CASC BULLETIN

THE CHARTERED ACCOUNTANTS STUDY CIRCLE

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MEETINGS

Date	Time	Speaker	Topic
13.02.2020 Thursday	06.30 am*	CA Prasan Tarachand	Direct Tax Proposals in Budget 2020 - An Analysis
27.02.2020 Thursday	06.30 pm**	CA S. Sundarraman	Accounting Standards - Recent Developments

*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

Dear Colleagues

"One Machine can do the work of Fifty Ordinary Men. No Machine can do the work of One Extraordinary Man." – Elbert Hubbard

Accounting Profession is evolving from providing traditional accounting services, such as bookkeeping and taxation to introducing higher-value and higher-margin services linked to traditional services. Accounting Professionals can do more Value-Added things but for which they need qualitative time.

For your information, Accounting Profession is in the midst of re-defining not only the services it provides but also the way in which they are to be delivered. Client expectations are changing and technology presents both challenges and opportunities for Accounting Practitioners. Technology is transforming the business landscape and turning entire industries on their heads. Accounting Profession is no exception.

The greatest value of technology is improved efficiency in the Professionals work and practice, with other drivers being improved quality of services, improved client engagement and communication, and remaining competitive. World over, the impact of technological change on accountants in public practice has been rapid and significant. Some of the Technological advancements that we need to study and adopt are:

- Cloud Based Technology
- Process Automation
- Real-Time Communication
- Block-Chain and Distributed Ledgers
- Software as a Service (SaaS)
- Data analytics
- Data Security

Of the above, just one technological advancement is highlighted here.

Automation will free up more time for advisory services. By harnessing innovative technology, we can streamline processes and improve the customer experience by automating tasks. With

automation, Clients also stand to benefit because our response time is faster and their costs are not going up, because our costs will remain low.

The opportunities presented by intelligent implementation of technology are both far-reaching and profound. For instance, by automating the lower-value work undertaken by accounting firms, practices are seeing their organisational structure become less complex. Technological trends have facilitated a shift away from the traditional pyramid structure, where relatively large numbers of staff carry out relatively low-value tasks, to a flat structure, where a greater proportion of staff are engaged in higher-value activities.

One of the ***challenges*** to be addressed is identifying the most important and appropriate technology to adopt, client demand, and affordability.

Technology is the biggest catalyst for change in the profession and professionals who don't keep pace with technological advancements, risk being left behind or rendered obsolete.

Dear Colleagues, we have no alternative other than to come to terms with technological advancements that re-define our lives. But then

"IF WE DON'T CHANGE, WE DON'T GROW.

IF WE DON'T GROW, WE ARENT REALLY LIVING"

– Gail Sheely

The editorial board wishes to place on record its appreciation and thanks for the time-consuming & painstaking efforts put in by our colleague CA. Vivek Rajan for the well-researched and documented 7-Part Series of articles on "A Discussion Paper on Chapter III – Direct Taxes on Finance (No.2) Act 2019" and for delivering the same well within the time-line for the strike-order. The series of articles has been very well received and has benefited the subscribers of CASC Bulletin.

Best Regards

P.Ramasamy

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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.
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RECENT JUDGMENTS IN VAT CST GST

Assessment: The impugned order of assessment is cryptic and the operative portion reads as follows: "Accordingly a notice was issued to the dealers and their objections were invited. Though sufficient opportunity was allowed the dealers have filed incorrect and incomplete supporting documents. It is presumed that they have none to file the correct and complete documents. Hence the assessments proposed in this office notice are confirmed". The court held that evidently, an order of this nature, sans any reasoning or discussion, is unacceptable in law and the detailed objections of the petitioner dated 24.09.2019 and 20.11.2018 have not been adverted to or considered by the Assessing Authority. Also, the presumption that the petitioner has no appropriate supporting documents or objections to offer is arbitrary, particularly since there is no counter denying the specific averment that the written submissions have, indeed been filed. In the light of this the court had no hesitation in setting aside the impugned order of assessment with directions. **Tvl.SSM Builders and Promoters Vs The Assistant Commissioner (ST) (FAC), Thirukhazhukundram Assessment Circle W.P.Nos.33998 etc DATED: 02.12.2019.**

Time Limit: The order of this Court in W.P.Nos. 18676 & 18694 of 2019 dated 03.07.2019 in relation to assessments

CA. V.V. SAMPATHKUMAR

framed for the periods 2011-12 and 2015-16, wherein this Court while dismissing the writ petitions, relegated the petitioner to alternate statutory remedy. At paragraph 23 of that order, the learned Judge has noted that the writ petitioner is entitled to seek exclusion of time spent in the writ petition before this Court, in computing limitation for filing of statutory appeal. The same ratio is to be followed in this writ petition as well. **M/s.Sri Venkateswara Timber Mart, Namakkal-638 182 Vs. State Tax Officer, (CT) Namakkal (Town) Assessment Circle Writ Petition No. 33974 of 2019 DATED: 05.12.2019**

C forms : PETITION filed under Article 226 of the Constitution of India praying for the issuance of Writ of Mandamus to direct the respondent to issue "C"forms under the Central Sales Tax Act, 1956 read with the Central Sales Tax (Registration and Turnover) Rules, 1957 to the petitioner for the purchases of High Speed Diesel

from the suppliers in other States in view of the recent judgment dated 26.10.2018 passed by the Hon'ble Madras High Court in the case of M/s. Ramco Cements Ltd & Others in W.P.Nos. 19458/2018 to 19460/2018 and the batch of cases. The State has, after the date of the above order, filed a Writ appeal challenging the decision in the case of Ramco Cements (Supra) that is pending. No stay of the order of the learned single Judge has been obtained. Barring the aforesaid, there is complete identity on facts and in law in the matter before me as well as in the matter considered earlier. Stating so, the Court Allowed the Petition. **M/s. Best Blue Metals, Karur-639 111.Vs.The Assistant Commissioner (ST), Karur (West) (C) Assessment Circle and others Writ Petition No. 33939 of 2019 DATED: 05.12.2019**

Stay order : Writ Petition filed under Article 226 of the Constitution of India, for the issuance of Writ of Certiorarified Mandamus, to call for the records of the first respondent in T.P.No.35/2019 in T.A.No.108/2019 and quash the impugned order dated 01.11.2019 and further direct the first respondent to grant an absolute stay of collection of the entire disputed penalty in respect of the assessment year TIN 2010-2011 without imposing any further condition of furnishing of security in the form of bank guarantee pending disposal of the appeal on his files. in the light of the fact that the entire disputed taxes have been remitted and in the light of there being no objection expressed by the learned Additional Government Pleader (T) to substitution of the condition of furnishing personal bond as against bank guarantee ordered by the Tribunal, the prayer of the petitioner is accepted. The petitioner will furnish personal bond within a period of two weeks from today. **M/s.Sun Blue, Vellore-632 403.Vs.The Assistant Commissioner (CT), Ranipet Assessment Circle, W.P.NoS.33227 of 2019 DATED: 06.12.2019**

Mis match: The issue that arises relates to mis-match between the purchase details furnished by the petitioner/dealer and those collected from the website of the Commercial Taxes Department in relation to third party dealers. This issue is covered by an order passed by this Court in the case of JKM Graphics Sales Private Limited, Chennai V. Commercial Tax Officer, Vepery Assessment Circle (99 VST 343). However, a Review Petition has been filed by the State which is pending before the learned Single Judge for constitution of an appropriate intra-departmental mechanism to deal with cases of mismatch. In the light of pendency of the Review Petition, the Principal Commissioner/Commissioner of Commercial Taxes has also issued a circular bearing No.3 of 2019 instructing

the Assessing Officer to keep in abeyance those assessments involving issues of mis-match. In the light of the aforesaid, the impugned orders in these writ petitions insofar as it is admitted that the details of third party transactions procured from the departmental website have not been furnished to the petitioner, are set aside and remanded to the file of the Assessing Officer. The Officer shall hear the petitioner and pass appropriate orders de novo after the Review Petition is disposed by this Court and in the light of the Circular No.3 of 2019. **Sureshkumar Vs. The Commercial Tax Officer, Chidambaram I Circle, Writ Petition Nos.21371 & 21372 of 2018 DATED: 06.12.2019**

Limitation: Petitioner assails the order solely on the ground of the same being barred by limitation. However, the provisions of Section 27 of the TNVAT Act permits a revision of assessment to be carried out within 6 years from date of original assessment, in these cases 30.06.2012, this is, on or before 30.06.2018. The present impugned order having been passed on 30.04.2018 is well within time and hence this ground is rejected. There is no other legal flaw or perversity in impugned order, and as such, no merit in these writ petitions that are dismissed. Seeing as the petitioner has had the benefit of an order of interim stay till date, the petitioner is permitted to file a statutory appeal before the appellate authority challenging the impugned order if it is so inclined, within a period of two weeks from date of receipt of this order. Such appeal if filed within the timeline as aforesaid, shall be accepted by the Registry without reference to limitation and be listed for hearing expeditiously. **Tvl.Roshan Vs .The Commercial Tax Officer, Nandanam Assessment Circle, Chennai 600 028. W.P.Nos.14451 to 14454 of 2018 DATED: 06.12.2019**

Appeals The petitioner challenges order dated 13.07.2018, passed by the Commissioner of GST and Central Excise (Appeals). At paragraphs 6.4 and 6.5 of the impugned order, said Commissioner refers to an order passed by a learned Single Judge of this Court in W.P.No.13615 of 2014 dated 03.07.2014, dismissing a writ petition filed by this petitioner wherein an observation is made to the effect that the petitioner is an institution imparting training to students in various activities. Order dated 03.07.2014 has been subsequently modified by the learned Judge on 02.09.2014, wherein he clarifies that the petitioners' appeal shall be considered by the appellate authorities without being influenced by the observations made by him in order dated 03.07.2014.Both the petitioner and the revenue have been heard by said commissioner (Appeals) and admittedly, the order of subsequent modification

dated 02.09.2014, was not produced before the appellate authority. Thus, the appellate authority cannot be faulted for quoting the said order. However, reference to the order is only in general terms, and appears incidental. The specific argument of the petitioner, in regard to recognition of the institution under law for the time being in force, appears to have been considered independently and decided and there is no reference to order dated 03.07.2014 in that portion of the order. Thus, I am of the view that the petitioner may well file an appeal before the Customs Excise and Service Tax Appellate Tribunal (CESTAT), within two weeks from date of receipt of a copy of this order and the CESTAT, while dealing with the appeal in accordance with law, shall, taking note of the modification order passed by the learned Single Judge on 02.09.2014, dispose the appeal uninfluenced by any observations made on 03.07.2014. The appeal, if filed within the time frame stipulated above, shall be received by the Registry without reference to limitation and heard in accordance with law. **Academy of Maritime Education and Training Trust Vs The Commissioner of GST & Central Excise (Appeals I), Chennai-600 034 and Additional Commissioner, North Commissionerate, Chennai 600040. W.P.No.29265 of 2018 DATED: 09.12.2019**

Assessment : Writ Petition filed under Article 226 of the Constitution of India, praying for the issuance of a Writ of Mandamus, directing the respondent to accept the methodology of payment of taxes on deemed sale value under Sec.5 of the TNVAT Act based on the directions of the VAT Audit Officers at the time of inspection on 17.07.2009 and accordingly complete the assessments for TNVAT 2009-10 to 2012-13 was allowed by the Court for the statement recorded at the time on inspection and based on the specific direction issued by this Court in the earlier round of Writ petitions in W.P.Nos.19014 to 19017 of 2015 and based on the details and reply submitted by the petitioners. Also, the Court directed that the impugned orders are set aside and these writ petitions disposed, directing the petitioner to appear before the Assessing Authority on Friday the 20th December, 2019 at 10.30 a.m. without expecting any further notice in that regard. **M/s.PRV Constructions (P) Ltd. Vs. The State Tax Officer, Alwarpet Assessment Circle, W.P.No.34650 of 2019 DATED: 13.12.2019**

C forms: The prayer for a mandamus directing the respondents to unlock the online facility and permit downloading of "C" form declarations to enable the petitioner to run the Petroleum Dealership business was not liable to be granted, as there are arrears of commercial tax and

penalty due from the petitioner as per the respondent. In representation dated 03.12.2019, the petitioner has submitted that the entire tax dues would be paid forthwith and sought six months' time for paying the penalty. The Court directed that this request is to be considered by the respondents in accordance with law and pass appropriate orders after hearing the petitioner on merits and in accordance with law within a period of two (2) weeks from date of receipt of a copy of this order. **Salila Auto Fuels Vs The Commercial Tax Officer, Mahe, Puducherry State. W.P. No.34755 of 2019 DATED: 16.12.2019**

Mismatch: The sole issue that arises for consideration is a modification effected to the returned turnover on the ground of alleged mismatch of sales / purchases as reflected in the annexures to the return of turnover filed by the petitioner and the returns of third party dealers that have been culled from the departmental website. Admittedly, these third party particulars have not been furnished to the petitioner for response / rebuttal. The issue involved is also covered by the decisions of this Court in the case of JKM Graphics Solutions Private Limited vs. Commercial Tax Officer, Vepery Assessment Circle, Chennai (99 VST 343) and Althaf Shoes (P) Ltd. vs. Assistant Commissioner (CT), Valluvarkottam Assessment Circle, Chennai-6 (50 VST 179). In the light of the aforesaid, there being an apparent violation of the principles of natural justice, both the writ petitions are allowed and the impugned order of assessments set aside. **Kumaran Gin & Pressing (P) Ltd. Vs. The State Tax Officer Chennimalai Assessment Circle, W.P.Nos.34708 & 34711 of 2019 DATED: 13.12.2019**

Assessment: There was an exchange of pre-assessment notice and response by the petitioner pursuant to a visit by the Enforcement officials on 02.11.2016 at the premises of the petitioner, the Assessing Officer has not verified the same. Also, the Assessing Officer proposes to reverse the entire input tax credit in respect of purchases, though the revises pre-assessment notice calls for detail of transactions only with transaction with one dealer, Sumangala Steels. Thus, enquiry to the extent and in the manner it ought to have been conducted has not been carried out in the present case and it was incumbent upon the Assessing Officer to have examined the documents supplied by the petitioner as well as the petitioners' submission in reply. Stating so, the court set aside the impugned assessment with specific directions. **M/ s.Akshara Industries Ltd. Vs The Assistant Commissioner (ST), Choolai Assessment Circle W.P.No.25462 of 2018 DATED: 16.12.2019**

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CASE LAWS - GST / SERVICE TAX

1. GST– ANTI-PROFITEERING AUTHORITY – MATTER HEARD BY THREE MEMBERS BUT ORDER SIGNED BY FOUR MEMBERS AND PRINCIPLES OF NATURAL JUSTICE VIOLATED

In Hardcastle Restaurants Pvt. Ltd. v. UOI 2019 (31) G.S.T.L 67 (Bom.), the petitioner operates quick-service restaurants under the brand name McDonald's in Western and Southern India, which was subject to GST @ 18% (with ITC) and @ 5% (without ITC). Some customers of the petitioner made complaints that, though the rate of GST on restaurant services was reduced from 18% to 5% between 15 November 2017 to 31 January 2018, the Petitioner had increased the prices of product sold, which was an act of illegal profiteering. The Standing Committee on Anti Profiteering referred the complaints to the Director-General of Safeguards which submitted a report concluding that the profiteering amount was of Rs.7.49 crores.

The Anti-Profiteering Authority considered the report of the Director-General in its sittings which were attended by the Chairman and two Technical Members. Thereafter, the Authority passed the order which was signed, in addition by those who were

CA. VIJAY ANAND

present during the personal hearing, by a Technical Member who had joined subsequently, after dates of personal hearings. Thereafter an SCN was filed seeking to impose penalty, against which a writ petition was filed before the high court which observed as under:-

1. The contention of the respondent is that there is no breach of principles of natural justice, and even assuming there is a breach, no prejudice is caused to the Petitioner, and the breach is a mere irregularity. The concept of natural justice will vary with the nature of the enquiry and the object of the proceedings and consequences that ensue from the order passed.

2. The decision of the authority is to be taken as provided under Rule 134, which states that three members constitute the quorum and that if the members differ in their opinion on any point, the point is to be decided by voting and if equality of votes occurs,

the Chairman would have a casting vote. Rule 134(2) clearly contemplate deliberations within the members before deciding.

3. Under Rule 126 of the CGST Rules, the authority has notified a procedure called National Anti Profiteering Authority under the Goods and Service Tax Methodology and Procedure, 2018 whose important contents can be summed up as under:-

a. The principal seat of the authority will be at New Delhi and the authority can hold seat at such places within the territory of India.

b. Consumers can lodge a complaint of profiteering by the registered persons to the authorities empowered to investigate in the complaints.

c. A detailed enquiry, with powers of Civil court and deemed judicial enquiry, is contemplated. Witnesses can be examined. Oral and documentary evidence can be produced. There can be examination and cross examination of witnesses.

d. The principles of natural justice shall be adhered to. The authority is guided by the principles of natural justice. A hearing is, thus, contemplated not merely looking at the records. The scheme of rules and the procedure demonstrate that the principles of natural justice are statutorily ingrained.

e. There is a deliberation amongst the members. Therefore, the presence of a member of the authority during the hearing is not a formality. Multi-member panels are constituted so a decision through discussion and exchange of opinions takes place.

f. The litigant is entitled to be heard by all members who are the ultimate decision-makers so the litigant can try to convince each member of the adjudicating Authority.

4. Oral hearing is clearly contemplated and the argument of the Respondent that since all the record was before the Authority, there is no illegality in the fourth member in signing the order, is not correct. If the scheme itself provides for hearing by all members, not giving hearing itself will cause prejudice. This results in the rejection of the respondent's contention that there is no prejudice.

5. The rule that one who hears must pass the order remains as the basic proposition. In certain circumstances, this rule can be deviated from.

6. Hence, the conclusion that when the three members of the Authority had heard the Petitioner and participated in the entire hearing, the collectively signed decision, when the fourth member joined only for signing the order has resulted in violation of the principles of natural justice and fairness, and is liable to be set aside.

7. The issues that come up before the Anti-Profiteering Authority are complex. The Act and Rules provide no appeal. The Authority can impose a penalty and can cancel the registration. The term profiteering, under the Act and Rules, is used in a pejorative sense. Such a finding can severely dent the business reputation. The Authority is newly established. Therefore, as a guidance to this Authority, highlighting the importance of fair decision-making is necessary.

   Consequently, the impugned order passed by the National Anti-Profiteering Authority was set aside and the proceedings before the authority was restored.

2. GST– ADVANCE RULING – WHERE LICENSEE CONTINUES TO OCCUPY PROPERTY AFTER THE EXPIRY OF CONTRACT PERIOD – TIME OF SUPPLY WOULD BE THE EARLIEST OF DATE OF RENT CLAIMED OR RECEIPT OF PAYMENT

In RE: Chennai Port Trust 2019 (31) G.S.T.L 164 (A.A.R. -GST), the applicant is engaged in supply of port services and incidental supply of goods like disposal of discarded assets and is functioning under the administrative control and supervision of Ministry of shipping of Government of India. An application was filed seeking advance ruling as to when the time of supply can be considered to occur with respect to providing continuous supply of services in the nature of renting immovable properties to Government, Government Agencies, Court in the following 3 situations.

i. The license has expired and not in force but the license continues to be in Possession and occupation of the immovable properties;

ii. The license is in force, but the licensee does not pay the periodical license fee to the assessee as provided in the license agreement;

iii. The license is in force, but the licensee pays a portion of the agreed license fee by them under the expired license agreement.

The authority observed as under:

1. The draft lease agreement with Principal Secretary, Home Department for accommodation provided to CISF personnel that the lease agreement is for a short fixed period as specified and the license fee is to be paid monthly. In the lease agreement with customs for lease of land for container freight station is for a long term lease with an upfront payment and rent to be paid annually. It is seen that there is a requirement of the lessee to pay lease rent or license fee periodically while they occupy the immovable

property. During the currency of the lease agreement, the applicant issues an invoice periodically as required in the respective lease agreement but once the agreement is expired they issue a Rent claim Advice or demand letter with the same periodicity.

2. The rentable land and buildings are licensed to Government and Government Agencies like Customs Department, Postal Department, Meteorological Department, Police Department, Coast Guard, Madras High Court, etc. which is being claimed to fall under the definition of "Continuous Supply of Service", since the licensing is normally done for a minimum period of 11 months and goes upto 30 years. There are also cases wherein the license agreement is not renewed on its expiry but the licensee continues to occupy the licensed premises.

3. In this scenario, the queries are answered as under:-

i. <u>The license has expired and not in force but the licensee continues to be in Possession and occupation of the immovable properties</u>:

4. In these cases, the applicant issues a reminder letter or Rent Claim Advice (RCA) periodically to pay monthly fee based on the expired license agreement. The applicant has furnished copy of Rent Claim Advice issued, the perusal of which we find that it contains the Name, address, GSTIN Number of the applicant, RCA No., date, Name of the Recipient and Address for correspondence, GSTIN, SAC No. Area type/ Rate, Location, Allot Date, Exp. Date, Description of the activity, Licence fee, GST along with a note that the above services are not liable for GST under Reverse Charge Mechanism.

5. As per Section31(2), in respect of a registered person supplying taxable service has to issue a tax invoice before or after the provision of service, showing the description, value, tax charged and such other particulars as may be prescribed. On comparison, the RCA being issued has all the details required to be mentioned in a Tax Invoice and it is nothing but 'Tax Invoice' u/s 31.

6. It is seen from the lease agreement with customs, there is a provision made in the lease agreement itself regarding the expiry, termination etc. of lease but the lessee continues to occupy the property. The lease agreement specifies total consideration including damages to be paid in that case. However, in the draft lease agreement with the Home Department, there is no clause regarding the eventuality of expiry or termination of lease but continued occupancy of the property.

7. When the license is expired and there are provisions made in the lease agreement regarding continued supply of service as in the case of the lease agreement with customs, the supply of service is a 'continuous Supply of Service' u/s 2(33).

8. However, if there is no such provision made in the agreement it can be said that the supply is not under a contract' and therefore, in such cases, the supply no longer qualifies under the definition of continuous supply.

9. In respect of continuous supply of service, as per Section 31(5), the tax invoice should be raised on or before due date of payment if said due date is ascertainable from the contract.

10. It is seen that in all cases the RCA issued by the applicant contains a due date of payment of the demand raised in the same. In case where the contract contains provisions for continued supply of service even after expiry, it is a continuous supply of service.

11. RCA is issued based on the said provision of the contract and in such cases it can be said that the due date of payment, specified in the RCA, is ascertainable from the contract. In all cases, the RCA is issued before the due date specified in the RCA.

12. Accordingly, in cases where there is a provision in contract for continued supply of services after expiry or termination of the contract, the invoice is issued with the period prescribed in section 3l (5) and the time of supply (TOS) is determined by Section 13(2) (a), as the earliest of the date of issue of invoice or RCA by the supplier and the date of receipt of payment.

13. In respect of cases where there is no such provision regarding continued supply of service after expiry of contract, it can be said that no such contract exists. However, there is still a supply of service of renting of the immovable property.

14. As per Rule 47 of the CGST/TNGST Rules, the invoice should be issued within thirty days from date of supply of service. In the instant case the applicant issues RCA on monthly basis for the rent/ fee pertaining to a specific month. If such RCAs are issued within thirty days after the end of recurrent period specified in the agreement after which the rent/license fee is to be paid for which the rent is being sought, it can be said that they are issued within the prescribed period as per Section 31(2) and the TOS is determined by Section 13(2) (a), as the earliest of the date of issue of invoice or RCA by the supplier and the date of receipt of payment as the invoice is issued within the period prescribed.

15. If the RCAs are issued more than thirty days after the end of the month for which the rent is being sought, it can be said that they are not issued within the prescribed period and the TOS is determined by Section 13(2) (b), as the earliest of the date of provision of service, which is the end of recurrent period specified in the agreement after which the rent / license fee is to be paid and the date of receipt of payment, whichever is earlier.

(ii) The license is in force, but the licensee does not pay the periodical license fee to them as provided in the license agreement:

16. In respect of continuous supply of service, as per Section31(5), the tax invoice should be raised on or before due date of payment as ascertainable from the contract. It is seen in the sample contracts provided that in certain cases, the due date of payment is periodical, either monthly or annually, with the due dates specified after the end of such period.

17. If the rent invoice is issued before the due date of payment, the TOS is determined by Section 13(2) (a), as the earliest of the date of issue of invoice or RCA by the supplier and the date of receipt of payment.

18. If payment is not received, the time of supply shal1 be date of issue of invoice or RCA.

19. If the invoice is issued after such due date of payment, the TOS is determined by Section 13(2)(b), as the earliest of the date of provision of service which is the end of the period (monthly / annual, etc.) specified in the contract and the date of receipt of payment, whichever is earlier.

20. If payment is not received, the TOS shall be the date of provision of service which is the end of recurrent period specified in the agreement after which the rent / license fee is to be paid.

(iii) The license is in force, but the licensee pays a portion of the agreed license fee by them under the expired license agreement.

21. The question is wrongly worded as if the license is in force, the licensee could not be paying any amount under the expired license agreement. The applicant means to ask regarding the case where the license is in force and instead of receiving the full consideration, they only get a partial amount as payment.

22. In this case too the above as in earlier paragraph will apply as the date of payment of full consideration is the date of reckoning of the date of payment.

Hence, the authority ruled as under:

a. In the scenario of the license for renting of immovable property has expired and not in force but the licensee continues to be in possession and occupation of the immovable properties, in cases where there is a provision in contract for continued supply of service after expiry or termination of the contract, the Rent Claim Advice is issued by the applicant with the period prescribed in Section 31(5) and the Time of supply as determined by Section13(2)(a), as the earliest of the date of issue of Rent Claim Advice by the supplier and the date of receipt of payment.

b. In respect of cases where there is no such provision regarding continued supply of service after expiry of contract, if such RCAs are issued within thirty days after the end of recurrent period specified in the agreement after which the rent / license fee is to be paid for which the rent is being sought, the time of supply as determined by Section 13(2)(a), as the earliest of the date of issue of invoice or Rent Claim Advice by the supplier and the date of receipt of payment. If the RCAs are issued more than thirty days after the end of the month for which the rent is being sought, the Time of supply as determined by Section 13(2)(b), as the earliest of the date of provision of service, which is the end of recurrent period specified in the agreement after which the rent / license fee is to be paid and the date of receipt of payment, whichever is earlier.

c. In the scenarios of the license for renting of immovable property is in force, but the licensee does not pay or pays only partially the periodical license fee to the applicant as agreed in the lease agreement, if the rent invoice is issued before the due date of payment as specified in the agreement, the Time of supply as determined by Section 13(2) (a) shall be date of issue of invoice or Rent Claim Advice. If the invoice is issued after such due date of payment, the Time of supply as determined by Section 13(2)(b) shall be the date of provision of service which is the end of recurrent period specified in the agreement after which the rent / license fee is to be paid.

3. GST– ADVANCE RULING – CATERING SERVICE – EMPLOYEES OF TWO INSTITUTIONS AT THEIR PREMISES FOR WHICH INFRASTRUCTURE IS PROVIDED BY THE SAID INSTITUTION – IN ADDITION PROVIDED ON CASH AND CARRY BASIS –SERVICE OF FOOD IN EATING JOINT – GST @5%

In RE: ELIOR India Catering LLP 2019 (31) G.S.T.L 362 (A.A.R. -GST), the applicant (Elior Group) is mainly engaged in the business of providing catering services to Corporates, Educational Institutions and range of customers located in the States of Karnataka, Maharashtra and Tamil Nadu for which they have obtained registrations in the respective States.

‘ In certain cases, the applicant operates its business from client premises, where it undertakes preparation and supply of food exclusively at client’s premises in terms of the contractual arrangement entered with the respective clients. In such cases, infrastructure facilities like kitchen space (cooking area), kitchen equipment and utilities such as electricity and water, gas bank area with pipeline, regulator connections etc. are made available to the applicant by the client at their premises (hereinafter referred to as ‘on-site kitchen’). The applicant sources all raw materials/inputs required for preparation of food on regular intervals and make its own arrangement for their transportation to the on-site kitchen area.

In the instant case, the applicant has entered into an agreement with M/s. CBRE South Asia (P.). Ltd (hereinafter referred as ‘CBRE’), for providing catering support services at premises of M/s. Cisco Systems India Private Limited (hereinafter referred as ‘Cisco’. CBRE has been appointed by Cisco for engaging service provider/s for provision of catering and other support services to Cisco.

As per the agreement, the applicant provides catering support services to Cisco/its employees, from its kitchen located at Cisco premises. Here applicant providing three types of catering services to the CISCO employees.—

a) Business catering model: The applicant serves food to employees working on specific shifts (as identified by Cisco), wherein the applicant receives consideration directly from Cisco on monthly basis (based on quantity of food served).

b) Corporate/social events model: The applicant provides catering and allied banquet services at internal events held at Cisco against consideration receivable from Cisco/Cisco employees responsible for the event, as the case maybe.

c) Cash & Carry model: applicant serves the food to employees of Cisco over the counter, and consideration towards the same is received from the respective employees/individuals who place the order, at the rates provided in the menu.

In light of the aforesaid facts, the applicant has sought to obtain a ruling with regard to the following questions.—

i. Whether, in the facts and circumstances of the case, the services rendered by the applicant under cash & carry model are in the nature of 'services provided by canteen' as per Sl. No. 7(i) or 'outdoor catering services' as per Sl. No. 7(v) of Notification No. 11/2017 - Central Tax (Rate) [as amended vide Notification No. 46/2017-CT (Rate), dated 14.11.2017]?

ii. If the services supplied by the applicant under cash & carry model are classifiable as 'services provided by canteen', whether, CGST ('Central Goods and Services Tax') & KGST be chargeable at the rate of 2.5% in terms of entry 7(i) of the Notification No. 11/2017-CT (Rate) [as amended vide Notification No. 46/2017-CT (Rate), dated 14.11.2017]?

The authority observed as under:

1. Under the cash and carry model, the materials offered to the employees on the menu card are displayed and there is no binding on the part of the employee to purchase the same. Though the menu is decided in consultation with the employer, it has no bearing on the contract between the supplier (applicant) and the person receiving the service (employee). Since the employee is the person who pays the consideration, he becomes the recipient of the service and the service is rendered by the applicant to the employee. The recipient is not bound to purchase the items and only on his decision to purchase the food items available for sale, the contract of supply is entered and the consideration is as shown in the menu card. Hence it is a contract of supply between the applicant and the employee.

2. A perusal of entry 7(i) of Notification No. 11/2017 - Central Tax (Rate) [as amended vide Notification No. 46/2017-CT (Rate), dated 14.11.2017] states that a supply of food or any other article of human consumption or drink to be covered under this entry should not be provided in a premises of a place where the declared tariff is more than Rs. 7500/- per day which is satisfied. But the issue is whether the applicant is a restaurant or eating joint including mess or canteen.

3. Explanation 1 states that the even the supply made by a person other than the institution based on a contractual arrangement with such institution for such supply is also included.

4. Consequently, it can be concluded that the supply of services by the applicant in the cash and carry model would be

covered under entry 7(i) of the Notification, if it satisfies the following two conditions:

a) That the supply of service made in the canteen belonging to an institution is based on the contractual arrangement with such institution, and

b) That such supply is not event based or occasional.

5. On verification of the cash and carry model, since the supply is not based on any event or is regular, the second condition gets satisfied. Regarding the first condition, the copies of the contracts provided the applicant are examined and found the following:

a) The contract entered by the applicant with Motorola Mobility India (P.) Ltd. is verified and the contract is just an outsourcing contract for running a canteen and hence this would squarely get covered under entry No. 7(i) of the Notification.

b) The other contract copy submitted is entered between the Megabite Food Services and CBRE South Asia (P.) Ltd. for supply of food and items of human consumption in the CISCO'S work place resources. In this it is mentioned that Megabite Food Services has entered into a Business Transfer Agreement (BTA) with the applicant and the entire business is sold to the applicant. Hence the agreement is between the CBRE South Asia (P.) Ltd with the Elior India Catering LLP for providing catering support at Cisco Systems (India) (P.) Ltd. and Cisco Video technologies (India) (P.) Ltd. facilities in India. There is no direct agreement between the institution in which the supply is made and the supplier.

c) CBRE is a Facility Management Company appointed by Cisco Systems India (P.) Ltd. and CBRE is entering into a contract with the applicant.

6. Explanation 1 of Entry No. 7(i) only says the transactions which are included in the said entry should be provided by a restaurant, eating joint including mess, canteen, whether for consumption on or away from the premises where such food or any other article for human consumption or drink is supplied.

7. Here, the applicant is preparing the food items at the place and is selling the goods to the purchasers. Hence, this amounts to sale of food items for consumption either in the premises or away from the premises. There is no condition in the entry that the premises should be own. It only mentions that the premises must be place where the services are supplied. The supply of services is happening in the premises of CISCO and the goods are prepared in the same premises and

the services are provided there itself. This would qualify as an eating joint (including mess, canteen) wherein the service is supplied.

8. Explanation 1 is only clarificatory in nature and the applicant's activity of cash and carry does not fit in the transactions narrated in Explanation 1, but still gets covered under the main entry 7(i) of the Notification. There is no condition as to the ownership of the premises in the said main entry and hence there is no need of going into the ownership of the premises or the contract.

Hence, the authority held as under:

1) The supply of goods being food or any other article for human consumption or any drink provided by the applicant under cash and carry model where in the items are prepared in the same premises from where it is supplied is covered under amended entry No. 7(i) of the Notification No. 11/2017 - Central Tax dated 28.06.2017 as amended by Notification No. 13/2018 - Central Tax (Rate), dated 26-07-2018.

2) The rate of tax applicable on the above transaction is 2.5% CGST and 2.5% SGST subject to the proviso that credit of input tax charged on goods and services used in supplying the service has not been taken.

4. SERVICE TAX – TRANSACTION BETWEEN DEVELOPER AND CO-DEVELOPER UNIT – EXEMPT NOTWITHSTANDING – NON FILING OF FORM A2

In GMR Aerospace Engineering Ltd. v. UOI 2019 (31) G.S.T.L.596 (A.P.), the brief facts are as under:-

a. That the 1st petitioner is a unit set up in GMR Aviation SEZ; and

b. That the 1st petitioner is approved as a co- Developer vide Letter of Approval dated 20-09-2010; and

c. That the 1st petitioner was issued with a certificate dated 29-09-2010 by the Development Commissioner to the effect that the services consumed within the SEZ for carrying out authorised operations are exempt from the levy of service tax; and

d. That the 2nd petitioner is the Developer of GMR Aviation SEZ, as borne out by a certificate dated 31-05-2010 and a Letter of Approval dated 31-05-2010; and

e. That as a Co-Developer, the 2nd petitioner entered into a sub-lease agreement with the petitioner on 01-06-2010, for rendering the services of lease of land, supply of electricity and supply of water; and

f. That the services so rendered are by a co-Developer to a Developer, which is a unit located in the SEZ.

g. No service tax is charged and as a consequence, Form A1 and A2 are not filed by the 2nd petitioner.

h. At the insistence of the authorities, the 1st petitioner requested the issue of the relevant forms with effect from 01-06-2010 which was rejected by the Board of Approval.

i. Thereafter, the 5th respondent issued a show cause notice dated 12-04-2017 to the 2nd petitioner alleging that the 2nd petitioner was providing the services of the renting of immovable property to the 1st petitioner without obtaining copies of Forms A1 and A2 and that therefore, there was contravention of the provisions of the Finance Act, 1994 resulting in the 2nd petitioner becoming ineligible for the grant of exemption in terms of the notifications.

j. Challenging the order of the Board of Approval dated 08-03-2017 and the show cause notice, the petitioner filed a writ petition. The writ petition was disposed of by an order dated 03-01-2018 directing the 5th respondent to consider the case of the petitioners with all objectivity and to pass orders after giving an opportunity of personal hearing.

k. After due process of law, the 5th respondent passed an Order-in-Original dated 20-02-2018 confirming the demand and also imposing a penalty under Sections 77 and 78 of the Finance Act, which was challenged before the High Court which observed as under:-

1. The main ground on which the petitioners challenge the impugned proceedings is that under Section 26 (1) (e) of the Special Economic Zones Act, 2005, ("the SEZ Act) wherein every Developer and entrepreneur shall be entitled to exemption from service tax under Chapter-V of the Finance Act, 1994 on taxable services provided to a Developer or Unit to carry on the authorised operations in a SEZ. But the grant of exemption will be subject to the terms and conditions as prescribed by the Central Government in terms of sub-section (2) of Section 26.

2. The Central Government has issued a set of Rules known as "Special Economic Zones Rules, 2006" in exercise of the power conferred by Section 55. Rule 22 of these Rules stipulates the terms and conditions for availing exemptions by the Developer and entrepreneur in respect of authorised operations. Therefore, the SEZ Act, 2005 and the Rules framed

there under entitle a unit located in a SEZ to exemption from payment of service taxes and the same cannot depend upon the conditions stipulated in the notifications issued under Section 93 of the Finance Act, 1994.

3. Neither the SEZ Act nor the Rules framed there under, make the exemption available under the Act, subject to the fulfillment of conditions stipulated in any other enactment including the Finance Act, 1994.

4. The only question that arises for consideration is as to whether the availability of exemptions under Section 26 of the SEZ Act would depend not only upon the terms and conditions prescribed under Section 26 (2), but also upon the terms and conditions prescribed in the notifications issued under various enactments such as Customs Act, 1962, Customs Tariff Act, 1975, Central Excise Act, 1944, Central Excise Tariff Act, 1985, Finance Act, 1994 and Central Sales Tax Act, 1956 etc., enlisted in clauses (a) to (g) of sub-section (1) of Section 26 of the Act.

5. A combined reading of Sections 7, 26 and 50 of the SEZ Act, 2005, would show that SEZ Act 2005 speaks of three different types of exemptions. They are,-

a. Exemption from payment of taxes under the enactments specified in the First Schedule, in respect of goods and services exported out of, or imported into or procured from a DTA by a unit in a Special Economic Zone or a Developer under Section 7.

b. Exemption from payment of duties under the Customs Act, 1962, Customs Tariff Act, 1975, Central Excise Act, 1994, Central Excise Tariff Act, 1985, Finance Act, 1994, Finance (No.2) Act, 2004 and Central Sales Tax Act, 1956, covered by Section 26 (1); and

c. Exemption from payment of state taxes, levies and duties covered by Section 50, provided there is a state enactment to the said effect.

6. The word "prescribe" is used in the present tense in Section 26 (2) and in the past tense in Section 7. Both will have the same meaning as assigned to the word under Section 2 (w). The moment a set of rules is issued either in respect of matters covered by Section 7 or in respect of matters covered by Section 26 (1), there is no scope for invoking any other law for imposing any other condition.

7. The benefit of exemptions granted under the notifications issued under Section 93 of the Finance Act, 1994, are

available to any one and not necessarily confined to a unit in a special economic zone. Section 93 of the Finance Act, in that sense is a general power of exemption available in respect of all taxable services. But, Section 26 (1) is a special power of exemption under a special enactment dealing with a unit in a special economic zone.

8. Therefore, the notifications issued under Section 93 of the Finance Act, 1994 cannot be pressed into service for finding out whether a unit in a SEZ qualifies for exemption or not.

9. Section 26 (1) of the SEZ Act indicates (1) persons who are entitled to exemptions; (2) the duties in respect which exemption is available; (3) the circumstances under which exemption is available and (4) the provisions of law subject to which the exemptions are available. To put it in simple terms, Section 26 (1) identifying the persons, who are eligible for exemption. They are the Developer and entrepreneur. Section 26 (1) identifies the duties from which exemption is available. They are the duties under the Customs Act, Customs Tariff Act etc. Section 26 (1) also indicates the circumstances under which the exemptions are available. These circumstances vary from clause to clause under Section 26 (1).

10. It is only the issues relating to refund, demand, adjudication, review and appeal, which were left unoccupied by the SEZ Act and the Rules framed there under. Realising the vacuum in respect of these specific areas, sub-rule (5) was inserted under Rule 47 Sub-rule (5) of Rule 47 makes a reference to the provisions of the three enactments namely Customs Act, 1962, Central Excise Act, 1944 and Finance Act, 1994 and the Rules made there under and the notifications issued there under. It is by virtue of this sub-rule (5) that the authorities can fall back upon the Rules and notifications issued under those three enactments. The very fact that sub-rule (5) was inserted would show, that but for its insertion, the respondents cannot fall back upon the Rules framed under the Customs Act etc., for dealing with a question of refund, demand, adjudication etc.

11. The issue can be looked at from another angle also. If sub-rule (5) of Rule 47 had also included the procedure for grant of exemption within its purview, then the stand taken by the Department would be perfectly valid. The very fact that sub-rule (5) of Rule 47 made the Rules and notifications issued under certain Acts applicable only to issues of refund, demand etc., would show that Rules 22 and 31 have independent legs to stand.

Therefore, the writ petition was allowed and the impugned order set aside.

5. GST– ADVANCE RULING – AMC PARTS – SPARES SUPPLY AS A PART OF AMC DELIVERY BY SISTER UNIT ON BEHALF OF AMC – ON BILL TO SHIP TO MODEL – MERE DELIVERY WOULD CONSTITUTE SUPPLY TO SISTER UNIT AND NOT TO CUSTOMERS

In RE: Juniper Networks Solution India P. Ltd. 2019(31) G.S.T.L 614 (A.A.R.-GST), the facts are as under:-

a) The applicant (JNSIPL) is engaged in import and sale of networking equipments to customers in India. The said entity is also engaged in provision of maintenance contracts (AMC) pertaining to the equipments supplied.

b) Import and sale of equipments in India is not a subject matter of this application and therefore is not discussed hereunder. JNSIPL provides AMC services in respect of equipments supplied to the customers across India. These AMC Contracts are executed by JNSIPL, Maharashtra. Applicable GST is discharged by JNSIPL, Maharashtra on issuance of an invoice for such AMC services.

c) The AMC supplies made by JNSIPL Maharashtra broadly comprises of equipment (i.e. Hardware) support and services. Further troubleshooting options are also made available to the customer.

d) As one of the obligations under the AMC, JNSIPL Maharashtra is required to deliver spares to the location, as directed by the customer, when required.

e) These spares are imported by JNSIPL, Maharashtra and supplied to JNSIPL, Karnataka on payment of GST. The same is occasioned to reduce the downtime in delivery of spares. Considering the nature of equipment, it is quintessential to make available the spares to the customers in a very short time.

f) On receipt of the request, the spares held with the applicant are delivered to the location as directed by JNSIPL, Maharashtra's customer. No consideration is received by the applicant for the deliveries occasioned by them. An invoice for the above is issued by the applicant to JNSIPL, Maharashtra for supplies made to the customer as a Bill to Ship to document.

An application was filed seeking advance ruling as to whether the delivery of spares by JNSIPL. Karnataka (i.e. the applicant) would constitute a supply under Schedule 1 of the CGST Act, 2017, by the applicant to JNSIPL, Maharashtra?

The authority observed as under:

1. The transaction of the applicant is examined and found that the contract of AMC is between the JNSIPL, Maharashtra and the ultimate consumer and the applicant is not a party to it. JNSIPL, Maharashtra is paying the taxes on these services and they shall be responsible for the delivery of the services to the consumer.

2. The applicant, on request for goods to execute the contractual obligation, delivers the goods from his account to the ultimate consumer and raises the invoice on JNSIPL, Maharashtra. The applicant charges IGST on the invoice as it is an interstate supply, which is deemed to be a supply even without consideration.

3. The delivery of spares is a bill to ship to transaction and the ultimate delivery of the spares is on the account of JNSIPL, Maharashtra to the consumer for the purpose of AMC services undertaken by JNSIPL, Maharashtra on which IGST is paid in Maharashtra, rightly so.

4. The supply by the applicant is not to the consumer, but to JNSIPL, Maharashtra and the delivery is to the ultimate consumer on account of JNSIPL, Maharashtra.

Hence, the authority ruled as under:

The delivery of spares by the applicant to the ultimate consumer on account of M/s.JNSIPL, Maharashtra, where invoice is raised against M/s.JNSIPL, Maharashtra and the goods are delivered to the ultimate consumer of M/s.JNSIPL, Maharashtra, would not amount to a supply to the ultimate consumer under the GST Act. However, the supply is made to M/s.JNSIPL, Maharashtra and invoice needs to be raised on them.

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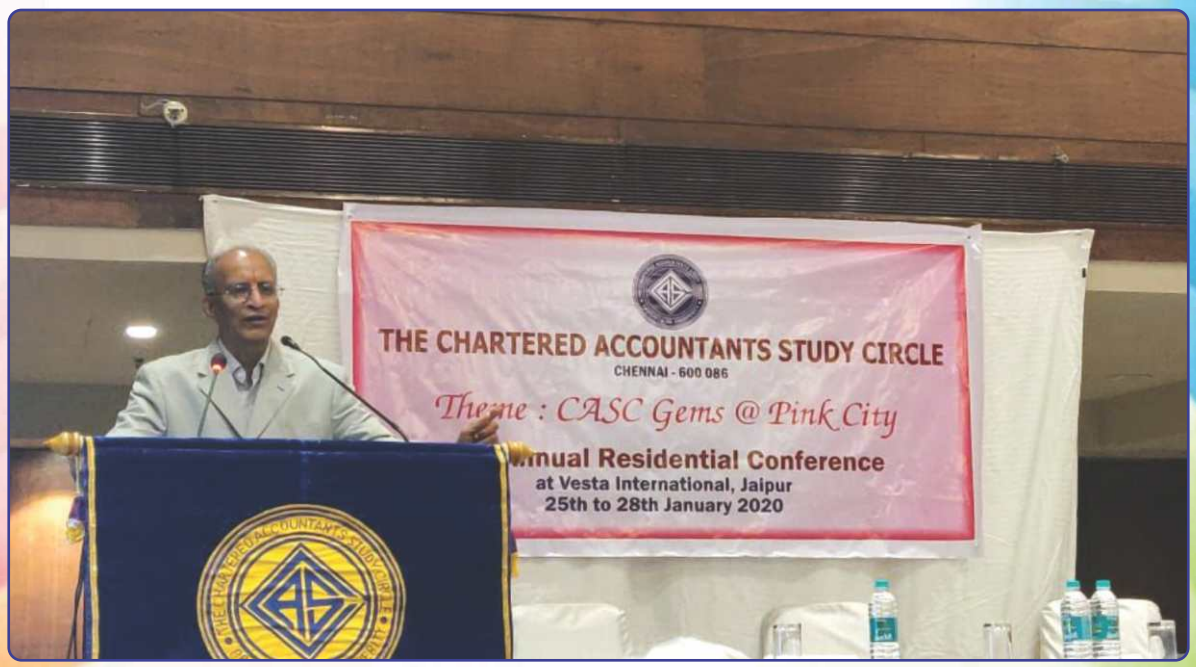
GLIMPSES of 21st Annual Residential Conference, Jaipur

Inaguration of Conference by CA Sunil Goyal, Past President of ICAI alongwith Committee members of CASC and Mr. P.V. Srinivasan, Speaker



CA P.V.Srinivasan, Bangalore addressing the delegates on Artificial Intelligence

21st ANNUAL RESIDENTIAL CONFERENCE
JAIPUR, RAJASTHAN 25-28 JANUARY-2020

Group Photo of the Delegates with their family

21st ANNUAL RESIDENTIAL CONFERENCE
JAIPUR,RAJASTHAN 25-28 JANUARY-2020

Delegates Group Photo

CA Rajeev Sogani, Speaker on Direct Taxes with Group Leaders

CA S. Venkataramani, Speaker on indirect Taxes with Group Leaders

Adv. Sudarshan Rangan, addressing the delegates on Tax Litigations

RECENT AMENDMENTS TO INSOLVENCY AND BANKRUPTCY CODE, 2016

CA. CS. DHANAPAL

The Insolvency and Bankruptcy Code, 2016, is a watershed in the history of India's banking credit culture. Replacing a plethora of legislations, it has provided for a single-window, time-bound process designed to revive a company or failing which to liquidate it.

As expected from a new set of laws for a complex subject, the Insolvency and Bankruptcy Code is evolving on a daily basis. It has been undergoing regular amendments since its notification in the year 2016.

In this write-up, a few recent pertinent amendments to the IBC, 2016 are narrated.

HOME BUYERS

The Insolvency and Bankruptcy Code (Amendment) Ordinance, 2019 dated 28.12.2019 has introduced a new requirement whereby for financial creditors who are allottees under a real estate project, an application for initiating CIRP against the Corporate Debtor shall be filed jointly by **not less than 100 of such allottees under the same real estate project or not less than 10% of the total number of such allottees under the same real estate project, whichever is less.** This amendment is met with strong opposition. The Hon'ble Supreme Court of India on 13.01.2020, in response to Writ Petition filed challenging constitutional validity of the above stated amendment, ordered status quo on all cases till Supreme Court decides on the matter meaning that no pending case could be dismissed till pendency of present batch of Writ Petitions before the Supreme Court.

PERSONAL GUARANTORS

Section 60 of the Code contains that the Adjudicating Authority, in relation to insolvency resolution and liquidation for corporate persons including corporate debtors and personal guarantors thereof shall be the NCLT having territorial jurisdiction over the place where the registered office of a corporate person is located.

It also contains that where a CIRP or liquidation proceeding of a corporate debtor is pending before a NCLT, an application relating to the insolvency resolution or liquidation or bankruptcy of a corporate guarantor or personal guarantor, as the case may be, of such corporate debtor shall be filed before the NCLT and that an insolvency resolution

process or liquidation or bankruptcy proceeding of a corporate guarantor or personal guarantor, as the case may be, of the corporate debtor pending in any court or tribunal shall stand transferred to the Adjudicating Authority dealing with insolvency resolution process or liquidation proceeding of such corporate debtor. For this purpose, the NCLT shall be vested with all the powers of the Debt Recovery Tribunal as contemplated under Part III of the Code.

Recently on 15th November, 2019, the Ministry of Corporate Affairs notified the 1st day of December, 2019 as the date on which the following provisions of the Code only **in so far as they relate to personal guarantors to corporate debtors**, shall come into force:–

(1) clause (e) of section 2;

(2) section 78 (except with regard to fresh start process) and section 79;

(3) sections 94 to 187 [both inclusive];

(4) clause (g) to clause (i) of sub-section (2) of section 239;

(5) clause (m) to clause (zc) of sub-section (2) of section 239;

(6) clause (zn) to clause (zs) of sub-section (2) of section 240; and

(7) section 249.

Further, the Ministry of Corporate Affairs notified the following Rules and Regulations relating to **Insolvency and Bankruptcy of Personal Guarantors to Corporate Debtors** to come into effect from 01.12.2019:

- The Insolvency and Bankruptcy (Application to Adjudicating Authority for Insolvency Resolution Process for Personal Guarantors to Corporate Debtors) Rules, 2019;
- The Insolvency and Bankruptcy (Application to Adjudicating Authority for Bankruptcy Process for Personal Guarantors to Corporate Guarantors) Rules, 2019
- IBBI (Insolvency Resolution Process for Personal Guarantors to Corporate Debtors) Regulations, 2019
- IBBI (Bankruptcy Process for Personal Guarantors to Corporate Debtors) egulations, 2019.

FINANCIAL SERVICE PROVIDERS

The Ministry of Corporate Affairs on 15.11.2019 notified the Insolvency and Bankruptcy (Insolvency and Liquidation Proceedings of Financial Service Providers and Application to Adjudicating Authority) Rules, 2019.

These rules shall apply to such financial service providers or categories of financial service providers, as may be notified by the Central Government under section 227, from time to time, for the purpose of their insolvency and liquidation proceedings under these rules.

As per these Rules, the provisions of the Code relating to the Corporate Insolvency Resolution Process of the corporate debtor shall, *mutatis mutandis* apply, to the insolvency resolution process of a financial service provider subject to the few modifications as specified.

On 18.11.2019, MCA notified that the insolvency resolution and liquidation proceedings of the following categories of financial service providers shall be undertaken in accordance with the provisions of the Insolvency and Bankruptcy Code, 2016 read with the Insolvency and Bankruptcy (Insolvency and Liquidation Proceedings of Financial Service Providers and Application to Adjudicating Authority) Rules, 2019 and the applicable Regulations:

Sl. No.	**Category of Financial Service Provider (rule 2 of the Rules)**	**Appropriate Regulator [clause (a) of sub-rule (1) of rule 3 of the Rules]**	**Dealing with third-party assets (rule 10 of the Rules)**
1	**Non-banking finance companies (which include housing finance companies) with asset size of Rs.500 crore or more, as per last audited balance sheet.**	Reserve Bank of India	To be notified separately

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

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 made successful by the readers

For the first time, we attempted to **cover all the sections** of the Finance Act, 2019 Giving due consideration to the volume of the discussion paper and the challenges involved in publishing, we presented this in a phased manner from August 2019 to February 2020 with 100% coverage achieved in February 2020. Our sincere thanks to the readers for extending their support.

Acronym and Description

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

1. Exemption of interest income of non-resident arising from borrowings by way of issue of Rupee Denominated Bonds u/s 194LC- Amendment of Section 10

With effect from 01st April 2019 and will apply for AY 2019-20 and subsequent years

Present scenario and reference to Explanatory Memorandum

a. Interest income payable to a non-resident by a specified company on borrowings in foreign currency from sources outside India by way of issue of long-term bond including long-term infrastructure bond, or rupee denominated bond was eligible for TDS @ concessional rate of 5% and the same was taxed at the rate of 5%.

b. To enable more low cost foreign borrowings through Off-shore Rupee Denominated Bond, the CBDT vide press release dated 17th September 2018 , announced that interest payable by an Indian company or a business trust to a non-resident including a foreign company, in respect of **rupee denominated bond issued outside India during the period from 17th September 2018 and ending on 31st March 2019 ,** shall be exempt from tax.

c. As a consequence, tax was not required to be deducted at source.

d. The amendment is to incorporate the above in the Act.

Amendment

Section 10(4C) has been inserted to incorporate the matters specified by the above press release.

2. Incentives to International Financial Services Centre (IFSC)- Amendment of Section 10 and consequential amendment of Section 47

With effect from 01st April 2020 and will apply to AY 2020-21 and subsequent AY's

Present scenario and reference to Explanatory Memorandum

a. Under section 47, any transfer of capital asset, being bonds or Global Depository Receipts or rupee denominated bond of an Indian company or derivative, made by a non-resident through a recognised stock exchange located in any IFSC , where the consideration for such transaction is paid or payable in foreign currency shall not be regarded as transfer.

b. With a view to provide tax-neutral transfer of certain securities by Category III Alternative Investment Fund (AIF) in IFSC, this amendment is proposed

Amendment

Amendment of Section 10 – Insertion of Section 10(4D)

Section 10(4D) has been inserted into the Act. The salient features of the amendment that confers the exemption, are as under

- Any income accrued or arisen to, or received by a specified unit on transfer of capital asset u/s 47, on a recognised stock exchange located in an IFSC.
- The consideration for such transaction is paid or payable in convertible foreign exchange.
- Such income has accrued or arisen to, or is received in respect of units held by a non-resident.

The following expressions have been specifically defined in the explanation

- Convertible foreign exchange
- Manager
- Specified fund
- Sponsor
- Trust
- Unit

Amendment of Section 47

Section 47 (viiab) has been suitably amended to incorporate the matters specified above.

3. Other amendments in Section 10

a. Incentives to NPS subscribers – Amendment of Section 10(12A)

With effect from 01st April 2020

Present scenario and reference to Explanatory Memorandum

Any payment from an NPS Trust, to an assessee on closure or on opting out of pension scheme, to the extent not exceeding 40% of total amount, is exempt from tax.

Amendment

To enable the pensioner to have more disposable funds, the section is amended to increase the limit from 40% to 60%

b. Amendment of Section 10(15)- Insertion of Clause (ix)

With effect from 01st April 2020

Amendment

Any income by way of interest payable to a non-resident by a unit located in IFSC in respect of monies borrowed by it on or after 01st day of September 2019, shall be exempt from tax

c. Amendment of Section 10(23C) – Emphasising compliance with any other law- Similar to amendment of Section 12AA- Para 6 of August 2019 edition

With effect from 01st September 2019

1. Amendment of second proviso- present scenario

The second proviso to Section 10(23C) enables the prescribed authority before giving approval to call for such documents or information so as to satisfy about the genuineness of the activities. The power to verify compliance with other legal pronouncements was not available.

Amendment

The second proviso to Section 10(23C) has been amended to enable the prescribed authority before giving approval, to call for such documents or information to

a. Satisfy about and

b. The compliance of such requirements under any other law for the time being in force, as are material for achieving its object.

2. Amendment of fifteenth proviso- present scenario

The approval given u/s 10(23C) can be withdrawn subject to principles of natural justice, when the authority is satisfied that such fund or institution has not applied its income or invested its funds in accordance with the Act.

The approval cannot be cancelled

- in case of activities not being genuine or not being carried out in accordance with the conditions for approval or
- Such fund or institution has not complied with any other law for the time being in force.

Amendment

The proviso has been suitably amended to enable cancellation of approval in case of

- activities not being genuine or not being carried out in accordance with the conditions for approval or
- Such fund or institution has not complied with any other law for the time being in force

d. Amendment of Section 10(34A)- Consequent to amendment of Section 115QA- Para 1 of December 2019 edition

With effect from 05th July 2019

Amendment

As a consequence, to amendment of section 115QA, section 10(34A) has been amended to bring parity on income arising to assessee being a shareholder on account of buy-back of shares of both listed and unlisted companies, both of them being exempt.

4. Amendments to Section 56

A. Present scenario and reference to Explanatory Memorandum- Amendment of First proviso to Section 56(2)(viib)

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

Incentives for Category II Alternative Investment Fund (AIF)

The provisions of Section 56(2)(viib) does not apply to venture capital undertaking to the extent consideration for issue of shares is received from venture capital company or venture capital fund.

At present this is restricted to Category I AIF. This is proposed to be extended to funds received from Category II AIF.

Amendment

Suitable amendments have been made to first proviso to Section 56(2)(viib) to confer the exemption as intended. The words "specified fund" and "trust" have been defined in the Explanation to Section 56(2(viib) and the same is as under

"Specified Fund" means a fund established or incorporated in India in the form of a trust or a company or a limited liability partnership or a body corporate which has been granted **a certificate of registration as a Category I or a Category II Alternative Investment Fund** and is regulated under the Securities and Exchange Board of India (Alternative Investment Fund) Regulations, 2012 made under the Securities and Exchange Board of India Act, 1992;

"Trust" means a trust established under the Indian Trusts Act, 1882 or under any other law for the time being in force

B. Present scenario and reference to Explanatory Memorandum- Insertion of Second proviso to Section 56(2)(viib)

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

Compliance with the notification of exemption issued under section 56(2)(viib)

The provisions of Section 56(2)(viib) does not apply where consideration for issue of shares is received by a company from class of persons notified by the CG subject to such other conditions as may be specified. [First Proviso]

Amendment

Second proviso has been inserted to provide that in case benefit of first proviso is availed subject to fulfilment of conditions specified therein and the company fails to comply with those conditions, then the exemption shall cease to have effect.

Further, the amount of securities premium shall be deemed to be the income of that company for the PY in which the failure took place.

Furthermore, it shall also be deemed that the company has under reported the income and the provisions of Section 270A shall also apply

Author's note- An example

The CBDT vide Notification No. 45/2016/F.No.173/103/2016, notified the persons to be the persons defined u/s 2(31), **being a resident,** who is making an investment at premium in case of a **"start-up" company.** Accordingly, the securities premium if received from resident, would not be chargeable as income u/s 56(2)(viib) subject to other conditions.

The exemption however is subject to conditions specified by the DIPP/DPIIT in the respective notifications like investment in machinery, quantum of share capital etc.

If the start-up company does not comply with the conditions specified by the DIPP/DPIIT, then the second proviso would apply and the provisions of Section 270A shall also apply.

Please refer to **"Indian Start-ups – Important Saga in the Incubation Stage"** of June 2019's bulletin for analysis of the section 56(2)(viib) in the context of Start-ups and DIPP/DPIIT's notification.

C. Consequential amendment to Section 56(2)(viii)

With retrospective effect from 01st April 2017 and will accordingly apply for AY 2017-18 and subsequent AY's

Present scenario and reference to Explanatory Memorandum

Income received by way of interest on compensation or enhanced compensation referred to in Section 145A(b) shall be chargeable to tax. The FA, 2018 substituted the provisions of section 145A with sections 145A and section 145B.

There was no consequential amendment to section 56 (2)(viii) and hence the amendment is proposed.

Amendment

Suitable amendments have been made in section 56(2)(viii) to provide the correct reference of section 145B(1) instead of 145A(b)

D. Prescription of electronic mode of payments and addition made to the exemption list for non-taxability of Gift

With effect from 01st day of April 2020 and will apply from AY 2020-21 onwards

Amendment

1. Section 56(2)(x) has been amended to provide legal recognition for receipt of money through bank account or through such other electronic mode as may be prescribed.

2. The provisions of Section 56(2) (x) is not applicable if the sum of money or property is received

- From the persons specified in the proviso like relative or on occasion of marriage etc or
- Under specific circumstances like under a will or by way of inheritance etc

In addition to the above categories of receipt already existing and qualifying for exemption, **"receipt from such class of persons and subject to such conditions as may be prescribed"** is included.

5. Deductions in respect of profits and gains from housing projects- Revised conditions – Amendment of Section 80- IBA

With effect from 01st day of April 2020 and will apply from AY 2020-21 onwards

Present scenario and reference to Explanatory Memorandum

Where the gross total income of an assessee includes any profits and gains derived from the business of developing and building housing projects, there shall subject to certain conditions, be allowed a deduction of an amount equal to 100% of the profits and gains so derived.

The amendment is proposed to align the definition of "affordable housing" under section 80-IBA with the definition under GST Act.

Amendment- For projects approved on or after 01st day of September 2019

The following are the revised conditions for claiming deduction

a. Measurement of Plot of land

- Plot of land not less than 1000 square metres, where such project is located within the metropolitan cities of

a. Bengaluru

b. Chennai

c. Delhi National Capital Region (limited to Delhi, Noida, Greater Noida, Ghaziabad, Gurugram, Faridabad)

d. Hyderabad

e. Kolkata and

f. Mumbai (whole of Mumbai Metropolitan Region)

- Plot of land should not be less than 2000 square metres, where such project is located in any other place

b. The project is the only housing project on the plot of the land

c. The carpet area of the residential unit comprised in the housing project does not exceed

- 60 square metres where such project is located within the metropolitan cities of

1. Bengaluru
2. Chennai
3. Delhi National Capital Region (limited to Delhi, Noida, Greater Noida, Ghaziabad, Gurugram, Faridabad)
4. Hyderabad
5. Kolkata and
6. Mumbai (whole of Mumbai Metropolitan Region)

- 90 square metres where such project is located in any other place

d. the stamp duty value of a residential unit in the housing project does not exceed **Rs. 45 Lakhs.**

e. where a residential unit in the housing project is allotted to an individual, no other residential unit in the housing project shall be allotted to the individual or the spouse or the minor children of such individual

f. Project utilises

- Not less than **90% of the floor area ratio** permissible in respect of the plot of land under rules to be made by the CG or SG , where such project is located within the metropolitan cities of

1. Bengaluru
2. Chennai
3. Delhi National Capital Region (limited to Delhi, Noida, Greater Noida, Ghaziabad, Gurugram, Faridabad)
4. Hyderabad
5. Kolkata and
6. Mumbai (whole of Mumbai Metropolitan Region)

- Not less than 80% of such floor area ratio in case of projects in other places

g. The assessee maintains separate books of account in respect of the housing project

h. "stamp duty value" means the value adopted or assessed or assessable by any authority of the Central Government or a State Government for the purpose of payment of stamp duty in respect of an immovable property.'

6. Revised Deductions in respect of certain incomes of Offshore Banking Units and International Financial Services Centre- Amendment of Section 80LA

With effect from 01st day of April 2020 and will apply from AY 2020-21 onwards

Present scenario and reference to Explanatory Memorandum

The amendment is proposed to further incentivize operation of units in IFSC

Amendment

In the case of assessee being a scheduled bank or any bank incorporated by or under the laws of a country outside India and having an Offshore Banking Unit in a Special Economic Zone, the assessee is eligible for deduction of

a. 100% of such income for 5 consecutive AY's beginning with the AY in which the permission was obtained under the Banking Regulation Act, 1949 and thereafter

b. 50% of such income for 5 consecutive AY's

In case of the assessee being an unit of IFSC , the assessee is eligible for deduction of

100% of such income for **any 10 consecutive AY's out of 15 AY's** beginning with the AY in which the permission was obtained under the Banking Regulation Act, 1949 or under the SEBI Act, 1992 or any other relevant law.

7. Inter-changeability of PAN & Aadhaar and mandatory quoting in prescribed transactions. - Amendment of Section 139A

With effect from 01st September 2019

Present scenario and reference to Explanatory Memorandum

It has been observed that in many cases persons entering into high value transactions, such as purchase of foreign currency or huge withdrawal from the banks, do not possess a PAN. In order to keep an audit trail of such transactions, for widening and deepening of the tax base, these amendments are proposed.

Amendment

1. Every person, who intends to enter into certain prescribed transactions and has not been alloted a PAN, shall also apply for allotment of a PAN.

2. Inter-changeability of PAN & Aadhaar

- Every person who is required to furnish or intimate or quote his PAN under the Act, and who, has not been allotted a PAN but possesses the Aadhaar number, may furnish or intimate or quote his Aadhaar number in lieu of PAN, and such person shall be allotted a PAN in the prescribed manner;.
- Every person who has been allotted a PAN, and who has linked his Aadhaar number u/s 139AA, may furnish or intimate or quote his Aadhaar number in lieu of a PAN.

3. Quoting of PAN or Aadhaar or both wherever authentication is required in the form and manner as may be specified.

8. Rationalisation of penalty provisions relating to under reporting of income- Amendment of Section 270A

With retrospective effect from 1st April 2017 and will apply from AY 2017-18 and subsequent AY's

Present scenario and reference to Explanatory Memorandum

The existing provisions provide for various situations for the purposes of levy of penalty. However, these provisions do not contain the mechanism for determining under-reporting of income and quantum of penalty to be levied in the case where the person has under-reported income and furnished the return of income for the first time u/s 148 of the Act.

Amendment

The section has been suitably amended to levy penalty in case where an assessee has under -reported income and furnished the return of income for the first-time u/s 148 of the Act, by inserting the words *" .....where return has been furnished for the first time u/s 148"* at appropriate places.

9. Widening the scope of Statement of Financial Transactions (SFT)- Amendment of Section 285BA and 271FAA

With effect from 01st September 2019

Present scenario and reference to Explanatory Memorandum

The amendment is proposed

1. To enable pre-filling of return of income

2. To obtain information by widening the scope of Section 285BA

3. To capture small amount of transactions by removing the existing threshold

4. To ensure compliance by providing that if the defect in return already furnished is not rectified within the time specified, then it would amount to furnishing inaccurate information in the statement.

5. To amend the penalty provisions contained in section 271FAA so as to ensure correct furnishing of information in the SFT and widen the scope of penalty to cover all the reporting entities under section 285BA

Amendment of Section 285BA

a. The scope of the sub- section (1) has been enabled to include the following

- A prescribed financial institution, *in clause no (k)* or
- A person other than those referred to in *clauses (a) to (k),* as may be prescribed

b. The second proviso in sub-section (3) that prescribed the threshold of Rs. 50,000 has been omitted

c. The sub-section 4 has been recast to levy penalty for not rectifying the defect identified in the return already filed.

Amendment of Section 271FAA

Section 271FAA is suitably amended to ensure correct furnishing of information in the SFT and widen the scope of penalty **to cover all the reporting entities u/s 285BA.**

10. Mandatory quoting of PAN and Aadhaar – Penalty for non-compliance – Amendment of Section 272B

With effect from 01st September 2019

Reference to Explanatory Memorandum

In order to ensure proper compliance of the provisions relating to quoting of PAN or Aadhaar , the penalty is proposed.

Amendment

i. If the PAN and the Aadhaar is required to be quoted either directly or indirectly for the purposes specified u/s 139A and

ii. If there is a failure to quote/ authenticate or there is a failure to ensure that it duly quoted/ authenticated,

iii. Then, the AO can levy a penalty of Rs. 10,000 for each such default.

11. Rationalisation of the provisions of section 276CC

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

Present scenario and reference to Explanatory Memorandum

The threshold for non-applicability of provisions of section 276CC is Rs. 3,000. The existing provisions do not provide for taking into account the TCS or TDS or the self-assessment tax for the purposes of determining the threshold.

The legislative intent has always been to consider the pre-paid taxes while determining the tax payable and also the self—assessment taxes paid before the expiry of AY.

Amendment

Section 276CC has been suitably amended to increase the threshold to Rs. 10,000 after considering TDS, TCS, advance tax or self-assessment tax paid before the end of the AY.

12. Clarificatory amendment regarding definition of "Accounting Year"- Section 286

With retrospective effect from 01st April 2017 and will apply from AY 2017-18 and subsequent AY's

Reference to Explanatory Memorandum

1. Section 286 contains provisions relating to specific reporting regime in the form of CbCR in respect of an international group.

2. Accordingly every parent entity or the alternate reporting entity(ARE), resident in India, shall, for every **reporting accounting year,** in respect of the international group of which it is a constituent, furnish a report, to the prescribed authority within a period of **12 months from the end of the said reporting accounting year,** in the form and manner as may be prescribed.

3. Several concerns were expressed that in the case of an ARE resident in India whose ultimate parent entity is not resident in India, the **accounting year** would always be the **accounting year** applicable in the country where such ultimate parent entity is resident and cannot be the PY of the entity resident in India.

4. It was requested to remove the unintended anomaly for the ARE resident in India.

Amendment

Section 286(9) has been suitably amended to give effect to the above clarificatory amendment.

13. Enhancing time limitation for sale of attached property-Amendment of Rule 68B of the Second Schedule

With effect from 01st September 2019

Present scenario and reference to Explanatory Memorandum

1. No sale of immovable property attached towards the recovery of tax, penalty etc shall be made after the expiry of **3 years** from end of the FY in which the order in consequence of which any tax, penalty etc becomes final.

2. In order to protect the interest of the revenue, especially in those cases where demand has been crystallised on conclusion of the proceedings, it is proposed to amend the aforesaid sub-rule so as to extend the period of limitation from **3 years to 7 years.**

3. In order to ensure that the limitation of time period for sale of attached property may not be an impediment in recovery of tax dues and may not lead to permanent loss of revenue to the exchequer, it is further proposed to insert a new proviso in the said sub-rule so as to provide that the CBDT may, extend the aforesaid period of limitation by a further period of **3 years**

Amendment

The Second Schedule has been suitably amended to

a. Extend the period of limitation from **3 years to 7 years**

b. Give CBDT the power to extend the above limitation period from **7** years to not exceeding **10 years,** after recording the reasons in writing.

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PAYMENT OF SOCIAL WELFARE SURCHARGE THORUGH SCRIPS - DECISION OF HON'BLE MADRAS HIGH COURT AND WAY FORWARD

CA. RAHUL JAIN

In the CASC Journal for the Month of January 2020, I had authored an Article on a very important decision of the Hon'ble Apex Court of Unicorn Industries Limited. The question before the Hon'ble Court in that case was on construction of the phrase 'duty of excise' and whether exemption granted to Basic Excise Duty will automatically extend to cesses and other duties such as NCCD. The Hon'ble Court answered in favour of the revenue and stated that the phrase 'duty of excise' would not cover other cesses and duties.

Subsequent to this decision, the Hon'ble Madras High Court has, in the case of M/s Gemini Edible Oils and Fats Pvt. Ltd vs Union of India & Ors , reported in 2020-VIL-05-MAD, relying upon the case of Unicorn Industries, delivered a landmark decision which forms the subject matter of this Article.

Facts of the case

The Appellant, M/s Gemini Edibles and Fats India Pvt. Ltd, was engaged in manufacturing and marketing edible oils and fats. The Appellant had procured Merchandise Exports from India Scheme (MEIS) and Service Exports from India Scheme (SEIS) scrips from various exporters who had obtained the same under Notification No. 24 & 25 of 2015 – customs dated 08.04.2015. The aforesaid Notifications provided for exemption from the whole of Basic Customs Duty (BCD) to goods imported against MEIS/SEIS scrips subject to the condition that the scrips will have to be debited at the time of import to the extent of exemption claimed. The Appellant availed the benefit of these scrips from payment of Customs duties with respect to the goods imported.

Subsequently, vide provisions of Section 110 of the Finance Act, 2018, a surcharge phrased as 'Social Welfare Surcharge (SWS)' was introduced and it was levied at 10% of the aggregate Customs duties. In the present case, for the imports undertaken by the Appellant, in addition to the customs duties, Revenue debited the Appellant's MEIS and SEIS scrips by the amount pertaining to SWS by including the same as a part of customs duties.

Question of Law

Whether SWS which is levied as a percentage of BCD, is payable on imports made against MEIS and SEIS duty credit scrips or would be exempted?

Grounds of Contention

The Appellant argued that the debit of BCD from the scrips tantamount to exemption and levy of SWS, being calculated as a percentage of BCD, will not be attracted. The Appellant relied on the decision of Madras High Court in the case of *Commissioner of Customs, Tuticorin vs DCW Ltd [2014 (306) ELT 398 (Mad)]* wherein it was held that Education cess has to be calculated at the percentage on duty liability and when the goods are fully exempted or chargeable to nil rate of duty or cleared without payment of duty under specified procedure such as clearance under bond, the question of education cess does not arise.

The Appellant further contended that under Notification 24 & 25 of 2015, the revenue is entitled to debit from the scrips only the BCD and additional customs duties and not SWS as the notifications do not include value of SWS to be debited from the scrips.

On the contrary, the Revenue contended that duty credit scrips scheme cannot be treated on par with an exemption from payment of duty. For stating so reliance was placed on the decision of *Tanfac Industries vs Commissioner [2009 (240) E.L.T. 341 (Mad.)]* which held that the goods cleared under DEPB Scheme cannot be treated as an exempted goods, but they can only be treated to be duty paid goods.

Decision

Hon'ble Madras High Court analysed whether SWS is an independent levy or whether it is the same as the parent levy. After relying on the recent decision of the Apex Court in Unicorn Industries, the Hon'ble High Court held that SWS will be considered as an independent levy under Section 110 of Finance Act and will not be treated as BCD levied.

The Court observed that Notifications 24 & 25 of 2015 which provide for debit of MEIS and SEIS scrips is not an exemption from duties but only a revenue neutralisation scheme where the customs duties otherwise payable are debited from the scrips. It was further held that if the duty was exempted, there would have been no requirement to pay the duty in any form, which includes debiting the scrip.

After holding so, the Court held that Notifications 24 & 25 of 2015 entitle the importer/ permit the Revenue to debit only BCD and Additional Duties under Section 3 of the Customs Tariff Act. Hence, SWS being a levy under a different enactment, can still be determined on the BCD value and hence would be payable, and the exemption from BCD will not bar the determination of SWS.

Going a step further, the Court held that the present practise of the Department of debiting the SWS amount from the scrip was incorrect. Consequently, the SWS liability would have to be paid in cash or any other manner and not through a debit in the Scrip. The court directed the Department to re-credit the value of Social Welfare Surcharge so far debited from the scrips held by the petitioner, subject to a condition that the assessee discharge the Social Welfare Surcharge either in cash or in any other mode.

Way Forward

Immediately after the decision of the Hon'ble Court, the CBIC issued a Circular No. 2/ 2020-Cus., dated 10-1-2020, clarifying the position as under.

- *Duty credit scrips are only a mode of payment of duty and not an exemption from duty even though the use of said scrip is governed by exemption notification.*
- *The FTP does not provide for a debit of SWS through scrips*
- *Resultantly, SWS liability must be deposited in cash.*

Thankfully, the circular also clarified that in respect of past cases, the revenue would not rock the boat by requiring the assessee to make payment of the SWS amounts in cash and payment of SWS made through duty credit scrips would be accepted as revenue duly collected.

LEARNING SERIES ON MULTILATERAL INSTRUMENT UNDER TAX TREATIES
LS #10: SIMPLIFIED LIMITATION ON BENEFITS UNDER MLI-RESERVATIONS & MISMATCHES

Objectives

A. Prelude

B. SLOB: Reservations, Elective Matches, Mismatches and Notifications under MLI

C. Debrief

Mr. SUDARSHAN RANGAN
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&
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A. Prelude – Treaty Entitlement – Abuse Provisions

In the last two learning series we discussed about the concept of Limitation on Benefits ('LOB'), why we need LOB and what is Simplified LOB under the BEPS MLI. Further it is also worth reiterating that, treaty abuse being the main objective of the entire BEPS project, the report in Action Plan 6 states that countries should implement the following as a minimum standard:

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

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

iii. a detailed LOB provision

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

o PPT is default and to be applied symmetrically.

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

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

- India has opted for application of the ***PPT Rule and the simplified limitation of benefits*** while adopting the MLI framework. In this edition of the learning series we intend to complete the Simplified LOB concept with the reservations and elective mis matches that may arise under the MLI. With this we will complete the Simplified LOB concept and move on to the PPT, which is a more subjective test unlike LOB which is an objective test. PPT will be dealt in the forthcoming editions.

B. Reservations and Potential Elective Mismatches in Simplified LOB under MLI

- In one of our previous learning series we dealt exclusively with the concept of 'reservation clauses' under the MLI. Just to refresh our memory, reservation clauses are opt-out clauses under which a party to the MLI can opt out of a clause / provision if they are not aggregable to it. This is to ensure that the MLI remains a flexible agreement for the contracting parties.
- Since treaty abuse under Action Plan 6 is a minimum standard, opting out is not possible. However, if the party to the signatory proves that the CTA already contains the relevant provision in their tax treaties, then they can opt out.
- Normally reservations work in a symmetrical way. That is if a particular provision is reserved by a party then it will not be applicable for the other party as well. However, under Article 7 of the MLI, asymmetrical positions also exist, which we will be discussing here.
- **Article 7(6) SLOB applies only when *all* contracting jurisdictions agree**

  Since PPT is the default rule, application of Simplified LOB to a CTA is only when all contracting jurisdictions to apply. Even if one contracting jurisdiction does not agree then Simplified LOB provision will not be applied. Therefore, it has to be applied by all jurisdictions. However, there is an exception to this rule, which is specified in Article 7(7)

- **Article 7(7) – Exceptions when all contracting jurisdiction don't agree.**

  As exceptions to the rule in Article 7(6), the Simplified LOB could still apply with respect to a CTA for *which some but not all* of the Contracting Jurisdictions have chosen pursuant to paragraph 6 to apply the Simplified LOB. The exceptions are:

a) Symmetrical Application: Parties that choose to apply the PPT alone can agree that the Simplified Limitation on Benefits Provision would apply symmetrically for the purposes of granting benefits in the case of CTA with Parties that choose to apply the Simplified LOB.

Example: Country A opts only for the default PPT rule. However, Country B opts for PPT and Simplified LOB. In such a case Country A can notify Article 7 (7)(a) wherein in such a case Country A will also apply PPT and Simplified LOB. (Symmetrical application)

b) Asymmetric Application: Parties that choose to apply the PPT alone to permit the Simplified Limitation on Benefits Provision to be applied asymmetrically with respect to a Covered Tax Agreement. Therefore under Article 7(7)(b) of the MLI, a

Contracting Jurisdiction to a Covered Tax Agreement that chooses to apply the Simplified Limitation on Benefits Provision would apply the PPT and the Simplified LOB in determining whether to grant the benefits of the Covered Tax Agreement, while the other Contracting Jurisdiction that does not choose to apply the Simplified Limitation on Benefits Provision would apply the PPT alone in determining whether to grant treaty benefits.

Example: Country A opts only for the default PPT rule. However Country B opts for PPT and Simplified LOB. In such a case Country A can notify Article 7(7)(b) wherein in such a case Country A will not apply Simplified LOB. However Country B can invoice PPT and Simplified LOB for the said CTA (Asymmetric application)

This agreement on the application of the Simplified LOB provision under Article 7(7) (a) or (b) is done by choosing to apply subparagraph a) or b) and notifying the Depositary accordingly under paragraph 17(d).

- **Article 7(15)(c) – Opt out of SLOB**

  Parties can opt out of the Simplified LOB with respect to CTA that already contain a LOB provision. Parties that do not choose pursuant to paragraph 6 to apply the Simplified Limitation on Benefits Provision but accept its symmetrical or asymmetrical application pursuant to paragraph 7 may prefer to opt out of the Simplified Limitation on Benefits Provision with respect to Covered Tax Agreements that already contain an LOB provision. Therefore, paragraph 15(c) would be available to such Parties as well as Parties that choose pursuant to paragraph 6 to apply the Simplified Limitation on Benefits Provision

- **Article 7(16) – Opt out of Article 7 (PPT and SLOB) in entirety.**

  As mentioned in the paragraph above, SLOB will apply only where all contracting jurisdiction agrees for invoking the same. (article 7(6)). We also saw the exception to it in Article 7(7) (a) or (b). However Parties that prefer to apply the Simplified LOB may prefer to apply nothing under Article 7 (no PPT as well) and leave the issue for bilateral negotiations. Where the Contracting Jurisdiction preferring the PPT alone has not chosen to apply paragraph 7(a) or (b), paragraph 16 of Article 7 allows Parties that choose Simplified LOB to opt out of Article 7 entirely with respect to their CTA.

  To ensure that the Contracting Jurisdictions to Covered Tax Agreements for which the entirety of Article 7 is opted out of under this paragraph will still have an avenue to meet the minimum standard, this paragraph, like paragraph 15(a), requires them

to endeavour to reach a mutually satisfactory solution which is in line with the minimum standard.

Example: Country A and Country B notifies their CTA. Country A opts for PPT and SLOB. However, Country B opts only for the default rule i.e the PPT. Further no agreement is reached under Article 7(7)(a) or (b). In such a case if Country A files a reservation in accordance with Article 7(16) then in such a case neither PPT nor SLOB applies to the A-B tax treaty. In such a case, the contracting parties must enter into bilateral negotiations to reach a mutually satisfactory agreement to implement minimum standard.

- **Notifications**

With regards to invoking the treaty abuse provisions under Article 7, It is important to mention here that contracting parties must notify their preferred positions under Article 7(17). Notification clauses come in two forms. The first is with regards to the election of certain provisions while the second is of an informative nature. Under Article 7(17), the contracting parties that fall within the scope of a notification clause are subject to a mandatory reporting to the depositary. Article 7(17)(c) and (d) discussed about the notification with regards to Simplified LOB provisions.

C Debrief

The Simplified LOB is one of the measures introduced in the OECD BEPS MLI, the BEPS Action Plan 6 on treaty abuse suggested measures to combat tax abuse. These measures were : (1) a Simple Limitation of Benefits (2) a Detailed Limitation of Benefits (3) Principle Purpose Test ('PPT') (4) Preamble to the treaty. The MLI focuses only on SLOB as it is a simpler and more concise version of objective categorical tests that countries may impose to access treaty benefits, the detailed LOB is left for the treaties to negotiate and implement. Having seen in this learning series, the potential elective matches and mismatches, reservations in applying SLOB, one needs to read in detail the reservations and notifications before applying the MLI provisions for each of the CTA. We will focus on PPT in the forthcoming editions.

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EXCEL TIPS

CUSTOMISING EXCEL & OTHERS

CA DUNGAR CHAND U JAIN

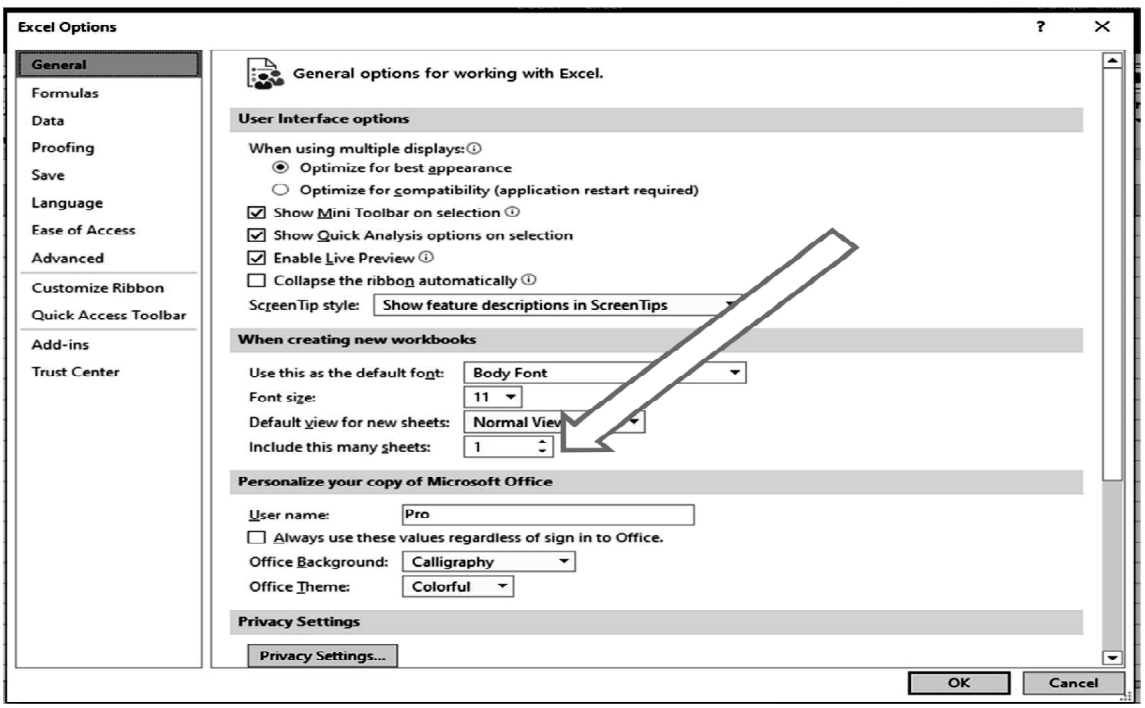
Number of Sheets

Excel by default includes 3 sheets in a work books. Many a time, these 3 sheets are not used and the file gets saved. Such Blank sheets not only creates an impression that some information might be there but also increases the size of the excel file. Size impact however is only miniscule. Also we are lethargic in deleting those blank sheets.

To overcome this, we can this change the default to lesser or more sheets, customising based on our needs.

Here are the steps :

- Go to File Options General.
- In General, under the **"When creating new workbooks"** there is an option available **"Includes this many sheets :"**, wherein the number of sheets can be changed / customised according to our requirement.
- Additionally, the default font, font size and Default view also can be set so that Excel opens every time with these options specified.



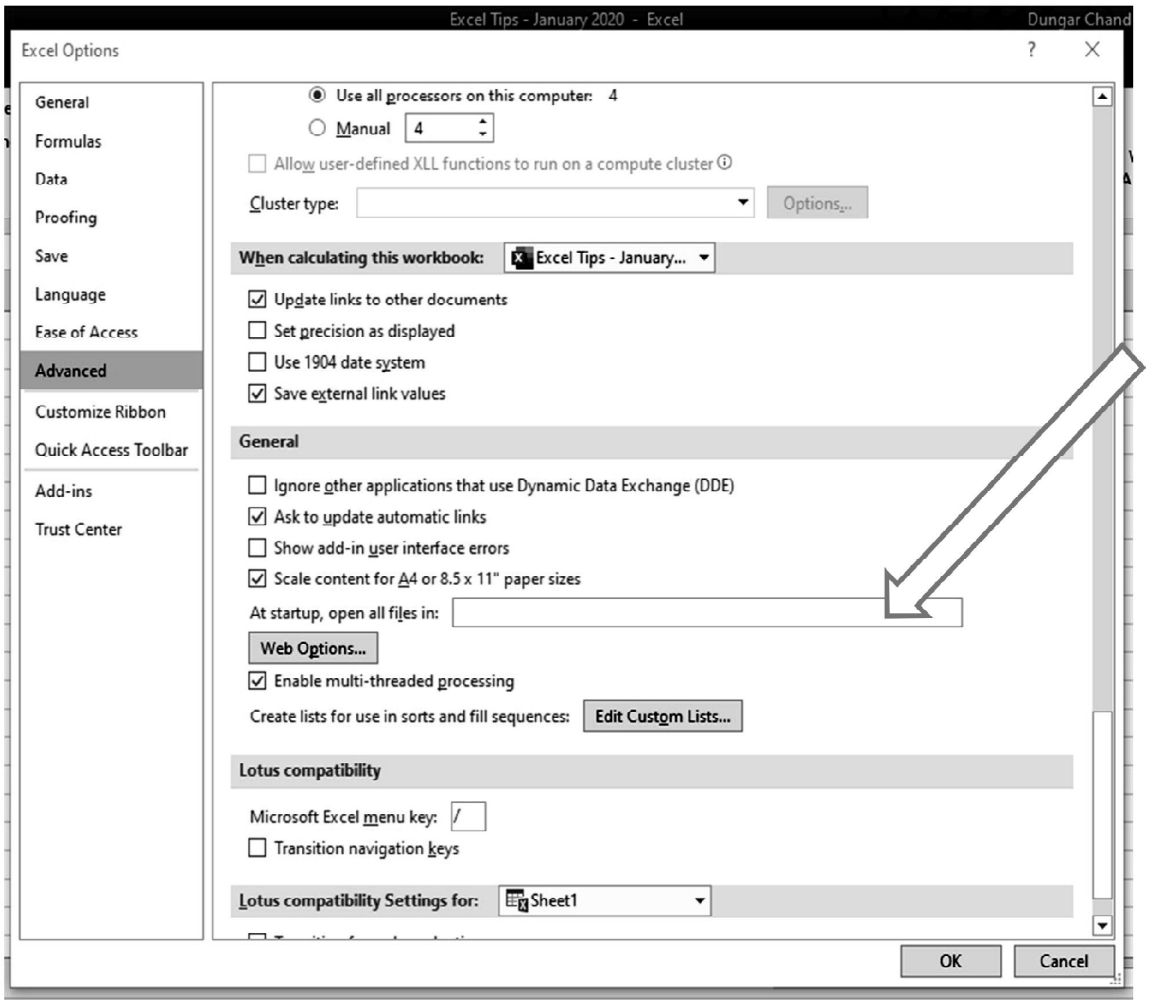
Open Specific File

Excel by default opens with a new blank workbook. But it is often observed that we may want to open excel with a particular file whenever we start.

There is an option in Excel which we can use to open a specific file(s) every time we start Excel in your system.

Here are the steps :

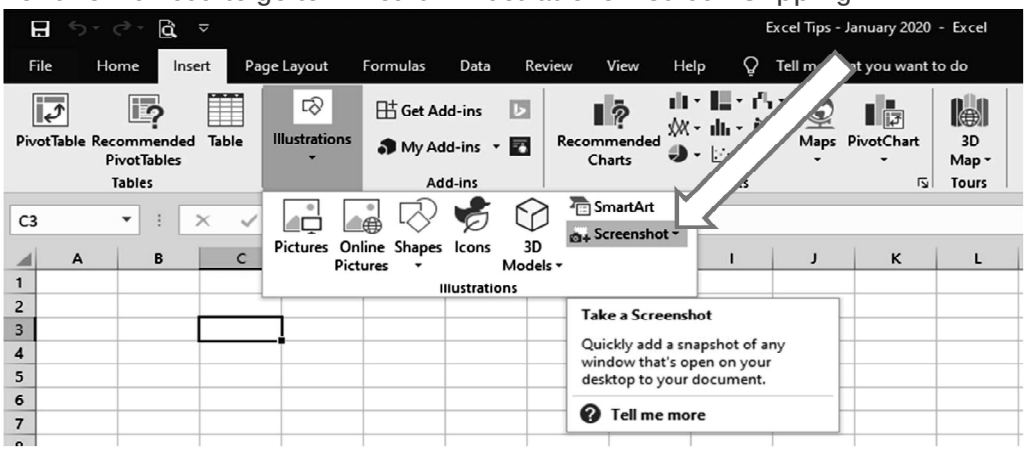
- Go to File Options Advanced General.
- In general, **"At startup, open all files in: "**, the file name which we need to use must be typed or copied with full path or location.
- Note : The location of the file cannot be selected but only typed / copied.



Screenshot :

Sometimes we need to add screenshots into Excel sheets. Excel has an option which can capture screen instantly, and paste it into the worksheet.

For this we need to go to Þ Insert Þ Illustrations Þ Screen Clipping.

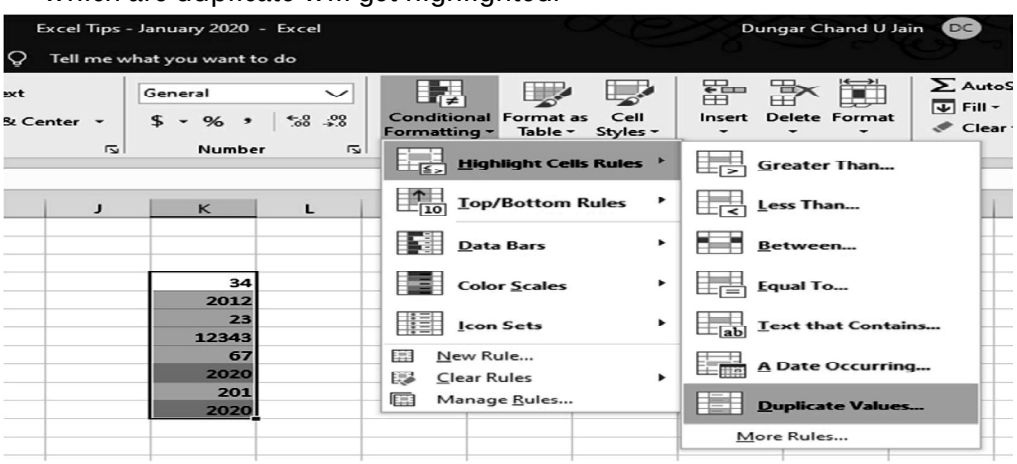


This is equivalent to using the "Snipping tool" of Windows. But easier as it instantly brings the screenshots into Excel Sheets.

Highlight Duplicate Values :

Though there are various methods and techniques to find the Duplicate Values using functions, a simpler way to highlight the same is available in Excel using Conditional formatting :

- First we need to **select the range** where we want to highlight the duplicate values.
- After that, go to Home Tab Conditional Formatting Highlight Cells Rule Duplicate Values.
- In the dialog box, we need to **select the color to use** and click OK. All the values which are duplicate will get highlighted.



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