# CASC BULLETIN

THE CHARTERED ACCOUNTANTS STUDY CIRCLE

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## INDEX



## MEETINGS

| Date | Time | Speaker | Topic |
|---|---|---|---|
| 14.09.2019 Saturday | 09.00 am* | CA. Girish Sundar | Recent Judicial Pronouncements Effecting Tax Audi |
| 26.09.2019 Thursday | 06.30 pm** | CA. Petchi Thangavel | Issues in Eassessments - Direct Taxes |

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

** Preceded with High Tea half an hour before the scheduled time of meeting

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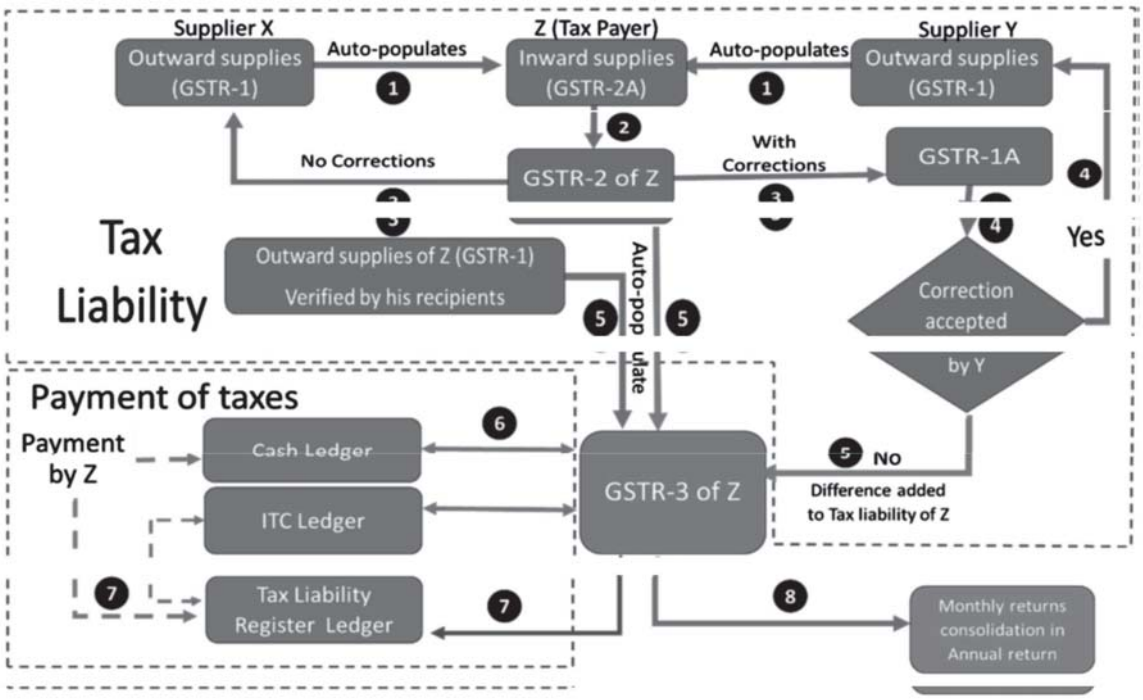
## EDITORIAL

***Compliance Audit – GST*:**

The Comptroller and Auditor General of India submitted its first report (Report No. 11 of 2019) and the same was tabled before the parliament. This is the first ever report on the latest giant in Indirect Taxes – namely GST – for the year ended 31st March, 2018. It would be pertinent to read certain paragraphs of this report and in particular the preface where the CAG takes the route of trying to use soothing language to safeguard itself from criticizing remarks from the one of major stake holder, the Government. It starts with complimenting all the stakeholder for efforts put in the transition into one of major tax reform for it sear magnitude and thereafter states "…….***That there would be teething problems in such a major transition is also not unexpected. The issues that remain, and that have been pointed out in the report, should not therefore be seen by the stakeholders as a fault-finding exercise……***"

This report of CAG is in reality a good eye opener as it has to a great extent the real appraisal of where the Government stands with respect to the implementation of law as well as use of technology in the said implementation of the GST law.

According to the concept based on which GST law was brought in as well as brought out by CAG, there would seamless flow of data based on auto population as well as seamless flow of credit of taxes paid on the said auto population.



CAG was informed that the GSTN was ready, gig businesses and their software were not ready which required the postponement of roll out of various forms as well as postponement of due dates of filing returns.

On page 13 of the report the above contention is not accepted by CAG and it states therein ***"However, this contention is not fully justified. GSTN was formed in March 2013, the constitutional amendment to bring in GST was passed in September 2016 and it was announced in January 2017 that GST would be implemented from 1st July 2017. Even before the constitutional amendment was passed, the Empowered Committee of Ministers (ECM) had started working on the model GST Acts and business processes and the first model GST Act was placed in public domain in June 2016. The Business Process Documents on Registration, Payment, Registration and Refund were also placed in public domain during April 2015 to October 2015.*** The GST model laws were prepared by Nov 2016 and Acts passed by Parliament in April 2017. The Draft Rules on Returns, Registration, Payments, Refunds, Invoice initially prepared in Sep 2016 and the next version of draft rules duly adding ITC, Transition, Valuation and, Composition were finalised in March 2017 and approved by Council in May 2017. The draft forms (Invoice, Payments, Registration, Refund, Return and Mismatch) were finalised in Sep 2016 and further set of draft forms covering Composition, ITC, Payment, Refund and Registration were finalised in May 2017. Final rules and forms were notified on 19 June 2017."

The GSTN was to be made a fully owned Government company and this decision was taken in May 2018. But according to CAG no further action or decision has been taken on this conversion into wholly owned Government Company. It is more than a year since the said decision has been taken.

According to the press release dated 31st July, 2019,

"*The* ***Adherence of the business rules and the system design*** *are the* ***responsibility of DoR, CBIC, State Tax authorities and GSTN****.*

*The system of payment and settlement of tax that was envisaged for GST was based on one hundred per cent invoice-matching and availment of input tax credit, as well as settlement of IGST on the basis of invoice-matching.* ***Neither is possible as of now, as an invoice-***

***matching system has not kicked-in**. It would protect the tax revenues of both the Centre and the States, it would lead to proper settlement of IGST and would minimise, if not eliminate, the tax official assessee interface."[Emphasis Supplied]*

Is the Government trying to wash of its hand by stating the adherence to business rules and the system design and the same does not flow from the Act as enacted by the same Government?

Be so at it may, we the Indians have to stay with this new Law and also adhere to the business rules as well as the faulty system design as on date and hope for the system design to improve for the betterment.

**Obituary**

CASC lost one of its eldest member, CA. G. Narayanswamy. CASC mourns his departure from amongst us and prays to the almighty GOD to bestow upon the family, relatives and friends to withstand the irreparable loss. An obituary penned by one of the founder member, CA. G. Subramanian is carried elsewhere in this Bulletin.

**Appeal**

The announcement for the Next Annual Residential Conference will be announced shortly after the Conference committee concludes its negotiations with various vendors involved. Kindly do look for the info in your mailbox.

Members are requested to attend the programs conducted by CASC and are also requested to send their suggestions and / or value additions to the services provided by CASC including this Bulletin. The same can be sent by hard copy to the office of the CASC or emailed to admin@casconline.org or any of the Members on the Management Committee.

For and on behalf of Editorial Board

**CA. Uttamchand Jain**

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## ANNOUNCEMENTS

1. The copies of the material used by the speakers and provided to CASC for distribution, for the regular meetings held twice in a month is available on the website and is freely downloadable.
2. Earlier issues of the bulletin are also available on the website in the "News" column.

The soft copy of this bulletin will be hosted on the website shortly.

## READER'S ATTENTION

You may please send your Feedback Contributions / Queries on Direct Taxes, Indirect Taxes, Company Law, FEMA, Accounting and Auditing Standards, Allied Laws or any other subject of professional interest to ***admin@casconline.org***


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## RECENT JUDGMENTS IN VAT & CST

**Personal Hearing:** The core issue is that the writ petitioner sought time to file requisite records namely Books of Accounts and other related documents, in the personal hearing, but the impugned Assessment orders have been passed without granting time and by recording that the writ petitioners have not produced documents in spite of opportunity being given. Commissioner's Circular dated 03.02.2014, emphasises that principles of natural justice should be adhered to. In the case on hand, one of the challenges made to the assessment order is that when opportunity of hearing was sought, it was denied. There is no dispute that the writ petitioner dealer has sought time to produce documents in writing. Therefore, no prejudice would be caused, if an opportunity is given to the writ petitioner. This Court is informed by the writ petitioner counsel that documents have already been furnished and if a date is fixed for personal hearing, they will go before the respondents. It is submitted by the Revenue counsel that it would be desirable to have the date 02.07.2019 as the date fixed for this purpose. Considering all the above the court set-aside the orders and issued specific directions **V.L.S.Fibre Vs The Assistant Commissioner(ST), Avadi Assessment Circle, W.P.Nos.14197, 14198 & 14203 of 2019 DATED : 01.07.2019**

**CA. V.V. SAMPATHKUMAR**

**Alternative remedy:** The primary and pivotal submission of writ petitioner is that the impugned order, in respect of mismatch of purchases and sales reported by the respective parties in the monthly returns, is in violation of what has now come to stay as JKM Graphics principle owing to M/s.JKM Graphics Solutions Private Limited Vs. The Commercial Tax Officer reported in 2017 (99) VST 343. It is the pointed submission of learned counsel for writ petitioner that invoice wise break up ought to have been given. The Court stated that though alternate remedy is a rule of discretion, Hon'ble Supreme Court in Satyawati Tandon Case [United Bank of India Vs. Satyawati Tandon and others reported in (2010) 8 SCC 110] has held that when it comes to cases pertaining to taxes, cess etc., i.e., fiscal laws in general, rule of alternate remedy has to be applied with utmost rigour. Satyawati Tandon Case has recently been reiterated by Hon'ble Supreme Court in K.C.Mathew case

[Authorized Officer, State Bank of Travancore vs. Mathew K.C. reported in (2018) 3 SCC 85]. Stating so, the court held that this is a fit case to relegate the writ petitioner to the alternate remedy of appeal before jurisdictional Appellate Deputy Commissioner under Section 51 of TNVAT Act and with regard to availing of the appeal remedy, if there is any delay, it is open to the writ petitioner to seek condonation of delay as well as exclusion of time spent in the instant writ petition under Section 14 of Limitation Act and if such prayers are made, the same shall be dealt with and disposed of by the Appellate Authority on their own merits and in accordance with law. **M/s.Bright Point India (P) Ltd., Vs. The Assistant Commissioner (ST) Pammal Assessment Circle W.P.No.18589 of 2019 DATE: 01.07.2019**

**Mismatch** : In respect of mismatch of purchases and sales reported by the buyer and seller it is submitted by learned counsel for writ petitioner that drop from Rs.93,72,607/-; to Rs.80,95,887/-; is not because of mismatch qua numerical values, but because certain supplies have been repeated and have been shown more than once. This turns heavily on facts. Therefore, this Court sitting in writ jurisdiction cannot go into those aspects. This should best be enquired into by the Appellate Authority more so as it turns on facts. However, this question is left open to be agitated before the Appellate Authority.In view of the above analysis by the AO, the principle laid down by this Court in M/s.JKM Graphics Solutions Private Limited Vs.The Commercial Tax Officer, Vepery Assessment Circle, Chennai-6 reported in (2017) 99 VST 343 does not come to the aid of the writ petitioner in the instant case. This Court deems it appropriate to relegate the writ petitioner to the alternate remedy of an appeal under Section 51 of TNVAT Act. **Tvl. Sampavi Properties Vs.The Assistant Commissioner (ST) Ashok Nagar Assessment Circle W.P.No.18482 of 2019 DATE: 02.07.2019**

**Independent Mind:** The court observed in this case that the principle ruled by the Courts is to the effect that the Assessing Officer should apply his/her mind independently i.e., independent of the proposal given by the Enforcement Wing Officials and come to a conclusion. Therefore, on the teeth of the obtaining position that Enforcement Wing proposals are approved by Joint Commissioner, this Court has held that the AO should independently apply his/her mind. This leads us to the inevitable sequitur that principle is to the effect that even though the Enforcement Wing Officials proposal is approved by Joint Commissioner, an authority much below the rank of DC or that matter below the rank of even the AC viz., a Commercial Tax Officer (CTO) would apply his mind independently and come to a conclusion by going through the

proposal of Enforcement Wing Officials on one side and objections of the dealer on the other. If this is the principle, the argument that a DC, who is without any disputation above the CTO in the hierarchy, cannot act as an Appellate Authority merely because Enforcement Wing proposals are approved by JC, who is above a DC is clearly untenable. Therefore, this Court has no difficultly in coming to the conclusion that this argument though attractive in first flush does not stand further scrutiny. **M/s.Sri Venkateswara Timber Mart Vs. State Tax Officer (CT) Namakkal (Town) Assessment Circle W.P.Nos.18676 & 18694 of 2019 DATE: 03.07.2019**

**"C" forms:** For inter-state purchases of High Speed Diesel Oil on concessional rate of tax at 2% by way of "C"forms assessees could not download the "C" forms later to introduction of GST law. The petitioner was informed that after introduction of GST regime on and with effect from 01.07.2017, the petitioner was not entitled to make purchase of High Speed Diesel Oil from other States on concessional rate of tax i.e., at 2% and therefore, the Department's website has been blocked to deny access to the petitioner and other similarly placed persons from downloading "C" forms This issue came up for consideration before another Hon'ble Judge of this Court in a batch of writ petitions i.e., W.P.Nos.19458 to 19460 of 2018 etc., being a batch of 71 writ petitions and a common order came to be passed by a Hon'ble Single Judge on 26.10.2018. In the batch, the lead matter is The Ramco Cements Ltd; In such circumstances, till such time the order of this court in the case of M/s. Ramco Cements Ltd (supra) is either stayed or reversed it is incumbent upon all Assessing Authorities within the State of Tamil Nadu to apply the rationale of the decision to all pending assessments. In the light of the narrative supra and in the light of the trajectory, which this matter has taken at the admission stage, it follows as a natural sequitur that the instant writ petition stands allowed. **M/s. Sri Vishnu Shankar Mill Limited vs The Assistant Commissioner (ST) Rajapalayam Assessment Circle W.P.No.18904 of 2019 Dated: 03.07.2019**

**TDS Credit:** Impugned orders are set aside on the sole ground that the credit particulars of TDS certificate have been sought for by the sole respondent, after the impugned orders. Sole respondent, after getting the credit particulars qua TDS certificates, which have been sought for vide aforementioned four separate letters dated 31.05.2019, shall send a notice to the writ petitioner fixing a personal hearing. This notice shall give with specificity date, time and venue of the personal hearing. Writ petitioner shall avail of the personal hearing and it will be open to writ petitioner to submit documents that may be necessary to buttress the objections

already sent besides making submissions on the credit particulars qua TDS certificate which obviously should be available with the sole respondent on the date of personal hearing. Post personal hearing, lone official respondent shall redo the assessments and pass revised assessment orders afresh as expeditiously as possible and in any event within four weeks from the date of personal hearing. **M/s.Naveen Enterprises vs. The State Tax Officer, Arumbakkam Assessment Circle W.P.Nos.19086, 19089, 19090 & 19094 of 2019 Dated: 04.07.2019**

**Best of judgment:** For the Notices issued for the non-filing of audit report in form WW and for the personal hearing there was no response from the writ petitioner. Best of judgment order was issued adding 50% to the reported turnover. When the writ petitioner, drew the attention of this Court points out that order made by a Hon'ble Division Bench in Tvl.Nithra Furniture P.Ltd., vs. The AC (CT), Chrompet Assessment Circle, in W.A.Nos.1148 & 1149 of 2015 dated 11.08.2015, where the best judgment assessment order was not the lone issue, but rejection of request for passing a revised assessment order being negatived and hence dintinuishabe from the facts of this matter and not applicable to this case on hand. This Court also notices that Hon'ble Supreme Court in Commissioner of Sales Tax, Madhya Pradesh Vs. H.M.Esufali reported in (1973) 2 SCC 137 [H.M.Esufali principle; for the sake of brevity] equivalent being 33 STC 42, had held that in best judgment assessment methods, some amount of approximation is inevitable. Hon'ble Supreme Court has also held that as long as the estimate made by the Assessing Officer is not arbitrary, the same cannot be questioned Therefore, applying the H.M.Esufali principle and S.G.Jayaraj Nadar principle (28 STC 700) laid down by Hon'ble Supreme Court, this Court is left with the considered view that this is not a fit case calling for interference qua impugned order. **M/s.Saravana International, vs The Assistant Commissioner (ST) Panruti (Town) W.P.No.12370 of 2019 DATED: 05.07.2019**

**Alternative remedy:** As pointed out, writ petitioner has gone into slumber after service of impugned order in the writ petition and has woken up only after the destraint notice was served on the writ petitioner on 15.04.2019 and has chosen to come to this Court on 1st July 2019 with the instant writ petition. There is no explanation whatsoever as to why the writ petitioner did not choose either to come to this Court or prefer a statutory appeal immediately after the receipt of the impugned order. It is now too late in the day to assail the impugned order. Notwithstanding this position, in the instant case, objections have been considered and the Assessing Officer has returned findings on the same. Submissions before this Court are in the

nature of either not appreciating all the documents filed along with the objections or not considering some of the documents not filed along with the objections. Therefore, these can at best qualify as grounds of appeal in a statutory appeal. Writ petitioner has missed the bus and filed the writ petition at such a belated point of time and this Court does not find any exceptional situation to interfere in this setting in the instant case. There is no disputation before this Court that a statutory appeal lies to jurisdictional Appellate Deputy Commissioner u/s 51 of TNVAT Act. **Tvl.Surabhi Granites Vs. The Assistant Commissioner (CT) Velandipalayam Assessment Circle W.P.No.19251 of 2019 DATE: 05.07.2019**

**Personal Hearing :** When the objections to the assessment proposal notice were considered and when it came to light that there were some discrepancies, particularly when the credit notes filed were examined and reconciled with the notice issued and statement filed, the writ petitioner dealer was not given an opportunity to explain the same. As many as nine such discrepancies have been adumbrated in 3 points and 6 sub-points. And as there is no material before this Court to show that writ petitioner dealer was given an opportunity to explain these discrepancies, this Court is left with the considered view that it would be appropriate to give a personal hearing to the writ petitioner to explain aforesaid discrepancies. **Bharat Heavy Electricals Limited vs. The Asst. Commissioner (ST) Ranipet (SIPCOT) Ranipet W.P.No.18957 of 2019 DATE: 09.07.2019**

**Refund**: Entire matter turns on a principle laid down in Everest Industries Case [Everest Industries Limited Vs. State of Tamil Nadu reported in (2017) 100 VST 158] by a Hon'ble single Judge of this Court. Everest Industries principle is to the effect that Section 19(2)(v) of Tamil Nadu Value Added Tax Act, 2006 is not applicable to manufacturers. It is submitted without any disputation or disagreement by both sides that this Everest Industries case has been carried in appeal by way of an intra court appeal and a Hon'ble Division Bench of this Court is in seized of the matter. Therefore, the writ petitioner has to necessarily await the outcome/verdict in aforesaid intra-court appeals, namely writ appeals against Everest Industries principle.In the light of the narrative thus far, it will suffice to say that the prayer of the writ petitioner for refund will be governed by the verdict / judgment of Division Bench in the aforesaid intra court appeals as this is the undisputed position before this Court. **Janatics India Private Ltd., Vs.The Assistant Commissioner (ST) Podanur Assessment Circle W.P.No.29941 of 2018 DATE: 10.07.2019**

*(The author is a Chennai based Chartered Accountant in practice. He can be reached at vvsampat@yahoo.com)*

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## CASE LAWS - SERVICE TAX & GST

**1. SERVICE TAX – RENTING OF IMMOVABLE PROPERTY - LEASING OUT OF WATER BODIES FOR PURPOSE OF AQUACULTURE AND FISHING RIGHTS – COVERED UNDER EXCLUSION CLAUSE**

In Department of Fisheries V. CCE & S. T. Jaipur, 2019 (26) GSTL 97 (Tri.-Del.), the Department of Fisheries, Government of Rajasthan are auctioning various water bodies for fishing rights to various persons for the purpose of aquaculture wherein certain amounts are collected by them on annual basis. The adjudicating authority confirmed the demand on the same under 'renting of immovable property services. On appeal, the Tribunal observed as under:-

On appeal, the Tribunal observed as under:

1. In the pre-negative era of Service tax, the activity of aquaculture was specifically excluded from the scope of "renting of immovable property" (RIPS) service and auctioning of water bodies by the Department of Fisheries was primarily only for developing the aquaculture and for fishing.

**CA. VIJAY ANAND**

2. The view of the Department that aquaculture and leasing of water bodies are two separate activities and, therefore, leasing of water bodies is not exempted from levy of service tax is certainly not tenable as water bodies can only exists on vacant land and for undertaking aquaculture, the presence of water bodies is absolutely essential and pre-requisite.

3. The learned adjudicating authority has applied the exclusion explanation to the definition of 'renting of immovable property' in a very narrow way when there is no ambiguity in the provisions to say that water bodies rented out for aquaculture, are excluded from the scope of RIPS.

4. Resultantly, the leasing of water bodies for fishing purposes is same as leasing of vacant land for aquaculture which is fully covered under the

exclusion clause of Section 65 of the Finance Act, 1994 and hence not leviable to Service tax.

5. W.r.t. the period between 1.7.2012 to August, 2013, the same provisions have continued in slightly modified way wherein the activity of agriculture has been included in the negative list of items under section 66 D of the Finance Act, 1994 and agriculture as defined in clause (3) of the Section 65 B, as "the cultivation of plants and rearing of all life-forms of animals, except the rearing of horses, for food, fiber, fuel, raw material or other similar products".

6. Fishing/ aquaculture is part of the broader definition of agriculture and thus exempted from levy of service tax as agriculture being in the negative list of items under Section 66D of the Finance Act, 1994 is not leviable to service tax consequent to which service tax is not leviable w.e.f. July 2012.

Hence, the appeal was held and impugned order set aside.

**2. SERVICE TAX – BUSINESS SUPPORT SERVICES – RENTING OF CRANES AND TOREX – NOT COVERED -**

In Sana Engineering Company V. C.C.E & ST., Coimbatore, 2019 (26) G.S.T.L. 210 (Tri. - Chennai), the appellants have collected amounts towards use of cranes and torex with operator, manpower and supervision, either on single use basis or on monthly or specified period basis. The adjudicating authority confirmed the demand under 'Business Support Service' (BSS for short) which was also sustained by the Commissioner (Appeals). On further appeal, the Tribunal observed as under:-

1. The demand has been confirmed under BSS, the definition of which is inclusive in nature. The definition only means that the type of activities that would come within the fold of that category will necessarily have to be of the kith and kin or similar to the examples listed therein. We see the list includes -

- Evaluation of prospective customers;
- Telemarketing;
- Processing of purchase orders and fulfilment services;
- Information and tracking of delivery schedules;
- Managing distribution and logistics;
- Customer relationship management services;

- Accounting and processing of transactions;
- Formulation of customer service and pricing policies;
- Infrastructural support services and other transaction processing.

3. Thus, for any other activity to find a fit within this definition of 'BSS' such activity should pertain to the same class or category or genus as the list of examples given in the definition. This is the basic all important maxim of *ejusdem generis*.

4. In Brooms Legal Maxims, Twelfth Edition, pg. 429, it was stated that the coupling of words together shows that they are to be understood in the same sense and where the meaning of a particular word is doubtful or obscure, or where a particular expression when taken singly is inoperative, the intention of the party who used it may frequently be ascertained by looking at adjoining words, or at expressions occurring in other parts of the same instrument, for quæ non valeant singular juncta juvant – words which are ineffective when taken singly operate when taken conjointly: one provision of a deed, or other instrument, must be construed by the bearing it will have upon another.

5. In the circumstances, by no stretch of imagination can renting of cranes be called an activity of the same genre as the other examples listed in the definition of BSS.

6. Consequently, the attempt to rope in the impugned activity of the appellant within the ambit of BSS cannot sustain. If the argument adopted by the lower authorities that all services for business and commerce will fall within the scope of Section 65 (104c) is to be accepted, there would not have been a need for the legislature to carve out so many types of services, which in the most, are performed only in relation to business or commerce.

Hence, the impugned order was set aside the appeals were allowed with consequential reliefs.

**3. SERVICE TAX – INITIAL SHOW CAUSE NOTICE DEMANDING TAX UNDER "FRANCHISE SERVICE" – SECOND SHOW CAUSE NOTICE DEMANDING TAX ON THE SAME AMOUNT UNDER "RENTING OF IMMOVABLE OF PROPERTY SERVICE" – NOT SUSTAINABLE**

In Punjab State Warehousing Corpn. (Conware) V. C.C.E. – Chandigarh-I,

2019 (26) G.S.T.L. 234 (Tri. - Chan.), the appellant entered into an agreement with M/s.Gateway District parks Ltd. (in short GDL), Mumbai on 12.1.2007 wherein the appellant has rented out to GDL the CFS located on plot along with all buildings and permanent structures erected etc. As per one of the conditions of the agreement, the recipient was required to pay Rs.35 crore lump-sum as upfront fee in advance to the appellant along with annual fee of Rs.10 crore. The appellant had initially received Rs.35 crore in January, 2007 as upfront fee from GDL for the entire period along with annual fee on quarterly basis. The appellant apportioned the upfront fee of Rs.35 crore in ten equal yearly parts and thus reflected income of Rs.3.5crore annually on this account in their balance sheets. The appellant was paying service tax on annual fee of Rs.10.00 crore under the category of "Renting Immovable of Property Service" with effect from 1.6.2007. The appellant did not pay service tax on apportioned upfront fee received by the appellant. The adjudicating authority confirmed the demand under 'Franchise' service but was remanded back to the adjudicating authority by the Tribunal. However, during the pendency of the de novo adjudication order, the adjudicating authority issued another SCN for the same amounts under 'Renting of Immovable Property' and confirmed the same. On appeal, the Tribunal observed as under:-

1. Initially show cause notice dt.11.10.2011 was issued to the appellant to demand service tax under the category of "Franchise Service".

2. In the impugned show cause notice dt.12.10.2012, the service tax sought to be demanded under the category of "Renting Immovable of Property Service".

3. In the impugned order (pursuant to the SCN dated 12.10.2012), the adjudicating authority held that service rendered by the appellant does not fall under the category of "Franchise Service".

4. As the demand of service tax under initial show cause notice has indirectly been dropped by the adjudicating authority, the same demand of service tax issued in another show cause notice to the appellant which is against the principles of res-judicata under section 11 of Code of Civil Procedure, 1908 as on the same amount, earlier show cause notice dt.11.1.0.2011 was issued

to demand service tax from the appellant under the category of "Franchise Service" and it was held in the impugned order that no service tax is payable by the appellant under the category of "Franchise Service".

5. Further, another show cause notice dt.12.10.2012 was issued to demand service tax under the category "Renting Immovable of Property Service".

6. Consequently, the show cause notice dt.12.10.2012 is not maintainable and the principle of res judicata is applicable.

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

**4. GST – ADVANCE RULING – SUPPLY OF LABOUR SERVICES TO FOREST DEPARTMENT OF THE STATE GOVT. - ACTIVITIES COVERED UNDER TWELFTH SCHEDULE READ WITH ARTICLE 243W OF CONSTITUTION OF INDIA – EXEMPT**

In RE: Puthoor Unnikrishnan, 2019 (26) G.S.T.L. 267 (A.A.R.-GST), the applicant is providing labour services for setting up fire lines in forests to protect forest from catching fire which cause damages to forest, labour services for plantation of trees in forests, labour services for rill/river maintenance (rill bank protection by using rill stones) and labour services of clearing the truck path in forests. These services are provided directly to Kerala Forest Department, under his supervision and control. An application was filed seeking advance ruling as to the following:-

(i) Whether the supply of providing labour services for setting up fire lines in forests to protect forest from catching fire which cause damages to forest, labour services for plantation of trees in forests, labour services for rill/river maintenance (rill bank protection by using rill stones), labour services of clearing the truck path in forests is included in exempted services in Notification No.12/2017 Central Tax (Rate) dated 28-06-2017 or any other related notification.

(ii) If the above supply of service not included in any exemption notifications as per Question No.1, the rate of goods and services tax applicable to such supply of services.

The authority observed as under:

1. "Pure services" means supply of services without involving any supply of goods. As per S. No. 3 of Notification No.12/2017 Central Tax

(Rate) dated 28-06-2017 (SRO.No.371/2017) pure services (excluding works contract service or other composite supplies involving supply of any goods) provided to the Central Government, State Government or Union territory or local authority or a Governmental authority or a Government entity by way of any activity in relation to any function entrusted to a Panchayat under Article 243G of the Constitution or in relation to any function entrusted to a Municipality under article 243W of the Constitution, is exempt.

2. As per the S. No. 3A in the exemption Notification, composite supply of goods and services in which the value of supply of goods constitutes not more than 25 per cent of the value of the said composite supply provided to the Central Government, State Government or Union territory or local authority or a Governmental authority or a Government entity by way of any activity in relation to any function entrusted to a Panchayat under Article 243G of the Constitution or in relation to any function entrusted to a Municipality under article 243W of the Constitution, is exempt vide Notification No.12/2017 Central Tax (Rate) dated 28-06-2017 as amended by Notification No.02/2018 Central Tax (Rate) dated 25-01-2018.

3. Therefore the functions like construction of roads, fire services, urban forestry, protection of environment etc. come within the scope and ambit of article 243W of the Constitution.

4. Whether the supply of providing labour services for setting up fire lines in forests to protect forest from catching fire which cause damages to forest, labour services for plantation of trees in forests, labour services for rill/river maintenance (rill bank protection by using rill stones), labour services of clearing the truck path in forests is included in exempted services in Notification No.12/2017 Central Tax (Rate) dated 28-06-2017 or any other related notification.

5. The services for setting up fire lines, plantation of trees in forest, river maintenance in forest, clearing of truck path in forest are pure services that are falling within the purview of the term "Protection of Environment 'Road'/Tire Services'" as covered in 12th Schedule under Article 243W of the Constitution.

Hence, the authority held that the services provided by the Querist are exempt as per Sl.No.3 of the Notification No.l2/2017-Central Tax (Rate) dated 28-06-2017.

**5. GST – ADVANCE RULING – VOCATIONAL TRAINING COURSES – RECOGNISED BY NCVT/JSS – EXEMPT – NOT EXEMPT WHEN PROOF OF SUCH RECOGNITION IS NOT PRODUCED**

In RE: Leprosy Mission Trust of India, 2019 (26) G.S.T.L 413 (A.A.R.-GST), the applicant is a society, a Non-Governmental Organization (NGO) registered under Section 12A of the Income Tax Act 1961 and having Leprosy Referral Hospitals, Vocational Training Institutes, Research Laboratory, homes for the care of elderly leprosy disabled people, etc., and is working in the areas of Health, Education, Sustainable Livelihoods, Community Development, Advocacy and Research. Such activities are charitable in nature and within the meaning of section 2(15) of the Income Tax Act, 1961. The vocational trainings provided by them include Diesel Mechanic, Computer Operator and Programming Assistance (COPA), Welder and Motor Mechanic are Affiliated/ Recognized by the National Council for Vocational Training (NCVT)/Ministry of HRD. These are under the MSD & E (Ministry of Skill Development and Entrepreneurship). They also have vocational training for 2/3 wheeler Mechanic, a training course recognized by Jan Shikshan Santhan (JSS) under the Ministry of Labour and Employment, Govt. of India.

An application for advance ruling was filed as to whether the services provided under vocational training courses recognized by National Council for Vocational Training (NCVT) or Jan Shikshan Sansthan (JSS) is exempt either under Entry No 64 of exemption list of Goods and Service Tax Act 2017 or under Educational Institution defined under Notification 22/Central Tax (Rate)?

The authority observed as under:

1. The applicant does not fall under clause 2(y) (i) & (ii) of Notification No. 12/2017-CT (Rate) dated 28.06.2017 (Exemption Notification for short) as amended being education as a part of any approved vocational course.

2. The applicant has been granted affiliation by the National Council for Vocational Training (NCVT) in respect of vocational skills pertaining to (i) Diesel Mechanic,

(ii) Computer Operator and Programming Assistance (COPA), (iii) Welder and (iv) Motor Mechanic. These courses are vocational courses and are approved by NCVT.

3. The definition of an 'approved vocational education course' in clause 2(h) of the Exemption Notification covers a course run by an industrial training institute or an industrial training center affiliated to the NCVT or State Council for Vocational Training offering courses in designated trades notified under the ApprenticesAct,1961(52 of 1961).

4. The vocational education courses pertaining to (i) Diesel Mechanic, (ii) Computer Operator and Programming Assistance (COPA), (iii) Welder and (iv)Motor Mechanic are carried out by the applicant who are affiliated to the NCVT and therefore such services provided by them are attracting NIL rate of tax under GST. (Sr. No. 66 of Notification No.12/2017 CT (Rate) dated 28.06.2019.

5. Further, they also have vocational training for 2/3 wheeler Mechanic, which they have submitted is a training course recognized by Jan Shikshan Sansthan (JSS) under the Ministry of Labour and Employment, Govt. of India. However they have not produced any evidence to support their submissions on this count.

Hence, the authority passed the following order:

a. The services provided under vocational training courses recognized by National Council for Vocational Training (NCVT) or Jan Shikshan Sansthan (JSS) is not exempt under Entry No 64 of exemption list of Goods and Service Tax Act 2017 nor under Educational Institution defined under Notification 22/ Central Tax (Rate).

b. Only the vocational training courses pertaining to (i)Diesel Mechanic, (ii) Computer Operator and Programming Assistance (COPA), (iii) Welder and (iv) Motor Mechanic are exempted under the Sr. No. 66 (a) of Notification No.12/2017-CT (Rate) dated 28.06.2017 as amended.

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## THE SABKA VISHWAS (LEGACY DISPUTE RESOLUTION) SCHEME, 2019

**CA. DEBASIS NAYAK**

Dispute resolution cum amnesty scheme called **"The Sabka Vishwas (Legacy Dispute Resolution) Scheme, 2019"** (hereinafter referred as LDRS, 2019) is 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. This scheme is akin to the amnesty scheme recently announced by some of the states like Kerala, Maharashtra, Gujrat, West Bengal and Karnataka in relation to liquidate legacy VAT issues.

More than 1.30 lakh legacy cases are pending under service tax and excise laws valuing 2.5 lakh crore and 1.25 lakh crore respectively.

Union Finance Minister in her maiden budget speech rightly pointed out that excessive baggage of litigation is not required in GST era. 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. Further, the Government has also increased the monetary limit for the Revenue appeal to reduce the pending litigations.

Glimpses of introductory speech of LDRS

*"GST has just completed two years. An area that concerns me is that we have huge pending litigations from pre-GST regime. More than **3.75 lakh crore** is blocked in litigations in service tax and excise. There is a need to unload this baggage and allow business to move on. I, therefore, propose, a Legacy Dispute Resolution Scheme that will allow quick closure of these litigations. I would urge the trade and business to avail this opportunity and be free from legacy litigations"*

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***.

**Objective of this scheme**

- To encourage voluntary disclosure of past disputes of Central Excise, Service Tax and 26 other Indirect Tax Enactments

- To facilitate an eligible person to declare the unpaid tax dues and pay the same in accordance with the provisions of this scheme.

- To provide certain immunities, including Penalty, Interest or any other proceedings including prosecution, to eligible persons who pay the declared tax dues.

- To provide an opportunity of voluntary disclosure to non-compliant taxpayers.

**Validity of this scheme**

The scheme shall be operation from 1st day of September 2019 to 31st December 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.

*Amount of duty - Amount of central excise duty, service tax and cess payable under indirect tax enactment.

**Amount in arrears - Amount of duty which is recoverable as arrears of duty either because no appeal was filed against an order before expiry of the time period for filing appeal, or towards an order in appeal attaining finality, or because tax liability has been admitted in the return filed on or before June 30, 2019 but such tax has not been paid.

*Meaning of Tax Dues*

| Tax Dues | | |
|---|---|---|
| Stage | Situation | Amount |
| Appeal | Single appeal is pending as on 30th day of June 2019 | Total amount of duty disputed in appeal |
| | Multiple appeal is pending (one appeal by declarant and other by department) | Sum of amount of duty disputed by declarant and department |
| SCN | SCN received on or before 30th day of June 2019 | Amount of duty stated as payable in SCN |
| Audit, enquiry, investigation | Audit, enquiry, investigation pending against the declarant | Amount quantified on or before 30th June 2019<br>(Quantification means written communication of amount of duty payable) |
| Voluntary disclosure | Amount has been voluntary disclosed by declarant | Total amount of duty declared by declarant |
| Amount in arrear | Amount in arrear relating to declarant is due | amount in arrear |

**Adjustment of amount already paid**

Any amount paid as pre-deposit at any stage of appellate proceedings or as deposit during enquiry, investigation, audit shall be deducted from the amount payable by the declarant as determined by the designated committee issuing the statement.

Provided that if the amount of pre-deposit or deposit already paid exceeds the amount payable under this scheme, the declarant shall not be entitled for refund.

**Person not eligible to opt for this scheme**

- Persons who have been issued a show cause notice and the final hearing has taken place on or before June 30, 2019.
- Persons who have been issued a show cause notice for an erroneous refund or refund.
- Persons whose appeal filed before the appellate forum has been heard finally on or before June 30, 2019.

- Persons who have been subjected to an enquiry or investigation or audit and the amount of duty involved has not been quantified on or before June 30, 2019.
- Persons who have been convicted for any offence for the matter for which he intends to file a declaration.
- Persons who have filed an application before the Settlement Commission.
- A person making a voluntary disclosure —
  1. After being subjected to any enquiry or investigation or audit;
  2. Having filed a return, where in the amount of duty has been reported as payable but the same has not been paid.
- Person seeking to make declarations with respect to certain excisable goods such as tobacco and manufactured tobacco substitutes and other goods.

**Procedure and timelines under this scheme**

Step 1 - The declaration under this scheme shall be made by declarant electronically at http://cbic-gst.gov.in in Form SVLDRS-1 on or before 31st December 2019;

Step 2 - The designated committee shall verify the correctness of the declaration and if

a) Amount of declaration equals to the amount estimated by designated committee then authority a statement shall be issued within sixty days from the date of receipt of declaration in Form SVLDRS-3 indicating the amount payable by the declarant.

b) Amount estimated by authority exceeds the amount declared by declarant then authority will issue a notice within thirty days from the date of application in Form SVLDRS-2 indicating an estimate of amount payable by declarant with an opportunity of being heard. The declarant can file its counter in Form SVLDRS-2A. After hearing the declarant Form SVLDRS-3 shall be issued by authority indicating the amount payable by applicant.

Provided that no such verification shall be made in case of voluntary disclosure by the declarant.

Step 3 - The designated committee may modify its order to correct the arithmetical error or clerical error apparent on the face of record within 30 days from the date of issue of Form SVLDRS-3

Step 4 - Declarant shall pay electronically the amount, as indicated in Form SVLDRS-3 issued by the designated committee, within a period of thirty days from the date of its issue.

Step 5 – Declarant to furnish the electronically proof of withdrawal of appeal or writ petition or reference pending before a High Court or the Supreme Court.

Step 6 – Issuance of discharge certificate – The authority shall issue the discharge certificate within 30 days of the said payment and submission of proof of withdrawal of appeal or writ petition or reference in Form SVLDRS-4.

**Effect of issuance of discharge certificate**

The declarant shall

a) Not be liable to pay any further duty, interest or penalty with respect to the matter and the time period covered

b) Not be liable to be prosecuted under the Indirect Tax enactment

c) Not be reopened in other proceeding under the Indirect Tax enactment

Note: Discharge certificate with respect to a matter for a time period shall not preclude the issuance of SCN

- For the same matter for a subsequent period;
- For the different matter for the same period

**Restriction under this scheme**

- Any amount payable under this scheme cannot be paid through input tax credit
- Any amount paid under this scheme shall not be taken as input tax credit as a recipient of excisable goods or taxable service
- Any amount paid shall not be refundable under any circumstances

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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 (September 2019 and October 2019). ***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 |
| CG | Capital Gains |
| IFHP | Income from House Property |
| LTCG | Long Term Capital Gain |
| The Act | Income Tax Act, 1961 |

| | |
|---|---|
| PY | Previous Year |
| AY | Assessment Year |
| PCIT | Principal Commissioner of Income-tax |
| CIT | Commissioner of Income-tax |
| NRI | Non- resident Indian |
| RBI | Reserve Bank of India |
| NCLT | National Company Law Tribunal |
| FMV | Fair Market Value |
| TDS | Tax Deducted at Source |
| TCS | Tax Collected at Source |
| APA | Advance Pricing Agreement |
| ALP | Arm's Length Price |
| IFSC | International Financial Services Centre |
| TDS | Tax Deduction at source |

**1. Secondary Adjustments in Transfer Pricing- Amendment of Section 92CE– One-time payment-More certainty and in line with international practices- Para 13 of our Discussion Paper of 2017**

The operational parts apply retrospectively from AY 2018-2019 and the procedural provisions would apply from 01st September 2019

Present scenario and reference to Explanatory Memorandum

1. India implemented the provisions of Secondary adjustments in Transfer Pricing in line with international best practices and joined the club that had countries like the USA, United Kingdom, Canada, France, and South Africa in it.
2. The salient features are as under

a. Firstly, a primary adjustment has been made (by the AO/ Assessee/ Safe Harbour Rules u/s 92CB/ APA u/s 92CC/ Agreement u/s 90/90A)

b. The amount of the primary adjustment made exceeds Rs. 1 Crore and is in respect of AY commencing 01st April 2016.

c. Consequently, there is an increase in total income or reduction in loss as the case may be and a benefit in the form of excess money gets vested with the Associated Enterprise.

d. This excess money has to be repatriated to India within such time and if not it shall be deemed to be an advance made by the assessee to Associated Enterprise and interest on such advance shall be computed in such manner.

3. Several concerns have been expressed regarding effective implementation of secondary adjustments regime and seeking clarity in law. Some of the concerns were

a. There were some situations where it may not be possible to repatriate the excess money due to exchange control norms or cases where Associated Enterprise has ceased to exist or is no longer part of the group. In such case of not being able to repatriate money, the provisions do not specify the time limit up to which notional interest may be computed.

b. Though secondary adjustments typically take the form of constructive transactions, the method of accounting for these adjustments in the context of the applicable legal regulations posed a challenge.

c. In many cases, transactions with multiple Associated Enterprises are benchmarked together and aggregated with other closely linked transactions. Clarifications was required in allocation of such quantum of primary adjustments in respect of such transactions, for the purpose of secondary adjustments.

Amendment

The following points are the crux of the amendments (the amendments taking effect from 01st September 2019 is specifically stated)

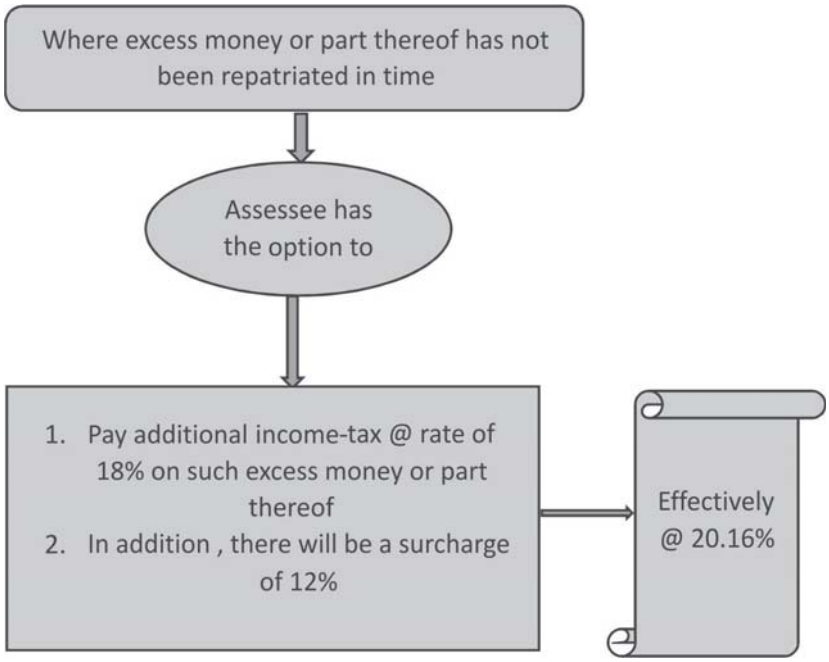
1. The conditions of threshold of Rs. 1 Crore and of the primary adjustments up to AY 2016-17 are alternate conditions.

2. Primary adjustments made under APA's signed prior to 01st April 2017 have now been excluded from the ambit of Section 92CE. However, no refund of the taxes already paid till date under pre amended section would be allowed.

3. The assessee shall be required to calculate interest on the excess money or part thereof

4. The excess money may be repatriated from any of the associated enterprise's of the assessee which is not a resident in India.

5. Optional One-time tax- With effect from 01st September 2019




6. Other conditions- With effect from 01st September 2019

a. The calculation of the interest will continue till the date of payment of the additional onetime tax as above.

b. The tax so paid shall be the final payment of tax and no credit shall be allowed in respect of tax so paid.

c. No deduction shall be allowed under any other provisions of the Act, in respect of the tax so paid.

d. If the assessee pays the additional income-tax, the assessee will not be required to make secondary adjustment or compute interest from the date of payment of such tax.

Author's note

llustration

Company X, a company registered in India has paid Rs. 20 Crores to its associated enterprise, Company Y for the goods supplied to it. Arm's length price was determined to be Rs. 15 Crores and the same was accepted. This excess money of Rs. 5 Crores lying with Company Y constitutes the secondary adjustment and the following table explains the various scenarios

| | Repatriation within 90 days - Scenario 1 in Rs. | Interest Imputation till the time of repatriation Scenario 2- in Rs. | One-time payment of tax- Scenario 3- in Rs. |
|---|---|---|---|
| | | No repatriation | |
| Secondary Adjustment | 5 Crores | 5 Crores | 5 Crores |
| Amount repatriated within 90 days | 5 Crores | Nil | Nil |
| Interest on deemed advance @ 8% p.a (ignoring fluctuations in foreign currency) for one year | | Rs. 40 Lakhs [Rs.5 Crores*8%] | |
| Tax on Interest@ 29.12% (assuming Company X's Total Income is > 10 Crores and Turnover is < 400 Crores in FY 2017 - 18) | | Rs. 11.64 Lakhs [ Rs. 40 Lakhs * 29.12%] | |
| One-time tax payment | | | Rs.1.008 Crores [Rs. 5 Crores * 20.16%] |

The assessee's would have to assess the feasibility of each of the above options before determining the suitable course of action. However, the option to settle all the tax liability with a single payment rather than imputing interest on a yearly basis would provide relief in critical cases like where either the funds could not be repatriated or the associated entreprise's cease to exist.

To conclude, most of the practical difficulties have been addressed by this amendment.

**2. Power of the AO in respect of modified return of income filed in pursuance to signing of APA- Amendment of Section 92CD**

With effect from 01st September 2019

Present scenario and reference to Explanatory Memorandum

Section 92CC empowers the CBDT to enter into APA, with the approval of CG to determine the ALP. The APA is valid for a period not exceeding 5 years and can be rolled back for 4 years.

In order to give effect to APA, Section 92CD also provides for mechanism, including filing of modified return of income and manner of completion of assessments by the AO having regards to the APA.

Section 92CD (3) deals with a situation where assessment/ re-assessment has already been completed, before expiry of the time allowed for filing of modified return of income. Apprehensions were expressed stating that due to the use of words "assess or reassess or recompute", the AO may start fresh assessments or re-assessment in respect of completed assessments of assessee's who have modified their returns of income in accordance with APA.

However, the legislative intent is to enable the AO only to carry out modification of the total income consequent to modification of return of income in pursuance to APA.

Amendment

Section 92CA is suitably amended to restrict the power of the AO to modification and the words "assessment, re-assessment or recomputation of total income" has been omitted.

**3. Rationalisations of provisions relating to maintenance of Master File – Amendment of Section 92D**

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

Present scenario and reference to Explanatory Memorandum

Section 92D provides for maintenance and keeping of information and documents by persons entering into international transactions or specified domestic transactions in the prescribed manner.

Presently, this provision applies to a constituent entity of an international group subject to the **thresholds of the consolidated group revenue and the international transactions.**

Amendment

The crux of the amendment is as under

1. The provisions of Section 92D would apply even when there is no international transaction undertaken by such constituent entity.

2. The AO or the CIT (A) shall not have the power to request for the Master File from the assessee constituent entity. The same has to be filed by the constituent entity with the prescribed authority.

**4. Concessional rate of Short-term Capital Gains to certain equity-oriented fund of funds- Amendment of Section 111A**

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

Present scenario and reference to Explanatory Memorandum

In order to incentivise fund of funds set up for disinvestment of Central Public Sector Enterprises, Finance Act, 2018 had provided for concessional rate of **long-term capital gains tax u/s 112A** for the transfer of units of such fund of funds. **The rate of tax is 10%.**

In order to further incentivise these funds of funds, it is proposed to amend Section 111A to extend the concessional rate of tax to the **short-term capital gains** in respect of transfer of units of such fund of funds, **which presently are taxed at 15%.**

Amendment

Section 111A is suitably amended to **reduce the rate of tax from 15% to 10%** in respect of short-term capital gains of the nature specified above.

**5. Benefit of Chapter VI-A deduction to IFSC Units- Amendment of Section 115A**

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

Present scenario and reference to Explanatory Memorandum

Section 115A provides the method of calculation of income-tax payable by a non-resident (not being a company) or by a foreign company where the total income includes any income by way of dividend (other than referred in 115-O), interest, royalty and fees for technical services; etc.

The income of units of an IFSC is taxed on gross basis u/s 115A and no deduction is available under Chapter VI-A which inter alia includes Section 80LA (Section 115A(4))

Amendment

It is proposed to provide that conditions of Section 115A(4) will not apply to a deduction allowed to a unit of an IFSC u/s 80LA.

**6. No disallowance of payments to non-resident without deduction of TDS – Amendment of Section 40 and Section 201-** ***Parity ensured***

With effect from 01st September 2019

Present scenario and reference to Explanatory Memorandum

The Finance Act, 2012 provided relief to resident assessee's in case of non-deduction of tax at source on payments specified u/s 40(a)(ia). The relief was in the form of giving allowance of the expenditure even though tax was not deducted at source subject to the following

a. The deductee has considered the amount in the return of income for that year and tax as the case may be has been paid and return of income has been furnished u/s 139.

b. The deductee provides a certificate to that effect in Form 26A from the accountant (auditor' certificate which presently can be generated online).

c. Interest as the case may be is paid for the interim period.

However, such relief was not available to the deductor in case of payments made to non-resident. This anomaly is proposed to be removed.

Amendment

Section 40 and Section 201 has been suitably amended to extend the above benefit even in respect **of failure to deduct tax at source on payments to non-resident**.

Author's note- Prospective vs Retrospective

Though the amendment to Section 40 (a) (ia) was curative in nature, since the law makers did not specifically give it a retrospective applicability, assessees faced difficulty in availing the benefit for payments made before the year 2012 as the revenue contended that the amendment was prospective in nature.

Consequently, the decision of the Delhi HC in the case of *CIT vs Ansal Landmark Township (P) Limited [2015] 61 taxmann.com 45* was the earliest in the context, where the HC held that though not specifically mentioned, amendments that are curative in nature are to be given retrospective effect. The decision of the Delhi HC was also supported by few other decisions of High Court, the latest being the Bombay HC in the case of *Perfect Circle India Private Limited, Income-tax Appeal No. 707 of 2016.*

Now the same scenario applies for this relief in case of payments made to non-residents without deduction of tax at source. The revenue would contend that this amendment is prospective in nature and deny the benefit. **However, with the support of these decisions of the High Court and also with expectation of similar decisions in the future, this benefit could also be availed for payments made to non-residents prior to Finance Act, 2019, without deduction of tax at source.**

**7. Online filing of application for determination of tax to be deducted at source on payments to non-residents- Section 195**

With effect from 01st November 2019

Present scenario and reference to Explanatory Memorandum

Under section 195(2), a person responsible for making payment of the specified nature which is chargeable under the Act, can make an application to the AO to determine the portion of sum chargeable.

This provision is used by a person making payment to a non-resident to obtain certificate/order from the Assessing Officer for lower or nil withholding-tax. However, this process is currently manual. To streamline this process and reduce processing time along with better administration, online filing of application is proposed to be enabled.

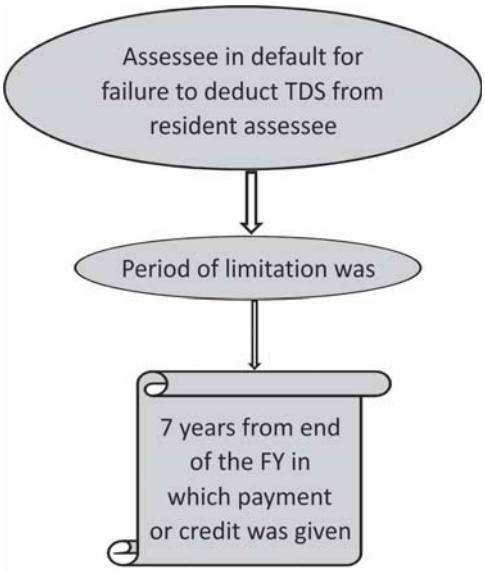
**Amendment**

Section 195(2) and Section 195(7) is suitably amended to enable online filing of application to the AO and also for the manner of determination of appropriate portion of sum chargeable to tax by the AO.

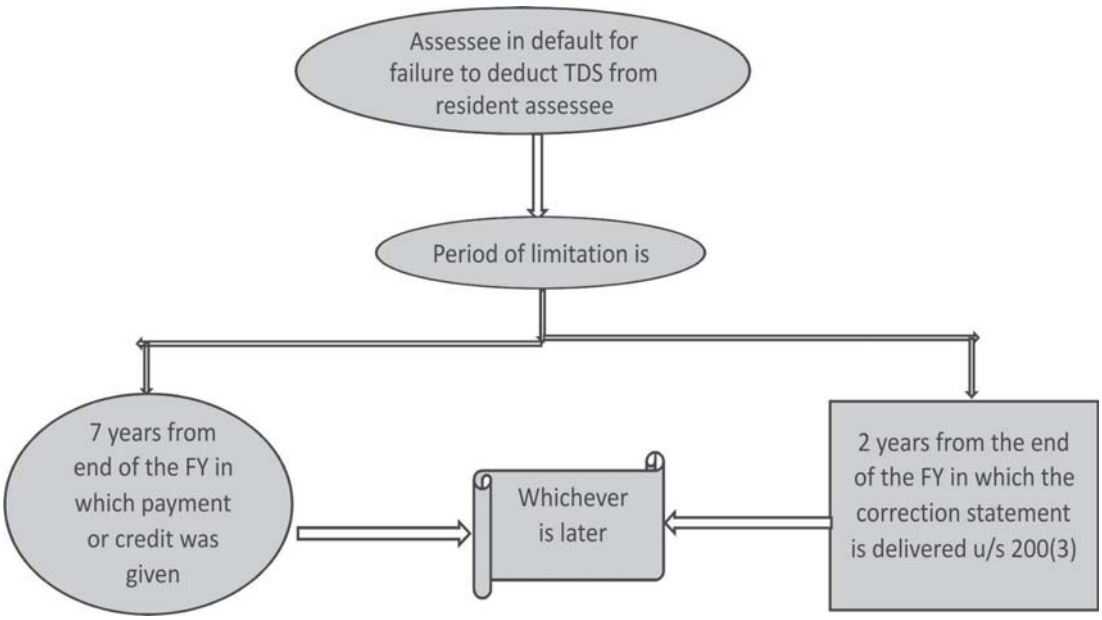
**8. Change in period of limitation for deeming the assessee to be in default- Amendment of Section 201**

With effect from 01st September 2019

Present scenario and reference to Explanatory Memorandum




Amendment

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# EXCEL TIPS

CA DUNGAR CHAND U JAIN

**IGNORING #N/A VALUES:**

At times, we need to make calculations on set of data and the range / cell contains errors as we have data as in below Illustration:

| | A |
|---|---|
| 1 | 1 |
| 2 | 2 |
| 3 | 3 |
| 4 | 4 |
| 5 | 5 |
| 6 | #N/A |
| 7 | 6 |
| 8 | 7 |
| 9 | #N/A |
| 10 | 9 |

Any calculations done on the same will also result in error. For example in A11, if we try to make a simple addition using **=SUM(A1:A10),** it will result in error because the range / cell contains errors (displaying as **#N/A)**

| | A | B |
|---|---|---|
| 1 | 1 | |
| 2 | 2 | |
| 3 | 3 | |
| 4 | 4 | |
| 5 | 5 | |
| 6 | #N/A | |
| 7 | 6 | |
| 8 | 7 | |
| 9 | #N/A | |
| 10 | 9 | |
| 11 | #N/A | =SUM(A1:A10) |
| 12 | | |

Because the range / cell contains errors **#N/A,** the output also results in an error and displays **#N/A.**

To overcome this, we need to get the calculations done ignoring #N/A values which may range from a simple addition to applying any logical test.

To get the same done, we shall use the (I) **Sumif** function along with (ii) "Not Equal to" function which lesser than symbol and greater than symbol, i.e. **<>**

**(i) Sumif Function:** This function adds the value of items which match criteria set by the user.

**SUMIF** function syntax has the following arguments:

- **Range** Required. The range of cells that you want evaluated by criteria. Cells in each range must be numbers or names, arrays, or references that contain numbers. Blank and text values are ignored. The selected range may contain dates in standard Excel format (examples below).
- **Criteria** Required. The criteria in the form of a number, expression, a cell reference, text, or a function that defines which cells will be added. For example, criteria can be expressed as 32, ">32", B5, "32", "apples", or TODAY().

  **Important:** Any text criteria or any criteria that includes logical or mathematical symbols must be enclosed in double quotation marks (**"**). If the criteria is numeric, double quotation marks are not required.
- **Sum_range** Optional. The actual cells to add, if you want to add cells other than those specified in the ***range*** argument. If the ***sum_range*** argument is omitted, Excel adds the cells that are specified in the ***range*** argument (the same cells to which the criteria is applied).
- You can use the wildcard characters—the question mark (**?**) and asterisk (*****)—as the ***criteria*** argument. A question mark matches any single character; an asterisk matches any sequence of characters. If you want to find an actual question mark or asterisk, type a tilde (~) preceding the character.

Illustration :

| | C | D | E |
|---|---|---|---|
| 3 | Item | Date | Cost |
| 4 | Brakes | 01-Jan-19 | 80 |
| 5 | Tyres | 10-May-19 | 25 |
| 6 | Brakes | 01-Feb-19 | 80 |
| 7 | Service | 01-Mar-19 | 150 |
| 8 | Service | 05-Jan-19 | 300 |
| 9 | Window | 01-Jun-19 | 50 |
| 10 | Tyres | 01-Apr-19 | 200 |
| 11 | Tyres | 01-Mar-19 | 100 |
| 12 | Clutch | 01-May-19 | 250 |

| | | | |
|---|---|---|---|
| Total cost of all Brakes bought. | | 160 | =SUMIF(C4:C12,"Brakes",E4:E12) |
| Total cost of all Tyres bought. | | 325 | =SUMIF(C4:C12,"Tyres",E4:E12) |
| Total of items costing Rs.100 or above. | | 1000 | =SUMIF(E4:E12,">=100") |
| Total of item typed in following cell. | Service | 450 | =SUMIF(C4:C12,E18,E4:E12) |

(ii) In **Excel,** Lesser than symbol and greater than symbol used one after other i.e. <> means **not equal** to. The <> operator in **Excel** checks if two values are **not equal** to each other.

So to get the calculation correct in the first Illustration, we need to use the formula **=SUMIF(A1:A10,"<>#N/A")**

This calculates sum of numbers / data in the range between A1 and A10 but ignores the data which are not in the recognisable format i,e, **#N/A**

| | A | B |
|---|---|---|
| 1 | 1 | |
| 2 | 2 | |
| 3 | 3 | |
| 4 | 4 | |
| 5 | 5 | |
| 6 | #N/A | |
| 7 | 6 | |
| 8 | 7 | |
| 9 | #N/A | |
| 10 | 9 | |
| 11 | 37 | =SUMIF(A1:A10,"<>#N/A") |
| 12 | | |

*(The author is Madurai based Chartered Accountant in practice. He can be reached at dungarchand@hotmail.com)*

# COMPANIES (AMENDMENT) ACT, 2019 - A QUICK LOOK ON PENALTY ASPECTS

CA. CS. DHANAPAL

The Parliament recently passed the Companies (Amendment) Bill, 2019 which has been notified as the Companies (Amendment) Act, 2019 on the 31st July, 2019.This is the third time the Companies Act, 2013 ("Act") has been amended since its inception in 2013; the earlier amendments were effected vide the Companies (Amendment) Act, 2015 and the Companies (Amendment) Act, 2017.The Companies (Amendment) Act, 2019 has introduced amendments in 42 Sections of the Act, subsuming the amendments introduced vide the Companies (Amendment) Ordinance, 2018 (replaced by the Companies (Amendment) Ordinance, 2019 and again by the Companies (Amendment) Second Ordinance, 2019) ('Ordinance") and introducing a number of other amendments also.

The amendments introduced vide the Ordinance continue to be in force w.e.f 02.11.2018 and other amendments will come into force on later dates as may be notified by the Ministry of Corporate Affairs. In this write up, focus is given only on the amendments relating to penalty for ease reference.

## AMENDMENTS IN DETAIL ON PENALITY ASPECTS

<table>
<tr><th>S.NO.</th><th>SECTION NUMBER AND HEADING</th><th>NATURE OF CHANGE</th><th>IMPACT OF THE AMENDMENT</th></tr>
<tr><td>1.</td><td>53 – Prohibition on Issue of Shares at Discount<br><br>In force Since 2nd day of November, 2018</td><td>Substitution of sub-section (3) of Section 53</td><td>• Revision has been made in penal provision for issue of shares at discount as below:
<table>
<tr><th>Before amendment</th><th>After amendment</th></tr>
<tr><td>Company: <u>Fine</u> which shall not be less than one lakh rupees but which may extend to five lakh rupees<br><br>Officer in default: imprisonment for a term which may extend to six months or with fine which shall not be less than one lakh rupees but which may extend to five lakh rupees, or with both.</td><td>Company & Officer in default: <u>Liable to Penalty</u> which may extend to an amount equal to the amount raised through the issue of shares at discount or five lakh rupees, whichever is less<br>+<br>Company shall be liable to refund all monies received with interest @ 12% p.a. from the date of issue of shares.</td></tr>
</table></td></tr>
<tr><td>2.</td><td>64 – Notice to be Given to Registrar for Alteration of Share Capital<br><br>In force Since 2nd day of November, 2018</td><td>Substitution of sub-section (2) of Section 64</td><td>• Revision has been made in penal provision for default in filing form SH 7 for alteration of authorized share capital as below:
<table>
<tr><th>Before amendment</th><th>After amendment</th></tr>
<tr><td>Company & Officer in default: <u>Fine</u> which may extend to Rs. 1000/ - for each day during which such default continues, or Rs. 5 Lakhs, whichever is less.</td><td>Company & Officer in default: <u>Penalty</u> which may extend to Rs. 1000/- for each day during which such default continues, or Rs. 5 Lakhs, whichever is less.</td></tr>
</table></td></tr>
</table>

<table>
<tr>
<td>3</td>
<td>92 – Annual Return<br><br>In force Since 2nd day of November, 2018</td>
<td>Substitution of sub-section (5) of Section 92</td>
<td>
• Revision has been made in penal provision for default in filing Annual Return as below:
<table>
<tr><th>Before amendment</th><th>After amendment</th></tr>
<tr>
<td>Company: <u>Punishable with Fine</u> which shall not be less than fifty thousand rupees but which may extend to five lakhs rupees<br><br>Officer in default: imprisonment for a term which may extend to six months or with fine which shall not be less than fifty thousand rupees but which may extend t o five lakh rupees, or with both.</td>
<td>Company & Officer in default: <u>Liable to Penalty</u> of fifty thousand rupees and in case of continuing failure, with further penalty of one hundred rupees for each day during which such failure continues, subject to a a maximum of five lakh rupees.</td>
</tr>
</table>
</td>
</tr>
<tr>
<td>4</td>
<td>102 – Statement to be annexed to Notice<br><br>In force Since 2nd day of November, 2018</td>
<td>Substitution of sub-section (5) of Section 102</td>
<td>
• Revision has been made in penal provision in relation to explanatory statement as below:
<table>
<tr><th>Before amendment</th><th>After amendment</th></tr>
<tr>
<td>Every promoter, director, manager or other key managerial personnel who is in default <u>shall be punishable with fine</u> which may extend to fifty thousand rupees or five times the amount of benefit accruing to the promoter, director, manager or other key managerial personnel or any of his relatives, whichever is more.</td>
<td>Every promoter, director, manager or other key managerial personnel who is in default shall be <u>liable to a penalty</u> of fifty thousand rupees or five times the amount of benefit accruing to the promoter, director, manager or other key managerial personnel or any of his relatives, whichever is higher. This shall be without prejudice to provisions of sub-section (4) of Section 102.</td>
</tr>
</table>
</td>
</tr>
<tr>
<td>5</td>
<td>105 – Proxies<br><br>In force Since 2nd day of November, 2018</td>
<td>Substitution of sub-section (3) of Section 105</td>
<td>
• Revision has been made in penal provision in relation to disclosure in notice of general meeting about provisions for appointment of proxies as below:
<table>
<tr><th>Before amendment</th><th>After amendment</th></tr>
<tr>
<td>If default is made in complying with sub-section (2), every officer of the company who is in default shall be <u>punishable with fine</u> which may extend to five thousand rupees.</td>
<td>If default is made in complying with sub-section (2), every officer of the company who is in default shall <u>be liable to a penalty</u> of five thousand rupees.</td>
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<table>
<tr>
<td>6.</td>
<td>117 – Resolutions and Agreements to be Filed<br>In force Since 2nd day of November, 2018</td>
<td>Substitution of sub-section (2) of Section 117</td>
<td>
• Revision has been made in penal provision in relation to default in filing of Form MGT 14 for registration of resolutions / agreements as below:
<table>
<tr><th>Before amendment</th><th>After amendment</th></tr>
<tr>
<td>Company: <u>Punishable with fine</u> which shall not be less than one lakh rupees but which may extend to twenty -five lakh rupees<br>Officer in default, including liquidator of the company, if any: fine which shall not be less than fifty thousand rupees but which may extend to five lakh rupees.</td>
<td>Company: <u>Liable to Penalty</u> of one lakh rupees and in case of a continuing failure, with further penalty of five hundred rupees for each day after the first d uring which the default continues, subject to a maximum of twenty five lakh rupees<br>Officer in default, including liquidator of the company, if any: Penalty of fifty thousand rupees and in case of a continuing failure, with further penalty of five hundred r upees for each day after the first during which the default continues, subject to a maximum of five lakh rupees.</td>
</tr>
</table>
</td>
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<tr>
<td>7</td>
<td>121 – Report on AGM<br>In force Since 2nd day of November, 2018</td>
<td>Substitution of sub-section (3) of Section 121</td>
<td>
• Revision has been made in penal provision in relation to default in filing of Form MGT 15 as below:
<table>
<tr><th>Before amendment</th><th>After amendment</th></tr>
<tr>
<td>Company: <u>Punishable with fine</u> which shall not be less than one lakh rupees but which may extend to five lakh rupees<br><br>Officer in default: fine which shall not be less than twenty-five thousand rupees but which may extend to one lakh rupees.</td>
<td>Company: <u>Liable to Penalty</u> of one lakh rupees and in case of a continuing failure, with further penalty of five hundred rupees for each day after the first during which the default continues, subject to a maximum of five lakh rupees<br>Officer in default: Penalty of twenty five thousand rupees and in case of a continuing failure, with further penalty of five hundred rupees for each day after the first during which the default continues, subject to a maximum of one lakh rupees.</td>
</tr>
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<table>
<tr>
<td>8</td>
<td>137 – Copy of financial statements to be filed with Registrar<br><br>In force Since 2nd day of November, 2018</td>
<td>Substitution of sub-section (3) of Section 137</td>
<td>
• Revision has been made in penal provision in relation to default in filing of financial statements with ROC as below:
<table>
<tr><th>Before amendment</th><th>After amendment</th></tr>
<tr>
<td>Company: <u>Punishable with fine</u> of one thousand rupees for every day during which the failure continues but which shall not be more than ten lakh rupees<br>Officer in default:<br>Managing director and the Chief Financial Officer of the company, if any, and, in the absence of the managing director and the Chief Financial Officer, any other director who is charged by the Board with the responsibility of complying with the provisions of this section, and, in the absence of any such director, all the directors of the company, <u>shall be punishable with</u> imprisonment for a term which may extend to six months or with fine which shall not be less than one lakh rupees but which may extend to five lakh rupees, or with both.</td>
<td>Company: <u>Liable to Penalty</u> of Rs. 1000/- for every day during which the failure continues but which shall not be more than Rs. 10 Lakhs<br>Officer in default:<br>Managing director and the Chief Financial Officer of the company, if any, and, in the absence of the managing director and the Chief Financial Officer, any other director who is charged by the Board with the responsibility of complying with the provisions of this section, and, in the absence of any such director, all the directors of the company, shall be <u>shall be liable to a penalty</u> of one lakh rupees and in case of continuing failure, with further penalty of one hundred rupees for each day after the first during which such failure continues, subject to a maximum of five lakh rupees.</td>
</tr>
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</tr>
<tr>
<td>9</td>
<td>140 – Removal, Resignation of Auditor and Giving of Special Notice<br><br>In force Since 2nd day of November, 2018</td>
<td>Substitution of sub-section (3) of Section 140</td>
<td>
• Revision has been made in penal provision in relation to filing notice of resignation of auditor with ROC as below:
<table>
<tr><th>Before amendment</th><th>After amendment</th></tr>
<tr>
<td>Auditor: <u>Punishable with fine</u> which shall not be less than fifty thousand rupees or the remuneration of the auditor, whichever is less, but which may extend to five lakh rupees.</td>
<td>Auditor: <u>Liable to Penalty</u> of fifty thousand rupees or an amount equal to the remuneration of the auditor, whichever is less, and in case of continuing failure, with further penalty of five hundred rupees for each day after the first during which such failure continues, subject to a maximum of five lakh rupees.</td>
</tr>
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<table>
<tr>
<td>10</td>
<td>157 – Company to inform DIN to ROC<br><br>In force Since 2nd day of November, 2018</td>
<td>Substitution of sub-section (2) of Section 157</td>
<td>
• Revision has been made in penal provision in relation to intimation of DIN by Company to ROC as below:
<table>
<tr><th>Before amendment</th><th>After amendment</th></tr>
<tr>
<td>Company: <u>Punishable with fine</u> which shall not be less than twenty -five thousand rupees but which may extend to one lakh rupees<br>Officer in default: fine which shall not be less than twenty-five thousand rupees but which may extend to one lakh rupees.</td>
<td>Company: <u>Liable to Penalty</u> of twenty five thousand rupees, and in case of continuing failure, with further penalty of one hundred rupees for each day after the first during which such failure continues, subject to a maximum of one lakh rupees.<br>Officer in default: Penalty of not less than twenty five thousand rupees, and in case of continuing failure, with further penalty of one hundred rupees for each day after the first during which such failure continues, subject to a maximum of one lakh rupees.</td>
</tr>
</table>
</td>
</tr>
<tr>
<td>11</td>
<td>159– Punishment for contravention<br><br>In force Since 2nd day of November, 2018</td>
<td>Substitution of whole Section 159</td>
<td>
• Revision has been made in penal provision in relation to provisions of Section 152, 155, 156 as below:
<table>
<tr><th>Before amendment</th><th>After amendment</th></tr>
<tr>
<td>If any individual or director of a company, contravenes any of the provisions of section 152, section 155 and section 156, such individual or director of the company shall be <u>punishable with imprisonmen</u>t for a term which may extend to six months or with fi ne which may extend to fifty thousand rupees and where the contravention is a continuing one, with a further fine which may extend to five hundred rupees for every day after the first during which the contravention continues.</td>
<td>If any individual or director of a company, makes any default in complying with any of the provisions of section 152, section 155 and section 156, such individual or director of the company shall be <u>liable to a penalty</u> which may extend to fifty thousand rupees and where the default is a continuing one, with a further penalty which may extend to five hundred rupees for every day after the first during which such default continues.</td>
</tr>
</table>
</td>
</tr>
</table>

<table>
<tr>
<td>12</td>
<td>165 – Number of directorships<br><br>In force Since 2nd day of November, 2018</td>
<td>Substitution of sub-section (6) of Section 165</td>
<td>
• Revision has been made in penal provision in relation to holding of directorship in excess of limits as below:
<table>
<tr><th>Before amendment</th><th>After amendment</th></tr>
<tr><td>If a person accepts an appointment as a director in contravention of sub - section (1), he shall be <u>punishable with fine</u> which shall not be less than five thousand rupees but which may extend to twenty-five thousand rupees for every day after the first durin g which the contravention continues.</td><td>If a person accepts an appointment as a director in contravention of sub - section (1), he shall be <u>liable to penalty</u> of five thousand rupees for each day after the first during which the default continues.</td></tr>
</table>
</td>
</tr>
<tr>
<td>13</td>
<td>191 – Payment to Director for Loss of Office, etc., in Connection with Transfer of Undertaking, Property or Shares<br><br>In force Since 2nd day of November, 2018</td>
<td>Substitution of sub-section (5) of Section 191</td>
<td>
• Revision has been made in penal provision in relation to Payment to Director for Loss of Office, etc. as below:
<table>
<tr><th>Before amendment</th><th>After amendment</th></tr>
<tr><td>If a director of the company contravenes the provisions of this section, such director shall be <u>punishable with fine</u> which shall not be less than twenty-five thousand rupees but which may extend to one lakh rupees.</td><td>If a director of the company makes any default in complying with provisions of this section, such director shall be <u>liable to a penalty</u> of one lakh rupees.</td></tr>
</table>
</td>
</tr>
<tr>
<td>14</td>
<td>197 – Overall Maximum Managerial Remuneratio n and Managerial Remuneratio n in Case of Absence or Inadequacy of Profits<br><br>In force Since 2nd day of November, 2018</td>
<td>Omission of sub-section (7)<br><br>Substitution of sub-section (15) of Section 197</td>
<td>
• Following provision has been omitted from section 197 as similar provision appears in Section 149 already : "Notwithstanding anything contained in any other provision of this Act but subject to the provisions of this section, an independent director shall not be enti tled to any stock option and may receive remuneration by way of fees provided under sub-section (5), reimbursement of expenses for participation in the Board and other meetings and profit related commission as may be approved by the members."<br>
• Penal provision has been changed as below:
<table>
<tr><th>Before amendment</th><th>After amendment</th></tr>
<tr><td>If any person contravenes the provisions of this section, he shall be <u>punishable with fine</u> which shall not be less than one lakh rupees but which may extend to five lakh rupees.</td><td>If any person makes any default in complying with the provisions of this section, he shall be <u>liable to a penalty</u> of one lakh rupees and where the default has been made by a company, the company shall be liable to a penalty of five lakh rupees</td></tr>
</table>
</td>
</tr>
</table>

<table>
<tr>
<td>15</td>
<td>203 – Appointment of KMP<br><br>In force Since 2nd day of November, 2018</td>
<td>Substitution of sub-section (5) of Section 203</td>
<td>
• Revision has been made in penal provision in relation to appointment of KMP as below:
<table>
<tr><th>Before amendment</th><th>After amendment</th></tr>
<tr><td>Company: <u>Punishable with fine</u> which shall not be less than one lakh rupees but which may extend to five lakh rupees<br>Director / KMP in default: <u>fine</u> which may extend to fifty thousand rupees and where the contravention is a continuing one, with a further fine which may extend to one thousand rupees for every day after the first during which the contravention continues.</td><td>Company: <u>Liable to Penalty</u> of fi ve lakh rupees<br><br>Director / KMP in default: <u>Penalty</u> of fifty thousand rupees and where the default is a continuing one, with a further penalty of one thousand rupees for every day after the first during which the contravention continues but not exceeding f ive lakh rupees.</td></tr>
</table>
</td>
</tr>
<tr>
<td>16</td>
<td>238 – Registration of Offer of Schemes Involving Transfer of Shares<br><br>In force Since 2nd day of November, 2018</td>
<td>Amendment of sub- section (2) of Section 238</td>
<td>
• Revision has been made in penal provision as below:
<table>
<tr><th>Before amendment</th><th>After amendment</th></tr>
<tr><td>The director who issues a circular which has not been presented for registration and registered under clause (c) of sub - section (1), shall be <u>punishable with fine</u> which shall not be less than twenty-five thousand rupees but which may extend to five lakh rupees</td><td>The director who issues a circular which has not been presented for registration and registered under clause (c) of sub-section (1), shall be <u>liable to penal ty</u> of one lakh rupees.</td></tr>
</table>
</td>
</tr>
<tr>
<td>17</td>
<td>441 – Compoundin g of certain offences In force Since 2nd day of November, 2018</td>
<td>Amendment of Section 441</td>
<td>
• The monetary limit of fine upto which offences may be compounded by RD has been enhanced from Rs. 5 Lakhs to Rs. 25 Lakhs.<br>
• The requirement of seeking permission of Special Court for compounding of any offence which is punishable under the Act, with imprisonment or fine, or with imprisonment or fine or with both has been omitted.
</td>
</tr>
</table>

<table>
<tr>
<td>18</td>
<td>446B – Lesser penalties for OPC / Small Companies<br><br>In force Since 2nd day of November, 2018</td>
<td>Amendment of Section 446B</td>
<td>• Revision has been made in penal provision as below:
<table>
<tr><th>Before amendment</th><th>After amendment</th></tr>
<tr><td>Notwithstanding anything contained in this Act, if a One Person Company or a small company fails to comply with the provisions of sub -section (5) of section 92, sub -section (2) of section 117 or sub-section (3) of section 137, such company and officer in d efault of such company shall be <u>punishable with fine</u> or imprisonment or fine and imprisonment, as the case may be, which shall not be more than one -half of the fine or imprisonment or fine and imprisonment, as the case may be, of the minimum or maximum fine or imprisonment or fine and imprisonment, as the case may be, specified in such sections</td><td>Notwithstanding anything contained in this Act, if a One Person Company or a small company fails to comply with the provisions of sub-section (5) of section 92, sub -section (2) of section 117 or sub -section (3) of section 137, such company and officer in default of such company shall be <u>liable to a penalty</u> which shall not be more than half of the penalty specified in such sections.</td></tr>
</table></td>
</tr>
<tr>
<td>19</td>
<td>447 – Punishment for fraud<br><br>In force Since 2nd day of November, 2018</td>
<td>Amendment of Section 447</td>
<td>• Upper limit of penalty where the fraud involves an amount less than ten lakh rupees or one per cent. of the turnover of the company, whichever is lower, and does not involve public interest has been enhanced from Rs. 25 Lakhs to Rs. 50 Lakhs.<br><br>The revised proviso reads as below:<br>Provided further that where the fraud involves an amount less than ten lakh rupees or one per cent. of the turnover of the company, whichever is lower, and does not involve public interest, any person guilty of such fraud shall be punishable with imprisonment for a term which may extend to five years or with fine which may extend to fifty lakh rupees or with both.</td>
</tr>
<tr>
<td>20.</td>
<td>454A – Penalty for Repeated Default<br><br>In force Since 2nd day of November, 2018</td>
<td>Insertion of new Section 454A</td>
<td>• A new section 454 A has been introduced which provides that where a Company or an officer of a company or any other person having already been subjected to penalty for default under any of the provisions of the Act, again commits such default within a period of 3 years from the date o f order imposing such penalty passed by the adjudicating officer or the Regional Director, as the case may be, it or he shall be liable for the second or subsequent defaults for an amount equal to twice the amount of penalty provided for such default under the relevant provisions of this Act.</td>
</tr>
</table>

*(The author is a Chennai based practicing Company Secretary. He can be reached at csdhanapal@gmail.com)*

## LEARNING SERIES ON MULTILATERAL INSTRUMENT UNDER TAX TREATIES
## LS # 6: - COMPATIBILITY OF MLI WITH CTA

**Objectives**

A. Prelude - Compatibility Clauses

B. Compatibility clause(s) - Its' function Debrief

C. Compatibility Clause(s) - 'What are they?'

D. Debrief

**Mr. SUDARSHAN RANGAN** Advocate & **CA. VIGNESH KRISHNASWAMY**

### A. Prelude – Compatibility Clauses

In the last five learning series, we had brought out the basic concepts in the context of Multilateral Instrument (MLI). As one should be aware, by now, that an MLI shall not by itself replace the existing tax treaties, but, the MLI shall now be read along with the mutually notified tax treaties that India has signed with other countries.

In a situation where two minds come together for a common purpose, there is arises a need to be bridge the dissimilarities. Let's take for a simplistic understanding of two minds coming together, carrying different ideologies, for a for a common business object of wealth maximization. It necessarily requires reasonable compatibility of the two minds to maintain an equilibrium, through compatible covenants, though it may be difficult to achieve a prefect equilibrium in all situations. Similarly, in the context of MLI, in order to maintain the relationship between MLI provisions and the tax treaty provisions (referred to as a Covered Tax Agreement in the context of MLI), '**compatibility clauses'** are contained in each Article of the MLI to achieve the aforesaid purpose.

In other words, the differences arising from, what was agreed originally between two states in a tax treaty, in respect of relief of double taxation of income to, what is now sought to be implemented through MLI, being anti-treaty abuse measures, are bridged through these compatibility clauses under the MLI. Therefore, in this learning series, we will focus on how the 'compatibility clauses' operate in the context of MLI and for its' functioning.

### B. Compatibility clause(s) – Its' function

Compatibility clause(s) define the relationship between the provisions of the Convention and Covered Tax Agreements in objective terms. The conflicts that arise between the provisions of MLI and the provisions of Covered Tax Agreement ('CTA') is sought to be addressed through one or more compatibility clauses placed in each of those Articles of MLI **in order supersede the provisions contained in the CTA**.

- Another important function of the compatibility clause is to also provide scope to leave those provisions of CTA undisturbed, where the intended object with which a particular provision of the MLI was placed, has already been satisfied under the existing provisions of ML.
- The compatibility clauses help the parties to the convention identify provisions within the objective scope of MLI, which shall either supersede or modify the provisions in a CTA.
- The purpose of these clauses is to ensure clarity and transparency about the application of the provisions of MLI on the CTA and under each notified provision of MLI shall meet its objective meaning corresponding to compatibility clause used to effect/ supersede/ modify the provisions of CTA.

**C. Compatibility Clause(s) – 'What are they?'**

- There are 4 different compatibility clause(s) that is found under the MLI convention. For each of the comparability clauses to be applied or be understood in the context of MLI Provisions, it requires primarily satisfy the applicability condition and the notification requirement.

| Compatibility Clause | Applicability | Notification requirement |
|---|---|---|
| **"in place of" an existing provision of CTA** | There must be an existing provision of CTA for MLI provisions to apply | All Contracting Jurisdictions make a notification with respect to the existing provision of the CTA |
| **"in the absence of" an existing provision of CTA** | There must be an existing provision of CTA for MLI provisions to apply | All Contracting Jurisdictions make a notification absence of an existing provision of the CTA |
| **"in place of" or "in the absence of" an existing provision of CTA** | Whether or not there is an existing provision of CTA, MLI provisions shall apply | If an existing provision is notified by both countries of a CTA, then, the provision is replaced<br><br>If an existing provision is absent or only one country notifies, the MLI provisions supersedes. |
| **"applies to" or "modifies"** | There must be an existing provision of CTA for MLI provisions to apply | All Contracting Jurisdictions make a notification with respect to the existing provision of the CTA |

- The compatibility clause(s) have different effects on the provisions of CTA depending on the type of compatibility clause that applies to the relevant article. These clauses are broadly classified as provided below and each clause carries a definitive meaning as stated:

| Compatibility Clause | Meaning | Effect |
|---|---|---|
| **"in place of" an existing provision of CTA** | Purpose of this clause is **to replace an existing provision of CTA**, with that of mutually notified provisions of MLI between two countries. | The notified provision of MLI shall remove the current CTA provision and supersedes the CTA by inserting/ placing the MLI provision with an inconsistent provision of a CTA |
| | | |
| **"in the absence of" an existing provision of CTA** | Purpose of this clause in to **enforce a new provision into the CTA**, where such provision is absent in the CTA and which provision have been mutually notified by both countries. | A notified provision with this compatibility clause shall have the effect of creating a new space for a notified provision into the CTA and shall have to be thereafter be read as being part of the CTA. This clause seeks to not to insert a provision as a replacement but as a new provision itself. |
| | | |
| **"in place of or in the absence of" an existing provision of CTA** | Purpose of this clause is to intend all those provisions containing this compatibility shall be applicable in all cases to the extent of the terms of the compatibility clause may apply. Since two conditions of (a) superseding replacement and (b) superseding new insertion is contemplated, each clause different character under the respective circumstance. | <u>Use of "in place of":</u><br>Where existing provisions of CTA are notified by two countries, then, the MLI provisions are replaced with CTA provisions.<br><br><u>Use of "in the absence of":</u><br>Where an existing provision in a CTA is not notified or NO such CTA provision is in existence, then the term shall have the effect of, the MLI provision which shall still apply or the MLI provision being added to the CTA, respectively.[1]<br><br>The terms shall apply independently to the extent it may apply depending on the context of, whether the existing provision is notified (or) not notified (or) notified but does not match (or) is such CTA provision is absent. |

[1]Article 30(3) of Vienna Convention

| | | |
|---|---|---|
| **"applies to" or "modifies"** | Purpose of this clause that the MLI provision changes the application of a MLI provision or modifies the application of such MLI provision into a CTA provision, without amending replacing such CTA provision. | This existence of this compatibility clause is that there should be a mutually notified CTA provision on which this condition is made effective. Thereafter, the relevant MLI provision shall be made applicable to an existing CTA provision without replacing/ modifying the provisions of CTA. |

- The compatibility of each provision of MLI with the provisions of CTA are not achieved unless, the said provisions of MLI notified one country finds a match with the same provisions of another country. Therefore, matching of notified provisions between the countries still play a critical role even prior to application of compatibility clauses. Drawing an analogy from our preliminary illustration, that, unless there is a common object the purpose of compatibility fails and finds no meaning within incongruous objectives.

- In so far as the interpretation of terms "*in place of or in the absence of*" has been given a superseding effect of MLI provisions being virtually forced into the CTA provisions based on the interpretation reflected in Article 30(3) of the Vienna Convention on the Law of Treaties ('VCLT'). Article 30 deals with the "*Application of successive treaties relating to the* ***same subject matter***", wherein sub-article (3) provides that the where the parties of an earlier treaty are also parties to a later treaty, in such a case the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty.

Hence, only in respect of the provisions where the compatibility clause "in place of or in the absence of" is being used, then provisions of earlier treaties shall apply on a later treaty only to the extent to which it is consistent with the later treaty. This would, therefore, imply that in the context this compatibility clause alone, the MLI provisions automatically apply into a CTA. Though it appears that the application of provisions of MLI on a CTA become easier and clear with the compatibility clauses, complexities do arise where, the provisions of the MLI contain an aspect of 'right to reservation'[1] on the Article/ a provision of the article by a country, in respect of application of such provisions into the CTA (which we propose to discuss while we unravel the provisions under the relevant Article)

[2]For instance Article 10, 11, 14 and 17, where the provisions have the compatibility clause of " in place of or in the absence of", do provide a leeway for a Contracting Jurisdictions to reserve a right on such provision and opting out of such provisions of the Article.

**D Debrief**

Compatibility clauses in the context of MLI become extremely critical in modifying a CTA between two contracting jurisdictions and align the CTA in accordance with a common, unified and a transparent tax policy. In a case where there exists a conflict or mismatch in notification or a country has opted out of a particular provision, the compatibility clauses fails to achieve its object due to the lack of commonalities.

Therefore, in order to apply the compatibility clauses, make way for appropriate modification of provisions of CTA and understand the impact of such modification on the taxing rights, the following steps are essential to be followed:

1. Check if a treaty partner is signatory to MLI;

2. Check if the both treaty partners have notified their respective tax treaties to CTA;

3. Check for the positions adopted by each treaty partner on the MLI provisions (whether there is a matching of MLI provisions or otherwise);

4. Lastly, reconcile the matched positions and the unmatched positions with reference to the compatibility clauses used under the relevant Article of MLI to arrive at a meaningful application of MLI provisions into a CTA.

*(The authors are Chennai Based Advocate and Chartered Accountant respectively. They can reached at sudarshan@inbox.com and vignesh.krishnaswamy@outlook.com respectively)*

***CASC is proud to inform that our Management Committee Member***

***CA. Uttamchand Jain***

***has Been Co-opted as Member to the Core Committee***

***("Seminar Public Relations & Membership Development Committee")***

***for the year 2019-20, one of Highly Reputed Association of Professionals***

***Namely the Bombay Chartered Accountants Society, Mumbai.***

***For the year 2019-20***

## OBITUARY

CASC deeply mourns the demise of a doyen in the Profession, **Sri. G. Narayana Swamy,** FCA, on the 23rd of August, 2019. He was 91 years old and was the Senior Partner of **M/s. S. Venkatram & Co.**

He was amongst the select seniors who attended our Inaugural Function on 29th December, 1978, and became a Life Member soon thereafter.

He has supported all our activities, by presiding over many meetings, chairing sessions at our Annual Conferences and advising us on selection of subjects and speakers. We were able to depend upon him to ensure adequate delegate enrolment and participation during the first two decades of our existence. Quick witted, well informed and appreciative of the talents of the youth, he has been a pillar of strength to CASC.

We deeply mourn his loss and offer our heartfelt condolences to his family and partners.

# Ministry of Railways

## Discounted Fare Schee for AC Chair Car and Executive Class Sitting Accommodation to be Implemented by the End of Next Month

**Posted On: 28 AUG 2019 12:35PM by PIB Delhi**

A Discounted fare Scheme for AC Chair Car and Executive Class sitting accommodation is to be implemented from the end of next month. The Scheme shall be applicable for AC Chair car and Executive chair car accommodation like in Shatabdi, Gatimaan, Tejas, Double Decker, Intercity trains etc.

The Powers to discount these fares is delegated to Principal Chief Commercial Managers of Zonal Railways. Only trains with monthly occupancy of less than 50% in the previous year are eligible for discount.

Discount to be offered can be upto 25% of the base fare. Reservation fee, superfast charge, GST, etc., as applicable will be separate. Discount can be given for the first leg and/or last leg of journey and/or intermediate sections and/or end to end journey. There is a provision to make catering optional with the discounted fare.

Discounted fare can be for the full year, part of the year or month wise or seasonal or for weekdays/weekend.

Accordingly, all Zonal Railways have been directed by the Commercial Directorate of the Railway Board to review the occupancy of all trains with Chair Car and Executive Class seating accommodation by the 30th of September 2019 and take suitable action. This scheme is aimed at improving occupancy and earnings.

It is further decided that the existing discounted scheme in following trains shall continue as per the existing discounted principles

- 12007/12008 Chennai Central-Mysuru Shatabdi Express over Benguluru-Mysuru-Bengaluru section,
- 12010 Ahemdabad-Mumbai Centra Shatabdi train over Ahemdabad-Vadodara section
- 12042 New Jalpaiguri-Horah Shatabdi Express over Jalpaiguri-Malda town section

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KSP/MKV/AP

Source: **https://pib.gov.in/PressReleseDetail.aspx?PRID=1583206**

# Ministry of Finance

## CBDT clarifies differential regime between domestic investors (including AIF category III) and FPIs existed even prior to General Budget 2019 and was not creation of the Finance (No. 2) Act, 2019

**Posted On: 28 AUG 2019 12:22PM by PIB Delhi**

The Central Board of Direct Taxes (CBDT) said today that an incorrect perception is being created in a section of media as if announcements made by Smt. Nirmala Sitharaman, Union Minister of Finance & Corporate Affairs, in a press conference on 23rd August 2019, which brought in a number of responsive structural measures to boost up the economy, have created a differential regime between FPIs and domestic investors including AIF category III.

Dispelling this false impression being created in certain sections of media including social media, CBDT said that differential regime between domestic investors (including AIF category III) and FPIs existed even prior to the General Budget 2019 and was therefore not the creation of the Finance (No. 2) Act, 2019 or the announcement made by the Finance Ministry on 23rd August 2019.

In this regard, CBDT has further stated that in case of Foreign Institutional Investors (FPIs), Income Tax Act, 1961 (the Act) contains special provisions [section 115AD read with section 2(14) of the Act] for taxation of income from derivatives. Under this regime, income of FPIs arising from derivatives was treated as capital gains and liable for special rate of tax as per section 115AD of the Act. However, income arising from derivatives for the domestic investors including Alternative Investment Funds (AIFs) category-III as well as for foreign investors who are not FPIs, has always been treated as business income and not as capital gains, and taxed at applicable normal income tax rates. The differential regime therefore already existed for FPIs through Section 115 AD. Therefore, to say that General Budget 2019 or FM's announcement on 23rd August 2019 created a differential regime between FPI and domestic investor is incorrect.

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RM/KMN

Source: **https://pib.gov.in/PressReleseDetail.aspx?PRID=1583205**

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