registered Valuers ('RV')

Who can be a registered valuer?

An individual, partnership firm, limited liability partnership ('LLP') or a company can be a Registered Valuer, if they comply with the requirements as specified in the Rules.

1. Individuals

Eligibility

An individual is required to meet the following criteria before making an application for registration with IBBI:

a. is a valuer member of RVO;

b. is recommended by RVO for registration as a valuer;

c. possess the requisite educational qualifications and work experience (refer Note 1 below) in the specified discipline[2];

d. pass the valuation examination within 3 years preceding the date of making application for registration (refer Note 2 below);

e. is not a minor;

f. has not been declared to be of unsound mind;

g. is not an undischarged bankrupt or has not applied to be adjudicated as bankrupt;

h. is resident in India;

i. is not convicted by any competent court for an offence punishable with imprisonment for a term > 6 months or for an offence involving moral turpitude, and a period of 5

2 "specified discipline" means specific discipline which is relevant for valuation of an asset class for which the registration as a valuer or recognition as a registered valuers organisation is sought under these rules.

years has not elapsed from date of expiry of sentence;

j. is not convicted of any offence, whereby he is sentenced to imprisonment for 7 years or more;

k. has not been levied a penalty u/s. 271J of Income-tax Act, 1961 and time limit for filing appeal before CIT(A) or ITAT has expired or such penalty has been confirmed by ITAT and 5 years have not elapsed after levy of penalty; and

l. is a fit and proper person.

Note 1: Requisite Qualifications and Experience

An individual is required to have the following educational qualifications and work experience in the specified discipline:

Sr. No.	Educational Qualification	Work Experience
1.	Post-graduate degree / diploma[3]	Minimum 3 years thereafter
	OR	
2.	Bachelor's degree or equivalent[3]	Minimum 5 years thereafter
	OR	
3.	Membership of a professional institute established by an Act of Parliament enacted for the purpose of regulation of a profession	Minimum 3 years after such membership and having qualification mentioned in point (1) or (2) above

An indicative list of requisite qualification and experience has been specifically laid down in the Rules for three asset classes viz. a) Land and Building, b) Plant and Machinery; and c) Securities or Financial Assets. Requisite qualifications and experience for other asset classes such as Business, Intangible assets, Jewellery, bullion, archaeological collections, drawings, paintings, sculptures have not yet been specified.

Note 2: Valuation Examination

Every individual who possesses the requisite qualification and experience as mentioned above is required to appear for the Valuation Examination for the asset class for which registration is desired. Such valuation examination will be conducted by IBBI. In addition, an individual should also complete the educational course of RVO in order to become eligible to appear for the valuation examination.

2. Others viz. partnership firm, LLP or a company

Eligibility

A firm / company shall be eligible to be registered as a RV, if it satisfies all the following conditions:

a. It has been set up only for the purpose of rendering professional or financial services, including valuation services;

b. It is not undergoing an insolvency resolution and is not an undischarged bankrupt;

c. 3 or all partners / directors, whichever is lower, are RV;

d. At least 1 partner / director is a RV for the asset class for which firm / company seeks to be RV;

e. In the case of a company, it is a subsidiary, JV or associate of another company or body corporate; and

3 Degree / diploma should be from a University or Institute established, recognised or incorporated by law in India.

f. All partners / directors comply with the criteria specified for individuals in para 1(c) to (l) above.

It appears that clause (e) above would mean that a company formed by individual shareholders would not qualify to be registered as an RV. Also, clause (f) requires the firm / company to have all partners / directors to be registered valuers, possess specified educational qualification and work experience in the specified discipline, pass valuation examination, be resident in India, etc. It may be impractical to comply with this condition especially in case of multi-disciplinary firms / companies. Further, as mentioned in clause (c), not all partners are required to be registered valuers and therefore, some clarification from MCA will be required in this regard.

3. Transitional Arrangement

Presently, the RVOs have not yet been formed, the machinery to conduct valuation examination is not in place, education syllabus is not yet formed and all these will take some time before the entire Rules can be made fully effective. Therefore, the Rules provide for transitional arrangement, whereby an existing valuer, who was rendering valuation services under the Co Act, 2013, can continue to render valuation services without obtaining the prescribed certificate of registration under the Rules up to 31st March, 2018.

Till the time section 247 and the Rules were not notified, the valuation required under the Co Act 2013 were required to be carried out by an independent merchant banker who is registered with the SEBI or an independent chartered accountant in practice having a minimum experience of ten years. By virtue of this transitional arrangement provisions, valuation under the Rules can be carried out by such merchant bankers and / or chartered accountants till 31 Mar 2018 without obtaining certificate of registration. Considering that RVOs are yet to be formed, it seems that this timeline for obtaining certificate of registration may be extended.

IV. Conduct of Valuation

Valuation Standards

While conducting valuation, a valuer will have to comply with the valuation standards to be notified by the Central Government. Until such valuation standards are notified by Central Government, a valuer needs to carry out valuation as per:

a. internationally accepted valuation standards; or

b. valuation standards adopted by any RVO.

Under FEMA, presently valuation is required to be carried out using internationally accepted valuation methodologies as against internationally accepted valuation standards as specified above. There are no specific valuation standards which can be said to be internationally accepted. However, there are valuation standards which are specific to certain jurisdictions. Applying these standards would involve not just use of valuation methodologies, but also specific contents for reports, disclosures, empirical studies, etc. some of which may not be practical to apply in the Indian context. Further, RVOs are yet not formed and therefore one cannot carry out valuation as per valuation standards adopted by RVO. Again, clarification from MCA in this regard would be required as complying with this provision would be practically difficult. May be the Rules could have permitted use of internationally accepted valuation methodologies pending valuation standards being notified by the Central Government.

Contents of Report

The valuer is required to mention the following in his report:

o background information of the asset being valued;

- purpose of valuation and appointing authority;
- identity of the valuer and any other experts involved in the valuation;
- disclosure of valuer interest or conflict, if any;
- date of appointment, valuation date and date of report;
- inspections and/or investigations undertaken;
- nature and sources of the information used or relied upon;
- procedures adopted in carrying out the valuation and valuation standards followed;
- restrictions on use of the report, if any;
- major factors that were taken into account during the valuation;
- conclusion; and
- caveats, limitations and disclaimers to the extent they explain or elucidate the limitations faced by valuer, which shall not be for the purpose of limiting his responsibility for the valuation report.

During the course of valuation, if a valuer obtains inputs for his valuation or relies on the report of another RV (e.g. for a different asset class), then he needs to disclose the details of such inputs and particulars, etc. of other RV in his report and in such case the liabilities against the resultant valuation, irrespective of the nature of inputs or valuation by the other RV, shall remain of the first mentioned valuer.

Model Code of Conduct

In addition to above, the Registered Valuers need to comply with Model Code of Conduct prescribed by the Rules. The Model Code of Conduct lays down guidance in respect of the following aspects:

- Integrity and Fairness
- Professional competence and due care
- Independence and disclosure of interest
- Confidentiality
- Information Management
- Gifts and hospitality
- Remuneration and costs
- Occupation, employability and restrictions.

V. Key Issues

Some of the key issues, arising from introduction of section 247 and the Rules, relating to independence of valuers, submission of information about assignments, limitations of liability and eligibility requirements are discussed below.

- **Independence**

  A RV cannot undertake valuation of any assets – in which he has a direct or indirect interest or becomes so interested at any time during or after the valuation of assets; or if he/it or any of his/its relatives or associates is not independent in terms of association to the company. Clarification is required as to what would constitute 'direct or indirect interest' and 'not independent in terms of association to the company'. Further, getting details from the relatives of their association with the company and an open-ended restriction whereby the valuer cannot acquire direct or indirect interest even after the completion of the valuation assignment seems to be impractical.

- **Eligibility criteria for firms / company to be RV**

  As mentioned earlier, clarity is required on whether all partners / directors are required to comply with the conditions prescribed for individual RVs and whether a

[Contd. on page 154]

CA Mayur Nayak, CA Natwar Thakrar &
CA Pankaj Bhuta

OTHER LAWS
FEMA Update and Analysis

In this article, we have discussed certain important amendments in provisions relating to Inbound Investments by RBI through reissue of Notification No. 20 i.e. FEMA 20R – Foreign Exchange Management (Transfer or Issue of Security by a Person Resident Outside India) Regulations, 2017

RBI *vide* Notification No. FEMA 20(R)/2017-RB, dated 7th November, 2017 issued **Foreign Exchange Management (Transfer or Issue of Security by a Person Resident Outside India) Regulations, 2017.**

The new Notification is issued in supersession of two original Notifications, namely, Notification No. FEMA 20/2000-RB Foreign Exchange Management (Transfer or Issue of Security by a Person Resident Outside India) Regulations, 2000 and Notification No. FEMA 24/2000-RB Foreign Exchange Management (Investment in Firm or Proprietary concern in India) Regulations, 2000.

The notification is effective from 8th November, 2017 (Date of publication in the Official gazette) except proviso (ii) to sub-regulation 1 of Regulation 10 and proviso and (ii) to sub-regulation 2 of Regulation 10 of these Regulations relating to transfer of shares from PROI to PROI which shall come into effect from a date to be notified.

This article discusses only key amendments made in the Notification through Regulations.

1. Analysis of amendments in / insertion of certain definitions under Regulation 2:

Key Definitions inserted/ amended	Analysis
New definition of **"Capital Instruments"** inserted in place of earlier definition of **"Capital"**	While the base definition remains intact, the definition of Capital Instruments expressly provides that warrants can be issued to a person resident outside India in accordance with the Regulations issued by SEBI, i.e., ICDR Regulations. Therefore, it is clear that unlisted companies/debt listed companies cannot issue warrants to person resident outside India. Definition of 'Warrants' provided in Regulations, 2000 has been deleted in line with provisions of the Companies Act, 2013.

Key Definitions inserted/ amended	Analysis
The definition of **'Investment'** modified	The definition of Investment includes 1) acquisition, holding or transfer of depository receipts issued outside India, the underlying of which is a security issued by a person resident in India 2) In respect of an LLP, investment shall mean capital contribution or acquisition/ transfer of profit shares.
Definition of **'Foreign Direct Investment' (FDI)** inserted under Regulation 2 – clause (xvii)	The new definition segregates investment in capital instruments in unlisted Indian company and listed Indian company. **'Listed Indian Company'** is defined under clause (xxxi) to mean an Indian company which has **any of its capital instruments** listed on a recognised stock exchange in India and the expression 'Unlisted Indian Company' shall be construed accordingly; Any investment on repatriation basis by a person resident outside India in capital instruments of an unlisted Indian company will be regarded as FDI irrespective of any limit. In case of listed Indian Company, investment of 10 per cent or more of the post issue paid-up equity capital on a fully diluted basis shall be regarded as FDI. Investments less than 10 per cent will be regarded as **Foreign Portfolio Investment.**
Definition of **'Foreign Investment'** inserted under Regulation 2 – clause (xviii)	Foreign investment means any investment made by a person resident outside India on a repatriable basis in capital instruments of an Indian company or to the capital of an LLP. Investments made on non-repatriable basis will be regarded as domestic investment. NRIs/OCIs are particularly eligible to make investments on a non-repatriable basis. These investments were treated at par with investments made by residents. Explanation to the definition provides that when a declaration is made by persons as per the provisions of the Companies Act, 2013 about a beneficial interest being held by a person resident outside India, even though the investment may be made by a resident Indian citizen, the same shall be counted as foreign investment. A note inserted to the definition provides that a person resident outside India may hold foreign investment either as Foreign Direct Investment or as Foreign Portfolio Investment in any particular Indian company.
Definition of (xix) **'Foreign Portfolio Investment'** inserted under Regulation – 2 clause (xix)	Foreign Portfolio Investment is possible in listed Indian company only. Any investment made by a person resident outside India in capital instruments where such investment is less than 10 per cent of the post issue paid-up share capital on a fully diluted basis of a

Key Definitions inserted/ amended	Analysis
	listed Indian company or less than 10 per cent of the paid up value of each series of capital instruments of a listed Indian company will not be regarded as FDI. The 10 per cent limit for foreign portfolio investors shall be applicable to each foreign portfolio investor or an investor group as referred to in Securities and Exchange Board of India (Foreign Portfolio Investors) Regulations, 2014. SEBI (FPI) Regulations, 2014 defines 'Foreign Portfolio Investor'. Regulation 21(1)(a) of the FPI Regulations provide that FPIs can invest in securities both in primary and secondary markets in shares, debentures and warrants of companies, listed or to be listed on a recognized stock exchange in India. Further, Regulation 21(7) of the FPI Regulations provides that purchase of equity shares of each company by a single foreign portfolio investor or an investor group shall be below ten per cent of the total issued capital of the company. The maximum permissible investment is provided under Schedule 2 of Regulations, 2017.
Definition of **'Group Company'** inserted under Regulation 2 – clause (xxii)	A group company is defined to mean a company in which two or more enterprises, directly or indirectly, are in a position to, (a) exercise 26 per cent, or more of the voting rights; or (b) appoint more than 50 per cent, of members of board of directors of the enterprise.
Definition of (xxxvii) **'Resident Indian citizen'** inserted under Regulation 2 – clause (xxxvi)	The definition covers an individual who is a person resident in India and is citizen of India by virtue of the Constitution of India or the Citizenship Act, 1955; As per Consolidated FDI Policy, 2017 'Resident Indian Citizen' shall be interpreted in line with the definition of 'person resident in India' as per FEMA, 1999, read in conjunction with the Indian Citizenship.
'Non-Resident Indian (NRI)' – Regulation 2 – clause (xxxv)	The definition now defines NRI as an individual resident outside India who is a citizen of India and excludes an 'Overseas Citizen of India' card holder within the meaning of section 7(A) of the Citizenship Act, 1955.
'Overseas Citizen of India (OCI)' – Regulation 2 – clause (xxxvi)	The definition of NRI now excludes OCI. Registration as an Overseas Citizen of India Cardholder under section 7(A) of the Citizenship Act, 1955 is mandatory to qualify as OCI under the Notification. Wherever required, the regulations make specific reference to OCI.

2. Alignment of certain definitions with Companies Act, 2013 / Consolidated FDI Policy or deletion of certain definitions

- Definition of "Employee Stock Option" and "Sweat Equity Shares" are aligned with the respective definitions provided under Companies Act, 2013
- Definition of "Startup" and "Startup company" are linked to Notification number G.S.R. 180(E) dated February 17, 2016 issued by the Department of Industrial Policy and Promotion, Ministry of Commerce and Industry, Government of India
- Definition of "Foreign Institutional Investor" is deleted and the definition of "Foreign Portfolio Investor" is inserted.
- Definition of "Warrants' deleted as new regulations permit issuance of warrants in accordance with the SEBI (ICDR) Regulations.

3. Downstream Investments

The modified provisions have certain new features as follows:

- The downstream investment should have the approval of the Board of Directors as also a Shareholders' Agreement, if any
- With effect from 31st day of July, 2012, downstream investment/s made under Corporate Debt Restructuring (CDR), or other loan restructuring mechanism, or in trading book, or for acquisition of shares due to defaults in loans, by a banking company, as defined in clause (c) of section 5 of the Banking Regulation Act, 1949, incorporated in India, which is not owned and not controlled by resident Indian citizens or owned or controlled by persons resident outside India, shall not count towards indirect foreign investment. However, their strategic downstream investment shall be counted towards indirect foreign investment for the company in which such investment is being made.

4. Issue of shares under merger, demerger or amalgamation

The Regulation has aligned the concept of issue of shares with the requirements under the Companies Act, 2013. Accordingly, general permission is available for issuance of shares in a scheme of merger, demerger or amalgamation pursuant to the orders of the National Company Law Tribunal (NCLT) or other competent authority subject to the entry routes, sectoral caps or investment limits.

5. Transfer of shares – Regulation 10

Salient features of the amendments are summarised as follows:

- Sub-Regulation (1) provides that in case of transfer of capital instruments by a person resident outside India to another person resident outside India by way of sale or gift, where the person resident outside India is an FPI and the acquisition of capital instruments made under Schedule 2 of Regulations, 2017 has resulted in a breach of the applicable aggregate FPI limits or sectoral limits, the FPI shall sell such capital instruments to a person resident in India eligible to hold such instruments within the time stipulated by Reserve Bank in consultation with the Central Government. The breach of the said aggregate or sectoral limit on account of such acquisition for the period between the acquisition and sale, provided the sale is within the prescribed time limit, shall not be reckoned as a contravention under these Regulations. The guidelines issued by Securities and Exchange Board of India in this regard shall be applicable. **(This change will be effective from a date which is yet to be notified).**

– Sub-regulation (2) provides that an NRI or an OCI holding capital instruments of an Indian company or units on repatriation basis may transfer the same by way of sale or gift to any person resident outside India. Earlier regulation required RBI approval for transfer of shares by NRI / PIO to a PIO.

– Clause (ii) of Sub-Regulation (2) provides that where the acquisition of capital instruments by an NRI or an OCI under the provisions of Schedule 3 of these regulations has resulted in a breach of the applicable aggregate NRI/OCI limit or sectoral limits, the NRI or the OCI shall sell such capital instruments to a person resident in India eligible to hold such instruments within the time stipulated by Reserve Bank in consultation with the Central Government. The breach of the said aggregate or sectoral limit on account of such acquisition for the period between the acquisition and sale, provided the sale is within the prescribed time, shall not be reckoned as a contravention under these Regulations. **(This change will be effective from a date which is yet to be notified).**

– Sub-regulation (4) allows a person resident in India holding capital instruments of an Indian company or units, or an NRI or an OCI or an eligible investor under Schedule 4 of these Regulations, holding capital instruments of an Indian company or units on a non-repatriation basis, to transfer the same to a person resident outside India by way of sale, subject to the adherence to entry routes, sectoral caps/ investment limits, pricing guidelines and other attendant conditions as applicable for investment by a person resident outside India and documentation and reporting requirements for such transfers as may be specified by Reserve Bank from time to time. The entry routes, sectoral caps/ investment limits, pricing guidelines and other attendant conditions shall not apply in case the transfer is to an NRI or an OCI or an eligible investor under Schedule 4 of these Regulations acquiring such investment on non-repatriation basis.

– Sub-Regulation (5) provides that a person resident in India holding capital instruments or units of an Indian company or an NRI or an OCI eligible investor under Schedule 4 of these Regulations holding capital instruments or units of an Indian company on a non-repatriation basis may transfer the same to a person resident outside India by way of gift with the prior approval of the Reserve Bank, in the manner prescribed, and subject to the following conditions:

(a) The donee is eligible to hold such a security under relevant schedules of these Regulations;

(b) The gift does not exceed 5 per cent of the paid up capital of the Indian company/ each series of debentures/ each mutual fund scheme;

(c) The applicable sectoral cap in the Indian company is not breached;

(d) The donor and the donee shall be 'relatives' within the meaning in section 2(77) of the Companies Act, 2013;

(e) The value of security to be transferred by the donor together with any security transferred to any person residing outside India as gift during the financial year does not exceed the rupee equivalent of USD 50,000;

(f) Such other conditions as considered necessary in public interest by the Reserve Bank;

– Sub-regulation (6) provides that an NRI or an OCI or an eligible investor under Schedule 4 of these Regulations holding capital instruments of an Indian company or units on a non-repatriation basis, may transfer the same by way of gift to an NRI or an OCI or an eligible investor under Schedule 4 of these Regulations who shall hold it on a non-repatriable basis;

– Sub-regulation (7) provides that a person resident outside India holding capital instruments of an Indian company containing an optionality clause in accordance with these Regulations and exercising the option/ right, may exit without any assured return, subject to the pricing guidelines prescribed in these Regulations and a minimum lock-in period of one year or minimum lock-in period as prescribed in these Regulations, whichever is higher;

– Sub-regulation (9) provides that in case of transfer of capital instruments between a person resident in India and a person resident outside India, an amount not exceeding twenty five per cent of the total consideration

a. can be paid by the buyer on a deferred basis within a period not exceeding eighteen months from the date of the transfer agreement; or

b. can be settled through an escrow arrangement between the buyer and the seller for a period not exceeding eighteen months from the date of the transfer agreement; or

c. can be indemnified by the seller for a period not exceeding eighteen months from the date of the payment of the full consideration, if the total consideration has been paid by the buyer to the seller.

Total consideration finally paid for the shares shall be compliant with the applicable pricing guidelines.

6. Changes in Reporting requirements

– **Reporting in Form Foreign Currency-Gross Provisional Return (FC-GPR):** To be filed not later than thirty days from the date of issue of capital instruments. Issue of 'participating interest/ rights' in oil fields shall be reported in Form FC-GPR.

The earlier period of six months allowed for allotment of capital instruments has been deleted as the Companies Act, 2013 requires allotment of shares within two months from the date of receipt of funds.

7. Late filing fees in case of delay in reporting instead of compounding

The Old Regulations required compounding in the case of late filing of reporting documents. New Regulations provides for payment of late submission fees instead of compounding.

If you want to shine like a sun, first burn like a sun.

— *A. P. J. Abdul Kalam*

CA Khurshed Pastakia

In Focus – Accounting and Auditing

Revised Auditor's Reporting Standards

The auditor's report is the ultimate "finished product" of an auditor's professional work. The auditor is privy to an entity's books of account, information and records, and by performing a detailed professional examination thereof provides reasonable assurance to stakeholders in the entity that the entity's financial statements are true and fair and/or in compliance with related laws and regulations. This assurance is provided by him through the medium of the auditor's report and, therefore, stakeholders in the entity are most concerned with the nature and extent of the contents of the auditor's report.

Over the years, the auditor's report became a 'boiler plate' document that does not reveal the peculiar details of the audited entity's state of affairs to the extent expected by its stakeholders. The stakeholders felt that information provided in the auditor's report did not fully realise their expectations from an independent audit. Large global investors and lenders put significant pressure on the International Federation of Accountants (IFAC) to review the International Standards on Auditing (ISAs) for making the auditor's report more useful. Similar pressure was also simultaneously exerted on the Public Companies Accounting Oversight Board (PCAOB) in the United States. After much discussion over more than five years, both these key bodies revised the related auditor's reporting standards and, following them, so did almost all countries in the world, including India.

The Institute of Charted Accountants of India (ICAI) adopted the revised Standards on Auditing (SAs) and fixed the effective date for their application for years beginning April 2017. This date was later pushed back to years beginning April 2018. In this context the following standards were revised:

SA 260R	Communication with Those Charged with Governance
SA 570R	Going Concern
SA 700R	Forming an Opinion and Reporting on Financial Statements
SA 701 (new)	Communicating Key Matters in the Independent Auditor's Report

SA 705R	Modifications to the Opinion in the Independent Auditor's Report
SA 706R	Emphasis of Matter Paragraphs and Other Matter Paragraphs in the Independent Auditor's Report

Key Changes

- The order of paragraphs in the Auditor's Report has changed so that the most important information, the Auditor's Opinion, comes first;
- For listed companies, the Auditor's Report will include a new section to describe Key Audit Matters (KAMs);
- Enhanced auditor reporting on Going Concern;
- Enhanced auditor reporting on Other Information in Documents Containing Audited Financial Statements
- Enhanced description of the auditor's responsibilities, key features of the audit, and responsibilities of the management and those charged with governance, particularly relating to going concern.

Placement of paragraphs

A comparison of the existing and the new paragraph placements is given below. The purpose of putting the opinion paragraph first was that the auditor's final opinion on the financial statement is the first (and sometimes the only) thing intended users want to see when they read an auditor's report. So rather than have them go searching for it, putting it upfront would help.

Existing order of paragraphs	*Revised order of paragraphs*
Title	Title
Addressee	Addressee
Introductory paragraph	Opinion paragraph[1]
Management's responsibilities paragraph	Basis for opinion paragraph
Auditor's responsibility paragraph	Going concern paragraph
Basis for modified opinion paragraph	Key audit matters paragraph
Opinion paragraph	Other Information
Emphasis of matter/ other matter paragraph	Management's responsibilities paragraph
Other reporting responsibilities paragraph	Auditor's responsibility paragraph[2]
Signature	Emphasis of matter/ other matter paragraph
Date	Other reporting responsibilities paragraph
Place	Signature
	Place
	Date

1 Includes contents of the earlier Introductory Paragraph

2 This could be included (i) within the body of the auditor's report, (ii) in an appendix referred to in the auditor's report, or (iii) on a website of an authority referred to in the auditor's report, if permitted by law, regulation or auditing standards

Basis for Opinion

Currently, a basis paragraph is inserted only in case the auditor's opinion is modified, but the revised auditor's report will contain a 'Basis for Opinion' paragraph even in case of a clean opinion. It will (i) contain an assertion that the audit was conducted in accordance with SAs, (ii) give reference to where the auditor's responsibility paragraph is located, (iii) include a statement on auditor independence and ethics[3], and (iv) state whether the auditor obtained sufficient appropriate audit evidence to provide a basis for his opinion. In case of a modified opinion, the basis for modification precedes the four items mentioned above, and the title is 'Basis for Qualified/ Adverse/ Disclaimer[4] of Opinion'.

Going Concern

An entity's ability to continue as a going concern in the future and if there are likely to be any material uncertainties in that journey is a vital concern for stakeholders. As far as the Going Concern paragraph goes, where auditor believes that the entity's use of the going concern basis of accounting is appropriate but a material uncertainty exists, which is adequately disclosed in the financial statements, he includes a paragraph under the heading, "Material Uncertainty Related to Going Concern" below the "Basis for Opinion" paragraph. This Going Concern paragraph therefore replaces what is currently being given in an Emphasis of Matter paragraph. A specific heading and separation of the going concern matter from other matters of emphasis in the auditor's report is intended to draw greater focus to this important matter.

Key Audit Matters (KAMs)

The requirement to include the KAMs paragraph as part of the auditor's report is by far the most path-breaking change introduced in auditor reporting. So far, the auditor planned and performed the audit in accordance with the SAs, discussed matters with management and those charged with governance, made audit judgments and kept documentation of all of this in his audit work paper files. Matters internal to the entity or to the audit process were not brought out in the auditor's report except those that required communication as either emphasis of matter or other matter, or the basis of a modified audit opinion.

Stakeholders the world over believed that the auditor's report, as it stood, was too "boiler plate", opaque, and did not provide them the information that they were looking for, with the result that they were not sufficiently forewarned of significant matters that could influence their investment, lending or other business decisions. There was therefore a clamour for the auditors to provide greater individuality and transparency in their auditor's reports – particularly for listed entities.

Does this provide new challenges to the auditor? Yes. Apart from the additional requirement of drafting the KAMs paragraph, the auditor must realise that he is making many new assertions in the public domain. These assertions are of two kinds: assertions that might bring out key internal matters about the entity and its business, and assertions about the audit process. In case of the former, the management and those charged with governance could, in some cases, be uneasy with the auditor revealing certain information or the manner of putting it across. In the latter case, the auditor himself will have to ensure that the assertions he makes about how he carried out the audit are duly supported by work performed and documented.

A new standard SA 701, Communicating Key Audit Matters in the Independent Auditor's Report, has been introduced. This is a detailed

3 In case of group audits, where several auditors are involved, the ethical requirements, including independence, would pertain to the principal auditor

4 As the case may be

standard of 82 paragraphs that needs to be studied carefully by every auditor before he starts next year's audits so that he uses that knowledge in planning the audit appropriately. He will also need to sensitise his subordinates as well as managements and those charged with governance on the new requirements in order that they co-operate with him throughout the duration of the audit. Furthermore, since the auditor is required to discuss all KAMs with those charged with governance *before issuing his auditor's report,* he and the management would need to determine beforehand the timing of such communications. For example, the current practice in many firms of issuance of a signed auditor's report almost simultaneously with the Q4 Board Meeting may no longer be appropriate unless a special audit committee meeting is held beforehand, just after fieldwork, to discuss the draft auditor's report, including the KAMs paragraph.

Some of the other implementation concerns are:

- Stakeholders are accustomed to a binary "pass-fail" opinion. With KAMs reporting would they perceive it to be a piece-meal qualification of items mentioned as KAMs?

- Will the KAMs make the auditor's report be perceived as the primary source of "red flags"?

- Would it trigger a negative market response?

- Will stakeholders perceive matters highlighted in KAMs as areas where management and TCWG failed to appropriately discharge their duties?

Neither SA 700 nor SA 701 provide any illustrations of a KAMs paragraph. There is therefore no "standard format" that can be used. In fact, the whole concept of the KAMs paragraph is not to have standardised drafting, as the issues of each entity and each audit are unique. However, mostly KAMs would relate to significant complex matters disclosed in the financial statements such as valuation of goodwill and other long-term assets, valuation of financial instruments, difficult or unique aspects of revenue recognition, or accounting for significant acquisitions.

Some key points about KAMs are as under:

- The purpose of communicating KAMs is to enhance transparency about the audit that was performed; to provide additional information to intended users to assist them in understanding matters that, in the auditor's professional judgment, were of most significance in the audit of the current period; and to assist intended users in understanding the entity and areas of significant management judgment in the audited financial statements.

- Communicating KAMs is additional to and not a substitute for anything that the entity is required to include in the financial statements or that the auditor is otherwise required to include in his auditor's report (e.g. disclosures, modified opinion, going concern), nor is it a separate opinion on individual matters.

- KAMs requirement applies to a full set of general purpose financial statements of listed companies. That is, it is not applicable to quarterly reporting or to unlisted entities.

- The definition of KAMs is: Those matters that, in the auditor's professional judgment, were of most significance in the audit of the financial statements of the current period. Key audit matters are selected from matters communicated with those charged with governance.

- In determining matters of most significance the auditor would consider: (a) areas of significant or higher assessed risk of material misstatement, (b) areas of significant auditor judgments where management has used its judgment, including accounting estimates having high estimation uncertainty, (c) significant events and transactions that occurred in the current period.

- Each KAM would be described under the KAMs paragraph under a separate subheading.

- The opening part of the KAMs paragraph would state what KAMs are and that the auditor does not provide a separate opinion thereon.

- Description of each KAM shall refer to the related disclosure in the financial statements, why the matter was determined as a KAM, and how the matter was addressed in audit.

- The auditor is mandated to describe KAMs in his auditor's report except in two circumstances: (a) where law or regulation precludes such disclosure, and (b) in extremely rare circumstances where the auditor determines that the adverse consequences of communicating a KAM would outweigh the public interest benefits of such communication.

- Matters giving rise to a modified opinion and going concern disclosure are, by their nature, key audit matters but as they are already communicated elsewhere in the auditor's report with due prominence they are not to be again repeated in the KAMs paragraph. However, in the KAMs paragraph, the auditor shall include a reference to where such matters are to be found in the auditor's report.

- If the auditor determines that there are no KAMs to communicate, he shall include a statement, under the heading "Key Audit Matters", that he has not determined any matters during the course of his audit that would be communicable as KAMs. In other words, he has to make a specific assertion about making such a determination.

- The auditor is required to communicate the matters that he has decided to communicate as KAMs to those charged with governance. Likewise, if he determines that there are no such matters, he has to communicate that as well.

SA 701 includes a judgment-based decision-making framework to help the auditor decide which audit issues become KAMs:

Based on a post-implementation survey of 150 listed entities conducted by the UK Financial Reporting Council (FRC) the top five KAMs reported in the UK were:

- Impairment of assets
- Tax
- Goodwill impairment
- Management override of controls, and
- Fraud in revenue recognition

Sample disclosure of a KAM	
Key Audit Matter	**How the matter was addressed in Audit**
Income Tax: Due to the multiple tax jurisdictions within which the Group operates and the ambiguity of tax laws, determining the amounts that should be recognised for tax is subject to judgment and is thus a key audit matter. Management's judgment includes consideration of regulations by various tax authorities with respect to transfer pricing regulations and other tax positions. Where there is uncertainty, management makes provision for tax based on the most probable outcome. Management's disclosures with regards to uncertainties are contained in Note XX, while the income tax disclosures are contained in Note YY.	We involved our tax specialists to evaluate the recognition and measurement of the current and deferred tax assets and liabilities. This included: – Analysing the current and deferred tax calculations for compliance with the relevant tax legislation. – Evaluating management's assessment of the estimated manner in which the timing differences, including the recoverability of the deferred tax assets, would be realised by comparing this to evidence obtained in respect of other areas of the audit, including cash flow forecasts, business plans, minutes of directors' meetings, and our own knowledge of the business

Other information

While IFAC has revised ISA 720, Auditor's Responsibilities Relating to Other Information and Related Conforming Amendments, ICAI has not yet issued the revised SA 720. When the Proposed SA 720 Revised becomes effective there will be one more paragraph added to the auditor's report under the heading "Other Information".

Other Information is financial or non-financial information (other than financial statements and the auditor's report thereon) included in an entity's Annual Report or Prospectus. Where there are inconsistencies between information given in the audited financial statements and Other Information, the intended users get confused as to which is correct. Duty is therefore cast on the auditor to read the Other Information and respond appropriately when he detects an inconsistency. Under the Proposed SA 720 Revised, response would also include reporting on Other Information in the auditor's report. Such reporting would specify whether the auditor was provided all or some of the Other Information to read as at the date of the auditor' report or that he expects to obtain it afterwards.

Management's (or TCWG's) responsibilities

The revised management's responsibility paragraph also includes:

- Management's responsibility for assessing that the entity continues as a going concern, whether use of the going concern assumption is appropriate in the circumstances, and all other matters relating to going concern.
- An identification of all those who are responsible for oversight of the financial reporting process – e.g. the audit committee.

Auditor's responsibilities

The auditor's responsibility paragraph under the revised Standard has undergone a complete overhaul. The Standard also allows this paragraph to be kept in a separate appendix to the auditor's report or uploaded on the website of an appropriate authority, with a reference of its location given in the body of the auditor's report. While it does not add to an auditor's

responsibilities under the SAs, it is a signed assertion made by the auditor in the public domain that the audit was carried out fulfilling all these responsibilities.

The auditor's responsibilities paragraph includes:

- Objectives of the auditor to obtain reasonable assurance and issue an auditor's report containing the audit opinion;
- What constitutes reasonable assurance;
- When misstatements arising from fraud or error are considered material;
- Statement that the auditor exercises professional judgement and maintains professional skepticism;
- Identification of risks of material misstatement to design appropriate audit procedures;
- Obtaining sufficient appropriate audit evidence;
- The risk of fraud;
- Obtaining an understanding of internal control to design appropriate audit procedures;
- Evaluating appropriateness of accounting policies used;
- Evaluating reasonableness of accounting estimates and related disclosures made by management;
- Concluding on appropriateness of management's use of going concern basis of accounting;
- Concluding whether a material uncertainty exists that may cast significant doubt about the entity's ability to continue as a going concern and, if so, the auditor's responsibility of providing a disclosure or modifying his auditor's opinion;
- Statement that auditor's conclusion about going concern is based on information available up to the date of his report and that future events or conditions may cause the entity to cease to be a going concern;
- When a fair presentation framework is used, evaluating overall presentation, structure and content of financial statements including disclosures, and whether they represent the underlying transactions and events in a manner that achieves fair presentation;
- Where SA 600, Using the Work of Another Auditor, is used (in group audit situations) details of the division of responsibility between auditors for audit of components;
- Statement about auditor's responsibility for communication with those charged with governance on planned scope and timing of audit, significant audit findings, and significant internal control deficiencies;
- Statement that auditor provides those charged with governance with a memorandum of compliance with relevant ethical requirements regarding independence, that includes a disclosure of all relationships and other matters that have a bearing thereon, including safeguards employed;
- Statement that from matters communicated with those charged with governance, the auditor culls out matters that are of most significance and includes them as KAMs in the auditor's report or excludes them in situations mentioned in SA 701.

Emphasis of matter and other matter paragraphs

Where a matter is included in KAMs, it is not also included as an emphasis of matter or other matter.

Documentation

There are no additional documentation requirements specific to the revised reporting standards except those mentioned in SA 701 which are as under:

Audit documentation shall include: (a) matters that required significant auditor attention and the rationale of why the auditor determined that they were or were not KAMs, (b) the rationale of why the auditor determined that there were no KAMs to include in his auditor's report, and (c) the rationale of why the auditor determined that a KAM, that would be otherwise communicated, is not communicated in the auditor's report.

Nevertheless, the tone and tenor of the revised standards and the history of stakeholder dissatisfaction with auditor's reports (and auditors?) in the past advises one that, going forward, the auditor should exercise utmost care to ensure that he has sufficient, appropriate and strong evidence in his work papers (documentation) that he performed the audit in accordance with the SAs with due professional care and competence, including compliance with independence and ethical requirements.

In matters where management has used judgment, the auditor needs to describe how he audited that judgment, and his rationale for agreeing or disagreeing with it. Also in areas where the auditor exercises his own professional judgment, he needs to describe the basis for his judgment, and the rationale of how he reached it. In all complex accounting matters where alternatives are possible, the auditor's documentation should include an evaluation of why the management considers one alternative as the most relevant to the entity's situation as opposed to the others, and why the auditor agrees or disagrees with that choice.

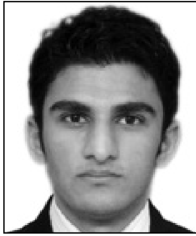
Where professional firms have doubts, they would do well to reexamine their firms' documentation policies, either themselves or more preferably by getting them peer reviewed by professionals who are skilled and experienced in documentation, to determine if they contain significant deficiencies. It must be realised, however, that one can only document what one has done. If the work performed is inadequate or not in full conformity with the requirements of the SAs, that would be a problem to be fixed much before fixing documentation deficiencies.

Next steps

Change is necessary and inevitable. But people are always afraid of the unknown. To avoid panic when the revised standards kick in next year, all those who read and prepare auditor's reports including auditors and their assistants; staff, managements and TCWG of audited entities; and stakeholders like investors, lenders, employees and analysts will need to be educated about these changes.

Anything attempted at the last minute is designed to fail. Audit firms should already begin to study the revised reporting standards and determine how they will impact their audit approach and documentation. Audit partners and managers will require to hone their drafting skills and to be focused and crystal clear on what the requirements entail. They should also start training their managers and holding meetings with managements and TCWG of the entities they audit. Auditors need to be prepared to be challenged on what has not been reported: since it is likely that an intended user may believe that what was not reported, was not audited.

More than the form of the revised auditor's report, the focus should be on inculcating the spirit of transparency and information dissemination that these revised reporting standards envisage. This will require a change in mindset, particularly of company managements. Audit partners will have to repeatedly engage with managements and TCWG in order to achieve this.



Rahul Sarda, *Advocate*

BEST OF THE REST

1. Insolvency & Bankruptcy Code – Notice issued by law firm on behalf of creditor couldn't be treated as a notice under Insolvency and Bankruptcy Code

The Adjudicating Authority entertained the application under section 9 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as "I&B Code") preferred by Respondent-Operational Creditor admitted the application, appointed the Interim Resolution Professional and ordered for moratorium with further directions in terms of 'I&B Code'. The Appellant challenged the order mainly on the ground that Notice under sub-section (1) of Section 8 was not issued by the 'Operational Creditor' but by the 'Law Firm', which is not in accordance with law. Held, since the notice under sub-section (1) of Section 8 was not issued by the Operational Creditor but by the law firm, the same was not in accordance with the provisions of the Code. Furthermore, the notice has been issued by a law firm and there was nothing on the record to suggest that the said law firm had been authorised by the Board of Directors of the 'Operational Creditor'. There was nothing on the record to suggest that any lawyer or law firm held any position with or in relation with the Respondent. Therefore, held that notice under section 8 of the 'I&B Code' at the instance of the Respondent against the appellant was not maintainable.

Smartcity (Kochi) Infrastructure (P) Ltd. vs. Synergy Property Development Services (P) Ltd. [2017] 87 taxmann.com 7 (NCLAT)

2. Condonation of delay – Delay of 265 days – Liberal construction – Aged person – State of shock

Held, the term "sufficient cause" needed liberal construction. When cause of substantial justice was pitted against technicalities of law, cause of substantial justice should get preference. Since the applicant was an aged person stated to be working as a clerk for reconciliation of old accounts, availability of funds, ailment, suffering of shock as such, were natural consequences when age of the applicant was concerned. In this view of the matter, for the stated reasons, held, delay was required to be condoned.

Vinod Chandulal Shah vs. SEBI [2017] 86 taxmann.com 261 (Bom.) (HC)

3. Negotiable Instruments Act, 1881 – Dishonour of cheque for insufficiency etc., of funds in account – Section 138 – Compounding of offence

Offence under Section 138 (cheque bouncing) of the Negotiable Instruments Act, 1881 is primarily a civil wrong. The principle of Section 258 Cr. P.C. will apply and the Court can close the proceedings and discharge the accused on satisfaction that the cheque amount with

assessed costs and interest is paid and if there is no reason to proceed with the punitive aspect. The object of the provision being primarily compensatory, punitive element being mainly with the object of enforcing the compensatory element, compounding at the initial stage has to be encouraged but is not debarred at later stage subject to appropriate compensation as may be found acceptable to the parties or the Court. Though compounding requires consent of both parties, even in absence of such consent, the Court, in the interests of justice, on being satisfied that the complainant has been duly compensated, can in its discretion close the proceedings and discharge the accused. Where the cheque amount with interest and cost as assessed by the Court is paid by a specified date, the Court is entitled to close the proceedings.

Meters & Instruments (P) Ltd. vs. Kanchan Mehta [2017] 87 taxmann.com 6 (SC)

[Contd. from page 138]

company formed by individual shareholders would be eligible to be RV. Also, relaxation in requirement of minimum number of partners / directors to be RVs in case of small multi-disciplinary firms / companies would be welcome and will help in easing hardships of obtaining registration that would be faced by valuers being partners / directors of small firms / companies.

– **Submission / Disclosure of information relating to assignments**
Individuals are required to submit copies of documents demonstrating work experience for obtaining registration. Further, once they are registered as RV, they are required to submit information about ongoing and concluded engagements to the RVO stating *inter alia*, the date of assignment, date of completion and reference number of valuation assignment and valuation report. Also, the valuer is required to disclose his past engagements (even in an unconnected transaction) with the company which he/it would have had during the last 5 years. It may not be practically possible to submit / disclose such information due to varied reasons such as non-disclosure/ confidentiality agreements, SEBI Insider Trading Regulations or due to individual changing organisations.

– **Limitation of liability**
In the preparation of a valuation report, the valuer cannot disclaim liability for his/ its expertise or deny his/its duty of care, except to the extent that the assumptions are based on statements of fact provided by the company or its auditors or consultants or information available in public domain and not generated by the valuer. A doubt arises in this regard as to whether projections provided by the Management and valuation of certain asset class done by another RV can be said to be statement of facts provided by the company / consultants; and information sourced from paid databases can be considered as information available in public domain? It may not be practical for the RV to take onus in respect of these information used by him for carrying out the valuation.

VI. Conclusion

The introduction of requirement of valuation by a 'Registered Valuer' under section 247 and the Valuation Rules is a welcome change as it will lead to setting up of 'Valuation Standards' that will ensure transparency and fairness. However, clarifications on some of the issues as discussed above will make the process of implementation of these Rules easy and help in achieving the desired objective of transparency and fairness.

Kishor Vanjara, *Tax Consultant*

Tax Articles for Your Reference

Articles published in Taxman, Current Tax Report (CTR), Income Tax Report (ITR), The Bombay Chartered Accountant Journal (BCAJ), The Chamber's Journal (CJ), The Chartered Accountant Journal (CAJ), All India Federation of Tax Practitioners Journal (AIFTPJ), Company Case, Times of India and Economic Times for the period October to November, 2017 has been arranged and indexed topic-wise.

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Reopening of assessment and scrutiny assessments of bogus purchases	Subhas Agarwal	AIFTPJ	20/No.7	37
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Benami Property Transactions Act, 1988 – An Introduction	Dilip K. Sheth	CJ	VI/No.2	11
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More responsibility thrust on taxpayers to assist the Government in Income tax budget making	T. N. Pandey	Taxman	250	15
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Can there be two kings of the jungle? The delineation of 'Dominance' under the Competition Act, 2002	Zerick Dastur & Aashni Dalal	BCAJ	49-B/Part 2	16
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Applicability of section 68 to Cash Credit in absence of books of account	Pradip Kapasi & Gautam Nayak	BCAJ	49-B/Part 2	53
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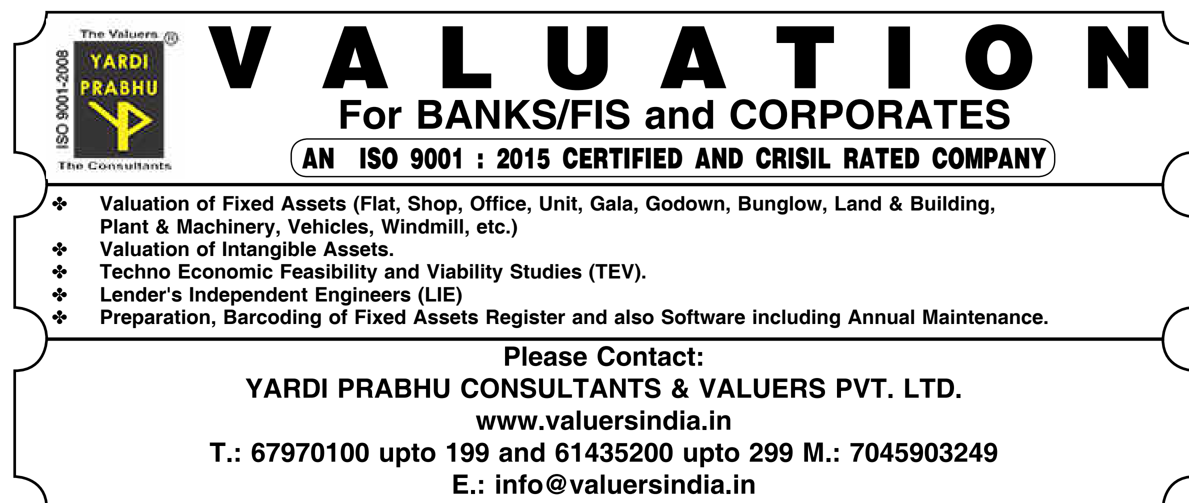

CA Ninad Karpe

The Lighter Side

ROBOTS TO REPLACE TAX CONSULTANTS!

Are you considered to belong to the old world? Have you been reluctant to embrace the digital world? Do you still prefer the analogue to the digital? Do you still keep reminiscing about the "good old days" when your life was devoid of so many connected devices?

If so, here is a scary scenario… All the new technologies – block chain, machine learning, big data and robotics – will overtake the need for a human being as a professional. A typical tax consultant's office in the year 2025 will have only robots giving tax advice and a single person controlling all those robots.

You are bound to look skeptical and question if this will this ever happen! The answer is – Yes, it is likely that robots rather than human beings will handle many of the routine transactions. So then, what would happen to all those human tax consultants? Well! There is good news for you! Tax laws are so innately complex that even the most intelligent robot is unlikely to replace the tax consultant. There have been numerous attempts to simplify these tax laws and every effort at this only ends adding to the existing complexity.

It takes more than a lifetime to understand tax laws and robots simply will be unable to comprehend them. So, whilst you will see more robots all around, a tax professional's office in 2025 will still be filled and buzzing with human beings.

So next time you complain, remember that the only reason you will survive the onslaught of robots is because you have a firm understanding of the complexity of tax laws!

CA Ketan Vajani & CA Nishtha Pandya
Hon. Jt. Secretaries

The Chamber News

Important events and happenings that took place between 7th November, 2017 and 7th December, 2017 are being reported as under.

I. PAST PROGRAMMES

1. INTERNATIONAL TAXATION COMMITTEE

Advance Transfer Pricing Conference was held on 10th November, 2017 at M. C. Ghia Hall, Kala Ghoda, Fort, Mumbai – 400 001. The conference was addressed by CA Waman Kale, CA. Vaishali Mane and CA. Tushar Hathiramani and the panellists for the panel discussion were CA. Ajit Kumar Jain and CA. Karishma Phatarphekar. CA. Vispi Patel was the moderator.

2. ACCOUNTING & AUDITING / ALLIED LAWS AND DIRECT TAX COMMITTEE

3 Day Conference on Real Estate Laws – Combating Challenges Arising out of Various Laws was held on 11th, 18th and 25th November, 2017 at IMC. The conference was addressed by eminent faculties – Mr. Parimal Shroff – Advocate & Solicitor, Mr. P. A. Jani, Advocate & Solicitor, Mr. Anil Harish – Advocate, Dr. Anup P. Shah, Dr. Dilip K. Sheth, Mr. Mahesh Shah - Advocate & Solicitor, CA. Pradip Kapasi, CA. Jagdish Punjabi, CA. Anil Sathe, CA. Zubin Billimoria, CA. Girish Raman, CA. Mahendra Sanghvi, CA Shrenik Baid and CA. Paresh P. Shah. Dr. K. Shivaram, Senior Advocate, Shri K. K. Ramani, Advocate and Shri Bharat Raichandani, Advocate were panel members for the panel discussion. Shri K. Gopal, Advocate was the moderator at the panel discussion.

3. IT CONNECT COMMITTEE

Workshop on Smart Usage of Smart Phone(s) was held on 17th November, 2017 at CTC Conference Room. The workshop was addressed by CA. Adarsh Madrecha and CA. Mayur Jain.

II. FUTURE PROGRAMMES

1. ACCOUNTING & AUDITING COMMITTEE

Certificate Training Course on IND-AS is scheduled to be held on Saturdays, 16th & 23rd December, 2017 at Babubhai Chinai Committee Room, 2nd Floor, IMC, Mumbai – 400 020

2. INDIRECT TAX COMMITTEE

6th Residential Referencer Course on GST is scheduled to be held from 25th to 28th January, 2018 at The Ananta, Udaipur.

Workshop on GST Law jointly with AIFTP (WZ), BCAS, GSTPAM, MCTC & WIRC OF ICAI is scheduled to be held from 17th January, 2018 to 14th March, 2018 at GSTPAM, Mazgaon Library, 1st Floor, 104, Vikrikar Bhavan, Mazgaon, Mumbai – 400 010

3. INTERNATIONAL TAXATION COMMITTEE

Intensive Study Course on FEMA is scheduled to be held on 15th, 16th and 22nd December, 2017 at M. C. Ghia Hall, Kala Ghoda, Fort, Mumbai – 400 020.

12th Residential Conference on International Taxation, 2017 is scheduled to be held from 21st June, 2018 to 24th June, 2018 at The Grand Bhagwati, Indore

4. MEMBERSHIP & PUBLIC RELATIONS COMMITTEE

2nd Triangular Box Cricket Tournament Jointly with The Malad Chamber of Tax Consultants and The Goods And Services Tax Practitioner's Association of Maharashtra will be held on Saturday, 10th March, 2018.

5. RESIDENTIAL REFRESHER COURSE & SKILL DEVELOPMENT COMMITTEE

41st Residential Refresher Course is scheduled to be held from 22nd to 25th February, 2018 at Taj Swarna, Amritsar.

(For details of the future programmes, kindly visit www.ctconline.org or refer The CTC News of December, 2017)

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Sincereity of conviction and purity of motive will surely gain the day; and even a small minority, armed with these, is surely destined to prevail against all odds.

— *Swami Vivekananda*

Accounting & Auditing Committee

Intensive Study Group Meeting on Ind-AS 16 – Property, Plant and Equipment was held on 15th November, 2017 at CTC Conference Room.

CA Hemal Shah addressing the participants

Intensive Study Group Meeting on Financial Instruments – Hedge Accounting was held on 29th November, 2017 at CTC Conference Room

CA Jayesh Gandhi addressing the participants

Indirect Taxes Committee

Study Circle on Issues under RCM was held on 21st November, 2017 at Jai Hind College, A. V. Room, Churchgate, Mumbai – 400 020

Mr. Bharat Raichandani, Advocate (Chairman) addressing the participants

CA Sumit Jhunjhunwala (Group Leader) addressing the participants

Study Circle & Study Group Committee

Study Group Meeting on Recent Judgments was held on 23rd November, 2017 at SNDT Committee Room, SNDT College, Mumbai – 400 020

Mr. Vipul Joshi, Advocate addressing the participants

Study Group Meeting on Taxation of Charitable Trust was held on 24th November, 2017 at SNDT Committee Room, SNDT College, Mumbai – 400 020

CA Rajesh S. Kadakia addressing the participants

Direct Taxes Committee

Webinar on Prosecution, Compounding and Charge of Abetment against Professionals under the Income-tax Act was held on 27th November, 2017

Mr. Aditya Ajgaonkar, Advocate addressing the participants

Webinar on Issues in Assessment and Reassessment under Income-tax Act, 1961 was held on 2nd November, 2017

CA Sanjeev Lalan addressing the participants

Allied Laws, Accounting & Auditing and Direct Taxes Committee

3 Days Conference on Real Estate Laws – Combating Challenges Arising out of various Laws held on 11th, 18th and 25th November, 2017 at IMC

DAY 1

Guest of Honour Hon'ble Justice Shri K. R. Sriram, inaugurating the Conference by Lighting the Lamp. Seen from L to R: CA Heneel Patel (Chairman - A&A Committee), Mr. Rahul Hakani, Advocate (Chairman – Allied Laws Committee), Mr. Ajay R. Singh, Advocate (President) and CA Nihar Mankad (Convenor – Allied Laws Committee)

Dignitaries on dais Seen from L to R: Mr. Rahul Hakani, Advocate (Chairman – Allied Laws Committee), Guest of Honour Hon'ble Justice Shri K. R. Sriram, Mr. Ajay R. Singh, Advocate (President), CA Ashok Mehta (Chairman – Direct Taxes Committee) and CA Heneel Patel (Chairman – A&A Committee)

Mr. Rahul Hakani, Advocate (Chairman – Allied Laws Committee) welcoming the speakers

CA Ashok Mehta (Chairman – Direct Taxes Committee) welcoming the speakers

CA Heneel Patel (Chairman – A&A Committee) welcoming the speakers

Mr. Ajay R. Singh, Advocate (President) presenting memento to Guest of Honour Hon'ble Justice Shri K. R. Sriram

Hon'ble Justice Shri K. R. Sriram delivering keynote remarks. Seen from L to R: Mr. Rahul Hakani, Advocate (Chairman – Allied Laws Committee), Mr. Ajay R. Singh, Advocate (President), CA Ashok Mehta (Chairman – Direct Taxes Committee) and CA Heneel Patel (Chairman – A&A Committee)

Faculties

Mr. Parimal Shroff, Advocate & Solicitor

Mr. P. A. Jani, Advocate & Solicitor

Mr. Anil Harish, Advocate

Dr. Anup Shah, Chartered Accountant

Dr. Dilip Sheth, Chartered Accountant

Mr. Mahesh Shah, Advocate & Solicitor

Allied Laws, Accounting & Auditing and Direct Taxes Committee

3 Days Conference on Real Estate Laws – Combating Challenges Arising out of various Laws held on 11th, 18th and 25th November, 2017 at IMC

DAY 2
Faculties

CA Pradip Kapasi

CA Shrenik Baid

CA Anil Sathe

CA Jagdish Punjabi

DAY 3

Faculties

CA Mahendra Sanghvi

CA Girish Raman

CA Zubin Billimoria

CA Paresh P. Shah

Group of Panellist. Seen from L to R: Mr. Bharat Raichandani – Advocate, Mr. K. Gopal – Advocate (Moderator), Mr. Ajay R. Singh, Advocate (President), Dr. K. Shivaram – Sr. Advocate and Shri K. K. Ramani – Advocate

Journal Committee

Marathon Meeting was held on 7th December, 2017 at Babubhai Chinai Committee Room, IMC

Dignitaries. Seen from L to R: S/Shri Kishor Vanjara (Past-President), Ajay R. Singh – Advocate (President), CA Vipul Choksi (Chairman), K. Gopal - Advocate (Editor), CA Bhadresh Doshi (Vice-Chairman) and CA Bhavik Shah (Convenor)

Section of delegates

International Taxation Committee

Advance Transfer Pricing Conference was held on 10th November, 2017 at M. C. Ghia Hall, Kala Ghoda, Fort, Mumbai – 400 020

Mr. Ajay R. Singh, Advocate (President) giving opening remarks

CA Rajesh Shah (Chairman), welcoming the speakers. Seen from L to R: CA Vaishali Mane (Speaker), Mr. Ajay R. Singh, Advocate (President) and CA Kartik Mehta

Faculties

CA Vaishali Mane

CA Waman Kale

CA Tushar Hathiramani

Panel Discussion. Seen from L to R: CA Rajesh Shah (Chairman), CA Vispi Patel (Moderator), CA Hinesh Doshi (Vice-President), CA Ajit Kumar Jain, CA Karishma Phatarphekar and CA Kartik Badiani (Vice-Chairman)

IT Connect Committee

Workshop on Smart usage on Smartphone(s) was held on 17th November, 2017 at CTC Conference Room

CA Adarsh Madrecha addressing the participants

CA Mayur Jain addressing the participants

Accounting & Auditing Committee

Certificate Training Course on Ind-AS was held on 2nd December, 2017 at Babubhai Chinai Hall, IMC

Guest of Honour CA Dolphy D'souza inaugurating the Course by lighting the lamp. Seen from L to R - CA Heneel Patel (Chairman – A&A Committee), CA Jayesh Gandhi (Speaker), Mr. Ajay R. Singh, Advocate (President) and CA Tejas Parikh (Vice-Chairman, A&A Committee)

Dignitaries on dais. Seen from L to R: CA Heneel Patel (Chairman – A&A Committee), Mr. Ajay R. Singh, Advocate (President), Guest of Honour CA Dolphy D'souza, CA Jayesh Gandhi (Speaker) and CA Anish Thacker (Chairman – Corporate Connect Committee)

Mr. Ajay R. Singh, Advocate (President) giving opening remarks

CA Heneel Patel (Chairman – A&A Committee) welcoming the speakers

CA Anish Thacker (Chairman – Corporate Connect Committee) welcoming the speakers

Guest of Honour CA Dolphy D'souza addressing the participants

Faculties

CA Zubin Billimoria

CA Jayesh Gandhi

CA Hemal Shah

Dignitaries. Seen from L to R: CA Arpita Gadia (Convenor A&A Committee), CA Depak Shah (Convenor, A&A Committee), CA Jayesh Gandhi (Speaker), CA Dolphy D'souza, CA Anish Thacker (Chairman – Corporate Connect Committee), CA Tejas Parikh (Vice-Chairman, A&A Committee), CA Heneel Patel (Chairman – A&A Committee), Mr. Ajay R. Singh, Advocate (President), CA Zubin Billimoria (Speaker) and CA Khozema Anajwalla.

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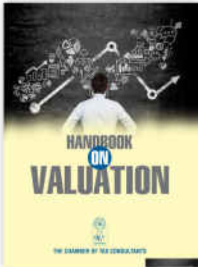

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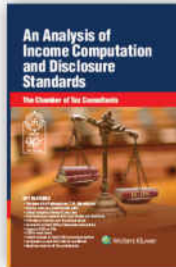

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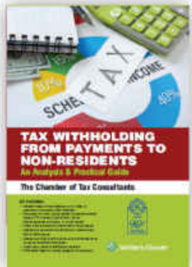

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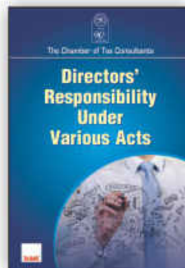

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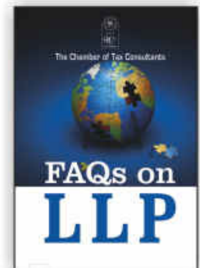

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