CASC BULLETIN

THE CHARTERED ACCOUNTANTS STUDY CIRCLE

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MEETINGS

Date	Time	Speaker	Topic
09.01.2020 Thursday	09.00 am*	CA Sumit Kedia	GST Audit and Recent Developments
23.01.2020 Thursday	06.30 pm**	CA K. Hemalatha	Practical Approach to Filing First Appeals - Direct Taxes

*Preceded with Breakfast half an hour before the scheduled time of meeting
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EDITORIAL

Dear Colleagues

Wishing you all a Happy & Prosperous New year!

"Where the mind is without fear
and the head is held high
Where knowledge is free
Where the world has not been broken up into fragments
By narrow domestic walls
Where words come out from the depth of truth
Where tireless striving stretches its arms towards perfection
Where the clear stream of reason has not lost its way
Into the dreary desert sand of dead habit
Where the mind is led forward by thee
Into ever-widening thought and action
Into that heaven of freedom, my Father,
LET MY COUNTRY AWAKE."

- ***Rabindranath Tagore, Gitanjali***

If all the people of a nation are not wise enough to lead a happy and peaceful life, free from all evils, they cannot enjoy their freedom well. Only political freedom is not so important unless you are fearless, self-dignified, knowledgeable, truthful, hard-working and broad-minded enough to enjoy it fully.

"Knowledge is Power, Power provides Information; Information leads to Education, Education breeds Wisdom; Wisdom is Liberation. People are not liberated because of lack of knowledge."

The most powerful thing in the world is knowledge because it can create or destroy life on earth. Every educated person is not knowledgeable, but every knowledgeable person is educated. This statement may sound weird but it's true. In today's world, almost everyone is educated still they do not have knowledge of the subject that they have studied.

A knowledgeable person is the richest person on earth because no one can steal his/her knowledge and he is the one who can give knowledge to the nation and this knowledge can increase the wealth of this nation.

Knowing incompletely is of no use. This leads to egoism, anger, jealousy, suspicion, inferiority complex & finally failure might end up as death, most horribly. Sometimes knowing half, makes others to take advantage of it to destroy.

Just to attract attention, few individuals float information in the media and more particularly on the social networking sites which are not accurate and people grab the same and indulge in circulating the same, making it viral.

It is important for human survival to be knowledgeable on different topics. People must be aware of laws so that they can live free and in harmony with others. Ignorance of the law is not accepted as a legal defence, so it is the responsibility of every individual to know the law.

Post the abrogation of Article 370 and 35A which lead to scrapping of the special status to J&K and post the passage of the Citizenship Amendment Act, 2019, the fact is, blatant misinformation is being spread by vested interests and this misinformation is time and again, bringing the country to the brink of a fully-blown riot situation.

Therefore, the need of the hour is for each and every citizen of this country to empower themselves with true and full knowledge of the legislations and happenings around them, so as to enable themselves to form their own individual opinions, rather than being influenced by politicised view points and biased media presentations.

It is imperative that we, as 'Professionals', enlighten ourselves with a subject in its entirety, before we disseminate the same to others or become judgemental ourselves. Forums such as ours, can serve as a platform to understand/interpret the facts of any legislation that has a bearing on the Country as whole, to which we proudly bear our allegiance.

ASATHOMA SADGAMAYA
(Lead me from the unreal to the real)
THAMASOMA JOTHIRGAMAYA
(Lead me from darkness to light)
MRUTHYOMA AMRUTHANGAMAYA
(Lead me from death to immortality)
OM SHANTHI SHANTHI SHANTIHI
(May there be peace everywhere)

Yours Truly

P.Ramasamy

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Revision: The observations made by this Court in Ashok leyland (supra) to the effect that an order passed under Sub-Section (2) of Section 6A can be subject matter of reopening of a proceeding under Section 16 of the State Act only in the limited cases of fraud, mis-representation etc. and not otherwise. The reassessment cannot be directed if there had been a mere error of judgment. Stating so, the petition of the petitioner is allowed M**/s.Elgi Equipments Ltd. Coimbatore. Vs The Assistant Commissioner (CT), Fast Track Assessment Circle I, Coimbatore. Writ Petition No.21269 of 2007 DATED: 26.11.2019**

Personal hearing: The petitioner has not responded to the pre-assessment proposals and equally the respondent has also not extended an opportunity of personal hearing, which he was bound to do. Taking into account the entirety of circumstances of this matter, the impugned orders of assessment are set aside by the Court with a direction to the petitioner to appear before the assessing authority on 06.12.2019 at 10.30 a.m. without expecting any further notice in this regard and with all/any materials that may be placed in support of the issues in question. After hearing the petitioner and considering materials filed, if any, orders of assessment shall be passed de novo and

CA. V.V. SAMPATHKUMAR

in accordance with law within a period of four(4) weeks from date of conclusion of proceedings. If the petitioner does not appear on the aforesaid date, the Assessing authority is at liberty to reiterate the orders already passéd. **M/s. Harini Ceramics and Sanitary, Vs. The Commercial Tax Officer, Tiruttani Assessment Circle, Tiruttani. Writ Petition Nos.38998 & 38999 of 2015 DATED: 29.11.2019**

Natural Justice: Learned counsel for the petitioner submitted that the speaking portion of the order mentions a single paragraph as follows: "A Notice was issued to the dealer to file their objections if any to the above proposals. But the dealers have not filed any objections. Hence I confirm the proposals & finally determine their total and Taxable turnover of Rs.14723402/-and Rs.13522377/-respectively under the TNGST Act, 59 for the year 2003-04". Also draws attention to the reply dated 27.01.2011 and the Learned Government Advocate states that no such

letter is available on file. Be that as it may, the order of assessment is cryptic as seen from the extract above. And moreover, no personal hearing has been afforded to the petitioner. Stating so, the Court set aside the impugned order on the ground of gross violation of the principles of natural justice with specific directions for personal hearing. **M/s. Space Crafts, Vs The Assistant Commissioner (CT), Anna Salai III Assessment Circle, Chennai. Writ Petition No.8954 of 2011. DATED: 21.11.2019**

Limitation: The matter involves a dispute as to whether two consignments of wood carried by lorries were undervalued and whether the same were being unloaded in the destination stipulated in the invoice. This matter involves detailed appreciation of facts impermissible under Article 226 of the Constitution of India. This writ petition is thus dismissed. The limitation to file revision petition (RP) in terms of Section 57 of the Tamil Nadu Value Added Tax Act, 2006 challenging order dated 30.03.2011 before the Additional Commissioner has long elapsed. There was a prayer to file RP by the petitioner and as the learned Government Advocate does not objected to the request, The Court permitted the petitioner to file a revision petition within a period of two weeks from date of receipt of a copy of this order. **M/s. Silver Wood Bazaar Vs The Commercial Tax Officer, Group VIII Enforce Central, Chennai.6. W.P.No.16494 of 2011 DATED: 19.11.2019**

Natural Justice: The issue involved relates to a turnover on the basis of an alleged mismatch between verification of the departmental website relating to purchases and data uploaded by supplier. The details of sales and collection of tax as culled from the website have been enclosed only with the impugned order and not furnished to the petitioner for rebuttal along with the pre-assessment notice or prior to completion of assessment. There is thus apparently, gross violation of the principles of natural justice. **R.S.M. Electricals Vs The Deputy Commercial Tax Officer, Ranipet W.P.Nos.15625 of 2016 DATED: 14.11.2019**

Mismatch: Without providing the details about the data took form the website an order issued by the AO in respect of mismatch of purchases and sales reported by the buyer and the seller in the portal of the department. The mismatch issue is covered by an order of the learned Single Judge in the case of M/s.JKM Graphics Solution Private Limited Vs. Commercial Tax Officer (99 VST 343) to be redone de novo. Hence, impugned assessments are set aside and the matters remanded to the respondent/Assessing Authority to be redone de novo after furnishing all relevant particulars to the petitioner and affording due opportunity to him. **Thiru.A.Ramalinga Reddiyar Vs The Deputy Commercial Tax Officer, Thindivanam, Villupuram District. Writ Petition Nos.40048 & 40049 of 2015 DATED: 11.11.2019**

Pre Assessment Notice: The petitioner has utilised the capital goods viz., Captive Power Plant (CPP) to generate electricity, the turnover from which is exempt from tax. As per 19(6) of the TNVAT act, no ITC shall be allowed on purchase of capital goods, which are exclusively in the manufacture of goods exempted under section 15. Earlier notices merely call for details of the capital goods purchased, that have been duly furnished by the assessee. Merely calling for details, both factual as well as numerical by the Officer and production of those details by the petitioner do not advance the process of assessment itself as it is only when the Officer crystalises the issue that he proposes to raise that the assessee can be said to be put to notice and effectively be afforded an opportunity to respond. The prevailing position in law is to the effect that an assessee is entitled to ITC pro rata on capital goods used both in the manufacture of taxable as well as exempt commodities. This aspect of the matter requires adjudication by the Officer. The impugned assessment order is thus set aside in the light of the fact that this position has neither been effectively captured or dealt with by the Assessing Officer in the impugned order nor for the reason that the pre-assessment proposals issued prior to completion of assessment do not put this issue for rebuttal to the assessee. **Tulsyan NEC Ltd. Vs the Assistant Commissioner (CT) (FAC) Broadway Assessment Circle W.P.No.29690 of 2014 DATED: 06.11.2019**

Opportunity: A notice was issued on 01.10.2013 proposing to treat the entire turnover as local sales liable to tax at the rate of 4% and disallowing the claim for exemption of stock transfer. The petitioner initially sought an adjournment on 29.10.2013 seeking some time to produce the necessary documents. The request was reiterated on 14.11.2013 on the ground that the accountant, who was in charge of the maintenance of the accounts of the Kerala office had been admitted in hospital. Since his discharge was imminent, a period of twenty (20) days was sought for production of required records. Rejecting the aforesaid request, the impugned order has been passed wherein the Assessing Authority states that the petitioner has been seeking adjournments repeatedly indicating to him, that they had no valid objections to be filed. The Court set aside the order and observed that the opportunity extended by the Assessing Officer was not adequate and the Assessing Authority should at least have indicated to the assessee that the request for time had been rejected and that he was proposing to proceed with the assessment and the petitioner will appear before the respondent on Friday, the 8th of November, 2019 at 10.30 a.m. without expecting any further notice in this regard. **Tvl.Sun Oil Trade, Vs. The Assistant Commissioner (CT), Villivakkam Assessment Circle, W.P.No.35184 of 2013 DATED: 01.11.2019**

Mismatch: A learned Judge of this Court in the case of JKM Graphics Solutions Private Limited Vs. Commercial Tax Officer, Vepery Assessment Circle, Chennai reported in 2017 (99) VST 343 (Mad), had considered the claim of the dealers in connection with Input Tax Credit reversal on an alleged mis-match between their returns and the returns filed by the sellers. The Court observed in that ruling to the extent that Mismatch issue can be solved only if there is a centralised mechanism and if the present practice is allowed to prevail, it would only result in multiplicity of proceedings with more number of cases pending before the courts and appellate forums, thus jeopardizing the interest of revenue. Therefore, it is high time the Principal Secretary and Commissioner of Commercial Taxes in consultation with him officers lays out a detailed procedure as to how to take forward cases of mismatch, evolve a central mechanism, which can go into these aspect and furnish details in full form to the respective assessing officers, who can decide for themselves as to whether there is a case made out to call to call upon their dealer to explain. If this centralized mechanism is not put in place exclusively for such purpose, it would result in notices and orders being issued by the respective assessing officers without even the knowledge of the assessing officers of the other end dealer resultantly no action being taken against other end dealer, assuming, he is at fault. Therefore, it is high time the Department wakes up and stops the one way approach and examine the matter in a holistic manner so that the defaulting dealer is brought to books. **M/s.K.P.Tex, Vadalur Vs The Assistant Commissioner (CT), Cuddalore (Taluk) W.P.No.13879 of 2016 DATED: 18.06.2019**

Mismatch: In respect of mismatch matters, the judgment in JKM Graphics Solutions Private Limited Vs. CTO, Vepery Assessment Circle, Chennai, [2017] 99 VST 343 (Mad) is relevant. The Hon'ble Single Judge referred an earlier judgment rendered by a Hon'ble Division Bench of this Court in AC Vs. Infiniti Wholesale Ltd. reported in [2017] 99 VST 341 (Mad). Paragraph 50 of this ruling is relevant which reads as follows: "50. As pointed out earlier, in cases where mismatch occurs, it is a starting point for an enquiry. The first phase of enquiry should be at the Department level, as in most cases, both the dealers are registered in different assessment circles. The Court has come across cases, where such mechanically drafted show cause notices have been sent by Assessing Officers without embarking upon any enquiry, even though the other end dealer is also registered within his jurisdiction. Thus, when the Assessing Officer has data to show that the dealers

registered with him, whose returns have been accepted when compared to the other end dealer does not match, then the Assessing Officer is first required to enquire with the Assessing Officer of the other end dealer to make verifications as to whether the mismatch could have occurred due to any one of the factors, which may not be due to the deliberate default of the dealer, satisfy himself that and after such verification, it prima facie appears that the returns to be revised, at that stage, the Assessing Officer would be entitled to issue a show cause notice containing full particulars and clearly stating as to what was the scope of enquiry done by him and why he is of the prima facie view that the dealer has failed to file proper returns or suppressed information. It is only then the dealer would be in a position to put forth his defence and demonstrate as to how this prima facie view is without any basis." **Tvl.SRS Ispatt (P) Ltd vs. The Assistant Commissioner (CT) Salem Town W.P.No.16910 of 2019 Dated : 18.06.2019**

Alternative Remedy: The petitioner has challenged proceedings dated 23.11.2009, which is a Pre-assessment notice calling for objections to the proposals contain therein. The court held that there is no justification for the present challenge insofar as no legal infirmity is made out to the impugned notice warranting the filing of this writ petition in terms of Article 226 of the Constitution of India. The petitioner is permitted to file his objection to the proposals contain in the notice within a period of two weeks from today (i.e.,04.06.2019), upon consideration of which, the respondent shall complete the proceedings for assessment after affording sufficient opportunity of personal hearing to the petitioner, within a period of two weeks from completion of personal hearing. **M/s. Paper Tubes India Vs. The Commercial Tax Officer II, Rajapalayam, W.P.(MD)No.12513 of 2009 DATED: 04.06.2019**

Entry tax: when the entry tax returns are not filed in time and paid the taxes in time, penalty will be leviable. The decision of the Madras High Court relied on by the petitioner in the case of Novel Digital Electronics Vs. The Commissioner (Customs (Imports) [CMA.NO.327 of 2008] is distinguishable on facts and in law so also the case, the Division Bench decision of the Gauhati High Court (Agartala Bench) in the case of Brajalal Banik vs. State of Tripura and another [2007 79 STC 217] **M/s. Hari & Co.,Vs. The Commercial Tax Officer II, Tuticorin. W.P.(MD)Nos.1843 and 1844 of 2009 DATED: 04.06.2019**

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CASE LAWS - GST / SERVICE TAX

1. GST–ADVANCE RULING – COMMISSION EARNED FROM AUCTIONING OF FLOWERS BY AUCTION HOUSE – EXEMPT

In RE: International Flower Auction Bangalore Ltd. 2019(30) GSTL 366 (AAR.-GST), the applicant is a joint venture company of private and public shareholders established to strike the potential of both export and domestic flower market, with a prime objective to auction high quality cut flowers of various flower crops on a daily basis and in the business of auctioning flowers and area commission agent for the flower growers. The appellant is funded by Centre and State to facilitate auction service and develop floriculture. The buyers would come in person and check quality and bid.

The applicant takes 3.5% from growers and 1.5% from buyers as commission for the services rendered, i.e, auctioning of flowers, which is the main stream of revenue. Other incomes earned or accrued include interest, packing charges, registration charges, etc. An application was filed seeking advance ruling as to whether the commission earned from auctioning of flowers is covered under entry no.54(e) & (g) of Notification No.12/2017-Central Tax (Rate) dated

CA. VIJAY ANAND

28.06.2017 and Entry No.54(e) & (g) of Notification (12/2017) FD 48 CSL 2017 dated 29.06.2017. The authority observed as under:

1. The applicant is an auction house where the growers of the flowers bring the flowers to auction them and the buyers come and buy the produce. On successful auction, the applicant issues invoice on behalf of the growers and collect the sale price from the buyers and pays the consideration to the growers. Hence the applicant is acting as a Selling Commission Agent of the Growers. At the same time, he is also collecting commission for the services rendered to the buyer in providing the facilities etc. in connection with the flower auction.

2. Sample copies of invoices indicate that the applicant issues the invoices for further supply of goods on behalf of the principal. This shows that the provision of the goods by the growers

to the applicant is covered under Entry 3 of Schedule 1 of the CGST Act, 2017 consequent to which the relationship between the applicant and the growers is that between a principal and its agent.

3. The fact that the applicant has the authority to pass or receive the title of the goods on behalf of the principal shows that the applicant predominantly acts as the commission agent. Since the applicant is a "commission agent" within the meaning of the term, he also falls under the definition of agent.

4. The "cut flowers" are covered under the definition of "agricultural produce" as is defined in the para 2(d) to the Notification No.12/2017-Central Tax (Rate), dated 28.06.2017.

5. Entry No. 54 of the Notification No. 12/2017 – Central Tax (Rate) dated 28.06.2017 prescribes exemption for the "services relating to agricultural produce by way of services by a commission agent for sale or purchase of agricultural produce".

6. In view of the fact that the applicant is a commission agent within the meaning of the term and he is providing services for sale or purchase of agricultural produce, the same is covered under clause (g) of entry no.54 of the Notification No.12/2017 – Central Tax (Rate) dated 28.06.2017 and hence the services provided by the applicant is exempted from CGST.

Hence, the authority held that the commission received by the applicant for facilitating the purchase and sale of cut flowers is covered under clause (g) of the entry 54 of the Notification No.12/2017-Central Tax (Rate) dated 28.06.2017 and hence exempted from GST.

2. GST- APPOINTMENT AS JUDICIAL MEMBER IN GSTAT OF INDIAN LEGAL SERVICES MEMBER – SECTIONS 109 & 110 OF CGST ACT PROVIDING FOR EXCLUSION OF LAWYERS FROM THE MEMBERSHIP FROM TRIBUNAL – NOT UNSUSTAINABLE

In Revenue Bar Association v. UOI 2019(30) GSTL 584 (Mad.), the petitioner challenged to declare sections 109 and 110 of the CGST Act and TNGST Act relating to the constitution of the Goods and Services Tax Appellate Tribunal (GSTAT) and the qualification and appointment of members, as void, defective and unconstitutional, being violative of articles 14, 21 and 50 of the Constitution of India and various judgments of the Hon'ble Supreme Court.

The High Court observed as under:

1. Section 109(2) provides that the powers of the Appellate Tribunal shall be exercised by the National Bench or the Regional Benches. Under the TNGST Act, the Appellate Tribunal is the State Bench or the Area Benches. The National Bench of the appellate tribunal is situated at Delhi, which will be presided over by the President and shall have two members viz., one Technical Member (Centre) and one Technical Member (State). The Government can also constitute the Regional Benches which shall consist of a Judicial Member, one Technical Member (Centre) and one Technical Member (State).

2. Section 109(5) provides that the National Bench and the Regional Benches of the Appellate Tribunal has the jurisdiction to hear appeals against the orders passed by the Appellate Authority or the Revisional Authority in cases where one of the issues involved relates to the place of supply.

3. Section 109(7) provides that the State Bench or the Area Benches shall have the jurisdiction to hear appeals against the orders passed by the Appellate Authority or the Revisional Authority in the cases involving matters other than the issue relating to the place of supply.

4. Section 109(11) provides that if the Members of the National Bench, Regional Benches, State Bench or Area Benches differ in opinion on any point or points, it shall be decided according to the opinion of the majority, if there is a majority, but if the Members are equally divided, they shall state the point or points on which they differ, and the case shall be referred by the President or as the case may be, State President for hearing on such point or points to one or more of the other Members of the National Bench, Regional Benches, State Bench or Area Benches and such point or points shall be decided according to the opinion of the majority of Members who have heard the case, including those who first heard it.

5. Section 110 of the Act prescribes the qualification, appointment and conditions of service, etc., of the President and the members of the Appellate Tribunal. The President of the Appellate Tribunal, is a retired judge of the Supreme Court of India or a sitting or retired Chief Justice of any High Court or a Judge of a High Court or a retired Judge of a High Court, with not less than five years of service.

6. The qualification of the Judicial Member has been prescribed as a Judge of the High Court or a sitting

or retired District Judge, qualified to be appointed as a Judge of a High Court or a member of the Indian Legal Service and has held a post not less than Additional Secretary for not less than three years.

7. The Technical Member (Centre) is a serving or a retired member of the Indian Revenue (Customs and Central Excise) Service, Group-A, who has completed atleast fifteen years of service in the Group–A.

8. The qualification of the Technical Member (State) is such a member, who is a serving or a retired officer of the State Government not below the rank of Additional Commissioner of Value Added Tax or the State Goods and Services Tax or such rank as may be notified by the concerned State Government on the recommendations of the Council with atleast three years of experience in the administration of an existing law or the State Goods and Services Tax Act or in the field of finance and taxation.

9. Section 110(2) prescribes that the President and the Judicial Members of the National Bench and Regional Benches shall be appointed by the Government of India after consultation with the Chief Justice of India or its nominee.

10. Section 110 (2) further provides that in the event of the occurrence of any vacancy in the office of the President by reason of his death, resignation or otherwise, the senior most Member of the National Bench shall act as the President until the date on which a new President, appointed in accordance with the provisions of this Act to fill such vacancy, resumes office.

11. Second proviso to Section 110(2) provides that if the President is unable to discharge his functions owing to absence, illness or any other cause, the senior most Member of the National Bench shall discharge the functions of the President until the date on which the President resumes office.

12. The writ petitions challenge the validity of Sections 109 and 110 of the CGST Act, 2017 and TNGST Act, 2017, more particularly the composition and qualification of the members to the Goods and Services Tax Appellate Tribunal.

13. The first challenge is to the vires of Section 110 (1)(b) of the CGST Act, on the ground of exclusion of lawyers from being eligible to be appointed as a Judicial Member of the Tribunal. According to the petitioners, exclusion of lawyers from zone of consideration as a Judicial Member, is violative of Article 14 of the Constitution of India.

It is the contention of the petitioners that the exclusion of lawyers from being considered to hold the post of Judicial Member of the tribunal is a departure from the existing practice. It is the case of the petitioners that Advocates are eligible to be considered as members of various tribunals and there is no justification or reason as to why they should be excluded from the zone of consideration of being appointed as Judicial Members under the CGST and TNGST Act. The petitioners state that in the Income Tax Appellate Tribunal, which is the oldest tribunal of India, CESTAT, the Sales Tax /VAT Tribunals, Advocates having more than ten years of experience were being considered for selection as Judicial Members. It is therefore stated that there is no valid explanation as to why the CGST Act, 2017 and the TNGST Act, 2017 excludes Advocates having more than 10 years of experience, from being considered as Judicial Members of the tribunal.

14. It is the case of the petitioner that the Hon'ble Supreme Court in R.K.Jain Vs. Union of India, reported in 1993 (4) SCC 119 and some other cases has held that the tribunal members must have a judicial approach and expertise in that particular branch of Constitution, administrative and tax laws. It is therefore submitted that lawyers having more than ten years of experience in that branch of law should be considered for appointment as judicial members, as they have the legal expertise and judicial experience and are legally trained to understand, examine and adjudicate upon complex question of law, which would arise for consideration.

15. The law has been settled by the Hon'ble Supreme Court, in S.P. Sampath Kumar v. Union of India, (1987) 1 SCC 124 : (1987) 2 ATC 82, insofar as the creation of alternative institutions which would exercise judicial function, would be that the alternative institutional mechanism must not be less effective than the High Court. The Parliament, therefore only has the power to set up an alternative institutional mechanism, insofar as such institution offers an effective mechanism which is no less effective that a High Court. To be as effective as a High Court, would not be limited to having powers akin to High Court, it would also include the ability to exercise judicial function akin to a High Court, in the sense of being impartial and independent.

16. In the case of Union of India v. Madras Bar Assn., (2010) 11 SCC 1, one of the main defects found in the NCLAT by the Hon'ble Supreme Court, which ultimately had to be

remedied by Parliament, was in respect of the Constitution of a Tribunal. It became necessary for the Tribunal to consist of at least one judicial member, and in the event that a larger bench was to be formed, such larger bench would necessarily require the present of judicial members at par, or in excess of the no. of technical members.

17. In the case of State of Karnataka v. Vishwabharathi House Building Coop. Society, (2003) 2 SCC 412, after analysing the provisions of the Consumer Protection Act, 1986, the Hon'ble Supreme Court upheld the validity of the Consumer Protection Act, for several reasons, including the fact that the tribunals had been established to provide consumers with an efficacious remedy, against big corporations.

18. An appeal from the adjudicating authority lies to an appellate authority under Section 107 of the CGST Act. Section 107 (16) states that the order of the appellate authority, subject to the provisions of Section 108 or Section 113 or Section 117 or Section 118, is final.

19. The revisional authority subject to the provisions of Section 121 and any rules made there under, may, on his own motion or upon information received by him or on request from the Commissioner of State tax, or the Commissioner of Union Territory Tax, shall call for and examine the record of any proceedings, and if he considers that any decision or order passed under this Act or under the State Goods and Service tax Act or the Union Territory Goods and Services Tax Act, by any officer subordinate to him is erroneous and is prejudicial to the interest of revenue or it is illegal or improper or has not taken into account certain material facts, shall stay the operation of the order for such period as he deems fit and after giving the person concerned, an opportunity of being heard, can pass order as he thinks just and proper, including enhancing or modifying or annulling the said decision or order.

20. Section 109 provides for a National Bench or the Regional Benches and State bench or the Area Benches. Section 109(5) provides that the National Bench and the Regional Benches, shall hear the appeals against the orders passed by the Appellate Authority or the Revisional Authority in cases where one of the issues involved relates to the place of supply and order of the National Bench or the Regional Benches can be challenged only in the Hon'ble Supreme Court.

21. The orders of the National Bench or the Regional Benches are not subjected to any appellate jurisdiction of High Court. It is therefore similar to an order passed by a Central Administrative Tribunal. It is a different question as to whether such an order would be subjected to Article 227 of the Constitution of India or not and we are not going into the controversy. This Court is aware of the fact that the National Tribunal cannot adjudicate the vires of the notifications issued under the Act or the constitutional validity of the notifications / regulations and the very consequences of the Act, but nevertheless, it cannot be said that the National Bench is only an extension of the mechanism to determine only the quantum of tax, which is only a subject matter of experts. The quantum of tax is determined on the interpretation of various sections and notifications. It also involves adjudication upon the orders of the appellate authority. It has to be borne in mind that the decision making process has to be scrutinised by the Tribunal.

22. In doing so, judicial principles have to be kept in mind. The criticism of the Manlimath Committee, that any weightage in favour of the service members or expert members and value- discounting the judicial members would render the tribunal less effective and efficacious than the High Court, would clearly apply to the Appellate Tribunal. It is well accepted that the tribunal must inspire confidence in the assessee for which purpose the members must have legal training, experience, judicial acumen, equipment and approach.

23. Similarly, even though the judgment of the State Bench or the Area Benches is subject to an appeal to High Court, it is well settled that while giving judicial decisions, Judges should be able to act impartially, objectively and without any bias. The Hon'ble Supreme Court in Manak Lal (Shri), Advocate Vs. Prem Chand Singhvi and Others, reported in 1957 SCR 575 has observed that when a tribunal or a Court decides the matter, the test is not whether in fact a bias has affected the judgment. The test always is and must be whether a litigant could reasonably apprehend that a bias attributable to a member of the Tribunal might have operated against him in the final decision of the tribunal.

24. The disputes which arise in these tribunals are between the assessee and the State. The technical members are nominees of the State government. In fact the Hon'ble Supreme Court in Manak Lal's case [supra] has observed as under.

25. The principle which emerges is that while deciding issues as to whether the decision making process by the adjudicating authority or the appellate authority was just, fair and reasonable and to decide issues regarding interpretation of notifications and sections under the CGST Act a properly trained judicially mind is necessary which the experts will not have. The number of expert members therefore cannot exceed the number of judicial members on the bench.

Hence, the High Court passed the following orders:-

a. Section 110(1)(b)(iii) of the CGST Act which states that a Member of the Indian Legal Services, who has held a post not less than Additional Secretary for three years, can be appointed as a Judicial Member in GSTAT is struck down.

b. Section 109(3) and 109(9) of the CGST Act, 2017, which prescribes that the Tribunal shall consists of one Judicial Member, one Technical Member (Centre) and one Technical Member (State) is struck down.

c. The argument that Sections 109 & 110 of the CGST Act, 2017 are ultra vires, in so far as exclusion of lawyers from the scope and view for consideration as members of the Tribunal, is rejected. However, it is recommended that the Parliament must consider to amend section for including lawyers to be eligible to be appointed as Judicial Members to the Appellate Tribunal in view of the issues which are likely to arise for adjudication under the CGST Act and in order to maintain uniformity in various statutes.

Hence, the writ petition was allowed in accordance with the above.

3. TRANSITION TO GST- ACCUMULATED CREDIT OF EDUCATION CESS, SHE CESS AND KK CESS – NOT DISENTITLED

In Sutherland Global Services Pvt. Ltd. v. Asstt. Commr. Of CGST And C.EX., Chennai 2019(30) GSTL 628 (Mad.) the petitioner prays for a writ of Certiorari quashing letter dated 14.02.2018 issued by the 1st respondent Assessing Officer consequent to which they would be entitled to avail and utilise accumulated credit pertaining to Education Cess (in short 'EC'), Secondary and Higher Education Cess (in short 'SHEC') and Krishi Kalyan Cess (in short KKC').

The High Court observed as under:

1. EC was introduced in 2004, SHEC in 2007 and KK Cess in 2016. Upon introduction of the levy of EC in 2004, Section 95 of Finance Act, 2004

provided that EC would be levied in addition to service tax on taxable services and could be availed of and utilised against payment of EC alone. Likewise for SHEC, introduced in 2007, it was made clear that the benefits of SHEC on input were available to be utilised only as against the respective payments alone and not on the payment of excise duty or service tax on manufactured goods or taxable services. Likewise for KK cess

2. Both EC and SHEC were abolished with effect from 01.06.2015 and consequently the unutilised credit of EC and SHEC available could not be set of and accumulated. KK Cess was abolished in July, 2017. However, since the CGST Act did not provide specifically for the levy of KK cess, as such there was no avenue to claim the same after 01.07.2017. However, the unutilised portion of EC, SHEC and KKC continued in the electronic credit ledgers of assesses, but could not be practically utilised in the absence of an enabling provision.

3. This issue can be clinched in favour of the petitioners for two reasons. The impugned order proceeds on the basis that the petitioner has no entitlement to claim set off of credit and thus denies it. However, such credit continues to be available till such time it is expressly stated to have lapsed. Lapsing is not a concept unknown to the respondents. In fact, there are multiple instances where the Board/ Government provides for specified credits to lapse mentioning the exact point in time when the lapsing would commence and/or stipulating other conditions in this regard.

4. That the authorities are conscious of the provisions for lapsing of credit, having utilised them in several situations and instances.

5. In the present case, admittedly, there is no notification/circular/instruction that has expressly provided that the credit accumulated would lapse. Not only this, the credit has been carried forward manually and reflected in the returns from time to time and such accumulated credits stare the Revenue in the face. Having permitted the assessee to carry forward the credit, the authorities cannot now take a stand that such credit is unavailable for use. The provisions of sub-section (1) read with sub-section (8) of section 140, and the Explanation there under make it more than clear that all available credit as on the date of transition would be available to an assessee for set off.

6. The Full Bench of the Supreme Court makes this position clear in the case of Eicher Motors and another v. Union of

India and others 106 ELT 3 (S.C.) while considering the applicability of Rule 57F. This Rule provided for the lapse of credit lying unutilised as on 16.03.1995 stating clearly that such credit would not be allowed to be utilised for payment of duty on any excisable goods, whether cleared for home consumption or export. Proviso therein clarified that such lapsing would not affect credit of duty, if any, in respect of inputs lying in stock or contained in finished products lying in stock on 16.03.1995. The Bench opined that Modvat Credit lying to the balance of an assessee represented a vested right accrued or acquired by the assessee. The right in respect of the credit had become absolute at that point when the input was used in the manufacturing of the final product.

7. The Supreme Court, in the case of Eicher Motor & another (supra) further observed that when, on the strength of the available Rules and Regulations, certain acts were carried out, all logical consequences must follow in sequence. If any alteration is brought about to this Scheme, then it would have a deleterious effect. The alteration of a credit scheme loses sight of fact that the provision for facility of credit is as good as tax paid till such time the taxes are adjusted on future goods on the basis of commitments made commercially by the assessee. Thus, altering a scheme of credit would affect the rights of the assessee. The impugned Rule was thus quashed, the Bench stating that it cannot be applied to goods manufactured prior to 16.03.1995, where duty payment stood discharged and credit available for further manufacture.

8. The claim of the petitioner before the Delhi High Court was that a vested right to avail the benefit of unutilised EC or SHEC credit was available as on 01.03.2015 and 01.06.2015 as against payment of tax on excisable goods and services. Simultaneous therewith the petitioners also challenged Instruction dated 07.12.2015 that provided as follows

9. Central Board of Excise and Customs Instructions dated 07.12.2015, reveal a policy decision, not to allow utilisation of accumulated credit of EC and SHEC, but nowhere states that the credit has lapsed. The Board only says that the cesses have been phased out and since there is no new liability to pay these cesses, no vested right can be said to exist in relation to the past accumulated credit in the light of Rule 3(7)(b) of the Cenvat Credit Rules, 2004 which stipulates that Cenvat Credit shall be utilised only as against payment of specified duties. The

request of the petitioner is that case has to be seen in this perspective and specifically in the light of the embargo placed by Rule 3(7)(b) as aforesaid. The Board could well have stated even at that juncture that the credit lapsed, but did not choose to do so.

10. There has been no instructions/ notification/circular from the Board till date to state that the accumulated credit has lapsed. There have been many occasions available to the Board to clearly stipulate that the accumulated credit had lapsed, this was not done. The petitioner had been permitted to carry forward the cesses in question without any move whatsoever to state that the credits could not be so carried forward, since they had lapsed. Not having done so, the provisions of Section 140 should be given full effect and meaning.

11. The revenue has placed reliance upon the conclusions of the Supreme Court in the cases of (i) Jayam and Co. vs. Assistant Commissioner and Ors. (AIR 2016 SC 4443) and (ii) ALD Automotive Pvt. Ltd. v. The Commercial Tax Officer and Others (AIR 2018 SC 5235), to state that the grant of ITC cannot be sought for as a right by an assessee and no such right vests in an assessee.

12. There is a material distinction between the cases relied upon by the revenue and the case before me. In Jayam and Company and ALD Automotive Pvt. Ltd. (supra), the Court was concerned with a claim of Input Tax Credit (ITC) by an assessee. It is in this context that the Benches state that the grant of ITC is a concession which is not admissible to all kinds of sales. Specified transactions are alone entitled to the benefit of ITC on specified situations and that too, upon satisfaction of conditions imposed. Thus no vested right could be claimed by an assessee in that regard.

13. In the present case, the situation is entirely different. The assessee only avails utilization of the credit accumulated, particularly since there is no prohibition in this regard either for the accumulation itself or for the utilization thereof under CGST.

14. A certain amount of planning and strategizing is undertaken by an assessee bearing in mind the credits and concessions available as well as liabilities imposed by a taxing Statute at any given point in time. The credit available in regard to EC, SHEC and KKC are no different. In strategising and conducting its business, the assessee would certainly have taken into account that credit was available for set-off against output tax liability.

Such credit accumulated has not been stated to have lapsed. The impugned action of the assessing authority in rejecting the claim has however the consequence of insertion of a Rule/ Regulation to this effect, which, in my view, is impermissible.

15. A fiscal statute has to be read and understood, as seen. The interpretation should be on the basis of what is apparent, apart from being strict. These are settled principles that need no reiteration, nor support of case law. If one were to apply these propositions to the case on hand, the provisions of section 140(1) provide for the transfer of all credits and levies, barring those set out in the proviso, which is, (i) where the said amount of credit is inadmissible as ITC (ii) where an assessee has not furnished returns required under the existing law for six preceding months or (iii) where the said credit relates to goods manufactured and cleared under exemption notifications. These are the only three conditions/ embargos that bar the transfer of accumulated credit. The language of section 140(1) and (8), both make it clear that an assessee to GST is entitled to transition of 'the amount of cenvat credit carried forward in the return relating to the period ending with the date preceding the appointed date' and this in the present case includes accumulated credit of EC, SHEC and KKC.

16. Section 140(8) which specifically deals with centralised registration also provides for transitioning of credit conditional upon an original or revised return being filed within three months of the appointed date reflecting a carry forward of the credit from the closing balance available. The intention, to my mind, is clear, to the effect that the credit reflected in the earlier returns is sought to be permitted to be transitioned, except if specifically barred.

17. Thus, the revenue has not made out any bar for the transitioning of EC, SHEC and KKC into the GST regime and the petitioner satisfies all conditions both under sub-section (1) and (8) of section 140. The embargo placed by Rule 3(7)(b) is long gone with the introduction of GST. Certainly the powers-that-be are conscious of these factors in drafting the new legislation and the specific provision in question i.e., Section 140.

18. The judgments in the case of S.S.Gadgil V. Lal and Co. (AIR 1965 SC 171), J.P.Jani, Income Tax Officer V. Induprasad Devshanker Bhatt (AIR 1969 SC 778), New India Insurance Co.

Ltd. V. Shanti Misra ((1975) 2 SCC 840, T.Kaliamurthi V. Five Gori Thaikkal Wakf ((2008) 9 SCC 306), Thirumalai Chemicals Ltd. V. Union of India ((2011) 6 SCC 739 and Mafatlal Industries Ltd. v. Union of India ((1997) 5 SCC 536 were cited by the Supreme Court in allowing the Revenues' appeal and holding that a dead claim could not be revived by a subsequent benefit.

Hence, the impugned order was set aside and the petition was allowed.

4. GST – ADVANCE RULING – VOLUME DISCOUNT – CREDIT NOTE ISSUED – POST-SALE EVENT- NO NEED TO ISSUE TAX INVOICE FOR TRANSACTION

In RE: Kwality Mobikes (P) Ltd. 2019(30) GSTL 668 (AAR.-GST) the applicant is issuing a tax invoice on the supply of goods to the applicant and is taking credit of the input tax charged in the invoice. The applicant when makes more purchases is eligible for the volume discount on purchases and a credit note is issued by the authorised supplier and no adjustment of price is made in respect of the goods already sold nor any adjustment of GST is made in the credit note. An application was filed seeking advance ruling as to the following:-

a) Whether the volume discount received on purchases is liable for GST? If yes, under which HSN/SAC?

b) Whether volume discount received on retail (on sales) is liable for GST? If yes, under which HSN/SAC?

c) Whether the Company has to issue taxable invoice to this effect?

The authority observed as under:

1. The applicant is issuing a tax invoice on the supply of goods to the applicant and is taking credit of the input tax charged in the invoice. The applicant when makes more purchases is eligible for the volume discount on purchases and a credit note is issued by the authorised supplier and no adjustment of price is made in respect of the goods already sold nor any adjustment of GST is made in the credit note. The applicant is also not claiming any reduction in input tax credit already claimed by him as it does not affect the price of the goods sold.

2. Consequently, the amount received by the applicant is in the form of an incentive provided by the authorised supplier and does not affect the sale price of the goods already sold and hence there is no liability to charge GST on the same.

3. Furthermore, the applicant when sells more than his target is eligible for the incentive which is provided by the authorised supplier in the form of a credit note without affecting the sale price of the goods purchased or sold. Even this is in the form of incentive and no adjustment of price nor tax is done either by the applicant or the authorised supplier.

4. Resultantly, the amount received by the applicant is in the form of an incentive provided by the authorised supplier and does not affect the sale price of the goods already sold and hence there is no liability to charge GST on the same.

5. Further, the applicant is not providing any service to the authorised supplier and is only receiving the incentive. Indirectly, it has an effect on the sale price of the goods purchased by the applicant from the authorised supplier and is actually in the form of discount.

6. Section15(3) of the CGST Act, 2017 excludes any discount in arriving at the value of supply. In view of the fact that credit note is a post sale discount, the same is not covered under clause (a) therein. The fact that the applicant has not reversed the input tax credit (ITC) attributable to the discount in the form of credit note will further disentail the coverage under clause (b) therein.

7. Consequent to the above, the credit note issued will not have any impact on the value of supply and is only a financial document for account adjustment for the incentive provided.

Hence, the authority ruled as under:

1. The Volume Discount received on purchases in the form of credit note without any adjustment of GST is not liable for GST.

2. The Volume Discount received on Retail (on sales) in the form of credit note without any adjustment of GST is not liable for GST.

3. In view of the fact that the amount received in the form of credit note is actually a discount and not a supply by the applicant to the authorized supplier, the applicant need not issue tax invoice for this transaction.

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GST RECAP FOR THE FY 2018-2019

CA. DEBASIS NAYAK

(A) Significant Amendment through CGST Amendment Act, 2018 with effect from Feburary 1, 2019

Government had notified effective date of implementation of amendments introduced through CGST Act, 2018 from 01 February 2019 vide Notification 2/2019 Central Tax dated 29.01.2019. Major amendments in CGST law has been listed as under:

1. *New Additions to Schedule III of the CGST Act*

The following transactions to be treated as neitehr supply of goods or services (no tax payable) under Schedule III:

a) Supply of goods from a place in the non-taxable territory to another place in the non-taxable territory without such goods entering into India;

b) Supply of warehoused goods to any person before clearance for home consumption; and

c) Supply of goods in case of high sea sales.

2. *Multiple registration within the same state without business vertical*

Proviso to Section 25(2) has been amended to allow the persons having multiple place of business in a state or UT to obtain separate registration for each such place of business. Rule 41A has been inserted to specify the manner of Transfer of credit on obtaining separate registration for multiple places of business within a State or Union territory.

3. *Input Tax Credit*

a. Explanation to Section 16(2) (b) has been substituted to provide that the deeming fiction for availing the input tax credit in case of services where services are provided by the supplier to any person on the direction of and on account of such registered person.

b. Credit restrictions on motor vehicles has been relaxed to allow credit on motor vehicles for transport of passengers having a seating capacity of more than 13 persons and also on the special purpose vehicles such as dumpers etc.

4. *Retrospective amendment in Transitional Provision*

Section 140(1) has been retrospectively amended to substitute the word CENVAT Credit with 'Eligible Duties' and Explanation 3 to the said Section provides the meaning of eligible duties as eligible duties as excluding the cess. In fact, the above Explanation alone is sufficient to fulfil the intention of the Government for not allowing balance of any CESS of the erstwhile law (like EC, SHEC, KKC, and SBC). However, this has been challenged in various High Courts.

5. Definition of Export of Service

Section 2(6) of the IGST Act, 2017 has been amended to allow the receipt of payment in Indian rupees in case of export of services where permitted by Reverse bank of India.

(B) Reduction of GST rate for Real estate Sector

The Government had prescribed the concessional rate of tax for new real estate projects executed on or after 01.04.2019 and ongoing projects who would exercise the option of new rate of tax on or before 20.05.2019 as:

Sl.No.	Projects	Rate of Tax (%)	Effective Rate of Tax*	Input Tax Credit (ITC)
1	***Residential***			
	Affordable Housing	1.5	1	Without ITC
	Residential other than Above	7.5	5	Without ITC
2	***Commercial***	18	12	With ITC
3	***Mixed (Residential and Commercial)***			
	Commercial apartments (Carpet area < 15% of the total carpet area)			
	Commercial Space	7.5	5	Without ITC
	Affordable Residential	1.5	1	
	Non Affordable Residential	7.5	5	

* Deduction of 1/3rd for Value of Land

Key Conditions to be complied for new rate of taxes

- Tax liability shall be paid in cash by way of debit in the electronic cash ledger.
- 80% input and input services [other than TDR/ JDA, FSI, long term lease (premiums), Electricity, High speed diesel, Motor spirit, Natural gas] shall be purchased from registered persons. If purchases from registered person is below 80%, tax shall be paid by the builder @ 18% on reverse charge mechanism (RCM) basis (other than cement)
- Tax on cement purchased from unregistered person shall be paid @ 28% under RCM. This liability has to be paid in the month in which cement is received.
- Tax on capital goods purchased from unregistered person shall be paid at applicable rates under RCM.
- The developer shall maintain project wise records for account of inward supplies from registered and unregistered person and report the ITC not availed in Form GSTR-3B as ineligible credit.

(C) E-way Bill

For quick and easy movement of goods across India without any hindrance, all the check posts across the country are abolished. The GST system provides a provision of e-Way Bill, a document to be carried by the person in charge of conveyance, generated electronically from the common portal.

E-way Bill system went live on 1 April 2018, to track movement of goods on interstate and intra-state transactions with the objective of to ensure ease of doing business, curb revenue leakage and remove check post and barriers.

Developments in E-way Bill System

1. Auto calculation of route distance based on PIN code for generation of EWB
2. Blocking of generation of multiple E-Way Bills on one Invoice / document
3. Extension of E-Way Bill in case Consignment is in Transit
4. Blocking of Interstate Transactions for Composition dealers
5. Report on list of e-Way Bills about to expire.
6. Blocking / Unblocking of genereation of E-way Bill, in case of non-filing of 2 or more consecutive GSTR 3B Return on GST Portal

Recent Trends on E-way Bill

1. Notices from the GST authorities on mismatch in e-way bill data vis a vis sales return (GSTR-1)
2. Detention of vehicle in case Part-B of the E-way bill was not updated
3. Undisclosed goods in the E-way Bill
4. Detention of vehicle on the ground of wrong mention of value in E-way bill

(D) Annual Return (GSTR-9) and Reconciliation Statement (GSTR-9C)

The government had notified the form for the annual return vide Notification No 39 / 2018 – CT, dated 4th September, 2018, by amending the existing CGST Rules. The Government has extended the deadline for filing of annual return and reconciliation statement multiple times for FY 2017-18 and 2018-19. Now, finally deadline for filing of annual return and reconciliation statement for FY 2017-18 is 31st January 2020 and FY 2018-19 is 31st March 2020.

Various clarrification, outreach programes and FAQ has been provided by the CBIC from time to time to faciliate the taxpayer in filing the returns in a time bound manner. Further, in order to provide relief to the small tax payer, the filing of GSTR-9 & 9C of financial years 2017-18 and 2018-19 has been made optional for the registered person aggregate turnover in a financial year does not exceed two crore rupees.

Recently, the Government has simplified the form GSTR-9 & 9C extensively to allow the taxpayers to file the returns. The key simplification includes no bifurcation of credit of input, input service and capital goods, HSN for inward supplies and expense wise bifurcation of input tax credit has been made optional, no requirement provide reasons of unreconciled balances between books and annual return, etc.

(E) Union Budget Highlights

Key highlights of the union budget are:

1. Trade Facilitation

a) Threshold limit for registration enhanced from 2 Million to 4 Million for taxpayers exclusively engaged in supply of goods.

b) Specified class of suppliers to mandatorily offer facility of digital payments to their recipients; in a manner to be prescribed by the Government.

c) Facility to taxpayer to transfer an amount of tax, interest, penalty and fees from one head to another in Electronic Cash ledger within the same registration. However, this will be subject to such manner and restriction as prescribed by the Government.

d) Interest to apply only on net tax liability (after considering eligible input tax credit) except where such return is furnished after commencement of any proceedings under section 73 or section 74 in respect of the said period.

2. Administration

Constitution of an Appellate forum namely National Appellate Authority for Advance Ruling (NAAAR) to deal with conflicting rulings pronounced on the same question by Appellate Authorities of Advance Ruling of two or more states/Union Territory.

3. Improving Compliances

a) There will be an alternative composition scheme for suppliers of services or mixed suppliers having an annual turnover up to INR 5m in the preceding FY

b) Aadhaar authentication mandatory for specified class of new taxpayers. However, if an Aadhaar number is not assigned; such person shall be offered alternate and viable means of identification.

4. Others

Empowering National Anti-Profiteering Authority to impose penalty equivalent to 10% of the profiteered amount. However, no penalty shall be leviable if the profiteered amount is deposited within thirty days of the date of passing of the order by the Authority.

(F) Sabka Vishwas Legancy Dispute Resolution Scheme (SVLDRS)

In order to reduce the excessive baggage of erstwhile litigation, The Finance Act, 2019 introduced dispute resolution cum amnesty scheme called **"The Sabka Vishwas (Legacy Dispute Resolution) Scheme, 2019"** (hereinafter referred as LDRS, 2019) as a onetime measure for resolution of pending disputes related to Central Excise, Service Tax and other 26 indirect tax enactment introduced through Finance Act 2019. The aim of this scheme is to unload the taxpayer and business house with unnecessary past litigation with an objective to enhance efficiency and effectiveness of business. The scheme shall be operation from 1st day of September 2019 to 31st December 2019.

The CBIC has notified the Sabka Vishwas (Legacy Dispute Resolution) Scheme Rules, 2019 vide ***Notification No. 05/2019- Central Excise (NT) dated 21st August 2019.***

Relief under this scheme

The relief under the scheme varies from forty percent to seventy percent of the tax dues for cases other than voluntary disclosure cases, depending on the amount of tax dues involved. The scheme also provides complete relief from payment of interest and penalty.

Particulars	Amount of relief (% of tax dues)	
	Amount of duty* < or = INR 50 lacs	Amount of duty > INR 50 lacs
Tax dues relate to an SCN or an appeal(s) pending as on June 30, 2019	70%	50%
Tax dues relate to an amount in arrears	60%	40%
Tax dues relate to an amount in arrears and where an amount of duty has been reported as payable in returns but tax has not been paid	60%	40%
Tax dues are linked to an enquiry, investigation or audit	70%	50%
Tax dues payable on account of voluntary disclosure	No relief with respect to tax dues	

Note: Where the tax dues are relatable to a SCN for late fee or penalty only then entire amount of late fee and penalty is considered as relief under this scheme.

(G) Departmental Audit

Section 65 of CGST Act is the enabling provision to commence the audit by the departmental officer. The audit is defined first time in the history of indirect taxation. Till now, department has not started audit as the due date of filing of annual return (GSTR-9/9A) and reconciliation statement (GSTR-9C) gets extended from time to time which is the trigger point for commencement of audit. In this regard, as a proactive measure, Directorate General of Audit ("DGA") vide F.No. 381/49/2019 dated June 25, 2019 has issued ***"Audit Plan for the FY 2019-2020".***

Further, in additon to this, DGA have also issued detailed "**Goods and Services Tax Audit Manual 2019" ('Audit Manual')** in July 2019 covering objectives and principles of audit, management of GST audit, selection of registered person, preparation, verification, audit report, follow up and soles and responsibilities in delivering high standard output.

(H) New Return

In the proposed system of new GST Return filing, a normal taxpayer would have to file FORM GST RET-1 (Normal) or FORM GST RET-2 (Sahaj) or FORM GST RET-3 (Sugam) on either monthly or quarterly basis. Annexure of supplies (GST ANX-1) and Annexure of Inward Supplies (GST ANX-2) will be filed as part of these returns. All the outward supplies will be detailed in GST ANX-1 while GST ANX-2 will contain details of inward supplies auto-populated mainly from the suppliers GST ANX-1.

a. **Annexure of Supplies (GST ANX-1)** contains features for uploading the details of outward supplies, imports (goods and services), and inward supplies attracting reverse charge etc.

b. **Annexure of Inward Supplies (GST ANX-2)** is the form in which user can take action on the auto-drafted documents uploaded by supplier, which will made available to them on real time basis.

In May 2019, GSTN has came with a prototype of the new return on the common portal to give the look and feel of the tool to the users. The look and feel of the prototype of return would be same as that of the online portal. In June 2019, CBIC has came up with detailed transition plan for implementation of new retrun.

Further, in July 2019, Trial run of Offline Tool of New return has been released. The purpose behind this is to enable familiarization of taxpayers with tools functionalities and to get their feedback and suggestion to improve the tool before its actual deployment.

The present system of return filing (GSTR-1 and GSTR-3B) would be replaced by new return in the following manner:

Nature	Present Return	Proposed New Returns
Outward Supplies	GSTR-1	GST ANX 1
Inward Supplies	GSTR-2A	GST ANX 2
Monthly consolidated return	GSTR-3B	GST RET 01

(I) New Online Refund Functionalities

On September 26, 2019, online development of refund module has been completed and made available to the taxpayers. A detailed advisory explaining the entire online process of refund with screenshots has been issued in public domain to familiarize the taxpayers with the online refund modalities. The complete online filing and processing of refund application is made applicable w.e.f September 26, 2019. Any ARN generated on or after September 26, 2019 will be treated as per new online functionalities.

Further, in order to take all the taxpayers in a single page, a detailed circular no. 125/44/2019 - GST dated November 18, 2019 is isuused explaining the complete online functionalities, documents required and time frame for processing by the department. The refund claim and sanctioning procedure will be completely online and time bound which is a marked departure from the existing time consuming and cumbersome procedure.

(J) E-Invoicing

In 35th GST Council meeting, the proposal to introduce e-invoice is raised with an overall aim to simply GST and curb the generation of fake and bogus billing. In this regard, Council has decided to introduce electronic invoicing system in a phase-wise manner for B2B transactions. The Phase 1 was proposed to be voluntary and it shall have be rolled out from 1st January 2020.

Under E-invoicing system, the enterprise resource planning (ERP) system of businesses would need to be linked to the government portal for generation of a unique invoice reference number (IRN), along with a QR code.

The Government had released a concept note, a schema and a template for e-invoicing after consultation with trade/ industry bodies as well as Institute of Chartered Accountant of India (ICAI). The e-invoice draft placed in the public domin was in the following three parts:

1. **E-invoice schema:** It has the Technical field name, description of each field, whether it is mandatory or not, and has a few sample values along with explanatory notes.

2. **Masters:** Masters are included of fields like UQC, State Code, invoice type, supply type etc.

3. **E-invoice template:** This template is as per the GST law and has been provided here to enable the reader to correlate the terms used in other sheets. The compulsory fields are marked green and optional fields are marked yellow.

Pursuant to the same, CBIC has issued several notifications to bring into effect provisions governing e-invoicing and Quick Response (QR) code generation from 1 April 2020:

Sl.No	Specification	Date of Implemention		Requirement	
		Voluntary	Mandatory	For B2B	B2C
1	Registered person with a turnover of INR 500 crore or more	1 January 2020	1 April 2020	E-invoicing	QR
2	Registered person with a turnover of INR 100 crore or more	1 February 2020	1 April 2020	E-invoicing	Yet to be prescribed
3	Registered person with a turnover of less than INR 100 crore	1 April 2020	Yet to be prescribed	E-invoicing (Volountary basis)	Yet to be prescribed

Invoices issued without an IRN will be treated as invalid. This process now eliminates the requirement to issue duplicate / triplicate invoice copies. Further, to reduce the techical glitches and network traific, a list of 10 websites that can be accessed for the generation of the IRN (collectively called the "Common Goods and Service Tax Electronic Portal") has been provided.

(K) *Miscellaneous*

1. Addition of Service under Reverse Charge Mechanism (RCM)

Various services are added under the ambit of reverse charge mechanism where the service recipient has to pay the applicable tax. However, tax paid are available as credit subject to the conditions. The key services having impact is tabulated below:

Category of Supply of Services	Supplier of Service	Recipient of Service
Security Services (services provided by way of supply of security personnel) provided to a registered person.	Any person other than a body corporate	A registered person, located in the taxable territory
Services provided by way of renting of a motor vehicle provided to a body corporate	Any person other than a body corporate, paying central tax at the rate of 2.5% on renting of motor vehicles with input tax credit only of input service in the same line of business	Anybody corporate located in the taxable territory

2. Restriction on availment of Input Tax Credit

The Government has introduced Rule 36(4), which prescribes a limit on availing input tax credit under GST. Under this amendment, a maximum limit of 20% has been set for availing input tax credit pertaining to invoices or debit notes which have not been uploaded by suppliers on the GST portal (i.e. invoices not appearing in GSTR 2A). In this regard, CBIC has issued a detailed circular providing clarifications and explanations on various aspects of such rule.

(L) Key Advance Ruling having impact on the business

Name of the parties and citition number	Question on which clarification is sought	Ruling
JOTUN INDIA PVT LTD [2019-TIOL-312-AAR-GST]	Applicant has introduced parental insurance for employees' parents - It is an optional scheme provided to the employees. As per this scheme, the Applicant initially pays the entire premium along with taxes to the insurance company. 50% of the premium is recovered from the respective employees who opt for parental insurance scheme. In this regard, Applicant has filed an application before the AAR seeking to know whether GST is payable on recovery of 50% of the insurance premium from the salary of the employees.	The AAR finds that the activity undertaken by the applicant of providing of Mediclaim policy for the employees' parent through insurance company neither satisfies conditions of section 7 to be held as "supply of service" nor it is covered under the term "business" of section 2(17) of CGST Act. Therefore, the applicant is not rendering any services of health insurance to their employees' parent and hence there is no supply of services and accordingly GST is not leviable.

SENCO GOLD LIMITED [2019-TIOL-140-AAR-GST]	Whether Input tax credit admissible to the Applicant when the debt created on inward supplies from Franchisee are settled through book adjustment?	A payment is a transfer of an asset to the payee for discharging an obligation arising out transactions involving goods, services or other legal obligations. The most common asset class used for payment is money, although other assets are valid, unless specifically excluded by law and payee accepts payment by such assets other than money as good and sufficient discharge of the obligation. Further, definition of consideration u/s 2(31) of the Act provides a very wide scope and ambit for modes of payment. Hence, the recipient can pay the suppliers consideration by way of setting off book debt if is agreed by the payee. Accordingly, ITC is admissible.
M/s ANSYS SOFTWARE PVT LTD [2019-TIOL-321-AAR-GST]	The Applicant is enagaged in the business of distribution of software in India, the proprietary ownership lies with parent entity located in US. In this regard, the applicant approached the AAR seeking to know whether marketing and pre-sales technical support services provided by it, would classify as Intermediary services u/s 2(13) of the IGST Act. Whether post-sales technical services provided would classify as Information Technology Support Service falling under HSN Code 998313.	AAR held that: 1). The marketing and pre-sales technical support services provided by the applicant would be classified as Intermediary services u/s 2(13) of the IGST Act 2). Post-sales Technical Support Services provided by the applicant are classified as Information Technology Support Services falling under HSN Code 998313.

(M) Key Judgements having impact on the business under erstwhile law

Citation	Facts and Issue of the case	Order / Judgement
CCE and ST, Jaipur-I vs Nissin Brake India Pvt Ltd [2019-TIOL-151-SC-S]	The assessee had entered into an agreement with its overseas parent company in Japan for payment of salary and other perquisites for employees deputed from such parent company. The Revenue sought to tax such reimbursement of salary as manpower supply services and demanded service tax under the reverse charge mechanism.	The SC dismissed the appeal filed by the Revenue and upheld the Tribunal's ruling. While determining the nature of service, it made the following key observations: 1. The deputed person works under the control, direction and supervision of the assessee, 2. The assessee did not pay any direct or indirect compensation to its parent company for the deployment of employees, apart from the reimbursement of salary at cost. 3. As per the agreement, the relationship between the assessee and the deputed employee is that of employer-employee. 4. Method of salary disbursement [through a group company] will not result in provision of service.

M/s. Amadeus India Private Limited vs. Principal Commissioner of Central Excise and Service Tax (W.P.(C) 914/2019	A SCN was issued to the petitioner alleging non payment of tax. The petitioner draw the attention of the respondent to the Master Circular dated 10th March 2017 in terms of which pre-show cause consultation in cases involving duty demand above 50 lakhs is mandatory. When no response received in relation to this from the respondent, the petitioner filed the writ petition.	High Court observed that in present case, the officers of the respondent do not appear to have taken any conscious decision in regard to the requirement of the Master Circular. This fact is also confirmed by the learned counsel appearing on behalf of the respondent that there was no noting in the file to that effect. Therefore, the court held that respondent had completely ignored the Master Circular. Accordingly, the court directed the respondent to grant a pre consultation to the petitioner.
M/s. Sutherland Global Services Pvt Ltd [2019-TIOL-2516-HC-MAD-GST]	Whether unutilised and accumulated CENVAT credit of the cesses (namely Education Cess, Senior and Higher Education Cess and Krishi Kalyan Cess collectively referred to as "cesses") can be transitioned and subsequently utilised for paying GST.	The Madras High Court upon examining a plethora of judgements and while referring mainly to the Supreme Court and Delhi High Court's decisions in Eicher Motors and Cellular Operators Association of India respectively, held that the credit of the cesses could be transitioned and utilised for payment under the GST. Accordingly, the High Court decided in favour of the taxpayer.

(N) Key Circulars/ Clarifications

Doubts / Issues	Clarification
GST on Tax Collected at Source under Income Tax Act, 1961	For the purpose of determination of value of supply under GST, Tax collected at source (TCS) under the provisions of the Income Tax Act, 1961 would not be includible as it is an interim levy not having the character of tax.
IT / ITES	CBIC has issued Circular No 107/ 26/2019 dated 18th July 2019 to clarify the doubts relating to the supply of IT-enabled services and classification of such services as an intermediary under the GST Act. However, due to the further confusion arising out of the circular, the Government has withdrawn this circular ab-initio vide Circular No. 127/46/2019 - GST dated December 4, 2019.
Post Sale discount	CBIC has issued Circular No. 105/2019-CT dated 28.06.2019 on treatment of secondary or post-sales discounts under GST. However, due to the numerous representations from trade expressing apprehensions on the implications of the said Circular, the Government has withdrawn this circular withdraws, ab-initio Circular No. 112/31/2019 - GST dated 3rd October, 2019
Clarification with respect to determination of place of supply in case of software or design services related to Electronics and Semi-Conductor and Design Manufacturing (EDSM) Industry	❖ Entire activity will be considered as composite supply of service and therefore viewed as one supply for the purpose of taxation; ❖ Software development and design service is the principal supply of service; and ❖ Testing of software on sample prototype hardware is only an ancillary supply as o service provider is not involved only in testing as separate service o Testing is done only for the purpose of improving the quality of software/ design developed.

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A DISCUSSION PAPER ON CHAPTER III- DIRECT TAXES OF FINANCE (NO.2) ACT, 2019- JULY & AUGUST 2019

CA. VIVEK RAJAN V

Introduction- Thanking everyone for our Discussion Papers of 2016, 2017 & 2018 & 2019 (Interim Budget of 2019)

The Finance (No.2) Bill, 2019 (Bill No. 55 of 2019) was presented in Lok Sabha on 05th July 2019 by Ms. Nirmala Sitharaman, Union Finance Minister. In Chapter III of Finance (No.2) Bill, 2019, there has been 66 amendments proposed to the Income-tax Act, 1961. The Finance Bill got the assent of the Hon'ble President of India on the 01st of August 2019 and became the **Finance (No.2) Act, 2019.**

Scope of the Discussion Paper

This discussion paper attempts to **cover all sections of the Finance (No.2) Act, 2019** relating only to Direct Taxation. This discussion paper attempts to cover all the aspects about the amendments broadly and not in detail. Further unless otherwise specifically mentioned, sections discussed in this paper, relates to Income-tax Act, 1961 and the Finance (No.2) Act, 2019. Please refer to Finance (No.2) Act, 2019 and the relevant pronouncements before taking any decision. The readers are requested to contact the author, in case of errors (which are unintentional) and also in case of divergent views with the author's note.

An Attempt

We are attempting to extend the coverage of the discussion paper **to all the sections of the Finance Act**. Giving due consideration to the volume of the discussion paper and the challenges involved in publishing, we intend to present this in a phased manner (December 2019 and January 2020). ***The sections which are not covered in this month's bulletin, would have been covered in the previous month (s) bulletin or would be covered in the subsequent month's bulletin***. We sincerely hope that this effort is of value addition to the readers.

Acronym and Description

FA	Finance Act	RBI	Reserve Bank of India
CG	Capital Gains	NCLT	National Company Law Tribunal
IFHP	Income from House Property	FMV	Fair Market Value
LTCG	Long Term Capital Gain	TDS	Tax Deducted at Source
The Act	Income Tax Act, 1961	TCS	Tax Collected at Source
PY	Previous Year	APA	Advance Pricing Agreement
AY	Assessment Year	ALP	Arm's Length Price
PCIT	Principal Commissioner of Income-tax	IFSC	International Financial Services Centre
CIT	Commissioner of Income-tax	TDS	Tax Deduction at source
NRI	Non- resident Indian	FII	Foreign Institutional Investors
FPI's	Foreign Portfolio Investors	NBFC	Non-banking Financial Company

1. Special friendlier taxation regime for offshore funds – Amendment of Section 9A

With retrospective effect from AY 2019-20

Present scenario and reference to Explanatory Memorandum

1. Section 9A of the Act provides for a safe harbour in respect of offshore funds.

1. It provides that in the case of an eligible investment fund, the fund management activity carried out through an eligible fund manager located in India and acting on behalf of such fund shall by itself not constitute business connection in India of the said fund

2. An eligible investment fund shall not be said to be resident in India merely because the eligible fund manager is located in India.

3. The above benefits are conditional in nature and the conditions relate to

- Residence of fund
- Corpus of fund – *The monthly average of the corpus shall not be less than Rs. 100 Crores. If the fund has been established in the PY, the Rs. 100 Crore limit was to be reckoned at the end of the FY.*

- Size and investor broad basing
- Investment diversification
- Payment of remuneration to fund manager at arm's length. In other words the remuneration paid by an offshore fund to a fund manager in India should not be less than the arm's length price that is paid for such activity.

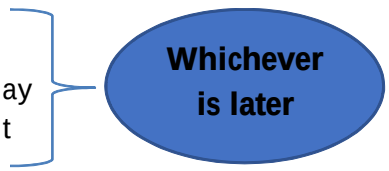
4. Consequent to receipt of representations to relax certain conditions related to the above and to give an impetus to fund management activities in India, these amendments are proposed

   Amendment

   Amendment No. 1 – For recently incorporated funds

   A relaxation has been given for funds incorporated in the PY by reckoning the limit either

a. End of the Previous year or
b. End of the period of 6 months from the last day of the month of incorporation orestablishment



Amendment No. 2 – Method and manner prescribed for calculation of remuneration paid to fund manager

Section 9A has been amended to calculate the remuneration paid to fund manager at such manner as may be prescribed.

The CBDT on 5th December 2019 has hosted the draft notification to amend rules for this purpose in the web portal and time upto 19th December 2019 had been given to public and stakeholders to give their inputs through mail correspondence. The draft rules have been circulated through mail to our members.

Author's note

Illustration for Amendment 1

If the Eligible Investment Fund has been incorporated on March 10th, 2019, then the **corpus of fund shall not be less than Rs. 100 Crores** as at

- 31st March 2019

  Or

- 30th September 2019

Prior to the amendment, this limit was reckoned at 31st March 2019.

2. Interest payments to certain NBFC's under the scope of Section 43B- Amendment of Section 43B- Consequential amendment to Section 43D

With effect from 01st April 2020 and will apply from AY 2020-21 and subsequent years

Present scenario and reference to Explanatory Memorandum

1. Section 43B did not include in its scope , the following interest payments for loan or borrowing from

- deposit taking NBFC's or
- systemically important non-deposit taking NBFC's.

2. This a consequential amendment as a matching principle in taxation for the amendment to Section 43D

Amendment

1. Section 43B has been suitably amended to include in its scope the interest payments for loan or borrowing from

- deposit taking NBFC's or
- systemically important non-deposit taking NBFC's.

2. Interest of such nature shall be allowed based on actual payment which can either be

- the same PY (if paid in the same PY or within 139(1) timelimit) or
- the PY in which the payment is made

3. Deduction will not be allowed on payment basis if the deduction is already allowed for the said interest in earlier years.

4. Conversion of interest into loan or borrowing will not be deemed to have been actually paid and deduction would not be available.

Meanings of few words

1. **Deposit taking NBFC** means a NBFC which is accepting or holding public deposits and is registered with the RBI under the provisions of the Reserve Bank of India Act, 1934.
2. **NBFC** shall have the meaning assigned to it in clause (*f*) of section 45-I of the Reserve Bank of India Act, 1934
3. **Systemically important non-deposit taking NBFC** means a NBFC which is not accepting or holding public deposits and having total assets of not less than Rs. 500 Crores as per the last audited balance sheet and is registered with the RBI under the provisions of the Reserve Bank of India Act, 1934.

3. Incentives to certain NBFC's- Amendment of Section 43D

With effect from 01st April 2020 and will apply from AY 2020-21 and subsequent years

Present scenario and reference to Explanatory Memorandum

Interest income on bad and doubtful debts for public financial institutions , State financial corporation etc were chargeable to tax on receipt basis. In other words, the taxable event was earlier of the following

- Credit to its Profit and Loss Account
- Year of actual receipt

This benefit is not available to **deposit taking NBFC's** and **systemically important non-deposit taking NBFC's**. The amendment is intended to provide a level playing field to these NBFC's.

Amendment

Section 43D has been suitably amended to include its special applicability to **deposit taking NBFC's** and **systemically important non-deposit taking NBFC's.**

The meaning for **deposit taking NBFC's** and **systemically important non-deposit taking NBFC's** is provided by the amended Section 43B covered above.

4. Prescription of electronic mode of payments – Promotion of less cash economy- Amendment of Section 50C

With effect from 01st April 2020 and will apply in relation to AY 2020-21 and onwards

Present scenario and reference to Explanatory Memorandum

There are various provisions in the Act which prohibit cash transactions and encourage payment through account payee cheque / account payee draft or electronic clearing system through a bank account.

In order to encourage other electronic modes of payment, it is proposed to amend section 50C so as to include such other electronic mode as may be prescribed in addition to already existing modes of payments.

Amendments

Section 50C is amended to include in its permissible modes of payment "such other electronic mode" as may be prescribed.

5. Capital gains benefit for entrepreneurs- Amendment of Section 54GB

With effect from 01st April 2020 and will apply in relation to AY 2020-21 and onwards

Present scenario and reference to Explanatory Memorandum

The LTCG on transfer of capital asset being a residential property (house or plot of land) owned by eligible assessee was not chargeable to tax, if along with other conditions,

a. the assessee before the ROI filing time limit u/s 139(1), utilises the net consideration for subscription in the equity shares of an eligible company and

b. That company has within 1 year from date of subscription in equity shares by the assessee, utilised the amount for purchase of new asset and

c. The new asset acquired by the company are not sold or transferred for a period **of 5 years** from date of acquisition

d. The assessee has more **than 50%** share capital or more **than 50%** voting rights after subscription.

Further, the provision had a sun set clause till 31st March 2019. In other words no benefit is available for residential property transferred after 31st March 2019.

In order to incentivise investment in eligible start-ups, these following amendments are proposed.

Amendment

Section 54GB is suitable amended to

- Extend the sun set date of transfer of residential property for investment in eligible start-ups from 31st March 2019 to 31st March 2021
- Relax the condition of minimum shareholding of 50% to 25%

Relax the condition restricting transfer of new asset being computer or computer software from **5 years to 3 years.**

(The author is a Chennai based Chartered Accountant in Practice. He can be reached at vvr@vvrcas.com)

UNICORN INDUSTRIES VS UNION OF INDIA AND OTHERS [2019]-TIOL-528-SC-CX

RJ. RAHUL JAIN

Facts of the case

The Appellant, M/s Unicorn Industries, was a manufacturer of mouth freshener at Sikkim. The Appellant-Assessee availed area-based exemption under Notification No. 71/2003-CE dated 09.09.2003 (hereinafter referred to as 'Exemption notification') from payment of '**duty of Excise**' under the Central Excise Act, 1944, Additional Duties of Excise under Additional Duties of Excise (Goods of Special Importance) Act, 1957 (58 of 1957) and Additional Duties of Excise (Textiles and Textile Articles) Act, 1978 (40 of 1978).

This exemption was granted by way of refund on payment of duties in accordance with the notification. It is to be noted that the Exemption Notification did not include National Calamity Contingent Duty (NCCD)[1] and the Notification was also not amended subsequently when Education Cess and SHE Cess were introduced in 2004 and 2007 respectively.

In the present facts, the Appellant-Assessee paid NCCD, EC and SHEC and subsequently claimed refund in accordance with the Exemption Notification, though refund of these duties were not provided for.

Question of Law

What is the construction of the phrase 'duty of excise' and whether exemption granted to Basic Excise Duty will automatically extend to cesses and other duties such as NCCD?

Grounds of Contention

The Appellant-Assessee relied on two recent decision of the Hon'ble Apex Court in the cases of M/s **SRD Nutrients Pvt. Ltd. vs Commissioner of C. Excise, Guwahati [2017 355 ELT 481 (SC)] and M/s Bajaj Auto Limited vs Union of India [2019 366 ELT 577 (SC)][2].** The former was a case in the context of EC and SHEC. It was held in SRD's case

[1]NCCD was imposed vide Section 136 of the Finance Act, 2001
[2]Both these cases were by a two judge Bench

that when Excise Duty is exempted, EC and SHEC would also be exempted on the basis that there cannot be surcharge when basic duty is 'Nil'. In Bajaj Auto's case, the Court held that once Excise Duty is exempted, NCCD, levied as Excise Duty cannot partake a different character. The decision of Bajaj Auto was rendered placing reliance on SRD Nutrient's case.

Hence, in both the above decisions, though the notification provided only for exemption to Basic Excise Duty, the Supreme Court read into the phrase 'duty of excise' widely and concluded that other duties and cesses which partake the character of excise duty would also be exempted; despite there being no specific reference in the notification to this extent.

Decision

The Larger Bench of the Supreme Court has held that the decisions of Bajaj Auto Limited and SRD Nutrients Pvt. Ltd are *per incurriam* on the ground that they have not considered the Landmark decision of Larger Bench[3] of the Supreme Court in Union of India vs **Modi Rubber** Limited [1986 4 SCC 66].

In Modi Rubber's case, the Supreme Court had held that exemption from Excise Duty cannot bear an extended meaning to include Special Excise Duty and Auxiliary Excise Duty. This decision was subsequently followed in Rita Textiles Private Limited vs Union of India 1986 SCC Supp.557

The Apex Court held that the 'Exemption Notification' did not provide exemption to NCCD which was levied vide Finance Act, 2001, by which NCCD was imposed.

Further, Finance Acts 2004 and 2007 was not in vogue at the time when the exemption Notification No. 71/2003 came into force and therefore, it could not have contemplated the inclusion of EC and SHEC within its fold.

[3]Three Judge bench

In the absence of a notification containing an exemption to such additional duties in the nature of EC and SHEC, they cannot be said to have been exempted.

The Court further held that mere exemption to one kind of duty would not mean that other kinds of duties are automatically exempted. Further, the fact that there would be difficulty in computation of additional duties when the 'Basic Excise Duty' is exempt cannot be a reason to not levy the additional duties.

Author's comments

In essence, the Supreme Court has now reiterated the law that the phrase 'duty of excise' would only include the 'Basic Excise Duty'. This phrase would not automatically encompass the other duties or cesses imposed under different legislations. In the personal view of the author, the rationale laid down by the Court now reflects the correct position of law.

Though the Supreme Court has not specifically distinguished the implications for duties like NCCD and Auto Cess vis a vis Education cess and SHE Cess, considering that the language employed in the language of Section 91 and Section 93 of the Finance Act, 2004 and Sections 126 and Section 128 of Finance Act, 2007[4], it would still be open to argue that Cesses (Education Cess and SHE Cess) would qualify as 'a duty of excise'. Resultantly, once any exemption is granted in respect of 'any duty of excise', even cesses would be exempt. This proposition has to be tested, preferably before another larger bench of the Court. Till such time, assessee's facing demands or rejection of refunds would be bound by this case.

[4]These sections states that Cesses 'shall be a duty of excise'

NEWS RE-COLLECT

Auditors get 90 days to file NFRA-2 form

The Hindu Businessline - Published on December 11, 2019

The Corporate Affairs Ministry (MCA) has given a breather for statutory auditors who were earlier required to le the NFRA-2 form with the National Financial Reporting Authority (NFRA) by November 30.

It has now allowed the form — which specified the format of the Annual return — to be led with the new independent audit regulator NFRA within 90 days from the day on which it was published on the website of the Authority.

With December 9 as the date on which form NFRA-2 was published on the Web site, auditors will have time till March 9 to file the form, said experts in the audit fraternity.

Part of the reason for extending the timeline was the fact that NFRA came up with the format very late and closer to the November 30 deadline. As the information sought was quite extensive, more time was required and representations were made to the MCA to extend the last date of ling, sources said.

Commenting on the move to extend the timeline, Ashok Haldia, former Secretary, CA Institute, said that NFRA -2 form is fairly comprehensive asking for details for each of the audit and audit qualifications and unfavourable comments, quality control procedure and quality review etc.

"These being asked for the first time, it is bound to take considerable time and effort. Nature of some of the questions suggest that response there against may be analysed and evaluated by NFRA later for corrective as well as punitive measures," Haldia told BusinessLine.

Amarjit Chopra, former President of the CA Institute, said the MCA move is a right step as adequate time should be given to various rms to furnish the various information. "Its a step in the right direction to provide adequate time to audit rms to furnish information," he said.

It may be recalled that NFRA — now an independent regulator for auditors of listed companies and large unlisted companies, besides banks and insurers — was constituted by the Central Government for enforcement of auditing standards and ensuring the quality of audits, in order to enhance investor and public confidence in financial disclosures of companies.

NFRA also has oversight of electricity firms and those body corporates referred to it by the Centre.

NFRA to rope in consultants for audit report review and other allied work

The Hindu Businessline - Published on December 24, 2019

Consultants mainly to be chartered accountants; professionals with law, MBA degrees also to be considered

Audit regulator NFRA has decided to hire consultants to assist the regulator in identifying the audit reports that need to be taken up for review.

Consultants — mainly chartered accountants — are mainly proposed to be hired for a period of one year (on contract basis) to assist National Financial Reporting Authority (NFRA) in conduct of audit quality review and disciplinary proceedings.

It may be recalled that NFRA is a statutory body set up under the Companies Act. NFRA is now an independent regulator for auditors of listed companies and large unlisted companies, besides banks and insurers. It was constituted by the Central Government for enforcement of auditing standards and ensuring the quality of audits, in order to enhance investor and public confidence in financial disclosures of companies. NFRA also has oversight of electricity rms and those body corporates referred to it by the Centre.

Now, consultants including senior consultants are proposed to be appointed across several grades. Commenting on this development, Amarjit Chopra, Past President of CA Institute said this NFRA plan to rope in consultants is a step in the right direction. Having permanent people within the Authority would create problem in weeding out dead stuff in the future, he noted.

At the same time, Chopra also said that in the case of junior consultants, there is a need to have minimum experience of ten years (minimum five years experience is proposed for the junior consultants). He also felt that the age limit for junior consultants should not be capped at 35 years. Rather, only those between 35-45 years should be picked to review audit reports.

Also, consultants should have no role in the identification of audit reports for review, Chopra said. "No consultant should be involved in any form of exercise for identification. There should be an independent mechanism within NFRA to see which of the audit reports should be taken up", Chopra said.

The consultant should be kept away from identifying and the identified reports could then be handed out to them.

Ashok Haldia, former Secretary of the CA Institute, said that a regulator for any profession should ideally depend on internal institutional capacity and capabilities. The objective should be to strengthen internal capacities even while availing external support. External support may be needed in specific areas like technology, forensic or for non-critical tasks, Haldia said.

NFRA seeks client details from auditors

The Economic Times – Published on December 14, 2019

In an unprecedented move, the National Financial Reporting Authority (NFRA) has asked the country's top audit firms to submit details of all clients and the audit findings related to them. The biggest audit firms in the country have been told to submit details about the audit processes, the number of clients, details of fees, the non-audit work done for these clients and details of audit qualifications on financial accounts. NFRA is the national audit regulator and part of the ministry of Corporate Affairs (MCA).

People with direct knowledge of the matter said the information submitted to NFRA would cover almost all the top companies and banks, both listed and unlisted, in the country. "NFRA is seeking too much information, some of the information is too sensitive and we need time to provide it to the regulator," the audit head of one of the top Indian firms said.

NFRA, said another person in the know of the development, may be planning to introduce stricter regulations for auditors.

The elaborate questionnaire sent to them could be a part of such a move, the person said.

NFRA, which has taken over all the powers from Institute of Chartered Accountants of India (ICAI) to regulate auditors, could make regulations stricter for the audit firms.

"The focus is to create stricter regulations on the conflict of interest issue and to ensure that auditors are truly independent while giving audit opinion. Auditors work for the public at large, not necessarily for a company," said another person in the know of the development. He added that there have been complaints that some audit firms also provide other services such as IT platform implementation and advice on mergers and acquisitions (M&A) for the company they audit.

"There seems to be a lot going on. Bigger players have some issues, smaller players seem to be having different problems," he said.

All the top firms including KPMG, EY, Deloitte, PwC, Grant Thornton and BDO have been asked to submit the details. An email questionnaire sent to five of these firms did not elicit any response.

Spokesperson of BSR & Co, part of KPMG, said the firm is fully cooperating with NFRA on this matter. "The firm is constantly strengthening its quality processes, incorporating various learnings from experiences."

One of the audit heads of a large audit firm said that while the focus seems to be on the big boys some of the smaller audit firms also need to be under scrutiny. "Just look at the way they operate," he said, "You have firms that have one big client and almost all their revenues come from that client, so how do you expect them to have independence?" he asked.

Another CEO of a rather small audit firm said that qualifications given by the auditor too could create problems for a firm. "What we have seen is that most auditors are merely giving qualifications rather than taking a stand on an issue. NFRA asking details around this could mean that there could be some regulations on this particular issue, which may be a concern."

An audit head with a multinational firm said that some of the questions could create problems for a few firms. One of the questions asks whether any part of the fees was accepted in any other currency and the rate of conversion used.

The development follows NFRA finding faults with Deloitte Haskins & Sells (DHS), the auditors of ILFS Financial Services Limited (IFIN), on Thursday in regards to complying with the standards of accounting. The NFRA investigation report said, "the audit firm did not have adequate justification for issuing the audit report asserting that the audit was conducted in accordance with the SAs (standards of accounting)."

NFRA is investigating auditing failures in some of the top companies recently.

Audit regulators globally follow such processes to achieve their objectives. NFRA is separately investigating some of the major audit failures in firms including IL&FS, ITNL, Infosys and PMC Bank, said people in the know.

The ICAI used to carry out quality review of some accounts every year, but seldom was any firm slapped with a fine. NFRA in April had asked ICAI to back off from investigating auditors in the IL&FS case and took it over.

Bank auditors have to be more vigilant

The Economic Times – Published on December 11, 2019

Auditing banks is becoming one of the trickiest and most demanding jobs. Auditors, according to a Reserve Bank of India (RBI) advisory to several banks this week, will have to carry out a more intensive examination of large-value accounts, the nature of security provided by borrowers as well as financial statements of borrowers. The regulator believes this will lend greater insight into determination of non-performing assets (NPAs) and other areas of concern like frauds.

Under the new framework, statutory auditors, in verifying whether an NPA has been correctly identified by the bank, should not confine to the objective tests laid down but "display a greater degree of scepticism and independence" in scrutinising banks' exposure to big borrowers.

These instructions, among others, will be included by all private and foreign banks in the annexure to the letter of appointment of auditors, said sources.

"Auditors are the first line of check. Some of the losses of banks could have been contained if they were more vigilant — at least that's what the regulator seems to think," said an industry person. Earlier this year, RBI had said that there would be quarterly meetings between bank auditors and the central bank to detect early warning signals.

An RBI spokesperson declined to speak on the subject.

In giving a declaration on the absence of indebtedness of relatives of partners or proprietors of a firm, the auditor may be required to go a little beyond than what is currently laid down in the law. Before appointing statutory auditors, banks, according to RBI, should ensure that in addition to the requirements of Section 141(3)(d) of the Companies Act (relating to indebtedness and disqualification of auditors), the "spouse, dependent children and wholly or mainly dependent parents, brothers, sisters or any of them, of any of the partners / proprietors of the firm or the firm / company in which they are partners / directors are not indebted to the bank".

The statutory auditor will have to ensure that qualifications, if any, made in audit report or financial statement should be "quantified wherever possible, if the same are material, in clear and unambiguous term." As soon as the audit work is completed, an auditor is advised to report "serious irregularities" to the top management of the bank as well as to the senior supervisory manager of RBI's department of supervision. In case of non-observance of any serious lapses, a 'nil' report may have to be submitted by statutory auditors.

If matters involving members of a bank's senior management who are part of the audit committee of the board are spotted during the course of audit, the findings should be immediately reported to the bank's board of directors and RBI.

Some of the banks have reported divergence in asset quality in recent times. However, bankers say this is often an outcome of hardening of stance by RBI inspectors amid a regulatory paranoia in the wake of frauds. In case of frauds of Rs 1 crore or more, auditors may have to report such irregularities directly to RBI's central fraud monitoring cell.

LEARNING SERIES ON MULTILATERAL INSTRUMENT UNDER TAX TREATIES
LS # 9: - TREATY ENTITLEMENT: SIMPLIFIED LIMITATION ON BENEFITS UNDER MLI

Objectives

A. Prelude - Why Limitation of Benefits

B. What is Simplified-LoB under MLI

C. Debrief

At the outset we wish the entire CASC members a Wonderful 2020 filled with a lot of Knowledge learning and sharing.

Mr. SUDARSHAN RANGAN
Advocate
&
CA. VIGNESH KRISHNASWAMY

A. Prelude – Why Simplified-LoB?

- The concept of Limitation on Benefits ('LOB') and why we need LOB were introduced in our last learning series acts as a tool to *deny treaty benefits* through certain objective mechanical tests, failure to satisfy the same will deny entitlement to a tax treaty. Hence a party even though it may be a resident of a country will not entitle it to access a treaty, it has to satisfy the additional requirements that will establish nexus to the state of residence or conduct of business or any other tests in order to entitle to access a tax treaty. LOB specifies those additional objective tests to be satisfied to access treaty benefits.

- Just to reiterate, SLOB is one of the measures introduced in the OECD BEPS MLI, the BEPS Action Plan 6 on treaty abuse suggested measures to combat tax abuse. These measures were : (1) a Simple Limitation of Benefits (2) a Detailed Limitation of Benefits (3) Principle Purpose Test ('PPT') (4) Preamble to the treaty. Therefore, as a result, the MLI framework under Article 7 is embedded with the provisions envisaged under Action Plan – 6 of the OECD on BEPS. The MLI focuses only on SLOB as it is a simpler and more concise version of objective categorical tests that countries may impose to access treaty benefits, the detailed LOB is left for the treaties to negotiate and implement. Hence, we will only focus on the SLOB.

- Further it is also worth reiterating that, treaty abuse being the main objective of the entire BEPS project, the report in Action Plan 6 states that countries should implement the following as a minimum standard:

i. a PPT ('Principle Purpose Test')only;

ii. a PPT and either a simplified or detailed LOB provision; or

iii. a detailed LOB provision

- Application / Matching choice of the MLI Provision on Treaty Abuse

o PPT is default and to be applied symmetrically.

o PPT and SLOB on a symmetrical basis or asymmetrically (only on authorization)

o PPT can be opted out provided the party intends to adopt implement detailed LOB.

- India has opted for application of the PPT Rule and the simplified limitation of benefits while adopting the MLI framework. In this edition of the learning series we intend to deal with the provisions of the simplified-Limitation on Benefits clause under the MLI and the comparative commentary on this particular clause. PPT, is a more subjective test and acts as general anti-avoidance rule, which we will be discussing in the forthcoming editions.

B. <u>What is Simplified Limitation on Benefits under MLI</u>

- Major components of SLOB provisions in the MLI

Paragraph under MLI	Content
Article 7(8)	Resident on satisfying 'Qualified Person Test' shall be entitled to access a Covered Tax Agreement (CTA)
Article 7(9)	Qualified Person Test - Criteria
Article 7(10)	Active Conduct of a Business Test – Criteria
Article 7(11)	Derivative Benefit Tests
Article 7(12)	MAP – Discretionary Relief
Article 7(13)	Definitions under SLOB
Article 7(14)	Compatibility Clause- SLOB to apply **<u>in place of or in the absence of</u>**

- Article 7 (9) - Qualified Person Test

- Firstly, the entitlement to benefits under a CTA shall be entitled to a resident 'qualified person' of in that contracting jurisdiction as defined in paragraph 9 of the aforementioned article. Unless, a resident of a contracting jurisdiction satisfies the primary entitlement condition of a 'qualifies person', the access to benefits of a CTA with the other jurisdiction may not be available to such resident. (Clause 8 of Article -7)

- However, the term "benefit" does not include:
  - (i) residence tiebreaker rules for persons other than individuals;
  - (ii) corresponding adjustments; and
  - (iii) mutual agreement procedures (MAPs) regarding taxation not in accordance with a CTA
- the term **"qualified person"** means
  - individuals,
  - the governments, political subdivision, local authority of the contracting jurisdictions to the CTA,
  - companies and entities traded on a recognized stock exchange,
  - non-profit organizations, pension funds, Collective Investment Vehicle and
  - persons other than individuals where 50% of the shares in such persons are held for at least half of the days in the 12-month period under consideration by residents of one of the contracting jurisdictions.

• **Article 7(10)- Active Conduct of Business**

- Second, the instrument provides another opportunity for entitlement to benefits of a CTA upon satisfying of conditions which may available for a resident of a contracting jurisdiction regardless of whether such resident is a qualified person, if the resident proves **active conduct of business in resident contracting jurisdiction**.
- In such a case, the resident of the contracting jurisdiction may be entitled to benefits under the CTA on such **items of income derived from other contracting jurisdiction** and the income derived from the other jurisdiction emanates or is incidental to the business. *(Clause 10(a) of Article -7)*
- Further, the treaty provision under a CTA to a resident of a contracting jurisdiction where such item of income is derived from the other contracting jurisdiction through a '**Connected Person**', provided that the business activity of the resident in his domicile jurisdiction and **the item of income is substantial in relation to the same**

activity or a complementary business activity carried on by the resident or such connected person in the other Contracting Jurisdiction. *(Clause 10(b) of Article -7) Note: The application of this clause is subjective and dependent on facts and circumstances of a resident.*

- The active conduct of a business does not include:

(i) holding company operations;

(ii) head office functions;

(iii) group financing; and

(iv) the making of investments

- **Article 7(11)- Equivalent Beneficiary or Derivative Benefits Test**

- Third, the benefits available on the items of income under a CTA shall be be accorded to a person other than a 'qualified person' provided that an 'Equivalent beneficiaries' held, for more than half the days during any 12 month period for which the benefit of the CTA is accorded, more than 75% of beneficial interests of the resident, directly or indirectly.

- An equivalent beneficiary refers to a person that would be entitled to benefits, under the same tax treaty or a tax treaty with a third state, which are equal, or preferable, to those

- available to the resident of the contracting jurisdiction claiming treaty relief. *(Clause 11 and 13c of Article -7)*

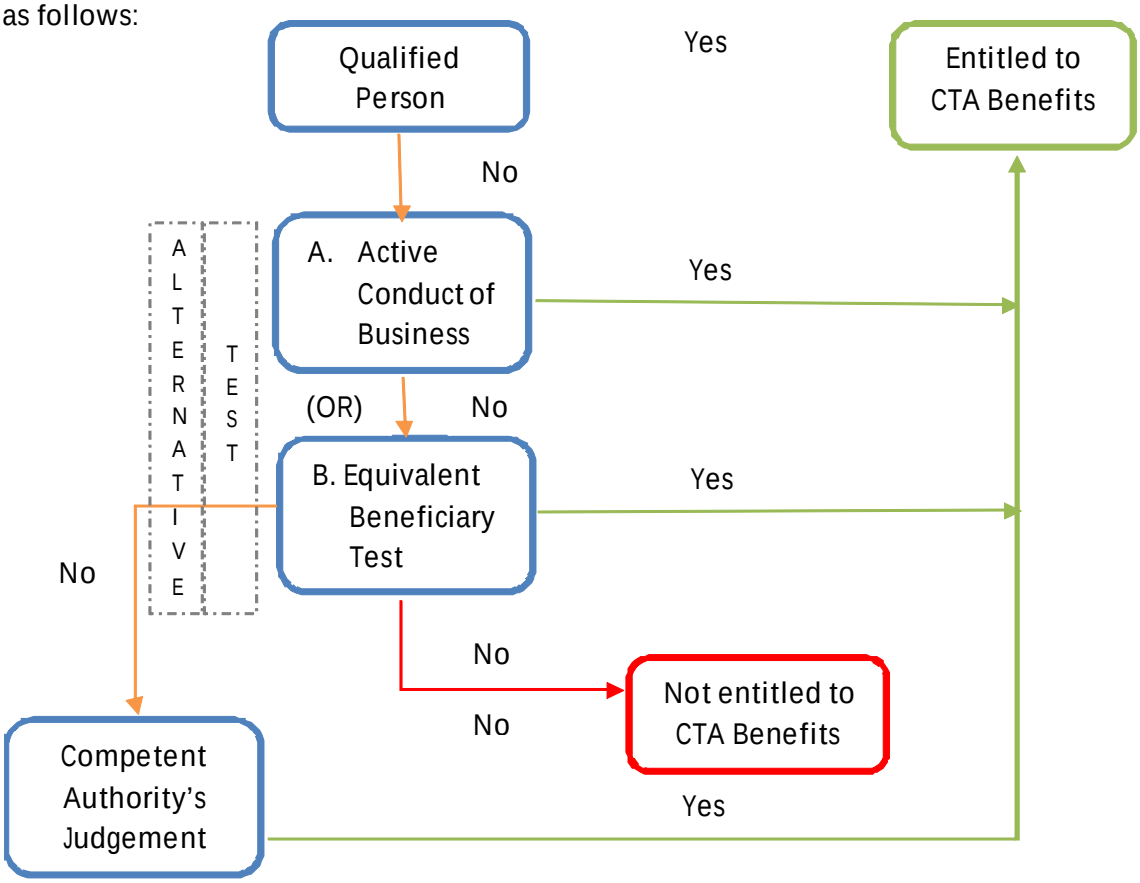
- **Article 7(12)-Discretionary Relief through Competent Authorities**

- Lastly, if none of the conditions are being satisfied to crack the embargo under paragraph 8,9,10 (or) 11, then in such situations the **competent authority of the other Contracting Jurisdiction** may, nevertheless, grant the benefits of the CTA, or benefits with respect to a specific item of income, taking into account the object and purpose of the CTA.

- This may be accorded provided that such resident demonstrates to the satisfaction of such competent authority that PPT test is being negated for any benefits sought availed under

Pictorial Summary of SLOB

To summarise the text of the MLI, the application of the simplified-LoB can be represented as follows:



C. Debrief

The LOB provisions are generally touted to be complex during application and hence the reason why the OECD BEPS resorted for a SLOB so as to ensure the entitlement of treat benefits under a CTA can be tested through a standard set of rules which may be uniform to all jurisdictions. Nevertheless, the flexibility provided under the MLI leaves space of each jurisdiction to negotiate the limiting provisions to treaty entitlement for their convenience and adherence to this minimum standard. We will be discussing about the application, reservations and elective mis-matches that one will encounter in SLOB provisions in the next learning series. In this learning series, we have brought out the basic overview of simplified-LoB provisions and its application with a treaty partner's CTA.

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