CASC BULLETIN

THE CHARTERED ACCOUNTANTS STUDY CIRCLE

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EDITORIAL

Dear Colleagues,

Starting on a positive note, edited versions of WhatsApp messages received on 1st July 2020:

"Chartered Accountants are the ones who create economies, create finances to rely on, create opportunities to grow …….. You are in some way contributing to strengthening the economy of your country …….. Without CAs, no company can function, no business can grow, no country can prosper ……. Congratulations to all the CAs who have contributed to the betterment of the society …….. Happy CA Day for all the CAs"

Getting Goosebumps? Once a Year, Enjoy it! Feels Good!

Prevailing pandemic period, witnessing 'infotainment Webinars' by the hour, the host invariably proclaims at the start of the session ***"mute yourselves and unmute only if you want to speak".*** Invariably, 90%-95% of the audience remains muted throughout and leave unnoticed.

Remaining muted, throughout a life filled with compromises, under the guise of "harmonious co-existence", without Voicing our Opinions, without Raising our Voices, without Putting across our Viewpoints, without Daring to Constructively Criticize - we need to consciously break.

Holding back our opinions can actually be more damaging than speaking them. In fact opinions are what fuel momentum – all ideas, plans and decisions begin and end with opinions.

In times of crisis, when our clientele are at cross-roads, they look towards us - the Accountants fraternity as their Business Advisors, to hear from us the 'no holds barred' hard-hitting facts straight from the horse's mouth. Before we even express an opinion, there are some factors we should take into consideration, such as:

- What is our Client's sensitivity to the issue or situation?
- What is our experience or competency level in the area in which we want to express opinions?

- Is it too late to express / receive our opinion?

- If the Client is from a different culture, how will he accept what we have to say?

- Are there generational differences between us and the Client to whom we want to express our views? How might that impact the client's willingness to be open to what we have to say?

- Our mood – Is it Low-Grumpy-Frustrated? Then, that is probably not the time for us to express our opinion. This could dramatically affect the outcome.

- Why are we even having the conversation with the Client?

- What is our motive in voicing our opinion? What do we hope to accomplish?

We, in the role of Business Advisors, are capable of taking a holistic view of the clients' business and in facilitating changes that will make a tremendous impact on their prosperity. In short, our skills and expertise can add value to the existing and prospective clients' to manage their business more effectively and take it to the next level.

In this hour of our clients' need, to tide over the pandemic and then to resurrect the businesses to their original glory, we need to have a well prepared plan in place. We need to work closely with our clients', support them with decision-making opinions and help them regain lost ground.

100+ days into the pandemic has left all of us with a lasting, deep-rooted, indelible, lifelong lasting impression that

"LIFE DOESN'T MAKE ANY SENSE WITHOUT INTERDEPENDENCE. WE NEED EACH OTHER, AND THE SOONER WE LEARN THAT, THE BETTER FOR US ALL." – Erik Erikson.

Best Regards

P.Ramasamy

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ANNOUNCEMENTS

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

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

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

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RECENT JUDGMENTS IN VAT CST GST

CA. V.V. SAMPATHKUMAR

Used car sales: As per the Notification Number in G.O.M.S.No.79/CT & R/B2 at Serial No.1, dated 23.03.2007at Serial No.23, a dealer engaged in sale of Used cars / Motor vehicle on value addition without input tax credit. Sale of used car was liable to pay tax @ 4% which was subsequently increased to 5% vide Notification Number in G.O.Ms.No.78, CT & R (B2) dated 11.07.2011: No.II(1) CT R/12(R-20)/2011. Already by an order, dated 20.01.2020 in W.P.Nos.37776 of 2015 & 3777 of 2015 this court already held that the benefit of above Notification operate and apply to different kinds of dealers and therefore they are not to be taxed In the light of the clarification dated 25.10.2016 of the Authority for Clarification and Advance Ruling issued u/s 48 A of the TNAVT Act, 2006, the issue relating to availability of benefit of above notifications would require reconsideration by the respondent. Stating so, the impugned orders are remitted back to the respondent to pass fresh order. **Tvl. Sri Amman Cars India Private Ltd., Salem-636 304.vs.The Assistant Commissioner (CT), Omalur Assessment Circle, W.P.Nos.37063 to 37068 of 2015 DATED: 20.01.2020**

Transitional input tax credit: Transitional input tax credit of Entry tax on the closing stock is not permissible under Section 88(6)(a) of the TN VAT Act, 2006 even if the petitioner had actually imported motor vehicles and paid the entry tax on import of the motor vehicles from other state. If such tax was paid, such tax at best would be available for adjustment in terms of Section 4 of the Tamil Nadu Tax on Entry of Motor Vehicles Into Local Areas Act, 1990. **M/s. Sangam Motors, Perambalur-621220.vs.The Assistant Commissioner (CT), Ariyalur Assessment Circle, W.P.No.35430 of 2015 Dated 21.01.2020**

Penalty: C form was issued for the purchase of Generator sets. Penalty under section 10(a) of the CST Act was proposed. For the notice issued in this regard, there was no reply from the petitioner. It is submitted that the issue is also fully covered by the Full Bench of this Court rendered in the case in C.S. Parthasarathy Chetty vs. State of Tamil Nadu, dated 27.07.2006 reported in [2006] 148 STC 256 (Mad) [FB]. The court observed that section 10 of CST Act, 1956 contemplates an opportunity of hearing before passing orders. The respondent ought to have called upon the petitioner for a personal hearing before passing the impugned order. Stating so, the impugned order is

set aside and the case is remitted back to the respondent to pass a fresh order. **Revathi Home Needs, Mulakadai Vs. The Assistant Commissioner (CT), Perambur Assessment Circle, W.P.No.19045 of 2011 DATED: 21.01.2020**

DEPB Licence vs input tax credit: Input tax credit cannot be claimed in respect of purchase of DEPB licence used for importing goods while discharging import duties as held by the division bench of the Court in Sha Kantilal Jayanthilal versus State of Tamil Nadu 2016 (339) ELT 520. In a revision of assessment the respondent considered the decision of a Division Bench of this Court in Prakash Impex versus State of Tamil Nadu in TCR Nos. 158-162 of 2011 and reversed the input tax credit claimed in respect of DEPB purchased and used while importing the goods. Applicants submit that the decision rendered in Sha Kantilal Jayanthilal Versus State of Tamil Nadu 2016 (339) ELT 520 was per incurriam. A single judge of this Court in Mahaveer Trading Company Versus Asst.Commissioner (CT) vide order dated 13.11.2017 in W.P.Nos. 28271 to 28275 of 2017 remanded the case back in the light of the decision of the Division Bench of the Delhi High Court in Jagriti Plastics Ltd versus Commissioner of Trade and Taxes [2016 IAD Delhi 625 and 2016 54 GST 632 (Delhi)] and the matter was later dropped by the AO. Analysing the provisions of Section 19 of the Act and entry for the levy of tax on intangible goods in entry 70 of Part B of the 1st Schedule of the TNVAT Act, 2006 the single judge in this matter observed that the observation in paragraphs 32- 36 of the Division Bench may require a re-look by a Full Bench of this Court on reference and concluded that the decision of the Division Bench of this Court in Sha Kantilal Jayanthilal versus State of Tamil Nadu 2016 (339) ELT 520 is binding and constrained to dismiss the writ petitions with the above observation. **M/s. P.I.Polymers, Chennai 600 050 vs. The Commercial Tax Officer, Pattarawalkam Assessment Circle W.P.Nos.38508 & 38509 of 2015 Dated 23.01.2020**

Settlement of Disputes Act: Judgments in CST v .Modi Sugar Mills Ltd., (1961) 2 SCR 189: AIR 1961 SC 1047] SCR at p. 198: (AIR p. 1051, para 11 stated the following while rendering the judgment in a matter of tax settlement scheme. "11 … in interpreting a taxing statute, equitable considerations are entirely out of place. Nor can taxing statutes be interpreted on any presumptions or assumptions. The court must look squarely at the words of the statute and interpret them. It must interpret a taxing statute in the light of what is clearly expressed: it cannot imply anything which is not expressed; it cannot import provisions in the statutes so as to supply any assumed deficiency.'" **Voltas Limited, vs. The Deputy Commissioner (CT), Chennai (Central) Division, W.P.No.35391 of 2005(O.P.No.1181 of 2003) Dated: 23.01.2020**

Works contract: Before the completion certificate was obtained in respect of multi

storeyed apartment construction, the petitioner decided to sell one of the built-up unit i.e., a flat to a 3rd party and therefore executed sale deed on 09.04.2014 and transferred a proportionate undivided share (UDS) in the land in favour of the prospective purchaser. On the same day, a Tripartite Construction Agreement was signed between petitioner along with his sister, with the prospective buyer and the builder. The said construction agreement was also registered. Based on this info gathered from the web, the AO concluded that the petitioner had failed to discharge tax liability as that of "works contractor" and impugned intimation dated 02.11.2015 demanding tax as works contract tax under section 5 of the TN VAT Act, 2006. The court held that there was no works contract by the petitioner exigible to tax under the provisions of the TN VAT Act, 2006. At best, such a tax liability would have been payable only by the builder and not on the petitioner. **Javanthi Singaram Vs The Commercial Tax Officer, Kilpauk Assessment Circle, W.P. No. 30466 of 2016 DATED : 23.01.2020**

Sale or Service: The petitioner is engaged in DTH services. For providing the aforesaid service, the petitioner used to sell Set-Top Box to its customers. Apart from collecting regular subscription charges for providing DTH service, the petitioner used to collect one time activation and installation charges. Later the petitioner altered the business model and started supplying set-top box also as a part of the service provided and therefore no VAT was paid to the petitioner on the Set top Box. It is the contention of the petitioner that it was paying service tax on installation and activation charges and therefore the petitioner cannot be made liable to pay VAT on such activation and installation charges under the provisions of the TN VAT Act, 2006. The court held that there may have been transfer of right to use of the dish net antenna, cable and accessories and later set top box as well. It is not clear from the impugned order whether any proposal was made to collect VAT from the petitioner under section 4 of the TNVAT Act, 2006 as the petitioner had prima facie, transferred the right to use in favour of the subscribers. There is also no clarity on the issue relating to denial of credit. There is also no clear discussion in the impugned orders as to whether the petitioner has paid service tax on the activation installation charges on the whole or part of the amount. Stating so, the impugned order is set aside and remitted back for passing a fresh order on merits within a period of 3 months. **Tata Sky Limited, Vs The Assistant Commissioner (CT), Chepauk Assessment Circle, W.P. Nos. 834, of 2015 DATED: 24.01.2020**

Input tax credit: Section 19(2)(ii) of the TNVAT 2006 is invalid to the extent that it denies availment of ITC in respect of those units which despatch tax suffered raw materials i.e. bullion/worn-out jewellery for conversion into final product (i.e. jewellery) outside the State which

upon conversion are received back and sold within the State of Tamil Nadu. According to this Court, the mere fact that the manufacturing unit is located outside the State of Tamil Nadu, cannot be the basis, for denial of ITC, under Section 19(1) of the 2006 Act following the decision in Division Bench of this Court in W.P. No.6377 of 2010 [Patina Gold Ornaments Pvt. Ltd., v.The AC(CT)}. Clause (ii) of Sub-Section (2) of Section 19 of the 2006 Act is, thus, declared bad in law. **Pasupathi Engineering W.P. No. 25436 of 2014 DATED: 24.01.2020 vs The Assistant Commissioner (CT), Villupuram-II Assessment Circle**

Revision: Petitioner's Assessment was completed. Based on web verification of the transaction of the dealer, it was noticed that the said dealer who sold had reported sale for a sum of Rs.8,75,235/- and collected the tax of Rs.46,325/- whereas the Petitioner had availed Input Tax Credit of Rs.1,15,121/- The Petitioner was therefore issued with a notice dated 30.01.2015 which, the Petitioner has not filed any objections. It is observed and held by this court that though, there is no representation on behalf of the Petitioner, it is noticed that the issue not only covered by a decision of the Division Bench of this Court in "Bata Shoe Company Private Limited Vs The JCTO, Harbour Division II, Madras and another, 1968 21 STC (Mad) in W.P. No. 589 of 1967 dated 18.10.1967 but also on merits in "Sri Vinayaga Agencies Vs The AC (CT), W.P.No.2038 of 2013 dated 29.01.2013. It is to be noted that once the assessment is completed unless there are mistakes on the part of the Petitioner by violating TNVAT Rules, the Input Tax Credit cannot be denied. At best the Department could recover the Tax from the dealer who sold the goods to the Petitioner without paying Tax after collecting the same from the Petitioner. There is no discussion as to why the credit could be denied if the Petitioner was found eligible to credit at the time of original assessment. It is informed that these decisions have not been reversed till date and quashed the impugned order. **M/s. Sastha Traders, Hosur -635 109 vs. The Assistant Commissioner (CT), Hosur (South) (C), Hosur-635 109 W.P.No.4330 of 2012 DATED: 27.01.2020**

Classification: Capital goods manufactured and sold in the course of inter-state trade and commerce are leviable to tax under Section 6 of the CST Act, 1956 read with Section 8 (1) with concessional rate by the coverage of C form and at Residuary Entry No. 69 to Part C to the 1st Schedule of the Tamil Nadu VAT Act, 2006 at 14.5%if the sale is under section 8(2) of the Act. **Proteck Circuit and Systems (P) Ltd., vs. The Assistant Commissioner (CT), Thiruvanmiyur Assessment Circle, W.P.No.34294 of 2013 Dated : 27 .01.2020.**

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Classification : Petitioner is engaged in the business of trading in pre-recorded Audio and Video CDs which attract tax at of 5% VAT under Commodity Code 2068 of Schedule I, part B, Item No.68 read with Sub Item No.5 (d) under Notification V annexed to G.O.(Ms).No.3 CT and R(B1) Department, dated 01.01.2007. Respondents contended that the petitioner is liable to pay tax at 14.5% under Part C of the First Schedule to the Tamil Nadu VAT Act, 2006.A clarification was given by the Advance Ruling Authority against the petitioner on 06.01.2017 and the petitioner had filed an application to review the said clarification and while that review petition was pending, the respondents passed the impugned order on 06.01.2017. The learned counsel has filed a copy of the review order dated 19.11.2018, passed by the Advance Ruling Authority, which has reviewed the earlier clarification, dated 06.01.2017 and submitted that impugned order of the first respondent in CST 789963/2013-14 was liable to be quashed. Since the earlier clarification dated 06.01.2017, stands reviewed by an order dated 19.11.2018 of Advance Ruling Authority, the Court set aside the impugned order dated 06.01.2017 and allowed writ petition. **M/s.Super Audio (Madras) P.Ltd. Vs The Assistant Commissioner (CT),Anna Salai Assessment Circle W.P. No. 2962 of 2017 DATED : 27.01.2020**

Inspection: The amount demanded in the impugned order proceed on the assumption, presumptions and conjectures that the goods were not received and therefore the petitioner had wrongly claimed exemption under the exemption is available for local sale up to Rs.500 crores which was available till 12.7.2011. This assumption etc., is contrary to law settled by the Hon'ble Supreme Court in Rukumanand Bairoliya vs .State of Bihar (1971)3 SCC 167. The respondent cannot proceed on assumption, presumption and conjectures. In the impugned order, it has been mentioned that the petitioner has not produced any documents to substantiate receipt of goods from the state of Maharashtra on the strength of Form F issued by the respondent. However, the annexures appended to various Form F give the details of the vehicle number together with the date, challan number and the number of Tin which were allegedly transported. Since this issue would require a proper examination by the respondent, the court was of the view that the impugned order cannot be sustained. Further, if there was no receipt of the refined soya oil as has assumed in the impugned order, the option that was available to the respondent was to only impose penalty under Section 10 of the Central Sales Tax Act, 1956. There is no power to recover tax. Stating so, the impugned order was set aside and

remitted back to the AO. **M/s.Deegee Orchards Private Limited, vs. The Commercial Tax Officer, Trichy Road Assessment Circle, Coimbatore 18 W.P.Nos.42190, 42191, 42311 & 42312 of 2016 dated 28.01.2020**

Opportunity: The petitioner ought to have participated in the proceeding and given a proper reply to the proposal notice issued by the AO. However, the petitioner failed to file a reply. Therefore, the respondent has passed the impugned order. At the same time, before passing the impugned order based on the best judgment method, the petitioner ought to have been put to a proper notice by way of a corrigendum notice to notice dated 19.06.2012. This was however not done in the case.Stating so, the Court set aside the impugned order and remit the case back to the respondent to pass a fresh order in accordance with law. **M/s. Elgi Electric and Industries Limited, Coimbatore Vs. The Assistant Commissioner (CT) (FAC), Trichy Road Assessment Circle, Coimbatore – 18 W.P.No.19288 of 2012 DATED: 28.01.2020**

Clarification: Petitions filed praying to issue a writ of declaration to declare that the Clarification No.40/2003 issued by the first respondent in L.Dis.Acts Cell II/ 4330/2003 dated 27.1.2003 shall have only prospective in application from the Assessment Year 2003-2004 and consequently declare that the impugned Assessment Order passed by the 2nd respondent dated 02.08.2007 as illegal and unsustainable in law. While passing order in W.P.No.16166 to 16168 of 2008, the learned Single Judge has held as under: "That apart, the impugned clarification is beyond the scope of Entry 9 of the Eleventh Schedule. The impugned clarification states that foreign goods whether imported directly from other countries or purchased from other states, the expression "purchase from other States" is conspicuously absent in Entry 9 of Eleventh Schedule. Therefore, by virtue of clarification, the respondent cannot add any expression or phraseology, which is not contained in the statute. Therefore, the impugned clarification has to be necessarily held to be bad in law. Furthermore, the Hon'ble Division Bench has observed that the said clarification cannot be given retrospective effect, which is precisely what the respondents have done in the case of the petitioners. Therefore, such retrospective application of the clarification was also illegal. Since, the above passage from Writ Petition in W.P.Nos.16166 to 16168 of 2008 answers the issue is in favour of the petitioner, the Court allowed the Writ Petition. **Lion Dates (Pvt) Limited, Trichy – 620 002 Vs. 1.The Commercial Tax Officer, Rock fort Assessment Circle, Tiruchirapalli. 2. The Special Commissioner & Commissioner of**

Commercial Taxes, W.P. No.35313 of 2005 (OP.No.1204 of 2003) DATED: 29.01.2020

Pre-existing Charge: The Petitioner earlier applied for an encumbrance certificate on 12.10.2012 i.e. 6 days prior to the purchase of the property from one Kamalanathan. It did not reflect any charge in favour of the respondent Commercial Tax Department. After the property was purchased by the Petitioner on 18.10.2012, the First Respondent issued the impugned notice dated 29.04.2016 seeking to recover the dues from the defaulting assessee namely M.Latha who was in arrears of tax for a total sum of Rs.47,46,216/- to the First Respondent (Commercial Tax Department). Only in the encumbrance certificate issued by the second respondent through online portal dated 24.6.2016 the charge has been reflected in favour of the 1st respondent. No doubt a purchaser purchasing a property without notice of charge and for valuable consideration is protected under a proviso to section 24-A of the TNGST, 1959, nevertheless, it requires to be proved whether such plea is available on facts of each case. Encumbrance certificate is merely one of the documents which would aid a purchaser to take a decision as to whether to purchase the property or not. However, it is not a substitute for actual physical verification of the register at the Sub Registrar's Office. The petitioner relied on various rulings viz., i) (1998) 108 STC 161 (Mad), ii) (2006) 148 STC 204 (Mad), iii) (2006) 148 STC 212 (Ker.), iv) (2006) 148 STC 477 (Mad) (FB) ,v) (2016) 93 VST 190 (Mad),vi) 2018(9) G.S.T.L.63(Mad.) etc. Analysing the facts and the rulings the court held that the present writ petition is dismissed as the decisions of the court referred to supra do not squarely apply to the facts of the present case. The fact that there was a pre-existing charge/encumbrance registered as early as July 2011 is the distinguishing factor and therefore the decisions relied by the petitioner cannot be applied to four corners of the facts of the present case. **C.D.Gajendran vs 1. Assistant Commissioner (CT), Ambattur Assessment Circle, 2. Sub-Registrar, Registration Department, Chennai – 600 053**. **W.P.No.29253 of 2016 Dated 30.01.2020.**

Input tax Credit Reversal: The issue on account of invisible loss is covered by an order dated 04.12.2019 in W.P.No.3172 of 2014 of this Court which is as extracted here. "5. In my view, the expression inputs destroyed at some intermediary stage of manufacture in sub clause (iii) of Section 19(9)(iii) of TNVAT Act, 2006 will not take within its fold those inputs "consumed" in the manufacture of final product. Only when inputs are "destroyed at some intermediary stage of manufacture"

reversal of input tax credit is warranted. They would be instance of inputs which are withdrawn at an intermediary stage of manufacture and are incapable of being used further and are sold as scrap / waste or physically destroyed by an assessee having no residual value. Such inputs alone can be construed as "inputs destroyed at some intermediary stage of manufacture". There is no scope for reversal of input tax credit on inputs which get consumed during the course of manufacture as "invisible loss". The authorities may therefore keep these observations while passing orders in the Show Cause Notice which have been issued". Extracting this, the Court set aside the impugned order passed by the respondent is set aside and the cases are remitted back to the respondent to pass appropriate orders in respect of invisible loss alone. **M/s.Kanishk Steel Industries Limited, Vs The Commercial Tax Officer, Thiruvallikeni Assessment Circle W.P.Nos.30298 to 30301 of 2015 DATED: 31.01.2020**

Special Committee: The very purpose of giving such wide power to the Special Committee constituted under Section 16D of TNGST Act, 1959 is to pass appropriate orders when an assessee has no other remedy left and where orders have been passed in violation of the provisions of the Act or the rules made their under or without following the principles of natural justice. Powers vested with the 1st respondent include the powers to set aside orders impugned before it or direct the Assessing Officer to make a fresh assessment and / or pass fresh order in such manner as may be directed. Thus, power has been given to the 1st respondent to examine the issue without any inhibition of limitations prescribed under the Act where an assessee was unable to participate in the proceeding or appropriate order from an Assessing Officer. Though the impugned order of the 1strespondent adverts to be proceedings which was challenged before it, it fails to address the core issue before it. Since the petitioner did not get to participate in the hearing and an ex parte order came to be passed by the 2nd respondent, the Court was of the view that the petitioner deserves an opportunity of being heard .Thus stating the Court, the impugned order is quashed and the case is remitted back to the 2nd respondent to pass appropriate orders on merits. **M/s Indian Commercial Syndicate,. Vs 1.The Special Committee, Secretariat, Chennai 600 009. 2. The Commercial Tax Officer (CT), Now upgraded as Assistant Commissioner (CT), Mettupalayam Road Assessment Circle, .Writ Petition No.24309 of 2015 Dated : 31.01.2020**

Surprise Inspection: There was a surprise inspection in the respective petitioner's place of business, resulting in recording statements from the responsible officer of the petitioners and issuance of Compounding Notices and Compounding Order which are impugned in these Writ Petitions. "It is noted that the issue is squarely covered by an order dated 25.07.2016 of this Court in W.P.Nos.14997 to 14999 of 2014 in the case of Tvl. Uma Shankar Traders vs CTO, Group-1 (Enforcement) (Central), Chennai And others and the Operative Portion of the said order reads as under: "8. After hearing the learned Additional Government Pleader and on perusing the materials placed on record, at the very out set, it has to be pointed out that writ of certiorari cannot be issued, quashing the inspection report or the seizure mahazar or the statement recorded from the dealer. The petitioners would state that the officer does not possess the jurisdiction to record the statement or prepare the inspection report or seize the documents. But however, it appears that the documents were seized from the place of business of the petitioner. Therefore, if the petitioners have any reservations on the statement given by them before the Enforcement Officials, it is always open to the petitioners to raise contention before the assessing officer and it is a settled legal position that the assessing officer, while completing the assessment, cannot solely be guided by the statement recorded by the Enforcement Officials. Therefore, the petitioners need not have any apprehension that their rights and remedies will stand foreclosed, if they allow the impugned inspection report and the statement to stand. It is always well open to the petitioners to contest the merits of the matter, when the assessing officer takes up the issue. Even if in a case the petitioners state that the record does not belong to their company or organisation that point also could be canvassed before the assessing officer. Since the petitioners have raised the question of jurisdiction and the respondents have stated that there is delegation of power, this Court is not inclined to quash the inspection report or the statement, at this juncture. This issue relating to jurisdiction is left open to be canvassed by the petitioners as and when notice is issued by the assessing officer" With the above observations, the writ petition stands disposed of. **Sri Maharaja Industries and other cases vs The Assistant Commissioner (CT), (Enf), Pollachi and others W.P.Nos.15547 to 15549 of 2014 DATED: 31.01.2020**

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CASE LAWS - GST / SERVICE TAX

1. GST – ZERO-RATED SUPPLY – AVAILMENT OF HIGHER DUTY DRAWBACK – NOT TO BE DENIED

In Precot Meridian Ltd. v. Commissioner of Customs, Tuticorin 2020 (34) G.S.T.L. 27 (Mad.) the petitioner is an exporter of cotton and exported cotton during September, 2017 and was entitled to the refund of IGST. However, an erroneous drawback claim to the tune of Rs.75,454/- was filed on 02.03.2018 & thereafter this was rectified by repaying it along with interest to the tune of Rs.81,891/- and subsequently, refund of IGST paid was sought. This refund was rejected, relying on Circular No.37/2018-Customs, dated 09.10.2018, holding that a person, who has made request consciously for refund of duty drawback, is not entitled to IGST/ITC claims and treated that exporter has consciously relinquished the same. On a writ petition been filed the High Court observed as under:

1. It is not in dispute that the petitioner exported cotton through seven shipping bills and paid IGST & that the statute provides for refund of IGST on export of materials. The only condition is that if the export is made after payment of tax, he is entitled to get refund.

CA. VIJAY ANAND

2. The Supreme Court, in a similar circumstance in the case of CCE, Bolpur v. Ratan Melting and Wire Industries [2008(12) S.T.R. 416 (S.C.)], held that Circulars cannot prevail over the statute & that Circulars are issued only to clarify the statutory provision and it cannot alter or prevail over the statutory provision.

3. Explanation of provisions of drawback has nothing to do with the IGST refund consequent to which Circular No.37/18-Customs,dated 09.10.2018 cannot have an application in the present case.

Hence, the respondents were directed to refund the amount of IGST paid by the petitioner for the goods exported from India which are zero rated supplies and the petition was allowed accordingly.

2. SERVICE TAX- HOTEL ACCOMMODATION SERVICES – ADVANCE AMOUNT RETAINED IN WHOLE OR IN PART, UPON

CANCELLATION OF ROOMS NOT LIABLE TO SERVICE TAX – PROVIDING FOOD IN THEIR HOTEL ROOMS NOT LIABLE TO SERVICE TAX AS THE SAME ASSESSABLE UNDER SALES TAX/ VAT

In Lemon Tree Hotel v. Commissioner, GST, C.E. & Customs, Indore, 2020 (34) G.S.T.L. 220 (Tri.-Del.), the appellant is in the business of running a hotel & offers advance booking to its customers, on payment of rent or deposit. Sometimes in the event of cancellation or of no show i.e. if the guest does not come for stay, the appellants retains the full or part of the amount towards cancellation charges. It is admitted that the appellant have paid service tax under Accommodation Services as and when they receive advance, availing the permissible abated value. In addition, the hotel supplies food to the customers who have booked accommodation and have not discharged service tax on the same as the same is leviable to VAT. The adjudicating authority confirmed the demand on the amount retained by the appellant consequent to the cancellation by the customers u/s 66 E (e) of the F.A. 1994 as well as on the sale of food to the customers of accommodation services and was sustained by Commissioner (appeals). On further appeal, the Tribunal observed as under:-

1. The customers pay an amount to the appellant in order to avail the hotel accommodation services, and not for agreeing to the obligation to refrain from an act, or to tolerate an act or a situation, or to do an act; and chargeable on full value and not on abated value. The amount retained by the appellant is for, as they have kept their services available for the accommodation, and if in any case, the customers could not avail the same, thus, under the terms of the contract, they are entitled to retain the whole amount or part of it.

2. Accordingly, the retention amount (on cancellation made) by the appellant does not undergo a change after receipt consequent to which no service tax is attracted under the provisions of Section 66 E(e) of the Finance Act.

3. W.r.t. the second issue regarding service tax on food served in the room is concerned, the appellant sold the food, which attracts service tax/VAT.

4. CBEC in its Clarificatory Circular No. 139/8/2011-TRU dated 10.05.2011 has to a question as to whether the serving of food and/or beverages by way of room service liable to service tax clarified that when the food is served in the room, the service tax cannot be charged under the restaurant service as the service is not provided in the premises of the air-conditioned

restaurants with a licence to serve liquor, and also the same cannot be charged under the Short Term Accommodation head, if the bill for the food raised separately and it does not form part of the declared tariff.

5. Similarly, the Dy. Commissioner of Central Excise & Service Tax Division, Chandigarh vide his letter No.ST-20/STD/Misc./Sevottam/62/12 dated 13.08.2015, has clarified that the levy of service tax on food sold by way of Pick-up or Home Deliveries would apply if there is an element of service involved, which is offered at the restaurants, be it ambience, live entertainment, if any, air conditioning, or personalized hospitability is offered. The service tax can be levied if there is an element of "Service" involved which would typically be the case where the food is served in restaurant. If the element of service is not involved, then it amounts to sale and does not attract service tax.

Hence, the appeal was allowed with consequential relief.

3. GST – APPELLATE AUTHORITY FOR ADVANCE RULING – CLUB MEMBERSHIP FEE AND ADMISSION FEE COLLECTED FROM MEMBERS – NOT LIABLE TO GST – NOT FOR PROFIT ORGANISATION – AFFILIATED TO INTERNATIONAL ORGANSIATION OF ROTARY

In RE: Rotary Club of Mumbai Nariman Point 2020 (34) G.S.T.L. 335 (App. A. A. R. – GST - Mah.), the appellant is an International organization having clubs in 216 countries and engaged in humanitarian and charitable activities which are executed through various districts comprising many clubs. In order to facilitate meetings and administration, reimbursements are collected from members which are used for administration and meetings. In some cases, the amount so collected exceeds Rs. 20.00 lakhs. An application was filed seeking advance ruling in respect of the following questions:

1. Whether contributions from the members in the Administration Account, recovered for expending the same for the weekly and other meetings and other petty administrative expenses incurred including the expenses for the location and light refreshments, amounts to or results in a supply, within the meaning of supply?

2. If answer to Question No. l is affirmative, whether it will be classified as supply of goods or services?

3. Whether the applicant would be a taxable person under the provisions of the Act?

4. If answer to question no.3 is affirmative, who shall be person responsible under GST, as office bearers keep on changing every year?

5. Whether the said collection of funds under common pool and spending back the same on said contributors, would entail 'supply' as defined in the law?

6. If answer to Question No.5 is affirmative, whether the same would be supply of goods or services?

The authority ruled as under:-

a. Q. 1 – Answered in the affirmative.

b. Q. 2 –It will be classified as supply of services.

c. Q. 3 – Answered in the affirmative, subject to provisions of Section 22 of the GST Act.

d. Q. 4 – The applicant is liable to pay GST and not the office bearers.

e. Q. 5 –Answered in the affirmative.

f. Q. 6 –It will be classified as supply of services.

Aggrieved by the above, appellant filed further appeal before the appellate authority which observed as under:

1. The moot issue in the present case is whether the membership subscription fee payment, if collected by the appellant from their members will be subject to GST or not.

2. A perusal of the definition of supply has contained in section 7 of the CGST Act reveal that to qualify as a supply the same should be undertaken in the course or furtherance of business.

3. Examination of the documents would indicate that the entire membership subscription received is has been towards meeting and administration expenses alone, consequent to which the appellant should be reckoned as not doing any business.

4. Accordingly, the appellant would not come within the ambit of scope of supply as envisaged in section 7 (1) of the CGST Act.

5. If the impugned activities are to be reckoned as supply then there would be double taxation in as much as amount has been towards meeting and administration expenses are already subject to GST in the hands of the respective suppliers.

Consequently, the ruling of the AAR was set aside and the appellate authority held that the amounts collected as membership subscription and admission fees from members would not be liable to GST as supply of services.

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FACELESS E-ASSESSMENT UNDER CUSTOMS - A NEW JOURNEY

CA. DEBASIS NAYAK

Background

India ratified the WTO Agreement on Trade Facilitation (TFA) in April 2016 and prepared and adopted National Trade Facilitation Action Plan 2017-2020[1] to further ease out the bottlenecks in trade. The overall vision of the Government to see India as an active facilitator of trade provides the foundation for an integrated roadmap for trade facilitation. It seeks to transform the trade ecosystem by reducing the time and cost of doing business. Four pillars are defined under TFA as:

1. **Transparency -** focus on improved access to accurate and complete information.
2. **Technology -** development and use of digital and detection technologies to ease out trade bottlenecks and improve efficiency.
3. **Simplification of Procedures and Risk based Assessments -** simplified, uniform and harmonized procedures with increased adoption of a risk based management approach.
4. **Infrastructure Augmentation -** enhancement of infrastructure, particularly the road and rail infrastructure leading to ports and the infrastructure within ports, airports, ICDs, Land Customs Stations is a major enabler for growth in trade that cuts across all stakeholders.

Pursuant to that, Central Board of Indirect Tax and Customs ("CBIC") in the recent past have taken a number of initiative to transform cross border clearance eco-system through efficient, transparent, risk based, digital, seamless and technology driven procedures. Due to this transformational reform, India now stood at the rank of 68 in The World Bank`s Ease of Doing Business (EODB) Index rankings 2020[2] in its "Trading Across Borders "category. Some of the landmark initiatives which helped India to achieve EODB are as follows:

[1] https://www.cbic.gov.in/resources//htdocs-cbec/implmntin-trade-facilitation/national-trade-facilitation.pdf;jsessionid=E43BDC461A81D0888C5DC7647DA4E7C6

[2] http://documents.worldbank.org/curated/en/688761571934946384/pdf/Doing-Business-2020-Comparing-Business-Regulation-in-190-Economies.pdf

- Reduced cargo dual time by introducing Direct Port Delivery (DPD) and Direct Port Entry (DPE)
- Turant Customs – Next Generation reforms for Ease of Doing Business;
- Paperless regulatory environment by adopting E-Sanchit process;
- Revised Authorised Economic Operator (AEO) scheme;
- Revised procedure for Manufacturing in bonded warehouse u/s 65 of the Customs Act;
- Single Window Interface for facilitating trade;
- 24*7 customs clearance at all customs formation;
- E-Gatepass and Electronic Out of Charge of Bill of Entry;
- RFID e-seal programme and so on

In continuation to the earlier transformation reforms and a step ahead to facilitate the legitimate trade, CBIC decided to implement faceless e-assessment. The board had started conducting the first pilot programme of Faceless Assessment in Chennai on 14th August 2019 covering articles falling under Chapter 84 of the Customs Tariff Act. Consequent to that similar pilot programmes were also begun in other Customs formations such as Delhi, Bengaluru, Gujarat and Visakhapatnam for articles primarily falling under other varied chapters such as chapters 85, 86 to 92, 39, 50 to 71 and 72 to 83 of the Customs Tariff Act. On gaining the experiences and bottlenecks from the pilot run, the board has issued a detailed consultation Paper on Faceless e-Assessment for imported goods with agenda to obtain views/ comments /suggestions from the trade/stakeholders on 18th Febuary 2020. The board requested to provide feedback maximum by March 3, 2020 for finalization and implementation.

Trade showed a huge response and provided their valuable comments and feedback. Based on the inputs, the board has revised the process flow, procedure for virtual assessment and the modalities as contemplated in concept papper. The stage is now ready for the roll out of the most critical and transformational reform under the Turant Customs viz., Faceless Assessment on Pan India.

Since, this a totally a new concept which requires times for trade to understand and familiarize with the process, the board has decided to introduce the faceless e-assessment in phases which would provide ample time to the trade and other stakeholders (including the Customs officers) to adapt to the new era of assessment without any disruption/ hindrances in their day to day work. Accordingly, the Board has decided to implement this at experienced custom formations which already gained knowledge from pilot programmes.

Applicability as of now

Accordingly, the board has started the first phase of virtual assessment from 08th June 2020 at Bengaluru and Chennai for items of imports primarily covered by Chapters 84 and 85 of the Customs Tariff Act. Further, the board has made plan to introduce this PAN India w.e.f 31st December 2020. Pursuant to that Board has issued ***Circular No. 28/2020-Customs dated 5th June 2020 and Instruction no. 09/ 2020-Customs dated 05th June 2020*** to briefly describe the procedures of virtual assessment. These instructions are applicable for Bengaluru and Chennai zones as of now and would be applicable for other zones as and when faceless assessment will be rolled out with suitable modification.

Government's Expectation

- To bring anonymity in assessment and cut down the physical interface between the Assessing Officer and the importer of goods
- Ensure uniformity in assessments across field formations
- Promote sector specific approach and functional specialization
- Improve workload balance amongst various field formations for efficient utilisation of the resources.

Structure of Commissionerates

Currently the Customs Commissionerates could be categorized in the following types:

- Customs Zone with full-fledged Commissionerate in terms of Customs functions
- Customs Zone with full-fledged Customs Commissionerate combined with separate Import and Export Commissionerates
- Customs Zone without full-fledged Commissionerate combined with Import and Export Commissionerate as well as functional Commissionerates -
- Customs Commissionerates under GST Zones - *Hyderabad, Meerut, Cochin, Visakhapatnam, Bhopal and Shillong*

Under the new scheme the existing Customs Commissionerate are to be restructured into two distinct categories:

- ***National Assessment Commissionerate (NAC)*** which are "Virtual Commissionerates". Each NAC would have an all India jurisdiction and it would comprise of a cluster of "Faceless Assessment Groups" (FAGs) headed by AC/DCs. The FAGs are legally empowered to undertake assessments pertaining to any customs location in India. With the introduction of FAG, the assessment part of the Customs clearance procedure would be delinked with the geographical location where the goods are available for examination.

Under the virtual assessment, bill of entry would be assessed by the officer of FAG

which are located other than the port where the goods are arrived and would not qualify as proper officer and hence requires tweaking the existing jurisdictional notifications. Accordingly, the board has issued ***Notification No.50/ 2020-Customs (N.T.) dated 05th June 2020*** enabling an assessing officer (proper officer under Sections 17 and 18 of the Customs Act, 1962), who is physically located in a particular jurisdiction to assess a Bill of Entry pertaining to imports made at a different Customs station, whenever such a Bill of Entry has been assigned to him in the ***Customs Automated system***. Further, since the first phase of roll out is only limited to Chennai and Bengaluru zone and items of chapter 84 and 85, the board has clarified that this notification will be applied only for inter-linking of Bengaluru and Chennai Customs zones for the purpose of Faceless Assessment.

- ***Jurisdictional Port Commissionerate (JPCs)*** would continue to have one Port Assessment Group ("PAG") to cater the assessment in cases referred by FAG. In addition, the JPC would continue to perform examination and inspection of goods and all functions other than assessment.

Setting up FAGs and PAGs for rolling out the 1st Phase

For the implementation of Faceless Assessment for Bengaluru and Chennai Zones, the Board nominated the following officers to acts as a nodal commissioner for administratively monitoring the assessment practice:

1. Principal Commissioner / Commissioner of Customs, Bengaluru City, Bengaluru,
2. Principal Commissioner / Commissioner of Customs, Airport and Air Cargo Complex, Bengaluru,
3. Principal Commissioner / Commissioner of Customs (II), Chennai and
4. Principal Commissioner / Commissioner of Customs (VII), Air Cargo Complex Chennai

In accordance with the same, the Principal Chief Commissioners / Chief Commissioners of Customs, Bengaluru and Chennai Zones are required to setup FAGs and PAGs.

(1). Faceless Assessment Groups

FAGs would comprise of Appraisers / Superintendents and AC / DC for assessment of bill of entry assigned by Customs Automated System. As of now, two FAGs needs to be set up; one for Chapter 84 and other for Chapter 85. FAG would consist of officer from both Bengaluru and Chennai zone and preferably those officers who have handled assessment of Chapter 84 and 85. The number of the officer would be decided by Principal Chief Commissioner / Chief Commissioners of Customs based on volume of bill of entry.

(2). Port Assessment Groups

PAGs would comprise of appraising group of officers located in each port of import.

PAGs would handle all other matters which is not assigned to FAGs and sometimes assessment if specifically referred by FAGs.

Functions of NAC and JPC

The key functions of the newly set up NACs are as follows:

- Monitor the assessment practice followed by the FAGs and ensure uniformity of classification, valuation, exemption benefit and enforcing import policy conditions
- Ensure best practices, taking into account international practices, are followed by the FAGs in assessment
- Interact with their sectoral trade and industry for inputs and function as a knowledge hub or repository for that particular industrial sector
- Analyse the RMS facilitated Bills of entry pertaining to their industrial sector and advise the DGARM regarding interventions
- Liaise with JPCs with regard to interpretation matters pertaining to classification, valuation, exemption and policy conditions
- Make suggestions for policy intervention, pertaining to the commodities specifically assigned to each NAC
- Assist and guide NACIN in designing training modules and impart training to officers to promote sector specific specialization

The key functions of the newly set up JPCs are as follows:

- Acts as one port assessment group to perform the assessment referred by FAGs
- Handle the examination / inspection of goods and all other functions other than assessment
- Setting up a Turant Suvidha Kendra for facilitating customs clearances

Turant Suvidha Kendra

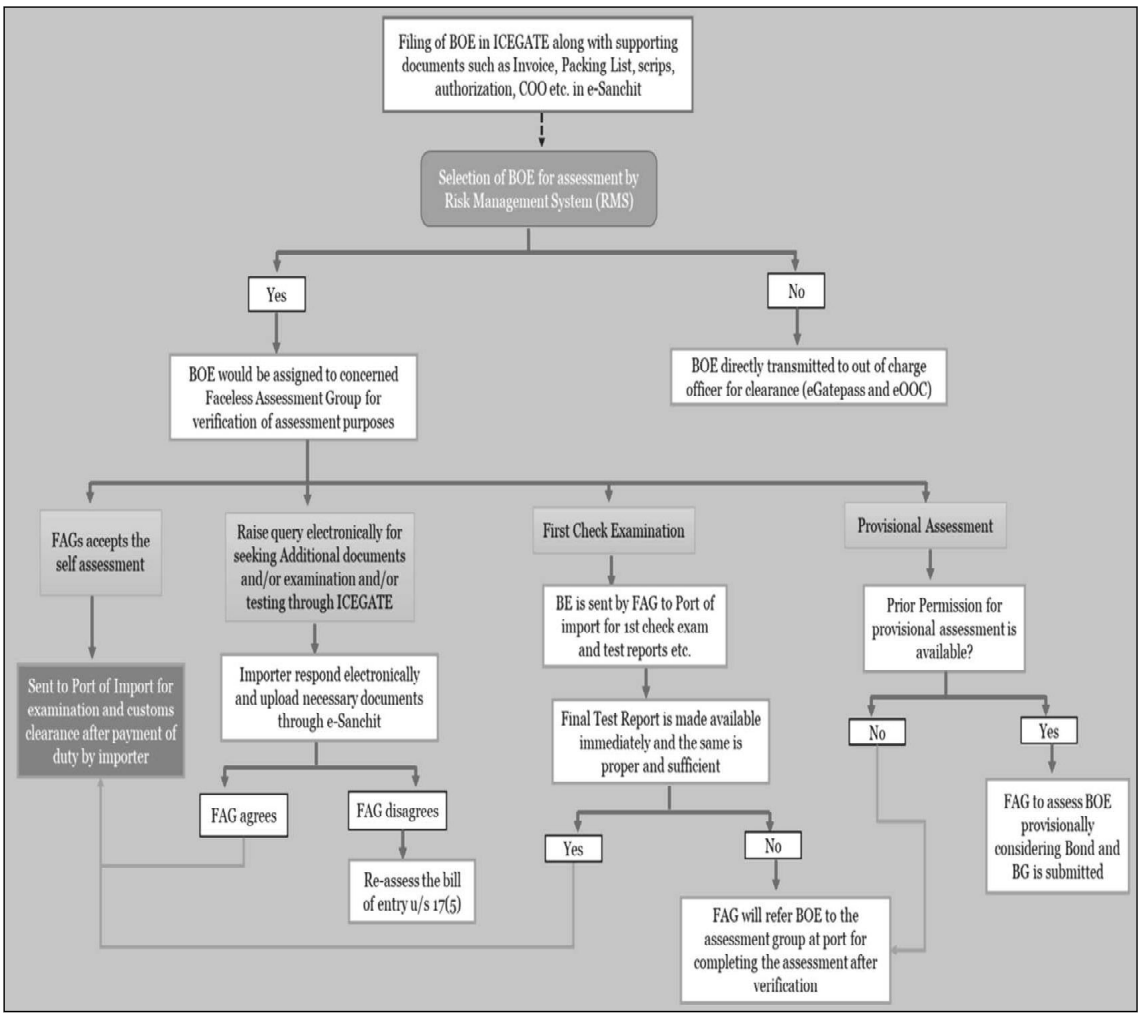
Turant Suvidha Kendra (TSK) would be a dedicated cell in every Customs port of import to facilitate the trade in completing various formalities relating to the Customs assessment even though the actual assessment may be done remotely. The Principal Chief Commissioners / Chief Commissioners shall set up TSK. More precisely, the commissionerate having jurisdiction over port of import would set up a Turant Suvidha Kendra for facilitating Customs clearances. TSK would perform the following roles and functions:

- Accept Bond or Bank Guarantee (BG);
- Carry out any other verifications that may be referred by the Faceless Assessment Groups;
- Defacing of documents / permits licences, wherever required;
- Debit of documents / permits / licences, wherever required; and
- Other functions determined by Commissioner to facilitate trade

It is advised by the board to the Commissionerates to keep in place the suitable procedures for numbering, handling & safekeep of documents at TSK. Based on that Principal Chief Commissioner of Customs Chennai and Bengaluru inaugurated the "Turant Suvidha Kendra" for rolling out the 1st phase of faceless assessment vide Public Notice No. 36/2020- Chennai Customs dated 06th June 2020 and 7/2020-BCZ dated 06th June 2020 respectively. For more details please refer public notice issued by the respective commissionerate for the location and address of the TSK in Chennai and Bengaluru zones.

Procedure for Assessment of Bill of Entry by FAGs in Normal Circumstances

A pictorial presentation of detailed procedure for assessment of bill of entry by FAGs and PAGs are as under:



Procedure for Assessment of Bill of Entry in Exceptional Circumstances

1. Faceless Assessment Group

FAGs may transfer the bill of entry using the Customs Automated System to PAG at the port of import for assessment, without completion of verification of assessment after obtaining the approval from JC / ADC in the following matters:

- Reason to believe that imported goods may be liable for confiscation u / s 111 of the Customs Act
- Related Party Transaction warranting investigation by Special Valuation Branch (SVB) of customs (except transaction which have SVB order)
- FAGs not able to complete the assessment due to lack of documents after multiple communication

2. Port of Import

In the following situations, the Principal Chief Commissioner / Chief Commissioner may direct PAG to pull out the bill of entry at any stage of assessment pending with FAGs

- Receipt of specific alter or intelligence for said bill of entry
- Ordered by Principal Chief Commissioner / Chief Commissioner after recording reasons in writing

Re-assessment procedure

FAGs may order for re-assessment of bill of entry if FAGs are not satisfied with self-assessment and the additional documents furnished by the importer. After the re-assessment the FAG have to compulsorily pass a speaking order in the following cases:

- *If the importer agrees with the re-assessment done by FAG* – In that case, the importer has to communicate his acceptance electronically and accordingly FAG would pass the speaking order within 15 days
- *If the importer does not agree with the re-assessment* – FAG would provide a personal hearing to the importer through video conferencing and thereafter the appellate proceeding may follow.

Adjudication Process

The board has clarified that audit objections, adjudication proceedings, demands u/s 28 of the Customs Act shall be performed by the port of import. Further, where the inputs and clarifications of FAGs are required, the nodal officer shall co-ordinate with the same.

Appellate Proceedings

Appeal against the re-assessment order passed by FAGs shall be handled by Commissioner (Appeal) having jurisdiction over the port of import. In this regard, the board has issued the ***Notification No.51/ 2020-Customs (N.T.) dated 05.06.2020*** authorizing the jurisdictional Commissioner (Appeal) at Bengaluru and Chennai to take up appeals filed. This has been done in order to eliminate the hardship to the taxpayers in filing the appeal at location other than their jurisdiction.

Key Takeaways

This step of the board will lead India towards further ease of doing business. This would be a very far reaching impact brining the transparency and removal of physical interface between the importer and the assessing officer. However, the implementation of the same needs to be tested on technological front. This step requires very high tech infrastructure and does not have any room for causalities. It may happen that in the initial period some teething problem may arose but the same would not affect the pledge of the customs towards paperless, contactless and faceless system.

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INCREASE OF INSOLVENCY TRIGGER THRESHOLD & ITS IMPACT FOR STAKEHOLDERS

Mr. ANANT MERATHIA [1]-*Advocate, Chennai*

In view of the outbreak of the pandemic Covid-19 affecting businesses and economies globally, and in light of the nationwide lock down in India due to the same, the Finance Ministry of India on 24.03.2020 had announced certain specific reliefs packages for companies under the Companies Act 2013 as well as the Insolvency and Bankruptcy Code, 2016. The same was followed by a notification[2]. This change will have a major impact on several stakeholders and the same is assessed herein.

The existing threshold limit provided for under Section 4 of the Insolvency and Bankruptcy Code, 2016 of Rupees One lakh to trigger insolvency proceedings has been raised to Rupees One Crore by way of a notification by the Central Government. The Central Government is of the opinion that raising of the threshold limit will prevent triggering of insolvency proceedings against small and medium enterprises that are facing currently the heat of coronavirus pandemic, thereby effectively safeguarding the interests of Micro, Small and Medium Enterprises (MSME's) in these times of strife. Also, there have been views stating that this revised threshold limit being put in place may not just be temporary, but in fact may be permanent. This of course only time can answer.

It ought to be noted that in the recent past, as early as February 2020[3], the Insolvency Law Committee in its 3rd Report had recommended an increase in the threshold limit for initiating proceedings under the Code. Thus the same had been envisaged and had been in the pipelines for some time now. A relevant extract from the Preface of the aforesaid report reads thus:

"Threshold for calculating default-due to the low threshold of default of INR 1 lakh that is currently required under the Code for initiation of CIRP, a large number of applications were being filed for initiation of CIRP. This has led

[1]Assisted by Associates Priyanka Verma & Poornima Devi

[2]https://www.ibbi.gov.in/uploads/legalframwork/48bf32150f5d6b30477b74f652964edc.pdf

[3]http://www.mca.gov.in/Ministry/pdf/ICLReport_05032020.pdf

to an increased burden on the Adjudicating Authority. Therefore, a need to review the minimum default threshold for admitting a case under Section 4 the Code was felt, and in this respect, it is recommended that it would be appropriate to notify a higher default threshold of INR 50 lakhs. However, it was considered necessary to provide certain exemptions to the MSME sector and accordingly, modified threshold limits have been specifically recommended for MSMEs."

The Ministry of Finance has also via its memorandum (No. F 18/4/2020-PPD) dated 19.02.2020 has clarified that the pandemic Covid-19 would come under an extraordinary event or circumstance beyond human control and stated that the Force Majeure Clause maybe invoked for Covid-19 wherever considered appropriate.[4]

This decision being taken by the Ministry of Finance is most likely being made in the long term vision considering the fact that parties who have entered into contractual obligations in their respective businesses shall be unable to fulfil the same, particularly since time is of essence in most contracts. In the background of the economic slump across multiple sectors in the country and with the pandemic COVID 19 wreaking havoc in India in such a big manner leading to more or less of a lockdown of officially for 21 days w.e.f. 25.03.2020. However, it is to be noted that even before the notification dated 24.03.2020 of the country-wide lockdown was announced several states had gone into a lockdown mode of sorts and closed its borders. It is also pertinent to note that businesses across multiple spectrums had also begun slowing down almost a week prior to the main lockdown. This has and will continue to have a contagion effect across various sectors in the economy considering the fact that most of them are interdependent on each other.

The most benefitted sector would obviously be the MSME's, who are facing insolvency situations in case of defaults of payments of amounts lesser than Rs. 1 crore to operational creditors wherein technically they were not in insolvent situation but under liquidity crunch & crisis which obviously gets aggravated once there is a spate of insolvency petitions filed against them by operational creditors who are primarily unsecured trade creditors.

The introduction of Insolvency and Bankruptcy Code, 2016, certainly did bring in a depression amongst MSME's. However, there were constant representations to the government as a result of which certain relaxations for promoters of these companies even in the background of there being able to come in as Resolution Applicants to propose restructuring plan/revival plan for their

[4]https://doe.gov.in/sites/default/files/Force%20Majeure%20Clause%20-FMC.pdf

own companies were brought in. It is to be noted that this option was not available for other promoters who were not in the category of MSME.

Having said that, the statistics of IBBI[5] show that the Resolution : Liquidation ratio under the IBC had been about 1:4, hence a lot of companies in the MSME sector were being hit. It is to be noted that once insolvency proceedings commence; a lot of aspects tend to go out of control, i.e., the promoter loses his position; uncertainty looms over employees in the business; lenders are reluctant to take haircuts; Insolvency Professionals not being domain experts face challenges apart from other issues such as non-cooperation on part of the erstwhile management etc.

While this move of increasing the minimum threshold is being certainly appreciated by MSME's it would be unfair to completely ignore or turn a blind eye to the concerns of lenders – Banks / NBFC's and other financial and operational creditors. The raising of the threshold limit is a big decision and while more or less a lot of people were of the view that Rs 1 Lakh in today's times was too less a value; Rs 1 Cr is now being seen as too high an amount by certain sections of stakeholders and their general tenor and pulse is that it could have been a possible midway amount like Rs 25 lakhs or Rs 50 lakhs. The reason for the same is that in all the prior regimes, while money recovery suits were extremely time-consuming and not effective; even cases of winding up had a threshold of 1 lakh. Hence now operational creditors whose dues are below 1 crore are left remediless as the winding up provisions have been scrapped and the only option for them is to go for money recovery suits if the amount is below Rupees 1 crore.

The general tendency of businesses to default in making payments to trade creditors was slowly coming down and there was certain sense of financial discipline that was coming in to the business models which will again be affected now in light of the recent developments. The use & misuse of the provisions of the IBC has been a much debated and controversial subject with different school of thoughts sticking to their respective strict points - one taking the view that this brought in a sense of seriousness and business discipline while the other stating that this had become a tool of threat and recoveries of money and ultimately led to a lot of good companies going into insolvency when actually they were in a solvent position and suffering nothing beyond the mere liquidity crisis which they could have come over had they been given time.

The other sector which will have serious concerns is that of the NBFC's and other

[5]https: / / www.ibbi.gov.in / publication

unsecured financial lenders whose loan amounts are less than the new threshold. Such lenders will also be constrained to only move to the civil courts given that most of them cannot approach the DRT's (not that the process is any faster there); but this handicaps them as it narrows down the recourses available and puts them in a financial strain and as far as NBFCs are concerned, they will have to figure out as to how will they manage their NPA's as companies will become relaxed once again in terms of repayments.

The Finance and Corporate Affairs Minister of India, Mrs. Nirmala Sitharaman also stated that the Government may also consider suspending the trigger provisions under the Insolvency and Bankruptcy Code, 2016 in case the current situation following the outbreak of the COVID-19 continues to remain beyond 30.04.2020. Sections 7, 9 and 10 of the Code might be suspended for a period of six months in case the current situation shows no improvement.

Again, if the suspension cited supra materializes, it largely appears to be good news for corporate entities, including MSME's as this will give them a breathing period to revive and focus on the business without the worry of being pushed into insolvency either by an operational or a financial creditor. But one will have to also take into account the perspective of the bankers and their concerns and challenges. It might be really difficult to once again implement the financial discipline that were just starting to be seen amongst several companies which were in the default category; but as they say extraordinary circumstances call for extraordinary measures; this could be seen as one of them and hence at this moment commenting against the same might be premature. It would be advisable to discuss this matter once the government officially takes a call on this post 15.04.2020.

The anti-thought of the above is that when the same banker had been patient enough to allow the company to go to a level where it became a bad account and ultimately a Non-Performing Asset, they can wait for another six months and not make it appear as though the heavens will fall if the trigger of insolvency is withheld to allow the companies to revive which on a larger scale may assist the resuscitation of the economy. However these relaxations should not be seen as a precursor to withdrawal of the Code itself; as this is one piece of legislation which has been most effective and has led to recoveries of more than Rs 4 lakhs Crores; as per earlier statements of the very same finance minister. If withdrawal is going to be the case, then we are headed for some serious concerns and problems in the coming years.

REASSESSMENT - `PRIMA FACIE VIEW' AND `PRIMARY FACTS'

New Delhi Television Ltd. *v.* DCIT [2020] 116 taxmann.com 151 (SC)]

FACTS:

1. New Delhi Television Ltd [NDTV] has number of foreign subsidiaries, essentially in UK and Neatherlands. NNPLC[UK], an indirect subsidiary of NDTV, in the assessment year 2008-09, raised funds by issuing Step Up Coupon Convertible Bonds, redeemable after five years at a premium of 7.5% on the basis of corporate guaranteed furnished by NDTV. However, these bonds were redeemed at discount in November 2009, out of the funds received from its Netharlands subsidiary. In the course of assessment under section 143 for the assessment year 2008-09, NDTV has disclosed the factum of issuance of convertible bonds and their redemption by NNPLC before the AO. While completing assessment under section 143(3), on 03.08.2012, AO concluded that in the absence of virtual financial growth in NNPLC, without the corporate guarantee of NDTV, it could not have raised funds, consequently estimated and added guarantee fees in the returned income of NDTV without suspecting the validity of the transaction.

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2. Subsequently, after the expiry of four year from the end of relevant assessment year, notice under section 148, dated 31.03.2015, was served on NDTV based on the order of DRP (Dispute Resolution Panel) dated 31.12.2013 [i.e. issued subsequent to the assessment u/s 143(3)]. The order of DRP held that the transactions amounting to Rs. 642 crores of Netherland subsidiary as sham, however, without questioning the issue of convertible bonds. NNPLC[UK], being a subsidiary of NDTV, has share capital only to the tune of Rs.40.00 lakhs and did not have any business operations in UK except a postal address. AO relying upon the order of DRP has reason to believe that the funds received for redemption by NNPLC(UK) were the funds of NDTV effected through circuitous round tripping and therefore proposed for an addition of Rs.405.09 crores; also

alleged that there was failure on the part of the NDTV to disclose fully and truly all material facts necessary for the assessment.

3. Pursuant to the order of DRP, assessment was completed for the AY 2009-10 also on similar facts.

4. Before the High Court, the revenue contended that by virtue of second proviso to section 147 read with section 149(1)(c), the limitation period of reassessment would be sixteen (16) years since income from foreign subsidiary is in relation to a financial asset (including financial interest in any entity) outside India; however the notice issued under section 148 was silent with respect to referring of provisions of second proviso to section 147 read with section 149(1)(c) of ITA for the limitation period.

5. On writ petition challenging the notice, the Delhi High Court dismissed the appeal of NDTV on the premise that it had not disclosed full and true materials facts in assessing income.

6. On appeal to Supreme Court;

ISSUES CONSIDERED:

7. The apex court considered the following issues in this case viz;

a. Whether the revenue had valid reason to believe that undisclosed income had escaped assessment?

b. Whether NDTV has disclosed fully and truly all material facts for assessing income in the original assessment?

c. Whether the notice of reassessment, along with the reasons communicated subsequently, invoke the second proviso of section 147?

ARGUMENTS OF NDTV:

8. **a) Reason to believe:** Transactions of Step Up Coupon Convertible Bonds were scrutinised in detail by AO during the course of original assessment. The transaction between the subsidiaries of UK and Netherlands were deliberately mixed up by the revenue. The DRP held the transactions of Netherlands as sham but not questioned about the transactions of Step Up Coupon Convertible Bonds over which the NDTV are related. Therefore, no fresh materials have cropped up and the re-opening resulted in mere change of opinion.

9. **b) True and full disclosure of material facts:** NDTV has disclosed full and true material facts in assessing income, in particular transactions pertaining to Step Up Coupon

Convertible Bonds. Accepting these transactions as genuine, while making assessment only corporate guarantee fees has been added to the income of NDTV in the assessment made u/s 143(3).

10. **Limitation of time – second proviso to S. 147 r. w. S. 149(1)(*c*) of ITA:** No reference has been made in the notice with respect to second proviso and there was no income derived from the foreign entity; a loan cannot be termed to be an asset or an income.

ARGUMENTS OF REVENUE:

11. **a) Reason to believe:** Fresh tangible material, i.e. order of DRP dated 31.12.2013 [arose subsequent to the assessment u/s 143(3)], was relied up on for the reassessment under section 147. At the stage of issue of show cause notice a tentative and *prima facie* view for the escapement of income is adequate and this has got emerged from the order of DRP.

12. **b) True and full disclosure of material facts:** Tax Evasion Petitions filed, subsequent to the original assessment, by the minority shareholders of NDTV allegedly showed evidence of round tripping of undisclosed income through subsidiaries; materials clearly indicate that NDTV is guilty of creating a network of shell companies for this purpose of effecting round tripping its untaxed income earned in India. Consequently, when the transactions found to be bogus, it cannot be said that true and full disclosure of material facts had been made in assessing its income. Relying on the decision[1] which ruled as; the law postulates a duty on every assessee to disclose fully and truly all material facts on its assessment; material facts should be proximate and do not have remote bearing on its assessment. Material facts are those facts which if taken into accounts they would have an adverse effect on assessee by the higher assessment of income than the one actually assessed/returned.

13. **Limitation of time – second proviso to S. 147 r. w. S. 149(1)(*c*) of ITA:** Mere not mentioning of the second proviso in the notice did not invalidate the re-opening; even if the source of power to issue notice has been wrongly mentioned, conveying all relevant facts would empower the revenue to issue such notice under section 148 of ITA.

SC DECISION:

14. **a) Reason to believe:** Information that cropped up and noticed during the proceedings of assessment in

[1]Honda Siel Power Products v. Dy. CIT [2012] 340 ITR 53 / [2011] 197 Taxman 415

subsequent years can definitely form a tangible material to invoke reassessment proceedings of an earlier year under section 147 of ITA. In the present case, the materials disclosed in the assessment proceedings of subsequent year as well as the material on record of minority shareholders form a **prima facie view** for the issue of notice under section 147 of ITA, therefore, there were reasons to believe that income had escaped assessment.

15. b) Disclosure of material facts: It is the duty of assessee to disclose fully and truly all material facts, which termed as **primary facts**; nondisclosure of other facts, which termed as secondary facts is not necessary. The fact that issue of step-up coupon bonds along with the details of entities who were subscribed to the bonds and redemption of bonds discounted at a lower rate were disclosed before the assessment was finalised and it was accepted. The disclosure of these primary facts amounted to true and full disclosure of all material facts for assessment; It was for the AO at that stage to decide what inference should be drawn from the facts of the case. Genuineness was not doubted at that stage. The other facts relied upon by revenue are order of DRP and petitions which emerged subsequent to assessment. Hence, this could not lead to the conclusion that there was non-disclosure of true and material facts by the assessee (NDTV) for the assessment made u/s 143(3), hence the issue of notice after the period of four (4) years is required to be quashed.

16. Limitation of time – second proviso to S. 147 r. w. S. 149(1)(*c*) of ITA: Though not mentioning of proviso will not invalidate the notice issued under section 148, in our view, this is not a fair and proper procedure. If not at the notice, even at the time of furnishing the reasons, reference to second proviso ought to have communicated to the assessee (NDTV) so as to provide an opportunity to show that it was not deriving any income from any foreign asset or financial interest in any foreign entity or that the asset did not belong to it or any other ground which may be available; this do not confirm the principles of natural justice. The assessee could not be taken by surprise at the stage of rejection of its objections, on relying on second proviso to section 147 by revenue, before the High Court. Therefore, fresh notice may be issued, by revenue, taking benefit of the second proviso if otherwise permissible under law.

BUTTRESSES or GROUNDS for the DECISION :

Reason to believe - facts cropped up subsequent to assessment:

17. Prior to the Direct Tax Laws (Amendment) Act, 1987, the prerequisite condition for invoking reassessment, by AO, under section 147 (b) is consequent of information in possession had reason to believe that income chargeable to tax had escaped assessment. The information obtained by AO in the assessment proceedings of subsequent year cannot be doubted and the information is very well within the purview of section 147(b).[2]

18. The fresh information obtained after concluding the assessment impacted two different and distinct situations viz i) falsifying the statements made by the assessee in original assessment or ii) drawing fresh inference other than the inference drawn in original assessment, which were based on the facts available at that time. Thus, where the transaction itself exploded as bogus consequent to fresh information, which is specific in nature and reliable in character, then it could not be regarded that the assessee had made full and true disclosure of material facts; failure to carry out detailed assessment/investigation proceedings during original assessment cannot take away the jurisdiction of reassessment proceedings under section 147 of ITA. Therefore, the subsequent information, based on which the AO has reason to believe that income chargeable to tax had escaped assessment, should be relevant, reliable and specific; it is the information which unearths the omission on the part of the assessee, for not having disclosed the true and full material facts relevant to the assessment.[3]

19. It does not preclude an AO from the reopening of assessment of an earlier year on the basis of findings of the fact out of fresh materials obtained in the course of assessment of subsequent year.[4]

Disclosure of true and full material [primary] facts in assessing income:

20. Though the statue postulates a duty on assessee to disclose fully and truly all material facts necessary for his assessment, what facts are material and necessary differs from case to case.

[2]Claggett Brachi Co. Ltd., London v. CIT, Andhra Pradesh1989 Supp. (2) SCC 182 [SC]

[3]Phool Chand Bajrang Lal and Another v. ITO and Another[1993] 4 SCC 77 [SC]

[4]Ess Kay Engineering Co.(P) Ltd. v. CIT, Amritsar [2001] 10 SCC 189 [SC]

In assessment, the AO must know all facts to derive correct conclusion in computing and determining income and tax for the assessment; these primary facts have inference to collect further facts in order to draw proper legal inference and ascertain on a correct interpretation of taxing element for the purpose of levying proper tax. To an issue whether a receipt is capital or revenue, the AO has to find out the primary facts provided and then infer the other secondary facts required in order to conclude a proper legal inference of what the nature of receipt should be. It is the duty of assessee to disclose all primary facts to AO in assessing the income. Mere production of account books and documents are not adequate unless the attention of AO has drawn on particular items in the account books, or the particular portions of the documents, which are relevant for assessment, otherwise it would amount to 'omission to disclose fully and truly all material facts necessary for his assessment'. However, the obligation of assessee does not travel beyond the disclosure of primary facts before AO in determining the income; once all primary facts are disclosed It is for the AO to decide what inferences of facts can be reasonably drawn and what legal inferences have ultimately to be drawn. It is meaningless to demand the assessee to disclose inferences on primary facts.[5]

Limitation of time – second proviso to S. 147 r. w. S. 149(1)(*c*) of ITA:

21. Second proviso to section 147 provides that first proviso to section 147 (i.e. the limitation time of 4 or 6 years) shall not be applicable in a case where any income escaped for assessment in any financial year relates to a financial asset (including financial interest in any entity) located outside India. However, in such case, section 149(1)(c) read with second proviso to section 147, provides that the limitation of time of 16 years from the end of relevant assessment year would apply.

22. The notice is conspicuously silent with regard to the second proviso of section 148 but basically relies on the provision of section 148 of the Act. In the reasons for re-opening communicated to NDTV also only reference has been made on non-disclosure of material facts but not this limitation of time; it is only when rejecting the objections of NDTV reference has been made.

[5]Calcutta Discount Co. Ltd. v. ITO [1961] 41 ITR 191 (SC)

AUTHOR's COMMENTS:

Scope of Reassessment:

23. Section 147 provides the power of assessing officer to assess income, if he has reason to believe, has escaped from assessment along with any other similar income that has been noticed subsequently during the course of re-assessment proceedings subject to the provisions of section 148 to 153.

24. Re-opening would be only on the basis of 'belief' and not on the basis of 'suspicion'.[6] information received from investigation wing can be used for re-opening only after having independent evaluation and forming of belief by AO that there is live and tangible nexus between the information and income that has escaped from assessment.[7]

25. Section 147 refers only the income chargeable to tax that has escaped from tax and the jurisdiction of AO is confined to assess only such income which has escaped tax or has been under-assessed; it does not extend to revising, reopening or reconsidering the whole assessment or permitting the assessee to reagitate the issues concluded in the original assessment proceedings. The term 'escaped assessment' includes both 'non-assessment' as well as 'under assessment'; income is said to have 'escaped assessment' when it has not been charged to tax in the relevant year of assessment.[8] Reassessment once accepted has attained finality and cannot be challenged subsequently.[9] Reassessment based on the order of earlier year is not justified.[10]

26. The use of the words 'reason to believe' in Section 147 has to be interpreted schematically; liberal interpretation of the word would have the consequence of conferring arbitrary powers on the AO resulting in initiation of re-assessment proceedings merely on the basis of change of opinion.[11]

Reason to believe – prima facie view of 'income has escaped' is adequate:

27. The word "reason" in the phrase "reason to believe" would mean cause or justification. If the AO has cause or justification that income had escaped assessment, it means that he has reason

[6]CIT v. Gupta Abhuwhan (P.) Ltd. [2009] 312 ITR 166/178 Taxman 473 (Delhi)
[7]AGR Investment Ltd. v. Additional CIT [2011] 333 ITR 146/197 Taxman 177/9 taxmann.com 62 (Delhi)
[8]CIT v. Sun Engineering Works (P.) Ltd. [1992] 64 Taxman 442 (SC)
[9]Kultar Exports v. CIT [2015] 63 taxmann.com 328 (SC)
[10]DCIT v. Atomstroy export [2018] 95 taxmann.com 260 (SC)
[11]ITO v. Techspan India (P.) Ltd. [2018] 92 taxmann.com 361/255 Taxman 152 (SC)

to believe that an income had escaped assessment; however, it does not mean that AO should have finally ascertained the fact by legal evidence or conclusion.[12]

28. At the stage of initiation, the final outcome of the proceeding is not relevant; what is required is "reason to believe", but not the established fact of escapement of income.[13]

29. Formation of belief is within the realm of subjective satisfaction of AO based on the relevant material, but whether the materials would conclusively prove the escapement is not concerned at the stage of issue of notice.[14]

30. The reasons must speak for themselves; it has to explain what the material that ought to be disclosed in the first instance that was not disclosed by the assessee.[15] The reasons recorded for reassessment are the guiding factor and not the reasons or explanations given by AO at a later stage with respect to notice of reassessment.[16]

Change of opinion – an in-built test embedded in 'reason to believe':

31. Prior to Direct Tax Laws (Amendment) Act, 1987, the pre-requisite of reopening of an assessment for assessing the income escaped from assessment, was based the two conditions provided in section 147 of ITA viz. i) reason to believe that income has escaped from assessment due to failure on the part of assessee in making true and full disclosure of material facts or ii) in consequence of information in possession of AO has reason to believe that income is chargeable to tax has escaped in the relevant year. Post amendment of section 147, with effect from 01.04.1987, provides only one condition viz., where the AO is of the *opinion* that income has escaped assessment, he can re-open the assessment; thus this has widened the powers of AO on reassessment. The Amendment Act 1989, again, on representations, replaced the words 'opinion' with the words 'reason to believe' with effect from 01.04.1989 with an intention to remove possible abuse of powers vested therein.

[12]Asstt. CIT v. Rajesh Jhaveri Stock Brokers (P.) Ltd. [2007] 161 Taxman 316/291 ITR 500 [SC]

[13]Central Provinces Manganese Ore Co. Ltd. v. ITO (1991) 191 ITR 662 [SC]

[14]ITO v. Selected Dalurband Coal Co. (P.) Ltd. (1996) 217 ITR 597 (SC); Raymond Woolen Mills Ltd. v.ITO (1999) 236 ITR 34 (SC)

[15]Oracle India (P.) Ltd. v. Asstt. CIT [2017] 83 taxmann.com 368 (Delhi)

[16]Northern Exim (P.) Ltd. v. Dy. CIT [2013] 357 ITR 586/[2012] 20 taxmann.com 466/208 Taxman 175 (Mag.) (Delhi)

32. To an issue whether this amendment has taken away the concept of 'change of opinion' in the proceedings of reassessment; held, there is conceptual difference between power to review and power to re-assess. The AO in reassessment proceedings has only the 'power to assess' not the 'power to review'. Only in case of review of assessment, change of opinion would occur, which is not the intended in reassessment proceedings. After 01.04.1989, for the purpose of reopening assessments, the AO must have 'tangible material' leading to the conclusion that income has escaped from assessment and the reasons must have a link or nexus with the formation of belief.[17]

Findings of Audit Party – review of assessment or change of opinion:

33. Mere change of opinion cannot be the basis for issuing notice under section 147/148. An audit party, essentially, performs administrative or executive functions and cannot be attributed the power of judicial supervision over the quasi-judicial acts of income-tax authorities. Information means knowledge or instruction may be either concerned with facts or particulars, or law. The audit opinion with respect to evaluation of law on an assessment cannot form a basis of belief, for reopening, as it vests solely with the AO. A second view on evaluation of law would amount to change of opinion. Also, an assessment cannot be reopened to correct an error discovered on a reconsideration of the same material.[18]

34. Findings of audit party would not constitute a tangible material[19] for forming reason to believe on escaped income. Having no fresh materials, the reassessment would result in change of opinion on the existing materials.[20] Conversely reopening of assessment on the basis of a factual error pointed out by the audit party is permissible under law as it does not amount to change of opinion.[21]

[17]CIT v. Kelvinator of India Ltd. [2010] 187 Taxman 312 (SC)

[18]Indian & Eastern Newspaper Society v. CIT [1979] 2 Taxman 197 (SC)

[19]PCIT v. S. Chand & Co. Ltd. [2018] 100 taxmann.com 353 (SC)

[20]Carlton Overseas (P.) Ltd. v. ITO [2010] 188 Taxman 11 (Delhi); FIS Global Business Solutions India (P.) Ltd. v. ACIT [2019] 102 taxmann.com 471 (Delhi)

[21]CIT v. P.V.S. Beedies (P.) Ltd. [1999] 103 Taxman 294 (SC);

Disclosure of truly and fully all material/ primary facts:

35. First proviso to section 147 provides that in case of assessment made under section 143(3) or reassessment under this section 147, no action for the reassessment on escapement of income shall be taken for that assessment year after the expiry of four years from the end of relevant assessment year unless a) there is failure on the part of the assessee to make return under section 139 / 142(1) / 148 or to disclose fully and truly all material facts necessary for assessment. When transaction itself found as bogus, on basis of subsequent information, it cannot be said that there was 'true' and 'full' disclosure of facts.[22]

CONCLUSION:

36. In most of the cases, reassessment proceedings are initiated without following the principles intended by the legislation. Challenging the proceedings at appropriate time, before the court of law, would invalidate the proceedings or this can be contested in the appeal proceedings as one of the grounds to struck down the appeal along with other grounds of objections.

[22]Phool Chand Bajrang Lal v. ITO [1993] 69 Taxman 627 (SC)

LARGER BENCH OF CESTAT PROVIDES A LARGE RELIEF TO BANKS

CA RAHUL JAIN & **CA. V. BARATWAJ**

One of the widely litigated issues of the pre-GST regime even today is in respect of eligibility to avail cenvat credit of input taxes paid. The root cause for the same is due to the restrictive and open definition of the terms 'input', 'input services' or 'capital goods' under the Cenvat Credit Rules, 2004 (CCR) in contradistinction to the definition of these terms in the GST law.

From the view point of Banks, one of such litigated issues having high stakes is eligibility to claim cenvat credit in respect of the service tax paid on insurance premium remunerated to Deposit Insurance and Credit Guarantee Corporation (DICGC).

Essentially, the primary function of a Bank is to accept deposits from public and use the same for providing various services, the primary one being lending.

In this regard, to safeguard the interests of the depositors, the Reserve Bank of India (RBI) established DICGC under the DICGC Act, 1961 which safeguards the deposits of the public. In simple terms, in case any bank fails in its functioning and is not able to repay the deposits back to the depositors, the DICGC steps in and is liable to the depositors upto a specified maximum limit. This is a service provided by DICGC to banks in return for a consideration known as premium. It is mandatory for all commercial banks to get itself registered with DICGC on obtaining banking license from RBI. In light of some of the recent developments in the banking sector, the requirement and importance of mandating banks to take such an insurance cannot be overstated. Further, RBI has the power to cancel the license of a bank in case it does not comply with the DICGC regulations.

The moot point of dispute is whether the services rendered by DICGC to banks is an input service for a bank and consequently, whether the bank is eligible for credit. There were contrasting views expressed by Tribunals. The issue was subsequently referred to the Larger Bench of the Tribunal in the case of South Indian Bank ('assessee') which held that credit is eligible.

This Article focusses on analysing the decision of the Larger Bench and its implications. Before delving into the decision, it is important to understand how banks avail credit.

Understanding cenvat availment by banks

As mentioned earlier, cenvat credit can be availed in respect of inputs, input services and capital goods used for providing output services. Banks avail of various services for provision of their output service. An illustrative list of services which are received by banks and provided by banks are given in the table below.

Illustrative list of services received by a bank	**Illustrative list of services provided by a bank**	**Illustrative list of services provided by a bank**
	Category-A	**Category-B**
Renting of building	Lending, where consideration is inform of interest or discount (covered under the negative list)	Lending, where consideration is in any other form like charges
Provision of Software		Merchant Banking
Maintenance of ATMs		Financing assets
DICGC guarantee		
Services of agents		

As per Rule 2(l) of CCR, a service shall be regarded as input service and eligible for cenvat credit if:

a) they are used for providing any output service **or**

b) they are services of the nature mentioned in the inclusive clause of 'input services'

and

c) the services are not covered in the 'exclusion' clause of 'input services'

Further, under the scheme of the CCR, the manner of availment of credit is as under:

a) full credit is available on input services used exclusively for providing taxable services

b) no credit is available on input services used exclusively for providing exempted services

c) credit of common services used for provision of both taxable and exempted services must be availed on a proportionate basis. That is, credit is to be taken in proportion to turnover of taxable services to total turnover based on a formula or by making payment of tax at a standard rate on the value of exempted services (say 6%/7%)

The term 'exempted service' *interalia* means a service specified in the negative list of services under Section 66D of the Finance Act, 1994. Further the term 'output service' excludes a service specified in the negative list of services.

Therefore, from the above, in view of the inclusion of lending to the extent consideration is in the form of interest or discount in the negative list, services used in relation to the same are not input services. Therefore, banks had to keep records for services which are used for providing Category-A services and Category-B services separately and avail credit only in respect of services used in relation to Category-B services. In case separate records were not maintained, credit reversal had to be done as mentioned in clause (c) above.

The 2011 Budget, introduced a special provision in the CCR whereby banks were entitled to take the entire credit, provided 50% of such credit was reversed by them. Reasoning for the same was stated in Circular No. F.No. 334/3/2011-TRU dated 28.02.2011 that major source of income for a bank is in the form of interest and considering that most of the services received by banks are common in nature, it was difficult to ascertain as to which services are used for providing Category-A services. To remove difficulty in attribution, banks were entitled to take 50% of the eligible credit instead of reversing credit under the normal mechanism. This provision made it easier for banks to calculate and avail credit.

Subsequently, the Budget 2016 made this 50% reversal as optional. That is, banks were allowed option to choose whether to make reversal under the normal mechanism or to continue reversal of 50%.

From the aforesaid discussion, it is clear that once a service is an input service,

a) Until 2011, banks had to reverse credit as per normal reversal mechanism

b) From 2011-2016, instead of following normal reversal mechanism, banks had to reverse 50% of the credit available in respect of such services and

c) From 2016, banks had the option of choosing between normal reversal mechanism and reversal of 50% credit.

The remaining credit after reversal can be availed by the banks. With this basic understanding, the decision in the case of South Indian Bank is analysed below.

Analysing the decision of the Larger Bench

The issue in the present case was at the threshold itself i.e. whether the services offered by DICGC could be regarded as input services or not. This was referred to the larger bench in view of the following conflicting decisions:

Decisions which held credit was eligible	**Decisions which held credit was not eligible**
State Bank of Bikaner and Jaipur vs. Commissioner of Central Excise and Service Tax, [**2019-VIL-422-CESTAT-DEL-ST]**	ICICI Bank Limited vs. Commissioner of Service Tax **[2019-VIL-108-CESTAT-MUM-ST]**
DCB Bank Limited vs. Commissioner of Service Tax, Mumbai **[2017-VIL-1115-CESTAT-MUM-ST]**	
Punjab National Bank vs. Commissioner of Central Excise and Service Tax, Bhopal **[2018-VIL-857-CESTAT-DEL-ST]**	

The finding in the case of ICICI Bank supra was that deposits by customers did not involve any service by the banks to customers and interest against loans and advances were covered in the negative list. Further, with the removal of 'activities relating to business' from the inclusive definition of 'input services', the argument that compliance with provisions of DICGC Act, 1961 was a pre-requisite to commence and continue the 'business' of banking and thus the premium is eligible for credit fails. It was also observed that the insurance is not in respect of business of the bank but only for the deposits of customers. Citing the aforesaid reasons, it was held that credit was not eligible.

Major arguments put forth by the department and the assessee before the Larger Bench and the findings of the Larger Bench is provided in the table below:

S. No	Arguments by Department	Arguments by assessee	Findings of the Tribunal
1	The service provided by DICGC does not have a direct nexus with the output services provided by the bank	Acceptance of deposits are integrally connected to the services provided by bank. Thus, insurance for such deposits are also connected with output services	• Acceptance of deposits is not only a prerequisite for lending but is also necessary for the banks since the entire activity undertaken by the bank begins with the acceptance of deposits • By registering with DICGC, banks protect interest of depositors without which there will loss of confidence in public which will result in loss of deposits • In case of cancellation of DICGC registration, it may result in cancellation of banking license • The insurance services received from DICGC is not only mandatory but also commercially expedient • The service is thus used for providing output service and hence an input service
2	The premium paid is only for protecting interest of the depositors and does not provide any protection to banks	Payment of the insurance premium is a statutory obligation and non-compliance of the same may result in cancellation of banking license by RBI	
3	No consideration is charged by bank for accepting the deposits, it is only a transaction in money and hence covered by the negative list	The negative list only covers extending of deposits by banks and not accepting deposits by bank. Both the activities are different	The activities 'accepting deposits' and 'extending deposits' are not the same. In case of the former, the bank pays interest while in the latter case, the bank receives interest. Thus, the department's contention cannot be agreed.

4	-	Even assuming that the insurance has no connection with the output service, upon reversing 50% of credit, remaining credit can still be availed	Once reversal of 50% has been made, banks are entitled for credit of input services having nexus with the output services. Having complied with the provisions of CCR, credit is available
5	-		• In the case of ***Commissioner of Central Excise, Bangalore vs. PNB Metlife India Insurance Co. Ltd [2015-VIL-174-KAR-ST],*** it was held that reinsurance service, being a statutory obligation under the Insurance Act, has to be considered as having nexus with the output service and hence would be an input service. • In ***Shriram Life Insurance Company Ltd. vs. Commissioner of Customs, Central Excise and Service Tax, Hyderabad [2019-VIL-92-CESTAT-HYD-ST],*** it was held that investment in securities was mandatory under the Insurance Act and thus was integral to the output service of insurance.

The Larger Bench thus held that the services of DICGC were part of input services for a bank and hence eligible for credit. This decision has provided a major relief to banks since sky rocketing demands were raised by the department on banks in this respect.

One major takeaway from this decision is that in case any service is received under a statutory obligation, in view of its importance for conducting the business, it shall be regarded as having nexus with the output services and hence regarded as input services.

Some interesting aspects and applications of this decision

Some of the interesting facets and applications of this decision is discussed below:

a) The Larger Bench did not give its finding as to whether the service by DICGC is covered under the inclusive definition of 'input service'. It was held that once the service is covered under the main clause, there was no necessity to venture into the 'inclusive' part. The inclusive definition interalia includes the services used in relation to 'financing'. It can be argued that the depositors are essentially 'financing' the bank and thus the services of DICGC are services in relation to 'financing' and thus eligible as 'input service'. A finding on this aspect may have ensured that the issue is settled even more favorably to the banks.

b) An important principle based on which this decision was rendered is that accepting of deposits is a pre-requisite for a bank to render its output services and hence DICGC services being in relation to accepting deposits, shall be regarded as having nexus with the output services of the bank. Therefore, a question may arise as to whether this principle can be applied in respect of all other services availed by a bank in relation to accepting deposits and whether credit can be availed. The answer seems to be in the affirmative provided such services satisfy the definition of 'input services'

c) Another food for thought is whether the rationale of this decision can be applied in case of a Non-Banking Financial Company (NBFC). NBFCs are also into the business of extending loans for a consideration in the form of interest and thus covered under the negative list. NBFCs raise funds from various sources like shares and debt instruments for which they receive services on which service tax may have been paid. For availing credit of such service tax, can this decision be relied upon? The answer seems to be in the affirmative considering the principle that since the function of financing is a pre-requisite for lending, there is a direct nexus with the output service.

Implication of this decision in GST regime

In the GST regime, the definition of input and input services are very wide and includes all items used in course or furtherance of business. Though there are specific restrictions in the form of 'blocked credits', the definition of input service is liberal in comparison to CCR and any service used in course or furtherance of business qualifies as an input service.

At this point it is important to note that erstwhile provisions relating to credit eligibility of banks are also enshrined in GST. Section 17 of the Central Goods and Services Act, 2017 provides for reversal of credit in relation to exempted services and also provides an option for banks to avail 50% credit. Further, like the negative list in service tax, the services of extending deposits, loans or advances in so far as the consideration is in the form of interest and discounts are exempted as per Notification No. 12/2017 dated 28.06.2017. So, the question which again arises in the GST regime is whether services relating to accepting of deposits is eligible for credit. From the Larger bench decision, it can be concluded that any statutory obligation is something which is necessary for conduct of business and credit in respect of premium paid to DICGC would be available to banks under GST subject to reversal under normal mechanism or reversal of 50% credit.

Conclusion

The issue of credit eligibility of DICGC premium has been put to rest by the Larger Bench. This has come as a huge relief to banks considering the amount of credit involved. Apart from the legal perspective, this decision may also have an Audit perspective attached to it. From the view point of Bank Audit, Auditors must keep in mind the impact of this decision while making his judgment on the treatment of provisions created and contingent liabilities disclosed in the earlier years. Auditors must also keep a tab on the status of this case while making the aforesaid judgment; considering the huge stakes involved, there is a high probability that the Department may prefer an appeal before higher forums (High Court and Supreme Court). Further, the impact of the decision in the GST regime shall be considered by Auditors while performing audit and also reporting such transactions in GSTR 9C.

[Rahul Jain is Joint Partner and V. Baratwaj is Associate in Lakshmikumaran & Sridharan, Chennai. Views expressed are strictly personal]

A DISCUSSION PAPER ON CHAPTER III- DIRECT TAXES OF FINANCE ACT, 2020- FEBRUARY & MARCH ,2020

CA. VIVEK RAJAN V

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

The Finance Bill, 2020 (Bill No. 26 of 2020) was presented in Lok Sabha on 01st February 2020 by Ms. Nirmala Sitharaman, Union Finance Minister. In Chapter III of Finance Bill, 2020, there has been 104 amendments to the Income-tax Act, 1961. The Finance Bill, 2020 got the assent of the President of India on 27th March 2020 and thereby becoming **THE FINANCE ACT, 2020** [ACT NO 12. OF 2020]

Scope of the Discussion Paper

This discussion paper attempts to **cover all sections of the Finance Act, 2020** 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 Act, 2020. Please refer to Finance Act, 2020 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.

We thank the readers for giving their support for the 100% coverage attempted for the first time for the Budget 2019. Similarly, we are attempting to extend the coverage of the discussion paper **to all the sections of the Finance Act, 2020 and also to coin FAQ's to the best extent possible.** Giving due consideration to the volume of the discussion paper and the challenges involved in publishing, we intend to present this in a phased manner (July 2020 and August 2020). ***The sections which are not covered in this month's bulletin, would be covered in the subsequent months.*** We sincerely hope that this effort is of value addition to the readers.

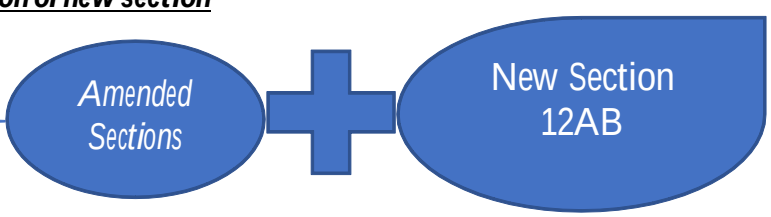
Acronym and Description

FA	Finance Act
CG	Capital Gains
IFHP	Income from House Property
LTCG	Long Term Capital Gain
The Act	Income Tax Act, 1961
PY	Previous Year
AY	Assessment Year
PCIT	Principal Commissioner of Income-tax
CIT	Commissioner of Income-tax
NRI	Non- resident Indian
RBI	Reserve Bank of India
NCLT	National Company Law Tribunal
FMV	Fair Market Value
TDS	Tax Deducted at Source
TCS	Tax Collected at Source

2. Amendments relating to Trusts- Gamechanger - Sunset of almost a 60-year regime and dawn of a new era layered in digital world and …….

Sections Amended and Insertion of new section

a. Section 10(23C)
b. Section 11
c. Section 12A
d. Section 12AA



With effect from 01st April 2021 and applies from AY 2021-22 and subsequent AY's

Present scenario and reference to the Explanatory Memorandum

Present scenario

1. Section 12 has been in place in the first version of Indian Income-tax Act, 1961 right from 1961.

2. From then on, the law relating to Trusts with respect to Income-tax law, have evolved so much so as to prompt a tabular image rather than a verbal summary and the same is as under

A travel from 1961 to 2020

Name of the Section	History
Section 12- Income of trusts or institutions from voluntary contributions	From 1961 to 1971
Section 12- Income of trusts or institutions from contributions	From 1972 to 2020
Section 12A- Conditions as to registration of trusts, etc	From 1972 to 2006
Section 12A- Conditions for applicability of sections 11 and 12	From 2007 to 2020
Section 12AA- Procedure for registration	From 1997 to 2020
Section 12AB- Procedure for fresh registration	From 2020

3. Section 10 (23C) has also been in the Act from the year 1976 initially covering CG and SG aided funds / charitable institutions and in the subsequent years including the

- Educational institutions/ Universities
- Hospitals
- Public Charitable Trusts
- Public Religious Trusts
- The PM CARES FUND (the *latest of the additions to section 10(23C) vide Ordinance No.2 of 2020 w.e.f 01.04.2020)*

4. Apart from the Income-tax Act, other statutes have also come into existence and have impacted the Trusts at large, the same are as under

- **The Foreign Contribution (Regulation) Act, 2010** – *A tough security law that fairly regulated the Trusts receiving foreign contribution and related matters and also cancelled the FCRA registration of many Trusts due to failure in submitting Annual Returns and also levied penalty.*
- **The Foreign Contribution Regulations Rules, 2015** *brought into existence the concept of registration being valid for 5 years and renewal thereof.*
- **The Companies Act, 2013** – *By introducing the Corporate Social Responsibility [CSR] provisions so much so that for most companies, the Trusts were at the backend* ***effectively*** *executing the CSR. Most of these Trusts, stayed true to the spirit and purpose and as is the general case, few of them used these provisions inappropriately thereby leading to more tightened regulations for everybody.*

5. Amidst weathering these strong storms, few aspects gave solace by not enhancing the compliance burden and these were

- Perpetuality of Section 10 (23C) and Section 12AA registration -*subject to cancellation and the provisions of cancellation further tightened by Finance (No.2) Act, 2019 (Point No 6. of the Discussion Paper, August 2019's monthly bulletin of CASC).*
- Filing of forms for the donation received as donee so as to confer the deduction benefit u/s 80G for the donor

6. The Budget of 2020 has done away with the perpetuality of Section 10(23C) and Section 12AA registration by introducing many provisions, the implications of each and every provision being very huge and deeply layered and many of them are welcome , open ended at few places, and requiring usage of rules of interpretation at many places, and also having the potential of leading to disputes/ litigations in few places.

7. The Budget of 2020 has also enabled filing of returns for the donations received by the donee trust so as to enable conferring of the deduction benefit u/s 80G to the donors.

8. We are attempting to cover all the amendments related to trusts in parts and to the extent possible include FAQ's and flowcharts. The parts are broadly as under

- Implications for an existing entity u/s 12AA or u/s 10(23C) with time limits from the organisation's perspective.
- Implications for organisations seeking fresh registrations u/s 12AB with time limits from the organisation's perspective.
- Implications for organisations having both registration u/s 12AA and u/s 10(23C)
- Implications with respect to section 80G
- Time limits from the department's perspective and matters relating to documentation *(what documents to be furnished and what can be sought)*
- Sneak peek into the tax implications in the international circuit

Reference to the Explanatory Memorandum

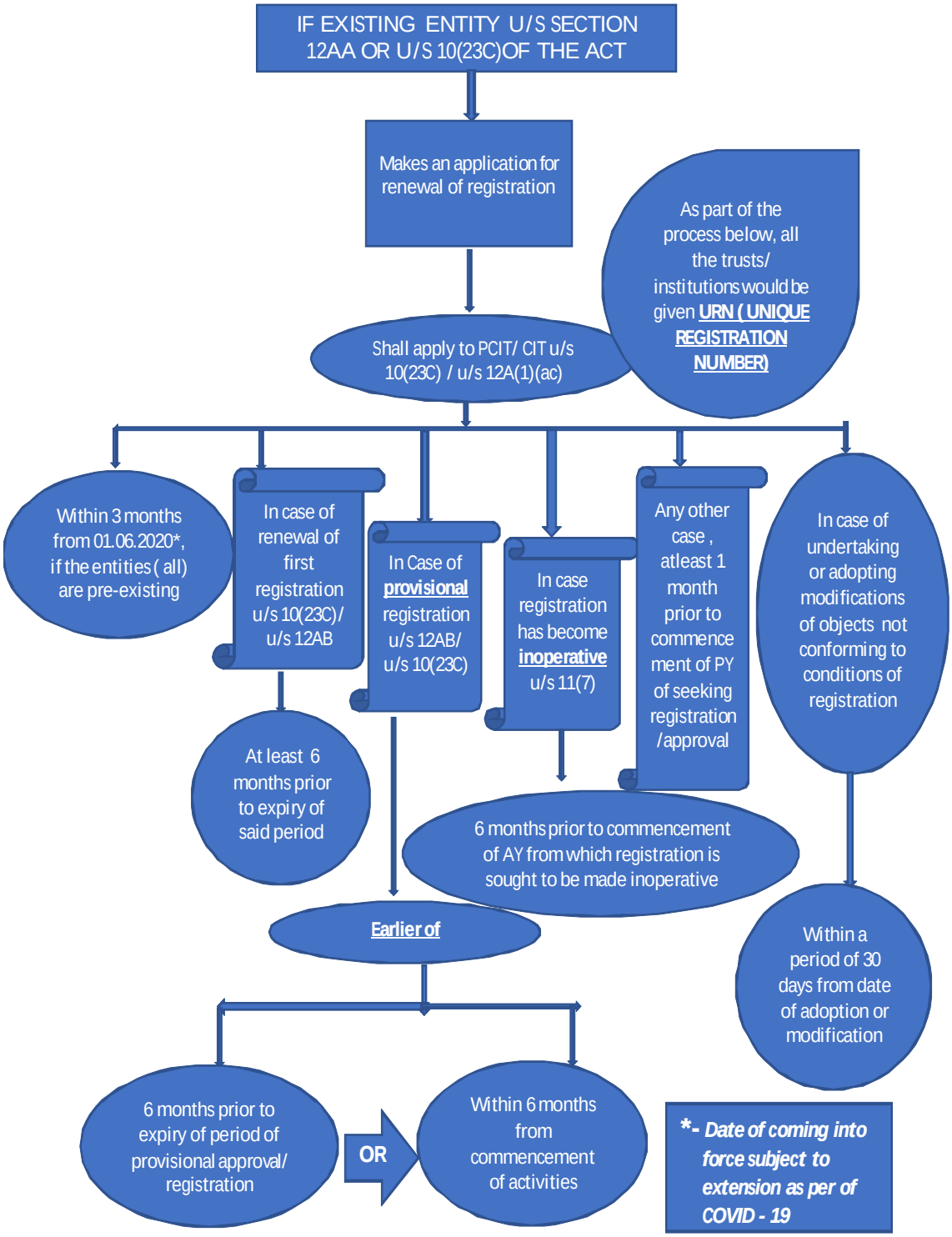
Rationalising the process of registration of trusts, institutions, funds, university, hospital etc and approval in the case of association, university, college, institution or company etc

1. The present process of the registration of organisations of the kind mentioned above and approval needs improvement with the advent of technology and keeping in mind the practical difficulties in obtaining registration/ approval before actually starting the activities.
2. It was also felt that the approval should be for a limited period, say for period **not exceeding 5 years at one time** which would ensure adherence to the conditions attached with the approval.
3. The amendment would help in having a non-adversarial regime and not conducting roving inquiry in the affairs of the exempt entities on day to day basis, in general, as in any case they would be revisiting the concerned authorities for new registration before expiry of the period of exemption.

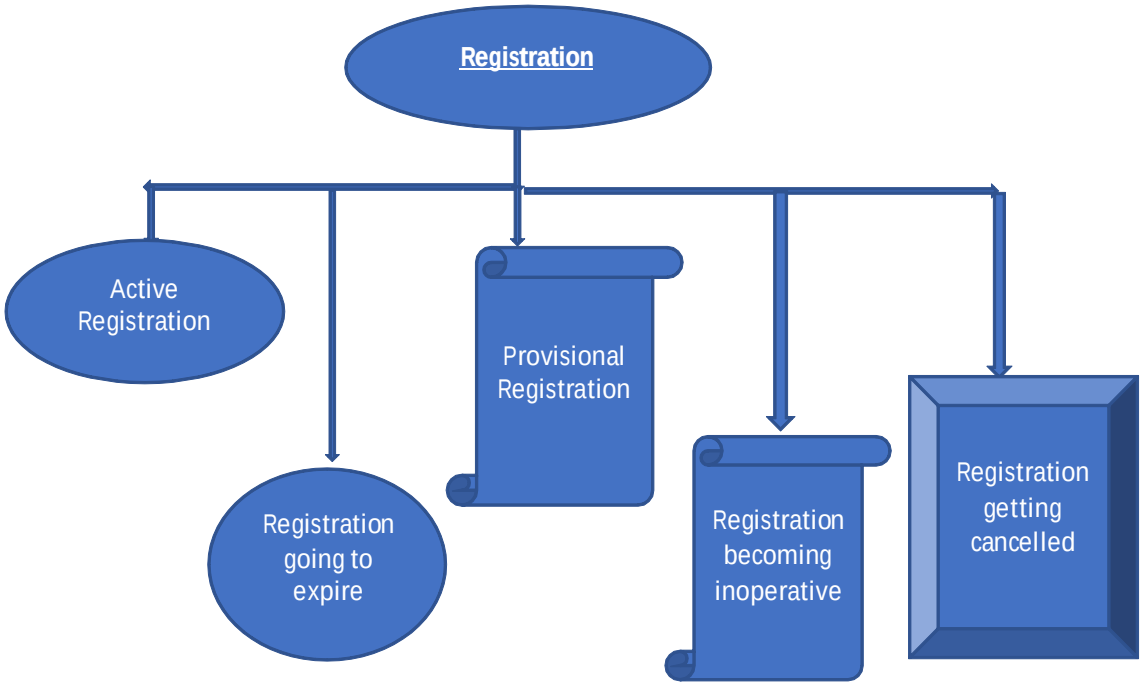
Amendment

- **Part I - Implications for an existing entity u/s 12AA or u/s 10(23C)**

The implications are explained with the help of a flow chart and series of FAQ's that follow them


IF EXISTING ENTITY U/S SECTION 12AA OR U/S 10(23C)OF THE ACT
Makes an application for renewal of registration
As part of the process below, all the trusts/ institutions would be given URN (UNIQUE REGISTRATION NUMBER)
Shall apply to PCIT/ CIT u/s 10(23C) / u/s 12A(1)(ac)
Within 3 months from 01.06.2020*, if the entities (all) are pre-existing
In case of renewal of first registration u/s 10(23C)/ u/s 12AB
In Case of provisional registration u/s 12AB/ u/s 10(23C)
In case registration has become inoperative u/s 11(7)
Any other case , atleast 1 month prior to commence ment of PY of seeking registration /approval
In case of undertaking or adopting modifications of objects not conforming to conditions of registration
At least 6 months prior to expiry of said period
6 months prior to commencement of AY from which registration is sought to be made inoperative
Earlier of
Within a period of 30 days from date of adoption or modification
6 months prior to expiry of period of provisional approval/ registration
OR
Within 6 months from commencement of activities
*- Date of coming into force subject to extension as per of COVID - 19

Words associated with the word "Registration"



Few FAQ's

1. What is the meaning of the word provisional registration?

The word "provisional" has not been defined in the Act. However, it has been used across in section 10(23C) and section 12A in varied contexts. The general meaning that can be attributed to the word "provisional" is that it is not final and it is subject to conditions and timelines.

The Finance Minister in the Budget speech mentioned that in order to facilitate registration of new organisations u/s 10(23C) / 12A which are yet to start their *charitable activities, it is proposed to allow provisional registration for 3 years.*

The concept of provisional registration is welcome as it would bring down the complexities involved in granting the registration u/s 12AA.

2. What is the meaning of registration becoming inoperative ?

The word "inoperative" has not been defined in the Act. It is used in the context *of Section 11(7)- Income from property held for charitable or religious purposes.*

Where a trust or institution has been granted registration for availing exemption u/s 11 and as long as the registration is in force, such trust or institution cannot claim any exemption

- u/s 10(1)
- u/s 10(23C)
- u/s 10 (46).

The registration of the above-mentioned trusts shall become **inoperative** from the date of approval or notification u/s 10(23C) and u/s 10(46) respectively.

Consequent to becoming inoperative, the trust or institution may apply to get the registration operative u/s 12AB subject to **foregoing of approval and the related exemptions u/s 10(23C) and u/s 10(46)**

3. What are the relaxations given owing to COVID-2019

The CG vide Press release dated 8th May 2020 has deferred the implementation of new procedure for approval/ registration/ notification u/s 10(23C), u/s 12AA, u/s 35 and u/s 80G from 01st June 2020 to 01st October 2020.

It is clarified that the pre-amended procedure shall continue to apply during the period June 2020 to September 2020. It was further clarified that the necessary legislative amendments in this regard shall be moved in due course of time

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