CASC BULLETIN

THE CHARTERED ACCOUNTANTS STUDY CIRCLE

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MEETINGS

Date	Time	Speaker	Topic
11.05.2019 Saturday	09.00 am*	CA. Muthuabirami	Recent Judicial Prouncements - Direct Taxes
23.05.2019 Thursday	06.30 pm**	CA. P Anand	"Corporate Audit Reporting- A New Look"

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

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

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EDITORIAL

The Challenges

The professional practice landscape is faced with new challenges in the new season. The speed of change can make even a newly qualified CA redundant in a short span of time.

First challenge in the adoption of new audit reporting standards like SA 701 and revised standards SA 700, 705 and 706. The ICAI has issued a detailed implementation guide to these standards which is a welcome step. Members need to understand the new requirements in discharge of their responsibilities.

The second challenge could be to understand the budget that may come in the month Jul 19 after the new government being sworn in. It looks like the Government is intending to adopt calendar year as the financial year. If companies also required to change the accounting year to calendar year format, which usher in an alignment with global year closing. This will solve the issue of consolidation, tax credit, tax residency status determination to a large extent. Though it may pose a difficulty in a short period, it is a welcome step.

The desire of the government to weed out shell companies and its fight against tainted money resulted in new requirements like filing active status for companies. Also the companies are required to make many onetime returns. This is a challenge to the companies as well as their professional advisors.

The ordinance on Banning of Unregulated Deposit Schemes which will throw challenges on certain reporting requirements. Hope that ICAI will suitably guide its members.

The alignment and revision of existing accounting standards with that of Ind AS is going to be huge challenge to the companies as well as professional community as a whole. The cost of transition is going to be a significant factor. A shift of converting companies into LLP will gain momentum.

The document issued for public comment on profit attribution to a PE again indicates the challenges the nations facing in taxing digital economic transactions. While it provides an opportunity for a professionals in the sphere of international taxation.

The changes in technological sphere like artificial intelligence, block chain and its impact on the audit profession is beyond ones imagination. The audit professional has to quickly unlearn and re learn its skills. Otherwise the chance of redundancy is quite high.

Editorial Board

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ANNOUNCEMENTS

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

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

READER'S ATTENTION

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

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Classification: The Tribunal has taken a different stand and held that the product was classified under a different entry of the TNGST Act than the one decided by the AO, when there is no fresh material placed before the Tribunal to examine the nature of the product. Admittedly, no remand report was called for regarding use of the product, its characteristics were not gone into but these aspects were dealt with by the Assessing Officer while completing the assessment under the TNGST Act earlier. Hence, the Court is of the view that the product dealt with by the assessee is classifiable under Entry decided by the AO taxable at higher rate of 12% and not otherwise wrongly decided by Tribunal. **Tvl.S.K.Rainguards Products, Vs The State of Tamil Nadu, Tax Case (Revision) Nos.11 and 12 of 2012 DATED: 13.12.2018**

Manufacture: The legal issue involved in this case is whether the conversion of wet blue leather into finished products amounts to manufacture or not. This issue is no longer res integra and it has been held to be manufacture by the Hon'ble Division Bench in the case of Golden Leather vs. Secretary TNSTAT reported in 2010 (35) VST 2016 (Mad). The Tribunal was not justified in passing orders without following the guidelines framed by the Full Bench of the High

CA. V.V. SAMPATHKUMAR

Court in 148 STC 256 and since the appellate Tribunal had failed in law in overlooking the process involved to convert the blue skin into finished leather and this finding is not opposed to settled principles of law laid down by the Supreme Court reported in 1989 SC 724, 1998 1 SCC 437. Stating so, these tax case revisions are allowed and the substantial questions of law are answered in favour of the assessee. **Tvl. Florence Shoe Co. Pvt. Ltd., Vs The Commercial Tax Officer, Purasawakkam Assessment Circle, Tax Case (Revision) Nos.94 and 95 of 2009 DATED: 13.12.2018**

Freight Charges: The law laid down by the Courts in many decisions is that cost of freight or delivery or cost of transportation cannot be included in the sale price, where they are separately charged. In the instant case, as a matter of fact, the first Appellate Authority found that the freight charges, pumping charges have been separately shown in the

invoices without including the same in the cost of the goods. Further, the purchase order also clearly says that the delivery is ex-RMC Works. Further, the Assessing Officer has not pointed out even a single instance of collection of consolidated amount and that the sale is completed only after delivery of RMC at the site of the customer and not even a single buyer was enquired and there was no material available with the Assessing Officer. Thus, there is no question of taxing eh freight Charges. **M/s. Larsen & Toubro Limited vs The Joint Commissioner (CT) Chennai (Central) Division, Tax Case (Revision) Nos.10 and 11 of 2013 Dated: 13.12.2018**

Judicial anarchy: When the Appellate authority issued its order it attained finality when the Revenue did not file any appeal against the said order. Therefore, judicial discipline demands that the Assessing Officer should implicitly obey the order passed by the Appellate Authority or the Tribunal. But unfortunately, the Commercial Tax Officer, Egmore- I Assessment Circle, failed to follow the appellate remand directions and passed an order rejecting the appellants" case by order dated 06.11.2007. This order was challenged by the assessee by way of appeal before the Appellate Deputy Commissioner, who by order dated 17.09.2009 allowed the appeal specifically noting that the earlier direction issued by the Appellate Assistant Commissioner dated 19.01.2007 which has attained finality. The Tribunal without noticing the same and without taking into consideration the facts of the case erroneously allowed the appeal filed by the State. The Hon'ble Supreme Court in the case of Union of India v. Kamlakshi Finance Corporation Limited [AIR 1992 SC 711] has held that the subordinate authorities are bound by the directions issued by the Appellate Authorities, if such hierarchy is not followed, then it will result in judicial anarchy. Therefore, the Assessing Officer is bound to follow the direction issued by the Appellate Authority in its order dated 19.01.2007 in A.P.No.50 of 2006, especially when the Revenue has not filed any appeal against the said order. **M/s.Chanda Softy Ice Creams Vs The Joint Commissioner (CT) Chennai (Central) Division, Tax Case (Revision) No.48 of 2013 Dated: 13.12.2018**

"C "Form: The petitioner seeks for mandamus directing the respondents to issue "C" forms under the Central Sales Tax Act, 1956 to the petitioner for the purchase of High Speed Diesel from the suppliers in the other States. Considering the very same issue, several other writ petitions were filed before this Court and the same was disposed of by a common order dated 26.10.2018 in W.P.Nos.19458 to 19460 of 2018 etc. batch, by setting aside

the proceedings therein. Accordingly, this writ petition is also allowed and the respondent is directed to permit this petitioner to download C form, as has been done in the past for the purpose of purchasing petroleum products against the issuance of C declaration forms. **Wheels India Limited vs. The Assistant Commissioner, Anna Salai Assessment Circle W.P.No.3165 of 2019 DATED: 01.02.2019**

C forms: These writ petitions are filed challenging the assessment order dated 23.08.2018 passed in respect of assessment years 2014-15, 2015-16 and 2016-17. It is stated that the petitioner has already filed applications before the Assessing Officer under section 9(2) of Central Sales Tax Act read with Section 84 of the Tamil Nadu Value Added Tax Act enclosing the C Forms and other documents which were not originally produced before the Assessing Officer. It is further stated that the said applications are pending before the Assessing Officer. Needless to state that the Assessing Officer will consider those applications and pass appropriate orders. Therefore, at this stage, the Court was not inclined to entertain the writ petitions challenging the orders of assessment. **M/s.Jain Rubbers Pvt. Ltd. Vs The Assistant Commissioner (ST) Ayanavaram Assessment Circle, W.P.Nos.2679, 2686 & 2690 of 2019 DATED: 31.01.2019**

Personal Hearing: Perusal of the impugned order would show that the Assessing Officer placed his reliance on the report submitted by the Enforcement Wing Officers for concluding the assessment. It is seen that in pursuant to the notice of proposal, the petitioner through their communication dated 12.12.2018 sought 30 days' time for filing their reply. The receipt of such communication is admitted by the Assessing Officer in the impugned order itself. However, it is stated that through the communication dated 13.12.2018, the assessee was informed to file such reply on or before 02.01.2019. The learned counsel for the petitioner denies the above contention and states that no such communication was served on the petitioner. In any event, as it is an admitted position that the assessment order was passed based on the report submitted by the Enforcement Wing Officers and not after providing an opportunity of personal hearing, this Court is of the view that one more opportunity can be given to the petitioner so as to enable them to file their objections to the notice of proposal so as to enable the Assessing Officer to pass the order of assessment on merits and in accordance with law, after providing personal hearing to the petitioner as well. **Wood & Craft Vs. The State Tax Officer N. H. Road Circle, Coimbatore WP.No.2980 of 2019 DATED: 01.02.2019**

Opportunity: Perusal of the impugned orders would show that the Assessing Officer, except by stating that the dealer has not explained the difference arrived by the figures in the balance sheet and monthly returns, has not referred to any of the materials furnished by the petitioner along with the reply. Therefore, this Court is of the view that the Assessing Officer ought to have gone into those materials and give a finding as to how such materials are either relevant or irrelevant on the proposal made. Even otherwise, as it is seen that the impugned proceedings were passed without providing an opportunity of personal hearing, this Court is of the view that on that ground also, the impugned orders cannot be sustained. This Court has already considered the issue as to whether indicating the personal hearing on any one of the day within which the reply has to be filed, can be considered as an effective personal hearing and found that such course of action is not proper as such personal hearing has to be provided only after receipt of the reply from the assessee. But, in this case, it has not been done so. Considering all these facts and circumstances, this Court is of the view that the assessment orders were passed without application of mind to the reply submitted by the petitioner and without providing personal hearing. Accordingly, all these writ petitions are allowed and the impugned assessment orders are set aside. **M/s.Marck India vs. The Assistant Commissioner (ST) (FAC) Periamet Assessment Circle W.P.Nos.2288, 2292, 2294, 2299, 2300 & 2302 of 2019 DATED: 28.01.2019**

Personal Hearing: The petitioner disputes his liability to pay the tax by contending that such levy on the maintenance work and payment of wages to the labourers is improper. This Court, at this stage, is not expressing any view on such contention since, the petitioner admittedly, has not filed any reply to the notice of proposal. On the other hand, it is stated that the petitioner personally went and met the Assessing Officer and explained him with details. Needless to say that when a notice of proposal was given in writing, it is for the petitioner to give a reply in writing. In this case, the petitioner has not made any such reply. However, apart from imposing tax, the Assessing Officer has also imposed penalty at the rate of 150% under Section 27(3) of the said Act. It is true that the notice of proposal indicated that the petitioner may appear before the Assessing Officer at his office on the date of filing their objection and failure to file the written objection or to appear for personal hearing within the specified date, will result in passing orders confirming the proposal. Therefore, it is evident that the Assessing Officer has not indicated any date of personal hearing even in the absence of any reply filed by

the petitioner, more particularly, when the Assessing Officer has chosen to impose penalty. Circular was also issued by the Revenue in Circular No.7 of 2014 Going by the above Circular issued by the Department and considering the fact that the pre-assessment notices and revised notices suggested, as though the petitioner is entitled for a personal hearing, the question that is to be gone into and decided in this case is as to whether the petitioner was really afforded such opportunity. The respondent has not intimated the petitioner about the date of personal hearing in pursuant to the objections filed by them. When such being the factual position, the only conclusion that can be arrived is that the respondent though stated that an opportunity of personal hearing would be given to the petitioner, has, in fact, not afforded such opportunity to the petitioner by not informing the date of such hearing. Therefore, it is evident that the petitioner was not given such personal hearing and consequently, as rightly argued by the learned counsel for the petitioner, the impugned orders of assessment suffers on the ground of violation of natural justice. **Tvl.K.Anandan Vs The Assistant Commissioner (ST), Pollachi Rural Assessment Circle, W.P.No.1615 of 2019 DATED: 28.01.2019**

Non Application of mind : While carrying out the remand directions of the appellate authority, the impugned orders on the face of it, would show that the same was passed in total non-application of mind, since both the orders though, referable to two different assessment years, have in fact referred to the same figures of transaction. Thus, it shows that the assessment orders were passed without application of mind. It is also seen that the Assessing Officer has taken note of the transactions with regard to 3 months period alone, even though, that was noted by the Appellate Authority as not correct. Considering the above stated facts and circumstances and considering the very fact that the Assessing Officer has taken into consideration the transactions relevant only to 3 months period and not to the entire 12 months and further, considering the fact that the Assessing Officer has referred to the quantum of transaction for both the assessment years as one and the same, the Court held that the impugned orders have to be set aside and the matter needs to be remitted back to the Assessing Officer for re0doing the assessment. **Tvl. Ambika Wood Industries (P) Ltd, Vs. The Assistant Commissioner [CT], Tambaram II Assessment Circle, Chennai -44 and another. W.P.Nos.2064 & 2070 of 2019 DATED: 28.01.2019**

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

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CASE LAWS - SERVICE TAX / GST

CA. VIJAY ANAND

1. Banking And Financial Services – Commission Received In Brussels By Assessee Whose Registered Office In Hyderabad In Respect Of Capital Raised In London For Use In Mauritius – Not Exigible To Service Tax In India Even If Corporate Office Located In India

In Enso Secutrack Ltd. V.CCE, Cu. & ST., Hyderabad-II, 2019(22) GSTL 43(Tri.-Hyd.) the appellants are having their registered office at Hyderabad and are engaged in the manufacture and trading of Electronic Cash Registers, Banking Automation Products, Electronic Surveillance Systems etc. and are also engaged in providing Management, Maintenance and Repair services. Appellants had issued "Foreign Currency Convertible Bonds (FCCBs) in the international capital market. These bonds were meant to raise capital in London for use in Mauritius. To facilitate this transaction, the services of M/s.Elara Capital Plc. London were used and they were paid a commission at Brussels. The adjudicating authority confirmed the demand under the head "Banking and Financial Services" under Reverse Charge Mechanism on the commission paid in Brussels which was sustained by the Commissioner (Appeals). On further appeal, the Tribunal observed as under:

1. A perusal of the documents indicates that the appellant is covered under the scope of Section 66A of Finance Act, 1994. However, the taxable services which are provided from outside India must be received in India under Rule 3 of the Taxation of Services (Provided from Outside India and Received in India) Rules, 2006 for taxation to be applicable. The Commissioner (Appeals) sustained the demand although the loan was raised outside India for use outside India merely on account of the fact that the service recipient is located in India and it can be linked to their business and commerce in the books of accounts.

2. The mere fact that the appellant company is located within India and the transactions which they made globally will also figure in their books of accounts cannot automatically tantamount that the services have been would not be received in India. In this case, the services were received in Mauritius and rendered in London. Therefore, they are not get covered by Rule 3 of Taxation of Services (Provided from Outside India and Received in India) Rules, 2006 even if these transactions are reflected in the books of accounts of the head office in Hyderabad.

3. Any transaction of a company in any of its places of business and commerce will get reflected directly or indirectly in the books of account of the Corporate Office and will affect their overall business result. This does not mean all these transactions are taking place or such services are being received in the location of the Corporate Office. Therefore, no service tax is leviable on the services in question.

Hence, the appeal was allowed with consequential relief.

2. <u>Service Tax - GTA – Non-Issuance Of Consignment Note On Periodical Consolidated Bill Issued For Multiple Trips – Not Liable</u>

In Chhattisgarh State Co-operative Mkg. Federation Ltd. V. CST, Raipur 2019(22) GSTL 265(Tri.-Del.) the appellant is a co-operative society created by Govt. of Chhattisgarh, involved, among other things, in procurement and transport of food grains. The appellants procures paddy etc. from farmers through co-operative Societies and thereafter transports the same from procurement centres to the storage centres of the appellant located throughout the state. Thereafter, the paddy is milled and rice transported to FCI or Civil Supplies Corporation Ltd. for PDS. For transporting paddy/rice the appellants engaged various trucks and entered into agreement for such arrangement with the truck owners. The adjudicating authority confirmed the demand under reverse charge mechanism under goods transport agency (GTA). On appeal, the Tribunal observed as nder:

1. The appellants hired lorries of different transporters and agreed to pay them consideration for transport of grains in terms of distance covered. The transport charges depending upon the distance and per M.T. is agreed upon. The c appellants engaged lorries to transport their own goods being

both consignor and consignee and there is no evidence on issue of consignment note as the transport was done on a continuing basis in terms of agreement with various transporters.

2. The bills raised by the transporters are on a periodical basis which contains details of quantum of grains transported, distance covered and No. of trips. The same cannot be considered as consignment note as multiple trips cannot be covered by single consignment note.

3. No evidence was produced by the revenue with reference to the existence of consignment note. Consequently, the arrangement in the present case for transport of the food grains cannot be brought under GTA service for tax liability on the part of the appellant on reverse charge basis as one of the essential ingredients of existence of consignment note is missing.

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

3. GST - Advance Ruling – Merger Of Proprietorship Firm As A Going Concern With Private Limited Company – Exemption Under Notification No.12/2017 –C.T.(Rate) – Eligible

In RE: B.M.Industries 2019(22) GSTL 293(AAR.-GST), the applicant is a proprietary concern engaged in the manufacture and sale of aluminium profiles, owning fixed assets, current assets and also has long-term as well as current liabilities. The applicant proposes to merge as GOING CONCERN with M/s Bimal Aluminium Pvt. Ltd. consequent to which the proprietorship firm M/s B. M Industries shall cease to exist and it's all present and future assets, liabilities, rights, claims, businesses, etc., shall be taken over by M/s Bimal Aluminium Pvt. Ltd. All future liabilities of GST, as and when arise, shall be met by M/s Bimal Aluminium Pvt. Ltd., in normal course of business. After merger, M/s B.M. Industries shall apply for cancellation of registration in form GST-REG-16, within 30 days as prescribed. An application was filed seeking advance ruling as to the following:-

i. Whether the applicant is liable to pay tax under CGST/SGST Act, on merger of his proprietorship firm as a going concern with a private limited company on the fixed assets and currents assets including stocks of raw material, semi-finished and finished goods?

ii. Whether the input tax credit available in the credit ledger account or cash ledger account of proprietorship firm shall be transferred to the respective credit ledger and cash ledger account of the private limited company, consequent upon merger.

The authority observed as under:

1. On the perusal of the facts and records. It is evident that this is a case of merger of two entities, and the questions raised relate to transfer of ITC lying as balance in electronic credit ledger of the going concern which is permitted u/s 18 (3) of the CGST/ HGST Act, 2017 read with rule 41 of the CGST/HGST Rules, 2017.

2. The provisions support such merger so long as Form GST ITC-02, is filed electronically on common portal. These provisions are not applicable to unutilized balance lying in electronic cash ledger.

3. As per para 4(c) of Schedule II to the CGST/HGST Act, 2017, transfer of business as a going concern is not treated as supply and thus, the same stands excluded from the scope of supply of goods.

4. Notification No. 12/2017-Central Tax (rate), dated 28-06-2017 exempts the intra state supply of services of transfer of a going concern as a whole or an independent part thereof from the central tax payable u/s 9(1).

5. Thus, the applicant can transfer un-utilized input tax credit, under the provisions of Section 18(3) of the CGST/HGST Act, 2017 and Rule 41 of the CGST/HGST Rules, 2017, in case of merger.

Hence, the authority ruled as under:

1. The applicant, on merger of his proprietorship firm as a going concern with a private limited company, is not liable to pay tax under CGST/SGST Act on the fixed assets and currents assets including stocks of raw material, semi-finished and finished goods.

2. The input tax credit available in the credit ledger account proprietorship firm shall be transferred to the respective credit ledger account of the private limited company, consequent upon merger, subject to the provisions of Section 18(3) of the CGST/HGST Act, 2017 and Rule 41 of the CGST/ HGST Rules, 2017.

3. The provisions of Section 18(3) of the CGST/HGST Act, 2017 and Rule 41 of the CGST/HGST Act, 2017, are not applicable to the balance in lying in electronic cash ledger.

4. <u>Service Tax – Construction Of Residential Complex – Sale Of UDS And Construction Of Dwelling Units For Consideration – Non Taxability Prior To 1.7.2010 – Consequent To The Introduction Of Explanation To Section 65(105)(zzzh)</u>

In Creations v. CST, Chennai 2019(22) GSTL 367(Tri.-Chennai), the assessee is a proprietary concern mainly engaged in promotion of residential complex. The adjudicating authority confirmed the demand under construction of residential complex, against which further appeal was preferred before the Tribunal which observed as under:-

1. The short issue for consideration is whether service tax is payable for the construction of residential complex service in respect of the dwelling units constructed by the assessee prior to 1.7.2010 i.e. before introduction of the Explanation to the Section 65(105)(zzzh) and thereafter.

2. The assessee has relied upon various Board circular. As per Board Circular F.No.332/35/2006-TRU dated 1.8.2006, the Board has categorically clarified that if no other person is engaged for construction work and the builder undertakes construction work on his own, in the land belonging to him, without engaging the services of any other person, then there is no service provider and service recipient relationship in existence and therefore the question of providing taxable service does not arise. This was clarified again in Circular No. 96/7/2007-ST dated 23.8.2007 wherein the Board clarified that in such instance, since the service provided is self-service, the activity of construction would not attract levy of service tax.

3. The Board had again, vide Circular No. 108/2/2009-ST dated 29.1.2009, explained that it is usual that initial agreement is entered between the promoter / builder and the prospective buyer, which is in the nature of agreement to sell the UDS in the property. This by itself does not create any interest or charge on such property. The property remains in the ownership of the promoter / builder and therefore when construction of residential complex is undertaken in such land, being self-service, it would not attract levy of service tax.

4. The permission certificate for construction of the complex as well as the completion certificate is issued in the name of the assessee. These documents therefore strongly indicate that the land belongs to assessee till the completion of construction. The assessee has strongly and consistently submitted that the land always belonged to him and that the construction having been done in his own land, would not attract the levy of service tax.

5. As clarified in Circular dated 29.1.2009, it is common practice that the promoter enters into an agreement to sell UDS of the property to the prospective buyers. Such agreement to sell does not transfer any interest in the property to the prospective buyer. The ownership and the possession still remains with the promoter. In such cases, as clarified by the circular, only after completion of construction and full payment of the agreed sum, the sale deed is executed and only then the ownership of the property (UDS + flat) gets transferred to the ultimate owner. The Board has clarified that even in the case where the prospective buyer enters into a contract for construction of residential complex with the promoter who himself provides the services of design, planning and construction; and after such construction, when such property is for his personal use, then such activity would not be subject to levy of service tax because this would fall under the exclusion provided in the definition of residential complex service and that this situation also does not attract levy of service tax.

6. Thus, prior to 1.7.2010, the levy of service tax cannot sustain for the reason that the assessee is the land owner and the construction done by himself without engaging a contractor would amount to self-service and that the Board circulars are binding upon the department.

7. W.r.t. the period after 1.7.2010, the insertion of explanation to Section 65(105)(zzzh) of the Finance Act has an effect a deeming fiction, that if any sum is received from the prospective buyer before grant of completion certificate would be construction of residential complex service. The said amendment is prospective in nature and would be effective only after 1.7.2010. However, in the instant case, the completion certificate shows that the construction activity has been completed on 19.11.2008. The provision of service, which is the taxable event during the impugned period, happened prior to 1.7.2010. Therefore, the said amendment cannot be pressed upon the assessee to demand service tax. The demand is without legal basis.

Hence, the appeals filed by the assessee were allowed and the impugned orders set aside.

5. Service Tax – Sale And Purchase Of Land Not Covered Under Real Estate Agent Services

In Premium Real Estate Developers v. CST., Delhi 2019(22) GSTL 373(Tri.-Del.), the appellant is in the business of purchase, sale, develop, take and

exchange or otherwise, whether for investment or sale in any real estate including lands to carry on the business of builders, contractors, dealers in land, building and any other activity in connection therewith and incidental thereto.

Sahara India Commercial Corporation Ltd. ('Sahara India' for short) was interested in acquiring large parcels of land for setting up townships. Accordingly Sahara India entered into separate but similar memorandum of understanding (MOU) with the appellant firm for acquiring large parcels of land at different locations pursuant to which the appellant firm received advance amount from Sahara India for each site, substantial part of which was used by the appellant to pay to the seller or the prospective seller of the land, for agreeing to sell land to Sahara India. The adjudicating authority confirmed the demand under 'real estate agent Service' (REA). On appeal, the Tribunal observed as under:-

1. There is no consideration defined and/ or provided for the alleged service. In absence of any defined consideration for the alleged service, there is no contract of service at all, and hence the transaction is not liable to service tax.

2. The appellant entered into an agreement of trading in land, wherein they agreed to transfer, a measurement or area of land, in a particular area in favour of the Sahara India. Such land was to be arranged by them by way of procurement from the land owners. The appellant was also obligated to examine the title of the prospective land owner and to further ensure the availability of land owner at the office of the Registrar for execution of the sale deed. In fact Sahara India, instead of paying the price directly to the land owner, paid lump sum amount to the appellant. Thereafter the appellant identified the land, the seller, and after being satisfied with the title of the seller, entered into agreement with the seller and obtained power of attorney, in their favour. Thereafter the appellant transferred the land in favour of Sahara India. Thus, the transaction is one of trading in land. In such transactions the appellant could either incur a loss or have a surplus (profit).

3. A perusal of the MoU between the appellant and M/s Sahara India Ltd. Indicates that it is not only for providing purely service for acquisition of the land but involves many other function such as verification of the title deeds of the persons from whom the lands are to be acquired and obtaining necessary

rights for development of the land from the Competent Authority and the remuneration or payment for providing this activity has actually not being quantified in the MoU. The MoU provides that "the difference, if any, of the amount being actually paid to the owner of the land and the average rate shall be payable to the second party (appellant). It is very clear from the provision of the MoU that the amount payable to the appellant is not quantified and it is more of the nature of a margin and share in the profit of the deal in purchase of land.

4. For the levy of service tax, a specific amount has to be agreed between the service recipient and the service provider. As no fixed amount has been agreed in the MoU which have been signed between the parties, the amount of the remuneration for service, if any is not clear in this case. In this regard, we also take shelter of this Tribunal's decision in the case of Mormugao Port Trust vs. CC, CE&ST, Goa – 2017 (48) S.T.R. 69 (Tri. – Mumbai) wherein it was held that unless it can be established that a specific amount has been agreed upon as quid pro quo for undertaking a particular activity, it cannot be assumed that there was a consideration agreed upon for any specific activity so as to constitute a service.

5. In view of the fact that the specific remuneration has not been fixed in the deal for acquisition of the land, the parties have worked more as a partner in the deal rather than as an agent and the principle. Therefore, we are of view that taxable value itself has not acquired finality in this case.

6. Some of the MoUs were not fully executed at the time of the issue of the show cause notice and thus the remaining amount still was to be used for procurement/acquisition of balance land. This indicates that the MoU has not been executed fully and the actual remuneration to the appellant have not got finalized consequent to which the issuance of the show cause notice was premature and unwarranted.

7. Arising out of the above, the taxable value has not reached finality and demanding service tax on the entire amount paid to the appellant for acquisition of land is not sustainable in law.

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

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RECENT DEVELOPMENTS IN E-WAY BILL

CA. DEBASIS NAYAK

E-way bill system has successfully completed one year of journey. The Central Government has implemented the e-way bill system by abolishing all the state waybill provisions. After an aborted attempt in February 2018, the Government managed to roll out the E-Way Bill system on 1 April 2018, to track movement of goods on interstate and intra-state transactions. The main objective of introduction of one e-way bill nationwide is to ensure ease of doing business, curb revenue leakage and remove check post and barriers.

In this article, we are going to cover the key statistics of e-way bill in 2018-2019, recent changes proposed courtroom judgements and recent trends.

A. Key Statistics

One Year of Successful Journey of E-way Bill (2018-2019)	
No. of e-way bills generated	5577 Lakhs
No. of inter-state e-way bills generated	2487 Lakhs
No. of intra-state e-way bills generated	3090 Lakhs
No. of Tax Payers Registered in EWB	28.89 Lakhs
No. of Transporters enrolled in EWB	0.41 Lakh

A. <u>Changes proposed in E-way Bill w.e.f 25 March 2019</u>

1) Auto calculation of route distance based on PIN code for generation of EWB

The NIC portal will now auto calculate the route distance for movement of goods, based on the Postal PIN codes of source and destination locations. Further the User is allowed to enter the actual distance limited to 10% more than the displayed distance for entry and in case the source PIN and destination PIN are same, the user can enter up to a maximum of 100KMs only.

2) Blocking of generation of multiple E-Way Bills on one Invoice/document

"One Invoice, One E-way Bill" policy will be followed throughout i.e. Once EWB is generated with an invoice number, then none of the parties - consignor, consignee or transporter - can generate the E-Way Bill with the same invoice number.

3) Extension of E-Way Bill in case Consignment is in Transit

Now on the NIC portal during the extension of the EWB, the user will be prompted to answer whether the Consignment is in Transit or in Movement. On selection of In Transit, the address details of the transit place needs to be provided. On selection of In Movement, the system will prompt the user to enter the Place and Vehicle details from where the extension is required.

4) Blocking of Interstate Transactions for Composition dealers

The NIC portal will now not allow generation of e-way bill for inter-state movement, if the supplier is composition taxpayer.

B. E-way Bill – Judicial precedent

1. Expiry of E-way Bill

In case of Jaspreet Kalra vs Union of India 2019-TIOL-646-HC-UKHAND-GST

Fact of the case

Vehicle of the petitioner has been seized by revenue authorities and thereby imposing a penalty equal to the tax amount on the ground that the validity of e-way bill had expired on 03.02.2019.

Contention of the petitioner

The petitioner contended that the company had generated a fresh e-way bill on 06.02.2019, which was valid upto 12.02.2019 in continuation of the previously generated e-way bill, which stood expired on 03.02.2019. Therefore, seizure of vehicle and imposition of penalty equivalent to tax amount should not be imposed on technical infraction.

Court decision

The Hon'ble High Court examined the provisions of the Section 129 of the Central Goods Services Tax Act, 2017 relating to "Detention, seizure and release of goods and conveyances in transit" and held that as an interim measure, vehicle of the petitioner shall be released forthwith provided the petitioner furnishes a security before the authority concerned as per the provisions contained under clause (c) sub-section (1) of Section 129 of the CGST Act, 2017

2. Undisclosed goods in the E-way Bill

Fact of the case

In case of M/s. S A Products vs State of UP 2019-TIOL-467-HC-ALL-VAT the petitioner has transported Pan Masala and Tabaco bags. The petitioner has paid the tax at the time of sale and also generated the e-way bill. In fact, the petitioner has deposited more amount of tax than required. The Commercial tax department detained the goods.

Contention of the Petitioner

The petitioner submitted that petitioner have already paid the required tax for the goods which were being transported. In fact, more tax amount has been deposited. The authorities without proper application of mind have seized the goods alongwith vehicle. It is also submitted that e-way bill was not required to be submitted for the same as the goods were valuing below Rs.50,000/-.

Submission of the department

The department brought facts to the notice of the court that petitioner had not paid the tax for the Tobacco bags and the tax which was deposited by the petitioner was only with respect to the Pan Masala. Further, department submitted that the quantity of the goods was much more than mentioned in the tax invoice.

Court decision

The Hon'ble Allahabad High Court held that petitioner shall furnish the security in the form of Bank Guarantee before the authority concerned, thereafter authority may consider the release of the goods and the vehicle and pass appropriate orders expeditiously say within a period of ten days.

3. Non Compliance of procedure specified in Section 129 of the CGST Act

Facts of the case

In case of Synergy Fertichem Pvt. Ltd. vs State of Gujarat 2019-TIOL-546-HC-AHM-GST the petitioner had imported the perishable goods and paid the integrated tax at the time of import. While the goods was in transit, revenue authorities detained the conveyance as well as goods on 14.02.2019. Pursuant to that a show cause notice dated 01.03.2019 was issued u/s 130 of the CGST Act calling upon to show cause as to why the goods in question as well as the vehicle should not be confiscated for non-payment of an amount. The petitioner had filed civil application before the court for granting the relief.

Contention of the petitioner

On 06.03.2019, the learned advocate for the petitioners invited the attention of the court to the provisions of sections 129 and 130 of the CGST Act, 2017. As per section 129 of the CGST Act, the officer is required to issue a notice as contemplated under sub-section (3) after giving an opportunity of hearing to the person concerned and then pass an order. Therefore, impose penalty, redemption fine and confiscation under section 130 of the Act without initiating any proceedings under section 129 of the Act, which is not permissible in law.

Contention of the revenue authorities

The learned Assistant Government Pleader has submitted that detention order was issued on 14.02.2019 as per section 129(1) of the CGST Act. Moreover, the goods were not accomplished with e-way bill during transit.

Court decision

The court held that learned Assistant Government Pleader is not in a position to point out that the procedure, as contemplated under subsections (3) and (4) of section 129 of the CGST Act, has been followed. Thus, prima facie, it appears that the show cause notice under section 130 of the CGST Act has been issued without complying with the requirements of section 129 of the CGST Act.

Further, it was only a prima facie view of the court and therefore the court directed the petitioner to file the undertaking that in case the petitioner does not succeed in the petition at later stage, he shall cooperate with the authorities.

4. Detention is not valid merely wrong mention of value in E-way bill

Facts of the case

In case of Rai Prexim India Pvt. Ltd. vs. State of Kerala [TS-771-HC-2018(KER)-NT] the petitioner's goods was detained because the place of delivery was not correct in e-way bill. The value of goods shown in e-way bill as Rs. 38, 82,200/-. On detention, the petitioner cancelled the existing e-way bill and generated the new e-way bill after correcting the place of delivery. However, the value of goods was mentioned as Rs.3, 88,220/- instead of Rs.38, 82,200 in e-way bill.

Court Decision

The Hon'ble High Court of Kerala held that if a human error which can be seen on naked eye is detected, such human error cannot be capitalized for penalisation. Further, the high court mentioned that if the petitioner had paid the IGST in accordance with the value as shown in the original bill, goods cannot be detained and shall be released to the petitioner by executing a simple bond.

However, the High Court has also provided that if the tax had not paid then goods and conveyances shall be released only on furnishing bank guarantee.

5. Part-B of the E-way bill was not updated

Facts of the case

In case of Daily Express vs The Assistant State Tax Officer 2018-VIL-552-KER the petitioner is a transporter. During the transportation of goods, the Assistant State Tax Officer ("ASTO") intercepted and detained both goods and vehicle. The reason assigned for the detention is that Part B of the accompanied e-way bill has not completed and hence not valid for the movement of goods as per Section 138 of the GST Act and Rules 2017. Thereafter, ASTO has issued order for physical verification/ inspection of the conveyance, followed by the notice under Section 129(3). Later, the petitioner has filed explanation to the same. However, ASTO has not released the goods and vehicle. Therefore, the petitioner filed writ petition before the Hon'ble Kerala High Court for quashing the order of ASTO.

Contention of the petitioner

Section 129 of the CGST Act in its entirety does not apply to the transporter. It may affect either the consignor or the consignee, at best. As the consignor and the consignee have insisted that the transporter has the obligation of reaching the goods to their destination, the petitioner has taken the trouble of coming to this Court. Further petitioner contended that transaction is genuine and there is no possibility of any tax evasion and section 126 grants exempts minor discrepancies.

The detention under Section 129 of the CSGT Act is unwanted when the discrepancy does not involve tax evasion. The petitioner further contended that as per Section 122 of the CGST Act if somebody transports any taxable goods without the cover of documents, at best he can be penalized with Rs.10,000/- .

Contention of the revenue authorities

The learned Government Pleader submitted that Section 129 of the CGST Act is a self-contained code and it lays down the entire mechanism for provisional release of the goods. When the Court queried about the interplay between Sections 126 and 129 of the Act, the Government pleader has submitted that Section 129 begins with a non-obstante clause and therefore it stands protected from every other provision.

It has also pointed out that earlier this Court, on more than one occasion, has held that unfilled Part B of the e-way bill cannot be treated as a minor omission.

Court Decision

The Hon'ble Kerala High Court held that the Section 129 of the CGST Act does not provide for any such exemption to the transporter. In fact, Section 129(1)((b) applies to all other persons interested in the goods in addition to the consignor. Therefore, plea of the petitioner that Section 129 is not applicable to petitioner is not accepted.

The High court hold that notices of detention do not suffer from any legal infirmity and if the petitioner wants the interim custody of the goods, it may comply with the statutory mandate under Section 129(1)(b) and get them released.

C. Recent Trends

1. Documents to be carried out by person in charge of the conveyance in case of expiry of e-way bill.

Recently the Tamil Nadu Commercial Tax department has issued Notification No.3/2019-TNGST/CST dated April o2, 2019 to direct

a. the documents to be carried by the person in charge of the conveyance, transporting goods in multi modal transport, in case of expiry of E-way bill - Expired E-way bill and Tax Invoice or Bill of Supply and Delivery Challan where the goods are transported other than by way of supply are mandated.

b. Where the goods are intended to be transported at a place other than the place of final delivery mentioned in expired e-way Bill - fresh E-Way Bill along with expired E-way bill.

2. Default in filing of monthly GST return

As per Notification No. 74/2018-CT dated 31.12.2018 it has been provided that taxpayers who have not filed the returns for two consecutive tax periods shall be restricted from generating e-way bills.

Therefore, taxpayer should ensure that all returns would be filed on time to avoid delay in transportation of goods.

3. Notices from the GST authorities on mismatch in e-way bill data vis a vis sales return (GSTR-1)

To curb tax evasion, the government officials has stated issuing notices to the taxpayers for mismatch in GSTR-1 (monthly Sales details) and E-way bill generated from the portal. To avoid this it is preferable to reconcile the monthly sales data with e-way bill generated during the month. To cross verify the reconciliation, while filing the GSTR-1, taxpayer can import the e-way bill data in GSTR-1.

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LEARNING SERIES ON MULTILATERAL INSTRUMENT UNDER TAX TREATIES
LS #3: - IMPLEMENTATION OF MULTILATERAL INSTRUMENT

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Objectives

1. Prelude
2. MLI - It's implementation and working
3. Debrief

A . Prelude

In this edition of the learning series, we will dwell into the last leg of the basic and essential aspect of MLI on "working of the MLI", as we inch towards the learning of the substantive provisions of the instrument in the learning editions to come. In understanding the working of the MLI wheel, it would be incomplete without understanding how the instrument is implemented. In order to say, whether an MLI will apply over a Covered Tax Agreement ('CTA'), being the DTAA already signed between two states, this understanding of implementation of this article is essential.

Without this backdrop, the understanding of MLI, its provisions alongside the existing CTA, may not provide desired result aimed to be achieved. Any new law, regulation, policy or a curative measure, may not achieve the object of its introduction unless its implementation is made in the most optimal sense. In India, we are no alien to implementation of new laws, regulations, policies, or economic measures and at times its implementation does become extremely critical to testify the ratio of success. In the context of MLI, it is an anti- tax avoidance measure aimed to be achieved through a single instrument, which would replace almost 3,000 double tax avoidance treaties. Such measure will have far reaching impact on economic policies in various countries and world trade. Hence understanding of implementation of MLI is extremely important.

The object of this edition is to provide an understanding of implementation framework without going into its blemishes.

B. MLI – It's implementation and working

As we discussed earlier, MLI will be a single instrument which will not replace the Double tax Avoidance Agreement ('DTAA') but will stand in parallel to the existing treaties. Therefore, this convention, does not function the same way as that of an amending protocol to an existing DTAA.

The approach taken under the MLI is on the legal principle of *lex posterior derogat legi priori*, which implies that where two rules apply in the same subject matter, to the extent of their incompatibility the later treaty (i.e. MLI) will prevail over the existing treaty ('DTAA') between the same parties.[1]

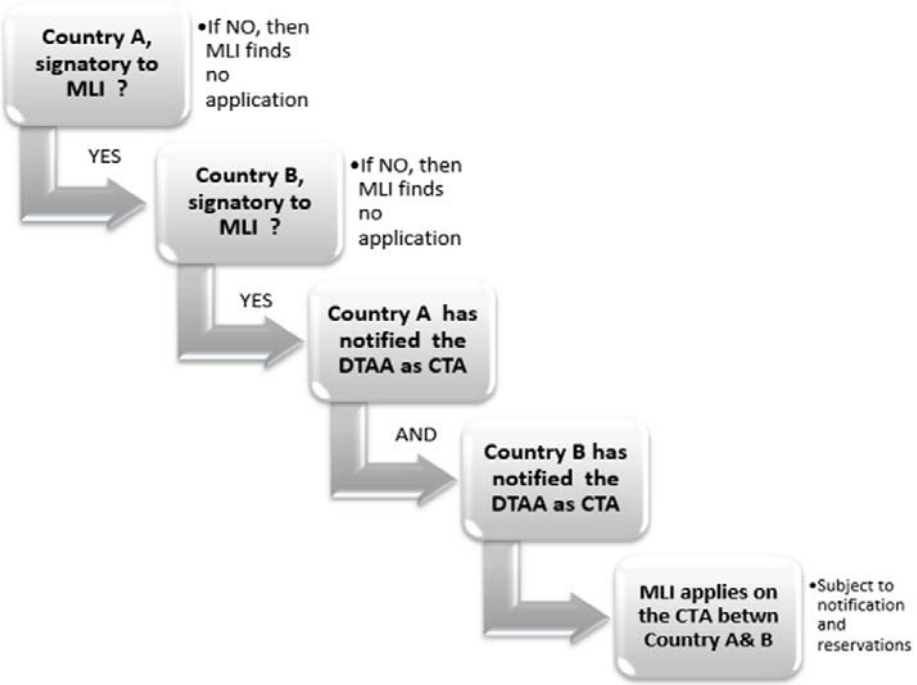
The MLI is a flexible instrument which will modify tax treaties according to a jurisdiction's policy preferences with respect to the BEPS measures. Further, the instrument also maintains transparency among nations on the positions opted in by each of jurisdictions and does not leave scope for differential positions based on its treaty partner, unless the treaty partners agree to bilaterally negotiate the existing DTAA to give effect to the BEPS measures (Ex: India-Mauritius DTAA). The flexibility of MLI has been provided in the following ways:

- Jurisdictions can choose amongst alternative provisions in certain MLI articles.
- Jurisdictions can choose to apply optional provisions
- Jurisdictions can choose to not apply MLI provisions (opt out of provisions those which does not reflect a minimum standard) and also with respect to those provisions which are already a part of the Covered Tax Agreements.
- Jurisdictions should opt for minimum standards, unless the each of the contracting jurisdiction agree to have a differential approach, which may be done by treaty renegotiation and specific inclusion of minimum standard provision under the CTA.
- Jurisdictions may opt in (or) opt out of a provision of the MLI (entirely or partly), provided it is not a mandatory minimum standard provision.

[1] Source: https://www.oecd.org/tax/treaties/legal-note-on-the-functioning-of-the-MLI-under-public-international-law.pdf

Though MLI is a flexible instrument, it shall need sovereign backing and proper implementation by the contracting jurisdictions being a signatory to the MLI. In this context it is important to know that, a country can decide **which of the DTAAs will be covered by the MLI** (referred in the context of MLI as a "Covered Tax Agreement" or "CTA") and which will be outside its purview. Once a DTAA is notified as a CTA mutually by the treaty partners, the MLI shall stand to apply on such notified CTA. An illustrative situation has been depicted in the diagram below between Country A & Country B to understand applicability of MLI.

Before understanding the application of MLI between two jurisdictions, the MLI enters into force only if 5 jurisdictions have deposited the instrument. If the answer to the question is yes, then we move forward to test the applicability of MLI between two contracting jurisdictions. (Article 34 of MLI).



Let us take the case of India and Australia to understand this process. Both India and Australia are signatories to the MLI and both countries become parties to this convention. Thereafter, one should check, for the MLI provisions to be applied on the existing DTAA, whether India had notified Australia and similarly Australia has notified India.

If only both Indian and Australia designate each other to the convention, the DTAA between India and Australia would be recognised as a CTA in the MLI Context. As on date, both India and Australia have notified each other and therefore, MLI provisions will be applied on India-Australia (India-Australia DTAA).

On the other hand, India has notified Brazil and United States of America (USA) and has opted to designate the existing DTAA with those countries under the MLI. However, since Brazil and USA are still not signatories to MLI convention, the applicability of MLI provisions shall not arise and the existing DTAA will continue to prevail.

The implementation/ application is not complete with a contracting jurisdiction just signing the instrument and notifying its CTAs. In the context of public international law, ratification (in accordance with the domestic laws of the contracting state) is an important step to be fulfilled by a state to establish in the international plan its consent to be bound by the treaty. Therefore, each state follows the processes of parliamentary approval or such other processes/ legislative formalities to fulfil the implementation of an international instrument. Likewise, MLI shall also needs to be ratified depending on each country's legal system and domestic law requirements.

The Government of India has only obtained separate cabinet approval to introduce MLI in the Indian context. However, we are of the view that unless the sanction is made through an amendment to section 90 (enabling provision for Central Government to enter into a DTAA) of the Income tax Act, 1961 to pave way for recognising the MLI along with DTAA, the ratification process may not be complete.

Finally, upon ratification the MLI the provisions shall generally have effect in the Contracting Jurisdictions with respect to a Covered Tax Agreement at different instances.

In respect of those aspects relating to withholding of taxes, as of the latest date on which the MLI enters into force (Entry into Force) for each of the Contracting Jurisdictions, MLI will be effective from 1st day of the next calendar year. For example, if the Convention enters into force for India on 1 March 2018 and, say, for Australia on 1 March 2019, the Convention will take effect with respect to all taxes which relate to an event occurring from 1 January 2020 onwards. On all other taxes levied, it is effective from expiration of a period of 6 months from the date on which the MLI enters into force for each of the Contracting Jurisdictions.

C. Debrief

With the introduction of MLI, the existing approach towards interpretation of tax treaties may become less significant. Unlearning and relearning of concepts, terminologies, application of provisions, interpretations of CTAs and its reference to the domestic tax law is necessary.

The operation of MLI as part of this edition of the learning series is aimed to bring out the key aspects and introduce how the MLI will operate. Further the operation of MLI will be possible only if such agreement is being ratified by each contracting state/ country signatory to the MLI Convention.

To conclude, MLI will apply only to those countries which have:

(a) Signed the MLI,

(b) Ratified it in accordance with domestic law (where such ratification, acceptance or approval is required) and deposited such instrument of ratification with the OECD depositary ("Depositary") and

(c) 3 months have passed from the date five instruments of ratification have been deposited with the Depositary, thereby bringing the MLI's entry into force[2].

Lastly, entry into effect of MLI is with reference to each state, after specified periods the MLI shall be applied on the CTAs. With this introduction, from our next edition of the learning series, we will dive into the substantive concepts in understanding the MLI.

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[2] Entry into force for subsequent instruments deposited–first day of the month following the expiry of 3 calendar months beginning on the date of such subsequent deposit.

EXCEL TIPS

CA DUNGAR CHAND U JAIN

The SUMPRODUCT function multiplies corresponding components in the given arrays, and returns the sum of those products. In other words, it calculates the sum of the products of corresponding numbers in one or more ranges. SUMPRODUCT is an incredibly versatile function that can be used to count and sum like COUNTIFS or SUMIFS with more flexibility. Other functions can easily be used inside SUMPRODUCT to extend functionality even further.

Syntax

SUMPRODUCT(array1, [array2], [array3], ...)

The SUMPRODUCT function syntax has the following arguments:

- **Array1** Required. The first array argument whose components you want to multiply and then add.
- **Array2, array3,...** Optional. Array arguments 2 to 255 whose components you want to multiply and then add.

Remarks

- The array arguments must have the same dimensions. If they do not, SUMPRODUCT returns the #VALUE! error value.
- SUMPRODUCT treats array entries that are not numeric as if they were zeros.

Illustration 1:

	A	B	C
1	Denomination	Nos.	
2	2000	185	
3	500	1520	
4	200	890	
5	100	150	
6	50	20	
7	20	12	
8	10	450	
9		**1328740**	=SUMPRODUCT(A2:A8,B2:B8)
10			

=SUMPRODUCT(A2:A8,B2:B8) in the above illustration actually multiplies A2 with B2, A3 with B3…. and A8 with B8 and then sums it up, i.e. Multiplies all the components of the two arrays and then adds the products (2000 * 185) + (500 * 1520) + (200 *890) + (100 * 150) + (50 * 20) + (20 * 12) + (10 * 450) resulting in 13,28,740/-

Instead of multiplying all the numbers separately and then summing up, Sumproduct function comes handy to do this exercise at one go.

The traditional way of getting the result by multiplication and then summing is replaced by one simple formula **=SUMPRODUCT(A2:A8,B2:B8)**

Sumproduct Vs. Traditional way of finding product

	A	B	C	D	E	F	G	H
1	Denomination	Nos.			Traditiona	way of finding product		
2	2000	185			370000	=A2*B2		
3	500	1520			760000	=A3*B3		
4	200	890			178000	=A4*B4		
5	100	150			15000	=A5*B5		
6	50	20			1000	=A6*B6		
7	20	12			240	=A7*B7		
8	10	450			4500	=A8*B8		
9		**1328740**	=SUMPRODUCT(A2:A8,B2:B8)		**1328740**	=SUM(E2:E8)		
10								

Illustration 2:

The ranges must have the same dimensions or Excel will display the #VALUE! Error. If dimension of both arrays are not the same as in the illustration below where 7 rows (A2:A8) are selected in the first parameter and only 6 rows (B2:B7) are selected in second parameter, Error #Value will be displayed.

	A	B	C	D
1	Denomination	Nos.		
2	2000	185		
3	500	1520		
4	200	890		
5	100	150		
6	50	20		
7	20	12		
8	10	450		
9		**#VALUE!**	=SUMPRODUCT(A2:A8,B2:B7)	
10				

Illustration 3:

The SUMPRODUCT function treats any entries that are not numeric as if they were zeros. Where any cell in these arrays are the numbers but text or blank, then excel assumes them as zeroes and the sumproduct is applied accordingly.

	A	B	C	D
1	Denomination	Nos.		
2	2000	185		
3	500	**Climate**		
4	200	890		
5	100	**is very**		
6	50	20		
7	20	**hot**		
8	10	450		
9		**553500**	=SUMPRODUCT(A2:A8,B2:B8)	
10				

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CASE STUDIES - ANNUAL RESIDENTIAL CONFERENCE

These are the case studies which were discussed during the Annual Residential Conference held during January, 2019 at Sri Lanka. The author of the case studies has been kind enough to provide the key to the case studies. The key to the balance case studies will be carried in the subsequent bulletin.

CA. BANUSEKAR

QUERY

- P is a resident individual. For the Assessment year 2008-09, he filed his return of income. No regular assessment was made. Notice for re-opening was issued and assessment proceedings ensued. Order u/s.147 r.w.s.143 was passed on 30.12.2011.

- The reasons for reopening stated that the assessee has lent a sum of Rs.2.5 crores to his wife but has not admitted the loan transaction and interest thereon in the return of income and hence the Assessing Officer believes that income chargeable to tax has escaped assessment.

- There is no discussion about the reasons for reopening in the assessment order u/s.147 r.w.s.143 passed on 30.12.2011. Totally three additions are made which are on entirely different issues than what is stated in the reasons viz.,

✓ difference in house property income brought to tax,

✓ interest income from Savings Bank A/c not admitted brought to tax and

✓ Proceeds from sale of land in Padur claimed as exempt by assessee on the ground that it was from sale of agricultural land, now brought to tax by the Assessing Officer as income from business.

- Before the CIT(A), the assessee contested only on the issue of treatment of proceeds from sale of land in Padur. Re-opening was not contested. CIT(A) allowed the appeal of assessee.

- Matter travelled to Tribunal and the Tribunal remitted the issue back to the file of Assessing Officer to consider all relevant facts regarding nature of land and decide the issue afresh.

- The Assessing Officer passed order u/s.143(3) r.w.s.147 r.w.s.254 dated 30.03.2015 giving detailed reasoning regarding nature of land and made the same additions as in the order u/s.147 r.w.s.143 passed on 30.12.2011.

- Before the CIT(A), the assessee again contested the issue of treatment of proceeds from sale of land in Padur. CIT(A) dismissed the appeal of assessee.

- Now the assessee is before the Tribunal. Can reopening be challenged for the first time at this stage? Having not challenged the other additions namely the difference in property income and interest income from SB account before the CIT(A) or the Tribunal whether the assessee can now challenge the reassessment before the Tribunal?

REPLY:

At the outset, the first question to be examined is that having failed to take up the ground relating to reopening, whether the same can be taken up for the first time in the second round of appeal before the Income Tax Appellate Tribunal?

In *National Thermal Power Co. Ltd. v CIT [1998] 229 ITR 383 (SC)* the Supreme Court observed that the view that the Tribunal is confined only to issues arising out of the appeal before the Commissioner of Income-tax (Appeals) takes too narrow a view of the powers of the Appellate Tribunal and held that the Tribunal has jurisdiction to examine a question of law which arises from facts as found by the authorities below.

In *CIT v Indian Bank [2015] 55 taxmann.com 372 (Mad)* the Madras High Court held that if the additional ground raised would be beneficial to the assessee, the same should be admitted.

In *Hemal Knitting Industries v Asstt CIT [2010] 127 ITD 160 (Chennai) (TM)*, ground on jurisdiction issue was admitted and adjudicated by the Tribunal for the first time in the second round.

Now coming to the other aspect, the concerned assessment year is Assessment year 2008-09 when the due date for filing return was 31st July. Assuming P filed his return in time, i.e. 31.07.2008, the due date for issue of notice u/s 143(2) was 30th September 2009 (six months from the end of the financial year in which the return was filed). Assessment u/s 143(3) read with Section 147 was completed on 30.12.2011, i.e. the notice u/s 148 would have been issued in the Financial year 2010-11 (working backwards – assessment u/s 143(3)

r.w.s 147 has to be completed within 9 months from the end of the financial year in which notice u/s 148 was issued. Since assessment was completed in Dec 2011, notice would have been issued in FY 2010-11.). Therefore all timelines appear to have been met.

From the facts it appears that no original assessment u/s 143(3) was done. It also appears that no fresh tangible material has come to the possession of Revenue for issuing notice for re-opening. The Madras High Court in *Tanmac India v DCIT [2017] 97 CCH 189 (Mad)* and the Delhi High Court in *CIT v Orient Craft Ltd [2013] 354 ITR 536 (Del)* after considering the decision the Supreme Court in *ACIT v Rajesh Jhaveri Stock Brokers Pvt Ltd [2007 291 ITR 500 (SC)* came to the conclusion that in the absence of fresh tangible material even where originally only intimation u/s.143(1) was sent and no regular assessment has been made, the reopening is invalid.

While framing the assessment order, the Assessing Officer has completed the assessments on entirely different issues. It therefore appears that either he did not examine the facts of the case which formed the reasons for reopening, or that he no longer believed that the issues on which the reopening was done were valid. In either case, it appears that the reasons have failed since the Assessing Officer obviously did not find any validity in the reasons. In the circumstances the reopening itself is not valid as it was based on reasons no longer valid.

In the following cases, it was held that where reasons fail, reopening fails:

CIT v Dr.Devendra Gupta [2008] 220 CTR (Raj) 629

CIT v Shri Ram Singh [2008] 306 ITR 343 (Raj)

CIT v Jet Airways (I) Ltd. [2011] 331 ITR 236 (Bom)

Ranbaxy Laboratories Ltd. v CIT [2011] 336 ITR 136 (Del)

Mohamed Juned Dadani [2014] 355 ITR 172 (Guj)

Oriental Bank of Commerce 90 CCH 27 (Del)

Martech Peripherals Pvt Ltd. [2017] 394 ITR 733 (Mad)

PVP Ventures Ltd. v ACIT 94 CCH 147 (Mad)

A contrary decision was reached in *N Govindaraju v ITO [2015] 377 ITR 243 (Kar)* and Majinder *Singh Kang v CIT [2012] 25 taxmann.com 124 (P & H).*

In appeal before Commissioner of Income Tax (Appeals) and the Income Tax Appellate Tribunal, the assessee could have successfully contested the reopening and reassessment on the ground that the Assessing Officer had failed to discuss the reasons based on which the reopening was done and had completed the reassessment on different grounds and this showed that the reasons for reopening had failed. Relying on the above cited decisions, where the reasons fail reopening fails.

Though there are the contrary decisions of the Karnataka High Court and the Punjab and Haryana High Court, relying on the decision of the Supreme Court in *CIT v Vegetable Products Ltd. [1973] 88 ITR 192 (SC),* where there are two possible interpretations, the interpretation in favour of the assessee must be accepted.

Therefore the assessee has a good case for challenging the reopening before the Tribunal, before going into the merits, both on the aspect of absence of fresh tangible material as well as failure of reasons stated for reopening.

QUERY:

1) M Pvt Ltd.is an NBFC accepting deposits from the public. Interest paid is substantial and TDS is also correspondingly high. For the year ended 31.03.2017, the company received a show cause notice from the TDS circle asking why prosecution u/s 276B should not be launched. The Officer gave the following justification:

- The TDS paid for year ended 31.3.2016 was 50% more than the TDS paid for the year ended 31.3.2017.
- Of the 350 cases for which TDS had been deducted, in 50 cases the TDS was deposited late by 35 days. The corresponding TDS amount was Rs.3.8 lakhs out of total TDS of Rs.2.5 crores.

M Pvt Ltd. wants to know whether the Officer is justified in initiating prosecution proceedings and what defence can be taken by it. M Pvt Ltd. also wants to know whether it can opt for compounding of offences.

2) N is an individual who runs a jewellery business. During the year ended 31.03.2016 there was a search in the business premises. Books of account were seized. As a result N could not file his return for Assessment year 2016-17 in time. Subsequently, after obtaining copies of the books of account N filed return of income declaring income of Rs.31 crores. Assessment was completed after making a disallowance of Rs.6 crores

against which N is in appeal. To the extent of Rs.10 crores which N declared as Long Term Capital Gains, the Assessing Officer has assessed the same under Business income, whereby there is a shortfall in tax paid. N is in appeal against this treatment also.

The Assessing Officer has now initiated prosecution proceedings for attempt to evade tax. N feels he has good defence since he could not file his return in time due to the after effects of the search and the fact that he did not have the books of account. Can this be a valid reason though there is no specific provision in the Income Tax Act?

Further, he feels that the return filed by him has been accepted except for one addition against which he is in appeal and one re-classification of income which also is in appeal. Is N right? What defences can he use to avoid prosecution? If N has paid 95% of tax liabilities (after TDS) by way of advance tax would this support his case?

N also wants to know if he can examine procedural failures on the part of the Assessing Officer since the notice mentions approval for prosecution obtained from Principal Director of Income Tax.

N would also like to know what would be the consequence in a worst case scenario

REPLY:

1. In the case of M Pvt Ltd. which is an NBFC, the TDS Officer has raised two issues – one, that the TDS of current year is 50% lower than the earlier year and, two, that in 50 cases, TDS was deposited late. In the first case, the Officer has not identified any specific instances and is only making a general remark. Prosecution cannot be initiated on a mere estimation or conjecture that there may be a violation. In the second matter, where there is delay in payment of tax deducted, prosecution can be initiated u/s 276B. However, Section 279 requires that before initiating action, the Assessing Officer must obtain the previous sanction of the Principal Commissioner / Commissioner / Commissioner (Appeals). M Pvt Ltd. can obtain information on whether this sanction has been obtained and if not, the prosecution proceedings are invalid.

   Another defence that can be taken by M Pvt Ltd. is to show that there was reasonable cause for failure to pay the tax in time. This is purely based on facts and where M Pvt Ltd. can show that the delay occurred due to reasons that would constitute reasonable cause, then prosecution proceedings can be avoided.

2. The issue is in respect of the Assessment year 2016-17 which is the year of search. For this year N could file his return only after obtaining copies of the books of account, which he has done, and has filed his return presumably within the time allowed in notice u/s 153A. Therefore to the extent of the returned income, the Assessing Officer cannot initiate prosecution proceedings for evasion of tax.

   In respect of the additions made to the returned income, N is in appeal before the appellate authorities. Until disposal of the appeals, prosecution proceedings cannot be initiated. In a recent case in *Sayarmull Surana v ITO [2019] 101 taxmann.com 228 (Mad),* the Madras High Court held that there was no necessity for Department to have launched prosecution hurriedly when the case was pending before lower authorities as the law of limitation under Section 468 Cr.P.C. for criminal prosecution had been excluded by the Economic Offences (Inapplicability of Limitation) Act, 1974. Therefore pending disposal of appeals, the prosecution proceedings cannot be initiated.

   Moreover, prosecution u/s 276C is warranted only where there is a "*wilful*" attempt to evade tax. Where the assessee differs from the Assessing Officer in the treatment of certain items of income, and there is a certain basis for such treatment by the assessee, it cannot be said to be a "*wilful*" attempt. The meaning of "wilful" is a deliberate attempt to evade and a difference in opinion cannot be held to be a wilful attempt. The Explanation to Section 276C gives instances of wilful attempt to evade tax. These are illustrative instances but where the assessee can distinguish his case and show that his does not fall within the wide range of the cited instances, the prosecution proceedings can be successfully defended. The fact that N has paid substantial part of his liabilities can also be presented in order to show that there is no "wilful" attempt to evade tax.

   Where the procedural requirements of obtaining approval from the Principal Commissioner / Commissioner / Commissioner (Appeals) or the appropriate authority, have not been followed, the prosecution proceedings can be held to be invalid.

   In a worst case scenario, the consequences would be that there would be levy of fine together with sentence to rigorous imprisonment. The extent of punishment would depend on the quantum of tax sought to be evaded. Hence the assessee may opt for compounding of offences

DISCLOSURE OF SIGNIFICANT BENEFICIAL OWNER - A NEW REQUIREMENT UNDER COMPANIES ACT, 2013

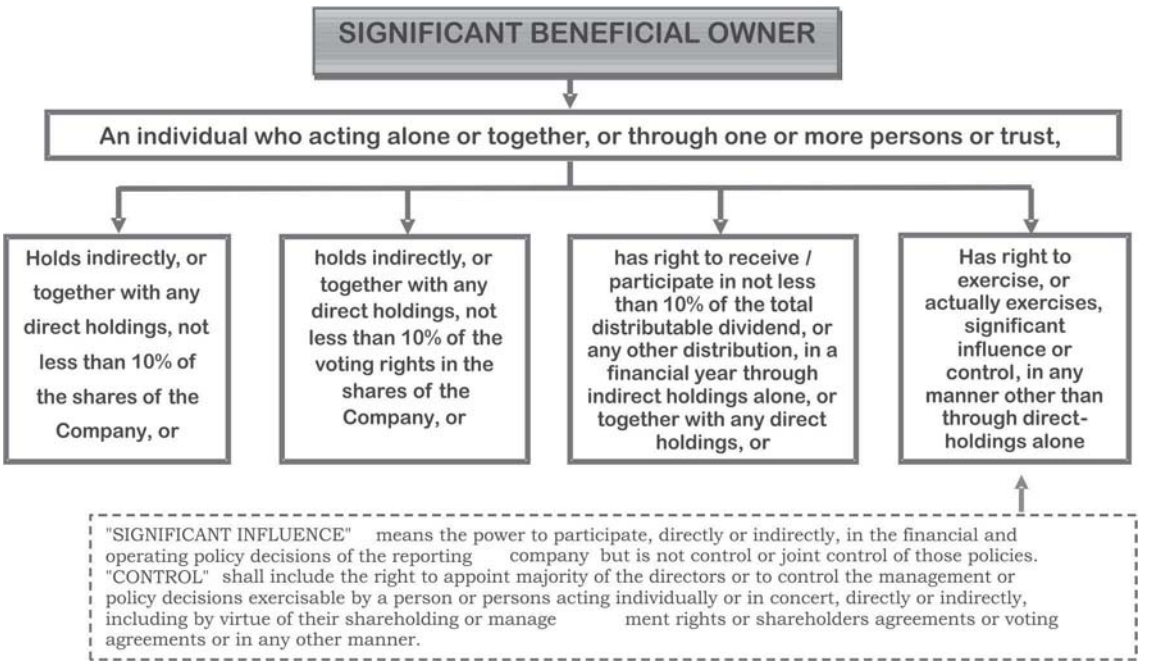
CA. C.S. DHANAPAL

Section 90 of the Companies Act, 2013 was amended by the Companies (Amendment) Act, 2017 wherein the concept of Significant Beneficial Owner was introduced. The amended Section 90 came into effect from 13th June, 2018.

The procedural aspects of Section 90 were issued in the form of Companies (Significant Beneficial Owners) Rules, 2018 on 13th June, 2018. The said Rules were posing certain difficulties to the stakeholders in response to which the Ministry of Corporate Affairs had issued two circulars; General Circular No. 07/2018 dated 06th September, 2018 and General Circular No. 08/2018 dated 10th September, 2018 clarifying that certain revisions will be made in the Rules.

Recently, on 8th February, 2019, the Ministry of Corporate Affairs has issued the Companies (Significant Beneficial Owners) Amendment Rules, 2019 which have made significant changes to the original Rules issued on 13th June, 2018.

The revised requirements and compliances relating to Significant Beneficial Holding are briefed below for quick reference of the readers.



If any individual, or individuals acting through any person or trust, act with a common intent or purpose of exercising any rights or entitlements, or exercising cont rol or significant influence, over a reporting company, pursuant to an agreement or understanding, formal or informal, such individual, or individuals, acting through any person or trust, as the case may be, shall be deemed to be 'acting together'.

INSTRUMENTS in the form of GDRs, CCPS or CCD shall be treated as 'shares' .

A. DIRECT HOLDING
(Any % which together with indirect holding is not less than 10%)

- Holding shares in the Company in his own name, or
- Holding beneficial interest in the shares of the Company and having made declaration to this effect u/s 89(2)

B. INDIRECT HOLDING
(Any % which individually or together with direct holding is not less than 10%)

1. Body Corporate (excluding LLP but including foreign entities) being the member of the reporting Company , individual who holds majority stake in that Body Corporate or in its ultimate Holding Company

2. HUF being the member of the reporting Company, the Karta of the HUF

3. Partnership Firm or LLP being the member of the reporting Company,
   - a partner of the Firm or LLP, or
   - who holds majority stake in the body corporate or the ultimate holding company of the Body Corporate which is a partner of the Firm or LLP

4. Trust being the member of the reporting Company,
   - a trustee of a discretionary / charitable trust, or
   - a beneficiary of a specific trust, or
   - the author / settler of a revocable trust

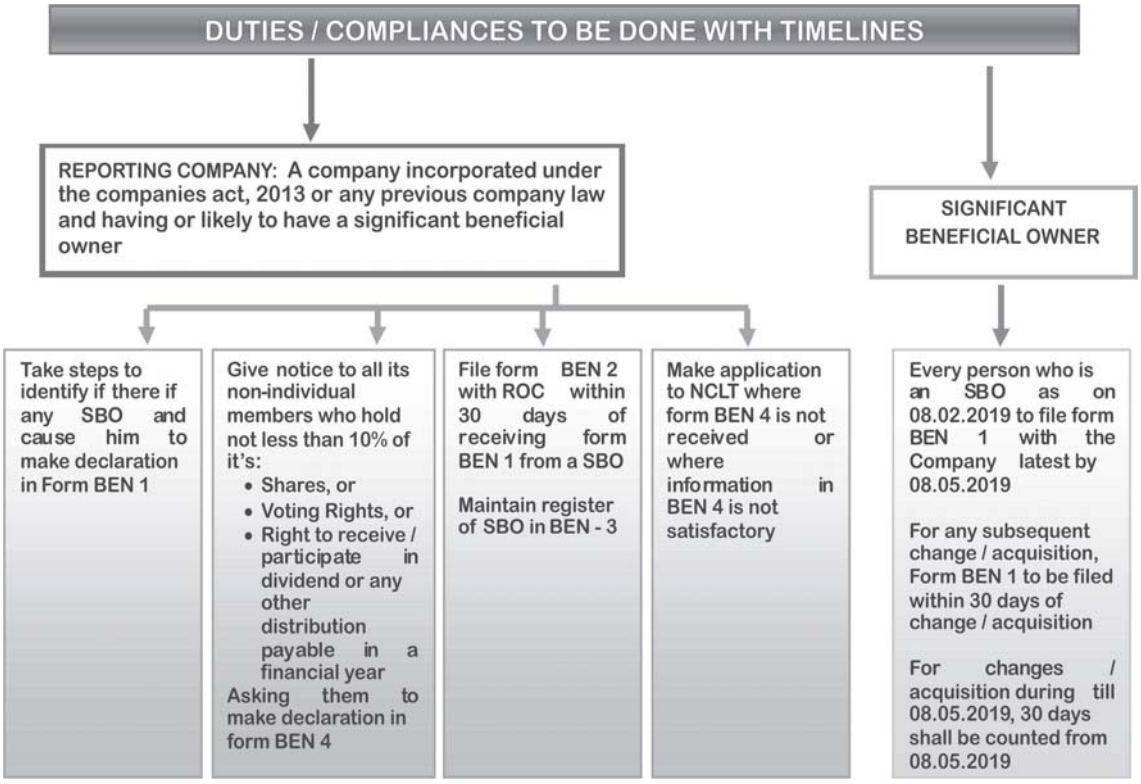
5. Pooled investm ent vehicle or an entity controlled by the pooled investment vehicle, being a member of the Company, based in Member State of the FATF & the regulator of the securities market is a member of the IOSCO
   - a general partner; or
   - an investment manager; or
   - A CEO where the investment manager of such pooled vehicle is a body corporate or a partnership entity.
   - Pooled Vehicle not falling in above jurisdiction – provisions as in 1. To 4. herein before shall apply

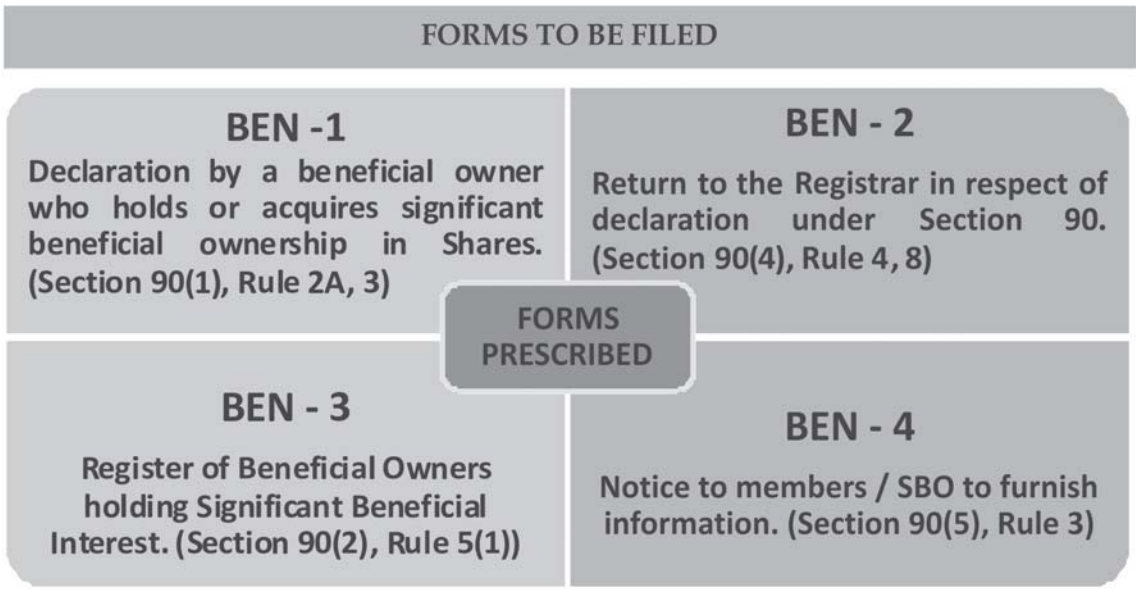
Majority stake means holding more than 50% of the equity share capital or voting rights of the Body Corporate or having right to receive / participate in more than 50% of the distributable dividend or any other distribution by the Body Corporate.

EXEMPTIONS

(To the extent the share of the reporting company is held by)

- IEPF
- its holding reporting company (details of such holding reporting company shall be reported in Form No. BEN-2)
- the Central Government, State Government or any local Authority;
- a reporting company, or a body corporate, or an entity, controlled by the Central Government or by any State Government or Governments, or partly by the Central Government and partly by one or more State Governments;
- SEBI registered Investment Vehicles such as mutual funds, AIF, REITs, InVITs regulated by SEBI
- Investment Vehicles regulated by RBI, or IRDA, or PFRDA





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